

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

**Azurelite, Inc.;**  
**Taisei Construction Corporation**

Case Nos.      13-0312-PWH;  
                         13-0332-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected contractor, Taisei Construction Corporation (Taisei), and affected subcontractor, Azurelite, Inc. (Azurelite), submitted timely requests for review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on June 12, 2013, with respect to glazier work performed by Azurelite employees as part of the Cunningham Science and Math Replacement Building project (Project) for the San Joaquin Community College District (District) in Stockton, California. The Assessment determined that \$76,123.27 in unpaid prevailing wages and statutory penalties was due. Taisei deposited the full amount of the Assessment with the Department of Industrial Relations pursuant to Labor Code section 1742.1, subdivision (b), thus liquidated damages are not in issue.<sup>1</sup> The parties submitted the matters for decision on stipulated facts and exhibits and the parties' briefs before Hearing Officer Nathan D. Schmidt on January 21, 2014. The Hearing Officer vacated submission on May 22, 2014, to take further evidence on issues not fully covered by the stipulated facts and exhibits. The matter was resubmitted for decision on October 31, 2014. Ian J. Pittluck appeared for Azurelite and Taisei and Galina Velikovich appeared for DLSE.

The issues for decision are:

- Whether Azurelite's workers were entitled to receive travel and subsistence payments according to the travel and subsistence provisions for San Joaquin County, where the

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

Project is located, or according to the travel and subsistence provisions for Los Angeles County, where Azurelite and its workers are based.

- Whether DLSE abused its discretion by assessing penalties under section 1775 at the mitigated rate of \$10.00 per violation.
- Whether Azurelite underpaid its workers for overtime worked on the Project and is therefore liable for penalties under section 1813 at the statutory rate of \$25.00 per violation.

The Director finds that Azurelite and Taisei have failed to carry their burden of proving that the basis of the Assessment was incorrect. However, having discovered calculation errors in DLSE's audit worksheet from which the assessed unpaid wage and penalty amount are derived, this Decision reduces the assessed unpaid wages and penalties in accord with the evidence. Therefore, the Director issues this Decision affirming the Assessment as modified.

### SUMMARY OF FACTS

The parties' stipulated facts are set forth verbatim:

#### **"I. PARTIES**

##### **"A. Azurelite, Inc.**

"The affected subcontractor who operated as a glazier on the subject public works project. Represented by Lawrence A. Treglia, Jr., Esq. and Ian J. Pittluck Esq. of MURTAUGH MEYER NELSON & TREGLIA LLP ('MMNT').

##### **"B. Taisei Construction Corporation**

"The affected Prime Contractor on the subject public works project. Represented by Lawrence A. Treglia, Jr. and Ian J. Pittluck of MMNT.

##### **"C. Division of Labor Standards Enforcement**

"The Enforcing agency who issued the subject Civil Wage and Penalty Assessment. Represented by Galina Velikovich, Esq. of the DLSE.

## **“II. INTRODUCTION**

“Civil Wage and Penalty Assessment number 40-34604/137 (the ‘Assessment,’ attached hereto as **Exhibit ‘A’**) issued by the DLSE alleges that Azurelite willfully failed to pay its workers overtime pay and appropriate travel and subsistence payments on the Cunningham Science and Math Replacement Building project (the ‘Project’).

“The Project is owned and operated by the San Joaquin Community College District and located at 5151 Pacific Ave, Stockton, California. Since Azurelite is a Los Angeles County based contractor, its workers traveled from Los Angeles County to San Joaquin County to perform the work in question.

“The Assessment seeks a grand total \$76,123.27 in wages and penalties. Since a deposit of the full amount of the Assessment (\$76,123.27) was made on or about August 8, 2013, liquidated damages are not at issue.

## **“III. FACTUAL SUMMARY**

“Prior to their work on the Project, Azurelite’s Los Angeles County based workers specifically requested an alternative workweek, i.e. to work four days a week at up to ten hours a day. Attached hereto as **Exhibit ‘B’** are declarations from Azurelite workers confirming the foregoing. DLSE’s Public Audit Investigation Worksheets detailing DLSE’s accounting of hours worked is attached hereto as **Exhibit ‘C.’**

“With respect to Travel and Subsistence payments to Azurelite’s Los Angeles based workers, Azurelite utilized the Travel and Subsistence Provisions that it found on the Department of Industrial Relations (the ‘DIR’) website that cover Los Angeles County, where Azurelite is located (see **Exhibit ‘D’** attached hereto). There is no dispute that Azurelite paid its workers the travel and subsistence payments called for in Travel and Subsistence Provisions that cover Los Angeles County as opposed to those called for in the DIR’s Travel and Subsistence Provisions for San Joaquin County, where the Project is located. Attached hereto as **Exhibit ‘E’** is the Travel and Subsistence Provisions [*sic*] for San Joaquin County.

