STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Lewis C. Nelson & Sons, Inc., and
J. Alexander Company

Case Nos. 08-0177-PWH;
08-0190-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

NOTICE OF NO ACTION ON REQUEST FOR RECONSIDERATION

Lewis C. Nelson & Sons, Inc. ("Nelson") seeks reconsideration of the Decision of the Director issued on September 28, 2010 ("Decision"), on the basis that the Decision incorrectly affirmed joint and several liability for liquidated damages against Nelson under Labor Code section 1742.1, subdivision (a). Under Labor Code section 1742, subdivision (b), the Director had 15 days from the issuance of the Decision to reconsider or modify it to correct an error. After that time, the Director has no jurisdiction to do other than correct clerical errors. Nelson's request for reconsideration was submitted via email to the Hearing Officer at 4:08 p.m. on October 13, 2010, the day upon which the 15-day time limit for reconsideration of the Decision elapsed. Due to the last minute nature of Nelson's request for reconsideration, there was insufficient time to review the request and provide an opportunity for response by the Division of Labor Standards Enforcement before the Director lost jurisdiction. The Director no longer has jurisdiction to reconsider or modify the Decision and Nelson's request for reconsideration is therefore denied by operation of law.

Dated: 10/14/10

John C. Duncan
Director of Industrial Relations

STATE OF CALIFORNIA

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DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Lewis C. Nelson & Sons, Inc. ("Nelson") and affected subcontractor J. Alexander Company ("Alexander") submitted timely requests for review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("DLSE") on July 29, 2008, with respect to carpentry work performed by Alexander on the Modernization of Heaton and Lowell Elementary Schools ("Project") in Fresno County. The Assessment determined that $27,624.48 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits occurred on May 13 and August 18, 2009, in Sacramento, California, before Hearing Officer Nathan D. Schmidt. Brian Crone appeared for Nelson, Ray Mullen, appeared for Alexander and Ramon Yuen-Garcia appeared for DLSE.

The issues for decision are:

- Whether the Assessment correctly found that Alexander had failed to report and pay the required prevailing wages for all hours worked on the Project by carpenters Frank Espinoza, Fidel Marquez and Emilio Zermeno ("affected workers").
- Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775[1] at the rate of $45.00 per violation.

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

- Whether Nelson is jointly and severally liable with Alexander for penalties assessed under section 1775 for violations by Alexander.
- Whether Alexander or Nelson has demonstrated substantial grounds for believing the Assessment to be in error, entitling it to a waiver of liquidated damages.

The Director finds Alexander has failed to carry its burden of proving that the basis of the Assessment was incorrect. Therefore, the Director issues this Decision affirming the Assessment in full. The Director also finds that Nelson has established that it is entitled to relief from penalties under section 1775, subdivision (b) and thus is not jointly or severally liable for the penalties assessed upon Alexander under section 1775. Neither Nelson nor Alexander has proven the existence of grounds for a waiver of liquidated damages.

FACTS

The Fresno Unified School District ("District") published a Notice to Bidders for the Project on or about March 26, 2007. Nelson, the general contractor for the Project, subcontracted with Alexander to furnish and install plastic laminate countertops and cabinets at the two schools.[2] Alexander employees worked on the Project from approximately July 16, 2007, to February 12, 2008, with the majority of the work being completed in the first month. The applicable prevailing wage rate for all work subject to the Assessment is the Area 3 Carpenter rate under prevailing wage determination NC-23-31-1-2006-1 (Carpenter and Related Trades for Northern California).[3]

DLSE served the Assessment on July 29, 2008. The Assessment found that Alexander had failed to report and pay prevailing wages for overtime and weekend hours worked by the affected workers between July 16 and August 12, 2007, and that Alexander had failed to report and pay the affected workers for any of the hours they worked from August 13 through August 16,

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[2] The Subcontract Agreement between Nelson and Alexander, executed on or about May 31, 2007, contains the full text of sections 1771, 1775, 1776, 1777.5, 1813 and 1815 as required by section 1775, subdivision (b)(1).

