STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Resource Development Company Case No.: **11-0075-PWH**

From a Notice of Withholding issued by:

North Valley Labor Compliance

DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Resource Development Company (RDC) submitted a timely request for review of a Notice of Withholding of Contract Payments (Notice) issued by North Valley Labor Compliance Services (NVLCS) dated September 15, 2010, with respect to work performed by RDC on the New Cosumnes River Elementary School Project (Project) in Sacramento County. The Notice determined that RDC owed $19,503.20 in unpaid prevailing wages, including travel and subsistence, and statutory penalties.[1] A hearing on the merits occurred on June 30, 2011, in Sacramento, California, before Hearing Officer, A. Roger Jeanson. Anne Collins appeared for North Valley. Roger Biale (Biale), President, and Dan Turley appeared for RDC.

The issues remaining for decision are:

- Whether the Notice correctly reclassified six of the affected workers from Laborer prevailing wage rates to Painter prevailing wage rates for some or all of their work on the Project.
- Whether the Notice correctly found that the six affected workers are entitled to payment for travel time under the relevant provisions of the wage determination for the Painter classification.

[1] Prior to the hearing, the parties resolved the issues of payment of prevailing wages, travel, subsistence, and penalties for workers performing work within the classification of Boilermaker. The remaining wages, travel, subsistence and penalties assessed per the Notice are $12,127.32.

- Whether the Notice correctly found that the six affected workers are entitled to subsistence under the relevant provisions of the wage determination for the Painter classification.
- Whether NVLCS properly assessed penalties under Labor Code section 1775 at the mitigated rate of $30.00 per violation.[2]
- Whether RDC is liable for penalties under section 1813 for failing to pay the proper overtime rate of pay.
- Whether RDC is liable for liquidated damages under section 1742.1, subdivision (a).

The Acting Director finds that RDC has failed to carry its burden of proving that the basis of the Notice was incorrect. RDC has demonstrated substantial grounds for appealing the Notice with respect to the travel time portion of the unpaid wages owed Painters covered by the Notice. Therefore, the Acting Director issues this Decision affirming the Notice and waiving payment of liquidated damages for that portion of the unpaid wages.

FACTS

RDC was a subcontractor on the Project. RDC is located in Reno, Nevada, and is a non-union shop. The Project was located in Elk Grove, California. The work performed by RDC involved the construction and painting of a water tank. The initial phase involved workers paid by RDC under the Boilermaker and Laborer classifications. The second phase involved workers paid by RDC under the Laborer (NC-23-102-1-2009-1) and Painter (SAC-2010-1) prevailing wage determination (PWD).

The scope of work for the Laborer PWD includes the following:

> ... All Laborers' work in connection with concrete work, including chipping and grinding, sandblasting, mixing, handling, shoveling, conveying, pouring, concrete pumps and similar type machines, grout pumps, nozzlemen (including gunmen and potmen), vibrating, guniting and otherwise applying concrete, whether done by hand or any other process, and wrecking, stripping, dismantling and handling concrete forms and false work, including tending of plasterers and brick and block layers.

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

The scope of work for the Painter PWD includes the following:

Work or services pertaining to the priming and finish coats on fabricated metal or steel products. Work or surface preparation and decoration of all types: including sandblasting ...The operation of all tools and equipment used by painting contractors and journeyman painters, including ... sandblasters ...

The travel and subsistence provisions for the Painter PWD provide:

Section 13. Subsistence – If one employee is required to live away from his or her place of residence, said employee shall be paid seventy-five dollars ($75.00) per day, for room and board, or actual reasonable room and board cost, whichever is greater. In addition, they shall receive the negotiated rate of pay and fringe benefits for their hours worked.

(a) Round trip airfare, mileage, or transportation shall be provided by the Employer on all jobs in which subsistence is required.

(b) Employees shall receive Travel Time, from the point of dispatch to the jobsite and return, on all jobs in which subsistence is required.

Section 14. Travel Time – Employees who jobsite report more than sixty-five (65) miles from the point of dispatch (Union dispatch office, employee's home or individual employer's shop) as determined by the individual employer, shall receive their Taxable Net Wage Rate for all time spent traveling beyond sixty-five (65) miles from the point of dispatch to the jobsite and return. Employees reporting in their private vehicles to a jobsite more than sixty-five (65) miles from the point of dispatch, shall also receive mileage at the current IRS rate per mile for all miles traveled outside of the sixty-five (65) miles. (Mileage and drive time is to be based on Microsoft MapPoint 2004 or latest available version.) Mileage will also be paid on a per vehicle basis. This system is based on employees reporting to their jobsite at their regular starting time and working on the job until their regular quitting time.

