

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

County Line Framing, Inc.

Case No. 12-0224-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor County Line Framing, Inc. (CLF) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued by Division of Labor Standards Enforcement (DLSE) with respect to the Tonner Hills Project (Project) in Orange County. The Assessment determined that \$52,560.47 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits was conducted on January 10, 2013, in Los Angeles, California, before Hearing Officer Harold Jackson. Robert Jones appeared for CLF, and David Cross appeared for DLSE. The matter was submitted for decision at the conclusion of the hearing.

The issues for decision are:

- Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775¹ at the mitigated rate of \$10.00 per violation.
- Whether CLF failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813.
- Whether the penalties should be waived under relevant case law.

The parties stipulate that the affected workers were not paid the correct prevailing

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

wage rate at the time of their work on the Project but that CLF had remitted the full amount of underpayment to DLSE by the time the Assessment was issued. The Director finds that CLF has not established that DLSE abused its discretion in assessing penalties under section 1775, subdivision (a) at the rate of \$10.00 per violation and affirms the assessment of penalties for unpaid overtime under section 1813. The Director of Industrial Relations, however, finds that equitable considerations dictate the waiver of section 1775 penalties as to CLF under relevant case law. Therefore, the Director of Industrial Relations modifies the Assessment.²

FACTS

On or about December 16, 2008, the California Department of Housing and Community Development (DHCD) requested from the Director a special prevailing wage determination for the Project under section 1773.4, subdivision (a). Through the Division of Labor Statistics and Research (DLSR), the Director provided a special determination for the classification of Residential Carpenter (number S-2009-013), dated January 16, 2009 (Special PWD) for the Project.³ Tonner Hills Housing Partners, L.P. and Advent Companies, Inc. (Advent), entered the prime contract on June 29, 2010. An exhibit to the contract specified that the applicable general prevailing wage rate determination was Residential Carpenter (R-23-31-2-2009-2). Advent's bid solicitation, however, indicated the Special PWD applied, and Advent selected CLF as the subcontractor for framing and finishing carpentry work. Advent attached the Special PWD to the subcontract, and the Special PWD states on its face that the rates applied for the life of the Project. No party disputes, however, that the applicable prevailing wage determination (PWD) for CLF's work on the Project is Residential Carpenter number R-23-31-2-2009-2 (Residential Carpenter PWD). The Residential Carpenter PWD applies because, as explained below,

² Because County Line paid the full amount of underpaid wages under the Assessment by the date of the Assessment, County Line is not liable for liquidated damages under section 1742.1, subdivision (a).

³ The prevailing hourly wage due under the Special PWD for Residential Framer & Finisher was \$39.34, comprised of a base rate of \$29.55, fringe benefits totaling \$9.37 and a training fund contribution of \$0.42. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

when DLSR issued the Special PWD, it indicated that an updated special determination would be required if the prime contract was not signed within 12 months of January 16, 2009. Under the prime contract that was entered on June 10, 2010, CLF's employees worked on the Project from approximately October 21, 2010, through November 18, 2011.

The Assessment: DLSE served the Assessment on June 22, 2012. The Assessment found that CLF failed to pay workers the correct prevailing wage rate by using the Special PWD, which DLSE determined was an expired prevailing wage determination. The Assessment found a total of \$23,960.47 in underpaid prevailing wages under the Residential Carpenter PWD⁴. Penalties were assessed under section 1775 in the mitigated amount of \$10.00 per violation for 2,850 violations, totaling \$28,500.00. In addition, penalties were assessed under section 1813 for four overtime violations at the statutory rate of \$25.00 per violation, totaling \$100.00.

By check dated June 21, 2012, CLF remitted to DLSE \$23,960.47 for the underpaid prevailing wages. CLF requested DLSE to waive the assessed penalties, but DLSE declined. CLF president Bill Dickinson testified that CLF paid its workers using the Special PWD because that was the determination Advent indicated was applicable.