## **“IV. CONCLUSION**

“The main dispute between the parties with respect to the alleged wages owed is that the DLSE contends that Azurelite should have utilized the Travel and Subsistence Provisions

found on the Department of Industrial Relations website for San Joaquin County instead of those for Los Angeles County. There is also a smaller dispute as to the exact amount of hours the workers worked per day. Finally, the parties have reached no agreement as to penalties.”

After determining that the stipulated facts and exhibits did not constitute a sufficient record to support a decision, the Hearing Officer vacated submission and directed the parties to submit additional evidence and briefing regarding:

- Whether Azurelite had paid its workers the required prevailing overtime rate, and
- The basis for DLSE’s determination of the proper penalty rate under section 1775.

The Assessment found that 15 Azurelite workers, eleven journeyman and four apprentice glaziers, had been underpaid required travel and subsistence and overtime pay totaling \$60,810.92 for their work on the Project. DLSE assessed penalties under section 1775, subdivision (a) in the amount of \$7,840.00 at a mitigated penalty rate of \$10.00 per violation based on its determination that Azurelite had no prior violations and that the current violations appeared to be the result of a good faith mistake. In addition, DLSE assessed penalties under section 1813 for failure to pay the required prevailing overtime rate in the amount of \$6,725.00 at the statutory rate of \$25.00 per violation.

After careful review of the audit worksheet DLSE prepared to calculate the assessed unpaid wages and penalties for the Assessment, and comparison with Azurelite’s certified payroll records (CPRs) and the individual audit worksheets that DLSE prepared for each of the affected workers, the Hearing Officer discovered calculation errors that resulted in an over assessment of section 1775 penalties for seven workers, section 1813 penalties for two workers and unpaid prevailing wages and training funds for one worker. Specifically:

- Section 1775 and 1813 penalties were erroneously assessed for 7th period apprentice glazier William Clee for whom no unpaid wages were found owing;
- Section 1775 penalties for six workers (Tanner Paz, Robert Rampenthal, Roberto Sanchez, Jesse Spanier, Anthony Tavares and Dennis Thacker) were erroneously

calculated at \$50.00 per violation rather than at the mitigated rate of \$10.00 per violation used for the remainder of the Assessment; and

- An excessive number of work hours was entered as the basis of the calculations for Roberto Sanchez (459 straight time hours and 110 overtime hours versus his actual time worked of 96 straight time hours and 24 overtime hours based on Azurelite's CPRs and DLSE individual spreadsheet for this worker) resulting in a greatly inflated assessment of unpaid wages and penalties for this worker.

To correct these errors and bring the Assessment into accord with the underlying evidence: the assessed section 1775 penalties for these seven workers will be modified as follows:

<b>Worker</b>	<b>Original Assessment</b>	<b>Modified Assessment</b>
Clee	\$80.00	\$0.00
Paz	\$450.00	\$90.00
Rampenthal	\$200.00	\$40.00
Sanchez	\$2,950.00	\$120.00
Spanier	\$100.00	\$20.00
Tavares	\$150.00	\$30.00
Thacker	\$2,050.00	\$410.00
<b>TOTAL</b>	<b>\$5,980.00</b>	<b>\$ 710.00</b>

the assessed section 1813 penalties for Clee and Sanchez will be modified as follows:

<b>Worker</b>	<b>Original Assessment</b>	<b>Modified Assessment</b>
Clee	\$200.00	\$0.00
Sanchez	\$1,375.00	\$300.00
<b>TOTAL</b>	<b>\$1,575.00</b>	<b>\$ 300.00</b>

and the assessed unpaid wages for Sanchez will be reduced from the originally assessed amount of \$11,801.40 to \$2,408.91. As a result of these modifications, the assessed unpaid wages are reduced from \$60,810.92 to \$51,418.43, the assessed section 1775 penalties are reduced from \$7,840.00 to \$2,570.00, and the assessed section 1813 penalties are reduced from \$6,725.00 to \$5,450.