[3] Throughout the relevant time period, the prevailing hourly wage due for this classification was $44.825 comprised of a base rate of $26.02, fringe benefits totaling $18.375 and a training fund contribution of $0.43. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

2007.[4] The Assessment found a total of $21,376.61 in underpaid prevailing wages and $342.87 in unpaid training fund contributions. Penalties were assessed under section 1775 in the amount of $45.00 per violation for 89 total violations. Though Alexander had no record of prior prevailing wage violations, DLSE determined that a $45.00 per violation rate was warranted by its finding that Alexander had intentionally falsified its certified payroll records ("CPRs"). In addition, penalties were assessed under section 1813 for 76 overtime violations, at the statutory rate of $25.00 per violation.

Under reporting of hours and days worked by the affected workers:

The affected workers started work on the Project on July 16, 2010, and were the only Alexander workers on the Project from the beginning through the week ending August 12, 2007. All of the affected workers lived in Southern California and commuted from home to the job site in Fresno.

Marquez, the only affected worker who testified, said that all the affected workers worked the same hours and days; he kept a contemporaneous daily record of the hours they had

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[4] In addition, the Assessment found that Alexander had underpaid the prevailing wages due to Alejandro Contreras, David Contreras and Juan Medina for work they performed during the week ending August 19, 2007. Alexander's CPR for the week ending August 19, 2007, reported these three workers as Cabinet Installers and reported payment of straight time and overtime at or above the applicable Carpenter wage rates. Alexander admits, however, that it erroneously paid these three workers, whose primary job was fabricating cabinets in Alexander's Bakersfield shop, their regular shop rate of $9.00 per hour rather than the Carpenter rate reported on the CPRs. The three workers had been called to the site for a few days during that week to help complete the bulk of the project prior to the reopening of the schools. None of these workers are reported on Alexander's CPRs for any other week of work on the project.

The issues were narrowed at hearing, when Alexander stipulated to the assessed underpaid prevailing wages owed to A. Contreras, D. Contreras and Medina as follows:

	Prevailing Wages Owing	Section 1775 Violations	Section 1813 Violations	Unpaid Training Fund Contributions
A. Contreras	$471.95	1	1	$0.00
D. Contreras	$1,200.72	3	3	$0.00
Medina	$1,328.51	4	3	$1.02
TOTALS	$3,001.18	8	7	$1.02

The Assessment is therefore affirmed as to those three workers.

worked. Marquez testified that the affected workers worked 10 hours per day (from 6:00 a.m. to approximately 5:00 p.m. with a 45 minute to one hour lunch) every weekday, except for the first Monday, July 16, 2007, when they only worked four hours. In addition, Marquez testified that they worked eight hours per day, from 6:00 a.m. to 2:30 p.m., with a 30 minute lunch, on the last two Saturdays and Sundays (August 4 and 5 and August 11 and 12). When the affected workers finished work on the weekends they would call a man from the District named Brent who came to the job site to lock the school. Marquez recalled other workers being present on the Saturdays but believed that only the affected workers were on site on the Sundays. Alexander paid the affected workers weekly. Some weeks the affected workers picked their checks up from Alexander on their way home, and the other weeks the checks were delivered by Elvis Zaldana, Alexander's supervisor.

On approximately July 30, 2007, Marquez and Espinoza complained to Zaldana that they were not being paid for the overtime hours they worked. Zaldana told them that the overtime would be made up on a future check. Marquez testified that he also recalled having a telephone conversation with John Park, the owner of Alexander, about the underpayments. Marquez testified that their last day of work on the Project was Thursday, August 16, 2007, when the affected workers quit because they were not being paid for their overtime. They asked Zaldana for their final pay at that time, but did not receive final checks until sometime later. On or about August 20, 2007, Marquez filed a wage claim with the Labor Commissioner, including a listing of the days and hours he claimed to have worked.[5] Only Zermeno went back to work on the Project, on August 20, 2007. He continued working for Alexander on various projects through approximately December 2007.