(a) [Sets forth the manner in which travel time and mileage is to be calculated.]

Carolyn Lay (Lay) of NVLCS visited the Project on April 8, 2010, at the beginning of the second phase of work done by RDC. She observed the work being done by the workers and interviewed three of them, Martin Stratton, George Hill, and Alan Johns. They described the job tasks they were performing as including sandblasting in preparation of painting the water tank and painting the water tank. They advised Lay that they had driven their personal vehicles from Reno to the jobsite, a distance of approximately 230 miles, and stayed in hotel rooms near the Project during the week. They were not been paid for travel time, mileage, or subsistence. When

Lay later reviewed RDC's certified payroll records (CPR), the CPRs showed that each of these workers was paid and classified as Laborer.

Martin Stratton was interviewed again at the Project on April 22, 2010. He was performing sandblasting on that date. RDC's CPRs showed that Stratton was classified for all hours worked that date as a Painter.

Lay again visited the Project on May 5, 2010, and interviewed RDC workers George Hill, Bruce Johns, Dane Rose, and Martin Stratton. All were painting the water tank. None had been paid travel or subsistence. RDC's CPRs showed that Hill was paid for 4.5 hours as a Laborer, Johns was paid 1 hour as a Painter and 7 hours as a Laborer, Rose was paid 8 hours as a Laborer, and Stratton was paid 7 hours as a Laborer.

Based on her investigation, Lay concluded that the work being performed by RDC's workers fell within the scope of work for Painter and that the workers should be paid the prevailing wage in the Painter PWD for all the work on those days. Lay also concluded that the affected workers were entitled to travel time and substance under the Painter's PWD.[3]

Lay prepared a revised Public Works Audit (Audit) in which she calculated wages, travel time and subsistence owed to the affected workers based on the Painter wage determination. On August 16, 2010, she submitted the Audit with a Revised Request for Forfeiture to DLSE. Lay recommended that penalties under section 1775 be assessed at the maximum amount of $50.00 per violation based on a willful failure to pay the correct prevailing wages and delinquent and inaccurate payroll records. DLSE approved the Request for Forfeiture but reduced the section 1775 penalties to $30.00 per violation based on the fact that RDC had no prior violations.

RDC argues that it properly classified these workers because some of the work performed by them, including sandblasting and pottender, is covered by the scope of work for Laborer. The

---

[3] At the hearing, NVLCS called Steven Caster (Caster) to testify to the meaning and application of the travel time provision. Caster is a staff person with the Painters and Allied Trades District Council in Northern California and Northern Nevada and an elected representative of Painters and Tapers Local 487 in Sacramento. He negotiated the Travel Time provision at issue. Caster testified that the current language permitting the employer to determine the point of dispatch was negotiated for the benefit of signatory contractors (including those out-of-the-area) and that a non-signatory (i.e., non-union) contractor such as RDC could not take advantage of the provision. Thus, a signatory (i.e., union) contractor could if it choose to do so have workers dispatched to the Project from the Union dispatch office, but a non-signatory contractor such as RDC could not for the reason that the Sacramento Union would not dispatch workers for a non-signatory, non-union contractor.

only evidence presented by RDC at the hearing was initially described by Biale as a summary prepared by RDC's foreman, Bruce Johns (Johns), from time records prepared either by the workers or by Johns. The summary purports to show work performed by the affected workers within the scope of work for Laborer as determined by RDC. However, Biale later admitted he did not know how or from what documents Johns had prepared the summary and did not know from where the information came from that went into the summary. He acknowledged that Johns "may have muddled this up." Biale had never been present on the jobsite, and, therefore, he could not confirm the accuracy of any information contained in the summary and could not testify whether on a given day a worker had performed what RDC considered to be the work of a Laborer or that of a Painter. Johns did not testify, and if there are time cards or other records to support the summary, they were not produced or offered into evidence.

With regard to the payment of travel time, RDC takes the position that a plain reading of the Painter Travel Time provision allows the employer to determine the point of dispatch from among the three options listed, and, thus, the employer may choose the Union dispatch office in Sacramento. Under this reading, the RDC employees would fall within the 65-mile "free zone" and would not be entitled to travel time pay or mileage.