It is undisputed that the Prevailing Wage Determination (PWD) applicable to the work done on the Project by Azurelite's workers is SJO-2009-2, the General Prevailing Wage Determination for San Joaquin County. This PWD includes the classification of Glazier, which is the prevailing wage rate that Azurelite states that it paid to the workers reported on its CPRs for the Project and upon which the Assessment is based.<sup>2</sup>

The Glazier travel and subsistence provisions for San Joaquin County, which DLSE relied upon in preparing the Assessment, provide in pertinent part as follows:

#### **Section A. Travel Time**

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2. Regular employees of the Employers located in Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, El Dorado, Glenn, Humboldt, Lassen, Modoc, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, portions of Solano, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo and Yuba Counties in California who are required to jobsite report more than forty (40) miles from the point of dispatch (employee's home or individual Employer's shop) as determined by the individual Employer, shall receive Wages and Benefits for all time spent traveling beyond forty (40) miles from the point of dispatch to the jobsite and return. Employees reporting in their private vehicles to a jobsite more than forty (40) miles from the point of dispatch, shall also receive mileage at the current IRS rate per mile for all miles traveled outside of the forty (40) miles. (Mileage and drive time is to be based on the latest version of Microsoft Map Point). Mileage will be paid on a per vehicle basis. This system is based on employees reporting to their jobsite at their regular start time and working on the job until their regular quitting time. Travel from jobsite to jobsite in a private vehicle shall be considered as hours worked and mileage will be reimbursed at the current IRS rate per mile. All travel commencing after reporting to the Employers shop to and from the jobsite will be considered as hours worked and use of the employee's vehicle will be reimbursed at the current IRS rate per mile. At no time shall the employee be allowed to transport the Employer's material or equipment in his own vehicle.

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<sup>2</sup> Throughout the relevant time period, the prevailing hourly wage due for Glazier was \$50.62, comprised of a base rate of \$33.53, fringe benefits totaling \$16.71, and other payments in the amount of \$0.38. Daily overtime required time and one-half in the amount of \$67.385, comprised of a base rate of \$50.295 (\$33.53 x 1.5), fringe benefits totaling \$16.71, and other payments in the amount of \$0.38. The applicable Apprentice prevailing hourly wages rates for Apprentice periods six, seven and eight are \$38.10, \$40.59, and \$43.11, respectively, and the applicable overtime rates for the same classifications are \$49.875, \$53.36, and \$56.85, respectively. An additional \$0.62 per hour training fund contribution is also required for all of the above pay rates.

## **Section B. Subsistence**

1. When employees are required to live away from their personal place of residence, in order to report for work when and where directed by the Employer, each employee shall receive lodging, or an amount equal to reasonable lodging, in advance, plus Subsistence in the amount of seventy-five dollars (\$75.00) per day, in-advance, on a separate check.
2. Round trip airfare, mileage, or transportation shall be provided by the Employer on all jobs in which subsistence is required.
3. Employees shall receive Travel Time, from the point of dispatch to the jobsite and return, on all jobs in which subsistence is required.

The Glazier travel and subsistence provisions for Los Angeles County, which Azurelite and Taisei contend should apply to Azurelite's workers on the Project, provide in pertinent part as follows:

### **ARTICLE TWENTY-FIVE**

#### **TRAVEL-TIME PAY**

**Section 1.** The rate of pay for travel time shall be based on the employee's straight time hourly wage rate.

**Section 2.** The rate of pay for travel time for the employee driving a company vehicle, shall be the employee's normal hourly rate, or applicable overtime rate except as provided in Section 3 below.

**Section 3.**

(a) The Employer shall have the right to direct where an employee shall start and conclude his workday. In the exercise of this right, the Employer may permit the employee to start and conclude the workday at the Employer's place of business. If the Employer provides transportation for employees reporting to the job site, including the driver, from his place of business to the job site, and at the option of the employee he elects to use such transportation instead of reporting to the job site, his work day shall start and conclude at the job site.

(b) An employee, who is directed to report to the Employers place of business, shall be paid in accordance with Section 1 or Section 2 for all travel which ensues until the end of his workday.

**Section 4.** If an employee performs any work en route to or departing from the Employer's place of business, he shall be paid for such travel at the Employee's applicable hourly rate of pay.