A complaint of underpayment of prevailing wages was filed with DLSE, and pursuant to request, CLF submitted its CPRs to DLSE on March 1, 2011. In the meantime, the owner of the Project evidently informed CLF it had not paid the correct prevailing wage rate. On October 4, 2011, CLF wrote to DLSR for confirmation that it did, in fact, pay the correct rate. DLSR responded to CLF on November 3, 2011, confirming that the rates listed in the Special PWD applied throughout the life of the Project. In seeking DLSR's confirmation, CLF did not mention that Advent's prime

⁴Throughout the relevant time period, the prevailing hourly wage due under the Residential Carpenter PWD for Residential Framer & Finisher was \$40.48, comprised of a base rate of \$29.55, fringe benefits totaling \$10.51 and a training fund contribution of \$0.42. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

contract was not entered until June 29, 2010, more than 12 months after the Special PWD had been issued.

In his initial investigation, DLSE deputy Reynaldo S. Tuyor found no evidence supporting the complaint of underpayment of wages. Also, three employee questionnaires obtained by DLSE confirmed that the hours and classifications listed on the CPRs submitted by CLF were correct. However, Tuyor subsequently obtained a DLSR memo dated January 16, 2009, transmitting to DHCD the Special PWD that states, in part: "If the construction contract is not signed and work is not scheduled to begin within twelve (12) months, please contact [DLSR] for updated special determinations." Tuyor also obtained a January 13, 2012, facsimile from DLSR to the Project manager stating that because the construction contract was not signed and work not scheduled to begin within 12 months of January 16, 2009, the Special PWD rates did not apply to the Project. The facsimile also states that because the prime contract was entered on June 29, 2010, the applicable PWD was the Residential Carpenter PWD, not the Special PWD. No evidence shows that CLF had notice that DLSR conditioned applicability of the Special PWD on the prime contract being signed within 12 months of issuance of the Special PWD. Nor does any evidence show that CLF had notice of the date the prime contract was signed.

Based on CLF's use of the Special PWD, and before the Assessment was issued, Tuyor wrote to CLF stating that his audit showed \$13,811.41 in wages and \$334,600.00 in section 1775 penalties were due and owing. CLF responded, stating that DLSR had confirmed on November 3, 2011 that CLF had used the correct PWD. CLF added that it now understood the Special PWD had expired before the prime contract was executed, but Advent had inadvertently attached the expired Special PWD to its subcontract. CLF offered to pay the additional wages and asked DLSE to waive the \$334,600.00 penalty because it did not willfully or knowingly pay less than the proper rate. CLF also informed Tuyor that the wages found due were based on an incomplete audit and that it would submit more CPRs. Tuyor later amended his audit to show \$23,960.47 in wages, \$142,500.00 in section 1775 penalties, and \$100.00 in section 1813 penalties. For this

first revised audit, Tuyor based the section 1775 penalty on the maximum \$50.00 per worker rate. The section 1813 penalties were based on four violations for two workers, Clark Ilagan and German Jimenez, who each worked 8 hours on a Saturday and 2.5 hours overtime on a Thursday in the week ending October 27, 2011.

Tuyor revised the audit a second time, resulting in the Assessment that found due \$23,960.47 in wages, \$27,500.00 in section 1775 penalties, and \$100.00 in section 1813 penalties. DLSE mitigated the section 1775 penalty rate to \$10.00 per worker "based on [the] type of violation," because its records indicated CLF had a prior violation from 2002, and because the \$10.00 rate was the lowest penalty it has imposed. Tuyor found ambiguous references in a DLSE database suggesting a prior violation, but he could not say whether CLF actually committed the prior violation. DLSE's record states that its database was "not clear" as to the penalty rate, number of violations, approving senior deputy or date of assessment. Dickinson testified that he successfully contested the prior violation, which was dismissed with no payment.

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 *Lusardi, ibid.*)

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.”

CLF Was Required To Pay The Prevailing Rate For Residential Carpenter For The Work Performed On The Project In Light Of The Information Publicly Available From DIR.