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*).) A Labor Compliance Program (LCP) such as NVLCS 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 under section 1741.

When an LCP determines that a violation of the prevailing wage laws has occurred, a written Notice of Withholding is issued pursuant to section 1771.6. 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 Notice of Withholding is incorrect."

RDC Has Failed to Prove That NVLCS's Reclassification Of Workers From Laborer To Painter Is Incorrect

The determination of the correct rate of pay for specific work turns on whether the affected workers actually performed work covered by a prevailing wage determination's scope of work. Here, NVLCS reclassified the work of the affected workers based on personal observation of the work being performed, interviews with the workers at the Project, and a review of daily reports prepared by the inspector of record which identify each worker on the Project and describe the work being performed. RDC presented no credible evidence to support its position that this basis for the Notice is incorrect or that on the workdays and times at issue, the affected workers did not perform work within the scope of work for Painter.

The Johns' summary not only does not support the position taken by RDC concerning the classification of work performed, it undermines it. For example, the summary shows that Martin Stratton on April 13 and 14, 2010, performed 9 hours of sandblasting work each day, which RDC argues is Laborer's work. Yet, the CPR submitted by RDC shows that Stratton was paid on each of those days for 9 hours work as a Painter. The summary shows that on April 9, 2010, George Hill performed 8 hours of work characterized as "Labor/Pottender," also work which RDC argues falls with the Laborer classification. Yet, the CPR shows that on that date, Hill also

was paid for 8 hours work as a Painter. As a final example, the summary shows that on April 16, 2010, Hill and Bruce Johns each worked 10 hours performing work described as "Spray paint Spc. coating." RDC's certified payroll records for that date show that Hill was paid for 10 hours as a Painter and Johns was paid for 10 hours as a Laborer.

Based on the foregoing, RDC has failed to meet its burden of proving that the basis for reclassifying the affected workers from Laborer to Painter is not correct.

The Affected Workers Are Entitled To Travel Time and Subsistence Pay Under The Terms Of The Wage Determination For Painter

Whether RDC owes travel time, mileage, and subsistence pay depends on the application of the relevant travel and subsistence provisions in the wage determination for Painter to the facts of this case. Subsistence is owed if an employee is "required to live away from his place of residence." Whether subsistence is "required" is a question of practicality and may be determined by the distance a worker is required to travel to and from the jobsite. In this case, the affected workers traveled between 150 and 229 miles each way between the Project and the RDC shop or their residence in Nevada. The distance is such that they workers reasonably had to spend the weeknights at motels. Under these circumstances, it was reasonable for NVLCS to conclude that the workers were required to live away from their residences during those periods in which they are expected to report to work to the jobsite in Elk Grove. RDC has failed to meet is burden of proving that this basis for the Notice is incorrect.

NVLCS concluded that RDC owed travel time to the affected workers based on Lay's conversations with representatives of the Painter's Union and District Council 16, who advised her that an out-of-area contractor could not use the Sacramento Union dispatch office as the dispatch point. RDC argues that a plain reading of Section 14, the Travel Time provision, gives the individual employer the right to determine the dispatch point, and therefore, RDC could designate the Union dispatch office as the dispatch point, and, therefore, it does not owe travel time or mileage.

The plain reading of the Travel Time provision supports the position taken by RDC. There is nothing in the wage determination which limits "the individual employer" who may take advantage of designating the Union dispatch office as the dispatch point to a signatory employer or which denies that right to a non-signatory out-of-area contractor. The provision simply states

that the dispatch point shall be "as determined by the individual employer." In fact, this interpretation is the consistent with the meaning Lay testified she would give the provision based on her understanding of it. When Lay was asked her understanding of whether a signatory employer who dispatched employees from more than 65 miles from the Project could choose any one of the three options as the dispatch point, she answered it could because "that's how the agreement is written."

Moreover, to apply the provision as NVLCS argues would be contrary to *Lusardi, supra*, in which the Court found that one purpose of the California prevailing wage laws is to provide a level playing field for union and non-union contractors. Though prevailing wage standards may be derived from a collective bargaining agreement (*see* section 1773), the Acting Director cannot interpret those standards in light of private understandings or negotiating history that is not apparent from the language itself. Accordingly, RDC does not owe travel time pay and mileage under the Travel Time provision.