### **ARTICLE TWENTY-SIX**

#### **TRAVEL EXPENSE**

**Section 1.** An Employee must report to the job and return to his residence without compensation for traveling expense for travel to any job within the jurisdiction of

Local Union No. 636. The Employee agrees to carry only the following company equipment: Drill, cord, hard hat and suction cup.

**Section 2.** Any Employee traveling to perform a duty for his Employer at distances which are unreasonable or beyond the jurisdiction of this Local Union, shall be paid for all reasonable expenses in addition to his wages.

**Section 3.** In the event an employee is required to travel in his own vehicle from one job site to another, he shall be paid at the established Federal Government standard mileage rate per mile. (Note: If the Federal Government does away with the allowable Standard Mileage Rate, then the applicable rate will be Thirty-one and one-half Cents (\$0.31.5) per mile.)

## ARTICLE TWENTY-SEVEN

### OUT-OF-TOWN EXPENSE

**Section 1.** On all out-of-town work, when the employee is required to stay overnight, transportation or travel and living expense shall be paid for by the Employer, with a minimum of sixty (\$60.00) dollars to each employee for each day, to cover three (3) meals and lodging.

In the event a round trip is made in one (1) day, the employee shall be paid continuous time. Each employee receiving his individual expense in advance, either direct or through his Foreman, shall have his time commence at the time of the departure for the job return trip to be made under the same conditions. When returning from an out-of-town job where it has been necessary to stay overnight the previous night, an employee shall receive Six Dollars and Fifty Cents (\$6.50) for breakfast, Six Dollars and Fifty Cents (\$6.50) for lunch and Twelve Dollars (\$12.00) for dinner. In the event employee works a full eight (8) hour day on the day of departure, the employee shall receive payment of Twelve Dollars (\$12.00) for the dinner meal that evening.

## 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*].) 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.” (Section 90.5, subdivision (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 rate, and 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 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.”

[Azurelite Is Required To Pay Travel And Subsistence For The Project In Accord With The Travel And Subsistence Provisions For San Joaquin County.](#)

Section 1771 requires all workers employed on public works to be paid “not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed.” It is undisputed that the glazier classification contained in SJO-2009-2, the General Prevailing Wage Determination for San Joaquin County, establishes the applicable prevailing wage rate for the work performed by Azurelite employees on the Project. The travel and subsistence provisions contained in the Northern California Glaziers Master Agreement, effective June 22, 2008, were adopted by the Director and incorporated by reference as part of the glazier prevailing wage rate for San Joaquin County. DLSE contends that Azurelite is required to pay its workers travel and subsistence in accord with these provisions for their travel related to work on the Project which was performed in San Joaquin County and included unpaid travel and subsistence as part of the

Assessment. Azurelite and Taisei dispute this position and argue that Azurelite's workers are only entitled to receive the lower travel and subsistence payments required by the travel and subsistence provisions for glaziers which are applicable to Los Angeles County where Azurelite and its workers are based. It is undisputed that Azurelite's payments to its workers satisfied the Los Angeles County travel and subsistence requirements.

In the context of public works construction, travel and subsistence requirements that are part of the prevailing wage help "protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas[.]" (*Lusardi, supra*, 1 Cal.4th at 987.) An obvious purpose of travel and subsistence pay is to ease the financial burden on employees assigned to work temporarily in locations that are a substantial distance from their homes. As with all elements of the prevailing wage rate, however, two of the main goals are of the prevailing wage law are:

- to guarantee that every individual performing the same work on public work projects in the same locality receives the same pay based on published prevailing wage rate determinations, and
- to level the playing field for contractors and subcontractors bidding on public works projects by requiring them to bid based on the same prevailing wage rates for the same work whether they are union or non-union shops and whether they are located locally or bidding on the job from a distance.