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

Enforcement v. Ericsson Information Systems (1990) 221 Cal.App.3d 114, 125
(*Ericsson*).

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

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project within 20 days after the advertisement for bids. (*See Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by § 1773.4].)

In this case both parties acknowledge that the Residential Carpenter PWD applied to the work of CLF workers on the Project. Consequently, because CLF did not pay the prevailing wages specified for the Residential Carpenter PWD and the scope of work provisions for that classification encompassed framing and finishing work done by CLF, it violated its statutory obligation to pay prevailing wages.

DLSE's Penalty Assessment Under Section 1775 Is Appropriate But
the Penalty Is Waived As to CLF Only.

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

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars (\$50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B)(i) The penalty may not be less than ten dollars (\$10) . . . unless the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) The penalty may not be less than twenty dollars (\$20) . . . if the contractor or subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than thirty dollars (\$30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.⁵

The Director's review of the Labor Commissioner's determination is limited to an inquiry into whether the action was "arbitrary, capricious or entirely lacking in evidentiary support . . ." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) 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 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

⁵ 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."

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)].)

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 neither mandates mitigation in all cases nor requires mitigation in a specific amount when the Labor Commissioner determines that mitigation is appropriate. The record shows that DLSE’s bases for selecting the section 1775 penalty rate of \$10.00 per worker were the “type of violation” that had occurred, the fact that its records indicated CLF had a prior violation from 2002, and the fact that \$10.00 was lowest penalty it has imposed. CLF successfully rebutted the allegation of a prior violation with Dickinson’s credible testimony that the database was incorrect and his company had no prior violation. Still, in making decisions after section 1742 hearings, the Director is not free to substitute her own judgment as to DLSE’s practices as to the minimum penalties it will impose. Following its practice for what is an admitted failure to pay the appropriate prevailing wage rate was up to the discretion of DLSE and the Director will not disturb that choice here. Accordingly, CLF has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of \$10.00 is affirmed for 2,850 violations.

The considerations are different as to whether the section 1775 penalties should be waived, however, under principles identified in *Lusardi*. (*Lusardi, supra*, 1 Cal.4th at p. 996.) There, the California Supreme Court stated that “in a proper case equitable considerations may preclude the imposition of statutory penalties against a public work contractor for failing to pay the prevailing wage.” The Court limited the contractor’s liability to the underpayment of wages because it “acted in good faith in entering into the contract on the basis of the [awarding body’s] representations, assertedly on the advice of its attorneys, that the project was not subject to the prevailing wage law.” (*Ibid.*) The same equitable considerations apply here, for the following reasons.

By specifying the Special PWD in the bid solicitation and by attaching the Special

PWD to its subcontract with CLF, Advent led CLF to rely on the assumption that the Special PWD applied to the Project. Advent did so, despite being on notice that the Residential Carpenter PWD, and not the Special PWD, applied by virtue of the Residential Carpenter PWD being identified as the applicable PWD in its prime contract with Tonner Hills Housing Partners, L.P. Yet, no evidence shows CLF ever saw the prime contract or had any reason to know before the end of the Project that the Special PWD did not apply. The mitigated rate of \$10.00 is a tacit acknowledgement by DLSE that the circumstances showed CLF had no reason to know that the Residential Carpenter PWD, and not the Special PWD, applied to the Project. While a DLSR memo dated contemporaneously with the Special PWD states it was only applicable if the prime contract was issued within 12 months, no evidence shows that CLF received a copy of that memo, or was aware of either the 12-month limitation or the date of the prime contract. Notably, the Special PWD does not make reference to the 12-month limitation. Instead, a footnote in the Special PWD states the rates were in effect for the life of the Project, as was confirmed by DLSR when CLF inquired about it.