However, that does not end the inquiry in this case. Under the Subsistence provision, Section 13, mileage and travel time must be paid from the point of dispatch to the jobsite and return "on all jobs in which subsistence is required." Because the job required the payment of subsistence, the affected employees are entitled under Section 13 to mileage and travel time pay.

The 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.[4]

The Acting Director's review of the LCP'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 Acting Director is not free to substitute her own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the LCP 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)].)

Here, NVLCS assessed the penalty at $30.00 per violation based on the fact that RDC has no prior violations. RDC does not directly challenge this determination and does not argue that NVLCS abused its discretion in determining the amount of the penalty.

Section 1775, subdivision (a)(2) grants the an LCP 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 LCP determines that mitigation is

---

[4] 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

appropriate. In this case, RDC on several occasions paid its workers less than the prevailing wage, thus warranting a penalty under section 1775. RDC has not proven an abuse of discretion and, accordingly, the assessment of penalties at the rate of $30.00 per violation is warranted in this case.

Overtime Penalties Are Due For The Worker Who Was Underpaid For Overtime Hours Worked On The Project.

Section 1813 states, in pertinent part, as follows:

> "The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25.00) for each worker employed in the execution of the contract by the ... contractor ... for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article." ...

Section 1815 states in full as follows:

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

The record establishes that RDC violated section 1815 by paying less than the required prevailing overtime wage rate for overtime hours worked by Martin Stratton on Saturday, May 8, 2010. Unlike section 1775 above, section 1813 does not give NVLCS any discretion to reduce the amount of the penalty, nor does it give the Acting Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813, as assessed, is affirmed in the amount of $25.00 for this violation.

RDC Is Liable For Liquidated Damages In An Amount Equal to Wages Owed To The Affected Employees Except For The Travel Time Portion Of Unpaid Wages

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

> After 60 days following the service of ... a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages,

---

to comply with its provisions."

> or portion thereof, that still remain unpaid. If the . . . the 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.
>
> Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the . . . the notice with respect to a portion of the unpaid wages covered by the . . . the notice, 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 Acting Director, RDC is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Notice. Entitlement to a waiver of liquidated damages in this case is tied to RDC's position on the merits and specifically whether, within the 60 day period after service of the Notice, it had "substantial grounds for appealing the ...notice...with respect to a portion of the unpaid wages covered by the... notice."

As discussed above, RDC was correct that NVLCS's assessment of travel time based on Section 14 of the wage determination was incorrect; this was the only provision which NVLCS advised RDC required it to pay travel time and mileage. The fact that travel time was due based on an independent reason does not change the fact that RDC had a good reason to challenge the Notice. Accordingly, I find that RDC has demonstrated substantial grounds for appealing the travel pay portion only of the wages found owing by the Notice and its liability for liquidated damages for travel time pay is waived.

FINDINGS

1. Affected contractor Resource Development Company filed a timely Request for Review of the Notice of Withholding of Contract Payments issued by NVLCS with respect to the Project.

2. RDC has failed to prove that the basis of the assessed unpaid wages, travel and assistance for the affected Painters is incorrect. RDC is therefore liable for the underpayment of prevailing wages to these workers in the amount of $10,182.32.

3. NVLCS did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of $30.00 per violation and the resulting total penalty of $1,920.00 for 64 violations is affirmed.

4. Penalties under section 1813 at the rate of $25.00 per violation are due for one violation on the Project, for a total of $25.00 in penalties.

5. RDC has met its burden under section 1742.1 of showing that it had substantial grounds for appealing the Notice with respect to its liability for travel time for the affected Painters. RDC therefore is liable for liquidated damages only in the amount of unpaid wages and subsistence in the amount of $5,583.21.

6. The amounts found due in the Notice, as affirmed by this Decision, including liquidated damages, are as follows:

Wages, Travel and Subsistence (Boilermaker):	$4,135.88
Penalties under section 1775 (Boilermaker):	3,240.00
Wages, Travel, and Subsistence (Painter):	10, 182.32
Penalties under section 1775 (Painter):	1,920.00
Penalties under section 1813 (Painter):	25.00
Liquidated Damages (Painter):	5,583.21
TOTAL:	**$25,086.41**

In addition, interest shall accrue on all unpaid wages as provided in section 1741, subdivision (b).

The Notice of Withholding of Contract Payments is 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: 10/3/2011

Christine Baker

Christine Baker
Acting Director of Industrial Relations