Arleen Ellberg, the investigating Deputy Labor Commissioner, identified the individual named Brent, referred to by Marquez, as Brent Meade, a Project Manager for the District's Facilities Management and Planning Division. Ellberg testified that she had at least two telephone conversations with Meade in the course of her investigation. According to Ellberg's notes,

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[5] Marquez marked the box for "Discharged" rather than "Quit" on his complaint. When asked about this on cross examination he testified that it must have been an error.

Meade told her that two Alexander workers had worked the last few weekends of the Project in August 2007, and sometimes as late as 8:00 or 9:00 p.m. during the week, because Alexander was behind on its part of the Project, which had to be completed before school started in the third week of August. Meade stated that the workers would call him at home when they were finished for the night; Meade then would lock up and activate the alarm. Meade expressed the opinion that Nelson knew that evening and weekend work was going on because they had a full-time superintendent on the Project.

Espinoza completed an Employee Questionnaire with answers substantially similar to Marquez's testimony and complaint. In agreement with Marquez, Espinoza stated that he worked the same hours and days on the Project as Marquez and Zermeno and that they had worked 10 hours per day. There were some discrepancies, however, between Marquez's testimony and the calendar Espinoza submitted with the Questionnaire: Espinoza listed the hours worked as 6:00 a.m. to 4:00 p.m. everyday, including weekend days; he included Saturday, July 21, 2007, as a day worked in addition to those listed by Marquez; and he did not list any hours worked during the week ending July 28, 2007. Ellberg testified that she had spoken to Espinoza on several occasions during the course of her investigation. Ellberg's notes recording those conversations state that Espinoza told her he had left off the hours worked the week ending July 28, 2007, by mistake and that she should rely on the hours reported by Marquez in case of any discrepancies because Marquez had kept a more contemporaneous record of the hours they worked.

Zermeno neither testified nor submitted an Employee Questionnaire. The only statement from him in the record is a letter that he wrote to Park on February 2, 2008, demanding payment for three hours of overtime worked on the Project in the third week of October 2007, after Espinosa and Marquez had left, and an additional six hours of overtime and expenses owed for work on other Alexander projects. Zermeno does not mention any amount owed for earlier work on the Project, when he was working with Espinosa and Marquez. Similar to Marquez's testimony, however, Zermeno wrote that he had reported the unpaid overtime hours in October 2007 to his supervisor and been told that he would be paid those hours later.

Three other Alexander workers described in footnote 4 testified that they were primarily

shop workers who had only worked on the job site for a few days. None of them recalled having seen any of the affected workers on the job site when they were there. A. Contreras testified that he did not know Marquez. All three workers agreed that checks were normally distributed around 2:00 p.m. on Fridays at Alexander's shop. D. Contreras testified that he remembered seeing the affected workers picking up their checks once or twice.

Park testified that, as president of Alexander, he was responsible for making sure that Alexander's work on the Project was done timely; he admitted, however, that he did not personally visit the job site until late in the Project. Park denied having authorized overtime or weekend work by the affected workers. Park also denied he heard about any unpaid wages claims from any of the affected workers prior to Marquez's complaint with the Labor Commissioner. Park testified that he had started receiving complaints about the affected workers from Nelson's project superintendent by the end of the second week of work on the Project because they were not showing up to the job site on time. Park stated that the affected workers showed up late on Monday mornings, after driving up from Southern California, and they stopped work early on Fridays to pick up their checks at the shop. Park testified that the affected workers usually picked up their checks in person at the shop, although he personally saw them only one time. He also remembered one weekend when the affected workers had gotten their checks from him at his home in Tarzana because they had gotten to the shop too late.