In a nutshell, Azurelite bases its argument that the Los Angeles County travel and subsistence rates should apply to its workers rather than the San Joaquin County rates on language in the San Joaquin County travel and subsistence provision stating that it applies to "Regular Employees of the Employers located in . . . San Joaquin . . . Count[y]." Azurelite argues that its business is not "located" in San Joaquin County and thus this provision cannot apply to its workers. While a very literal reading of the language could lead to this interpretation, this language must be considered in context. Unlike the text of a PWD which sets the prevailing wage rates, and which is carefully drafted for adoption by the Director, the scopes of work and travel and subsistence provisions which a PWD incorporates by reference are typically drawn from the collective bargaining agreements or memorandums of understanding applicable to the trades in the locality to which the PWD applies. As such,

these provisions are normally drafted with the only consideration being their application to the local unions and contractors who are signatory to the agreement. When interpreted in the context of prevailing wage enforcement, however, these provisions must be read more broadly in light of the purposes of the prevailing wage law to guarantee equal pay for all workers in a given trade on the same public works project and to level the playing field for contractors and subcontractors bidding for work on that project, whether signatory to the agreement that the provisions are drawn from or not.

Consequently, when applying such provisions in a prevailing wage context, language such as “Regular Employees of the Employers located in . . . San Joaquin . . . Count[y]” must be read more broadly to mean “Regular Employees of the Employers *working on public works* located in . . . San Joaquin . . . Count[y].” The applicable PWD for a particular trade and locality, including scopes of work and travel and subsistence provisions, apply to all contractors and subcontractors performing public work in that trade and locality under section 1771, because the Director has determined it to be “the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed” pursuant to sections 1770 and 1773, *et seq.*, not because a particular contractor or subcontractor is or is not signatory to the agreement those provisions are drawn from or based upon. Azurelite’s assertion that it cannot be bound by an agreement negotiated by a Northern California union is therefore unavailing.

Azurelite is therefore required to pay its workers travel and subsistence for the Project according to the terms of the San Joaquin County travel and subsistence provisions incorporated by reference as part of the glazier prevailing wage rate established by PWD SJO-2009-2. DLSE’s assessment of unpaid travel and subsistence payments to the affected workers is affirmed as modified.

DLSE Did Not Abuse Its Discretion By Assessing Penalties Under Section 1775 At The Mitigated Rate Of \$10.00 Per Violation.

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.<sup>[3]</sup>

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. 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)].)

The Director's review of DLSE's determination is limited to an inquiry into whether the action was "arbitrary, capricious or entirely lacking in evidentiary support ..." (*City of*

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<sup>3</sup> 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."

*Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) 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.

The record shows that DLSE mitigated the section 1775 penalty rate used in the Assessment to \$10.00 per violation based on its determination that Azurelite had no prior violations and that the current violations appeared to be the result of a good faith mistake. Neither Azurelite nor Taisei has offered any evidence or argument to show that DLSE abused its discretion in assessing penalties at this greatly mitigated rate or that Taisei is not jointly and severally liable with Azurelite for those penalties.

The record does not establish that DLSE abused its discretion and, accordingly, the assessment of penalties under section 1775, subdivision (a) is affirmed jointly and severally against Azurelite and Taisei in the modified amount of \$2,570.00.

Azurelite Underpaid Its Workers For Overtime Hours Worked On The Project And Is Therefore Liable For Unpaid Overtime And Overtime Penalties Under Section 1813.

The stipulated record establishes that Azurelite’s workers worked an alternative workweek of four days per week and up to ten hours per day on the Project and were paid at the prevailing straight time rate for those hours under the mistaken belief that Azurelite workers could elect an alternative workweek for the Project.<sup>4</sup> Such arrangements are prohibited on public works projects under sections 1811, which restricts the work day for public works projects to eight hours per day, and 1815, which allows work in excess of eight hours per day only upon payment on one and one-half times the basic rate of pay. As a result, Azurelite workers working on the Project under this alternative workweek schedule were required to be paid at the applicable prevailing overtime rate for any hours worked in excess of eight in one day whether or not they worked in excess of 40 hours per week.

There are three components to the prevailing wage: the basic hourly rate, fringe

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<sup>4</sup> The stipulated record establishes that three workers who each worked 50 hours on the Project over five days during the week ending November 8, 2011, were paid ten hours of overtime for their work in excess of eight hours per day and forty hours per week at the rate of \$75.93 per hour. This rate is in excess of the required time and one-half rate of \$67.385 (see footnote 2, above).

benefit payments and a contribution to the California Apprenticeship Council or an approved apprenticeship training fund. The first two components (also known as the total prevailing wage) must be paid to the worker or on the worker's behalf and for his benefit. An employer cannot pay a worker less than the basic hourly rate; the balance must be paid to the worker as wages or offset by credit for "employer payments" authorized by section 1773.1. Under the glazier rate applicable to this project, the basic hourly rate for journeymen is \$33.53 per hour and the balance of the total prevailing wage is \$17.09, comprised of fringe benefits totaling \$16.71 and other payments in the amount of \$0.38. When combined, this results in a total straight time prevailing wage rate of \$50.62 per hour.