In short, DLSE presents neither argument nor evidence that CLF lacked a good faith and reasonable belief that the Special PWD applied. CLF demonstrated further good faith and intent to comply with prevailing wage law when it offered DLSE further CPRs after the first audit because some wages had been omitted from the initial finding of underpayment and when it voluntarily corrected the underpayment of wages by the time the Assessment was imposed. All these considerations provide compelling reason, under *Lusardi*, to waive section 1775 penalties as to CLF only. This finding, however, does not absolve Advent of its joint and several liability for the full amount of the section 1775 penalties assessed by DLSE, and affirmed by this decision, nor does it prevent DLSE from pursuing the collection of those penalties from Advent.⁶

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

Section 1813 states, in pertinent part, as follows:

⁶ Advent did not request review of the Assessment.

The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. ...

Section 1815 states in full as follows:

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

The record establishes that CLF violated section 1815 by paying less than the required prevailing overtime wage rate for two workers, Clark Ilagan and German Jimenez, who each worked a Saturday and 2.5 hours overtime on a Thursday in one week. CLF argues that the four instances should not lead to imposition of four \$25.00 penalties based on an unidentified DLSE memorandum specifying that overtime penalties should not be "pyramided." While a concern over pyramiding may apply to overtime penalties where the same occurrence leads to two types of potential violations (e.g., work more than eight hours in one day that also brings a weekly total to more than 40 hours), that is not the situation here. Instead, the Assessment imposed overtime penalties for four instances of underpayment of applicable overtime rates for work done by two workers on two separate days. Unlike section 1775 above, section 1813 does not give DLSE discretion to waive or reduce the amount of the penalty for these violations.

CLF also argues that section 1813 penalties should be waived by the Director based on equitable considerations allowed under *Lusardi*. Without answering the question whether *Lusardi* authorizes waiver of section 1813 penalties, the factual context for the section 1813 penalties is distinguishable from the circumstances for the section 1775 penalties. The section 1775 penalties were based on CLF's understandable mistake in paying workers the lesser rates under the Special PWD that Advent, in essence,

directed CLF to pay. In contrast, both the Special PWD and the Residential Carpenter PWD required CLF to pay the time and a half rate for work over eight hours in one day and for work on a Saturday. CLF failed to pay those rates for two workers on two separate days, as discussed above. Regardless of which of the two PWDs applied, CLF underpaid the two workers. Consequently, no basis exists upon which the Director should waive section 1813 penalties. Accordingly, the assessment of penalties under section 1813, as assessed is affirmed in the amount of \$100.00 for four violations.

FINDINGS

1. Affected subcontractor CLF filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. All back wages found under the Assessment have been paid and CLF is not liable for liquidated damages under section 1742.1, subdivision (a).

3. CLF failed to pay its workers at least the prevailing wage for the disputed work, as it paid the affected workers the Special PWD prevailing wage rate rather than the applicable Residential Carpenter PWD prevailing wage rate. The associated penalties assessed under sections 1775 and 1813, are therefore affirmed. CLF's underpayment of its workers for their work on the Project comprises 2,850 violations of section 1775 and four violations of section 1813.

4. In light of Finding 3, above, CLF underpaid its employees on the Project in the aggregate amount of \$23,960.47. The evidence establishes that those wages were paid in full by CLF before DLSE issued the Assessment.

5. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of \$10.00 per violation, and the resulting total penalty of \$28,500.00, as assessed, for 2,850 violations is affirmed. However, under the equitable considerations allowed by *Lusardi*, the Director waives the section 1775 penalties as to CLF only.

6. Penalties under section 1813 at the rate of \$25.00 per violation are due for

four violations on the Project, for a total of \$100.00 in penalties.


7. The amounts found remaining due in the Assessment, as to CLF only, as modified and affirmed by this Decision are as follows:

Wages Due:	\$	-0-
Penalties under section 1775, subdivision (a):	\$	-0-
Penalties under section 1813:		\$100.00
TOTAL:		\$ 100.00

ORDER

The Civil Wage and Penalty Assessment is affirmed and modified 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: 5/14/13


~~D. Lachlan Taylor, Acting Director~~
for Christine Baker
Director of Industrial Relations