When time and one-half is required for overtime work, only the basic hourly rate is multiplied while the fringe benefit and other payments component of the wage rate remains constant. Thus, the required time and one-half rate for daily overtime is \$67.385, comprised of the base rate of \$33.53 multiplied by one and one-half, totaling \$50.295, combined with fringe benefits totaling \$16.71 and other payments in the amount of \$0.38.

It is undisputed that Azurelite paid its journeyman on the Project the straight time prevailing wage rate of \$50.62 per hour for all hours worked up to 40 in one week, regardless of whether a worker worked in excess of eight hours per day. Azurelite and Taisei mistakenly argue that \$50.62 per hour is in excess of the required overtime rate by multiplying the base rate alone to arrive at a purported overtime rate of \$50.295. This calculation fails to add the required unmultiplied amount of \$17.09, for fringe benefits and other payments, however, which results in the actual required prevailing overtime rate of \$67.385. Consequently, I find that Azurelite has underpaid its journeyman glaziers by \$16.765 per hour for each hour of daily overtime worked on the Project and affirm the assessment of unpaid overtime wages as modified.<sup>5</sup>

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-

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<sup>5</sup> Penalties for underpayment of overtime under section 1813 have only been assessed for one apprentice on the Project, sixth period apprentice glazier Tanner Paz, in the Assessment as modified. The applicable prevailing straight time and overtime pay rates for Paz are \$38.10 and \$49.875, respectively. According to Azurelite's CPRs, Paz was paid an hourly rate of \$37.21 for his work on the project and worked 15 minutes of overtime on each of the nine days that he worked on the Project.

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 stipulated record establishes that Azurelite violated section 1815 by paying less than the required prevailing overtime wage rate to its workers on 218 occasions. 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 is affirmed, as modified, in the aggregate amount of \$5,450.00 for 218 violations. Azurelite and Taisei are jointly and severally liable for these penalties.

### FINDINGS

1. Affected contractor Taisei Construction Corporation and affected subcontractor Azurelite, Inc., timely requested review of the civil wage and penalty assessment issued by the Division of Labor Standards Enforcement with respect to the Cunningham Science and Math Replacement Building project in Stockton, California.
2. The Assessment was issued timely.
3. Azurelite was required to pay its workers travel and subsistence for the Project at the rates specified in the Travel and Subsistence provisions for San Joaquin County adopted by the Director and incorporated by reference as part of prevailing wage determination SJO-2009-2.
4. Azurelite underpaid its workers for daily overtime worked on the Project by paying the applicable prevailing straight time rate for hours worked on the Project in excess of

eight hours per day, up to 40 hours per week, under an alternative workweek schedule of four days per week and up to ten hours per day.

5. As a result of findings 3 and 4, above, Azurelite underpaid required travel and subsistence and daily overtime pay to the affected workers in the aggregate amount of \$51,418.43, as modified.

6. DLSE did not abuse its discretion by setting the penalty for these violations under section 1775, subdivision (a) at the mitigated rate of \$10.00 per violation for 257 violations on the Project, totaling \$2,570.00 in penalties, as modified. Taisei is jointly and severally liable for these penalties.

7. Penalties under section 1813 at the rate of \$25.00 per violation are due for 218 violations on the Project by Azurelite, totaling \$5,450.00 in penalties, as modified. Taisei is jointly and severally liable for these penalties.

8. The amounts found remaining due in the Assessment, as modified, against Azurelite and Taisei are affirmed by this Decision are as follows:

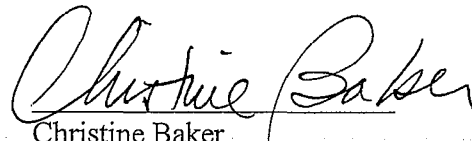
Wages Due:	\$51,418.43
Penalties under section 1775, subdivision (a):	\$2,570.00
Penalties under section 1813:	\$5,450.00
<b>TOTAL:</b>	<b>\$59,438.43</b>

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

#### ORDER

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

Dated: 4/20/2015

  
Christine Baker  
Director of Industrial Relations