By the third week, Park said, the affected workers were causing other trades' work to fall behind because they had not completed sink cutouts and other similar work. Park testified that on Thursday, August 9, 2007, he sent Zaldana to the job site to find out what the problems were because they were "under the gun" to be finished by August 16. Park stated that Zaldana fired the affected workers at the end of the day on August 9 and took over the Project himself. Park denies that any of the affected workers worked on the Project during the following week; instead, he sent people out from the shop to finish up the work.

Park instructed Renata Thomas, who was in charge of preparing CPRs and generating paychecks for Alexander, to have Marquez and Espinoza sign statements on their timesheets stating that they had been paid in full when they picked up their final checks. He was not present

when they did so, but submitted copies of timesheets for both workers for the weeks ending July 22, July 29, and August 5, 2007, containing statements acknowledging payment in full which were purportedly signed by Marquez and Espinoza on August 24, 2007.[6] Marquez denied having ever seen the timesheets and denied his signature appeared on them. According to Ellberg's investigation notes, Espinoza also denied ever having signed such a statement.

Alexander's CPRs for the Project report the following hours worked by the affected workers, all of which are above the prevailing wage:

- Week ending July 22, 2007: 40 hours paid at the rate of $55.68 per hour for all three workers.
- Week ending July 29, 2007: 37 hours paid at the rate of $44.88 per hour for all three workers.
- Week ending August 5, 2007: 33 hours paid at the rate of $44.73 per hour for all three workers.
- Week ending August 12, 2007: Originally reported with a Statement of Non-Performance dated September 10, 2007. A corrected CPR, dated September 25, 2007, was subsequently submitted reporting 32 hours for Marquez and Espinoza, paid at the rate of $46.87, and 31.75 hours for Zermeno, paid at the rate of $44.73. No hours were reported for any Alexander workers on Friday, August 10, 2007, although both Alexander's Subcontractor Daily Report and Nelson's Daily Job Journal for that date report a foreman and three journeymen on the job site.
- Week ending August 19, 2007: The original CPR submitted for this week, dated September 10, 2007, is identical to the corrected CPR later submitted for the prior week (August 12), except for the dates, and reports work by the affected workers through

[6] The hours recorded on the submitted timesheets, which are identical for both Marquez and Espinoza, do not match the hours reported on Alexander's CPRs for the same weeks. The timesheets for the week ending July 22 record 32 hours worked versus 40 hours reported on the CPR and the timesheets for the subsequent two weeks record 40 hours worked in both weeks versus 37 and 33 hours respectively reported on the CPRs.

August 16. A corrected CPR, dated September 25, 2007, reported hours for five other Alexander workers omitted on the original CPR but reported no hours for any of the affected workers. Alexander's Subcontractor Daily Reports and Nelson's Daily Job Journals for Monday through Thursday of that week, however,, all report three more Alexander workers on the job site than are reported on Alexander's CPR for those days. This is the week Marquez testified the affected workers were still working.

Alexander's cancelled checks and paystubs for the affected workers match the corrected CPRs, but the paystubs for the last checks issued to Espinoza and Marquez, which were purportedly for the week ending August 12, 2007, show a pay period of "08/13/2007 – 08/19/2007," and a pay date of "08/13/2007." In addition, rather than the total hours worked the paystubs for Espinoza and Marquez report a quantity of "1.00" and a rate of "1,500." In contrast, the paystubs for other workers showing the same pay period show a pay date of "08/24/2007," the total hours worked as the quantity and the hourly rate paid.

Oversight of Alexander by Nelson:

Nelson's compliance officer, Yvette Florendo, wrote to Alexander on September 21, 2007, requesting the correction of discrepancies she had noted in their first five CPRs for the Project. The discrepancies included, among other things, the non-performance statement submitted for the week ending August 12, 2007, when the daily reports showed Alexander workers on the job site. Florendo's letter also asked for an explanation of why the reported pay rates had decreased after the first week.[7] Charles Fletcher, Nelson's controller and assistant corporate secretary, testified that neither Meade nor anyone else had ever informed Nelson that any weekend work had been done on the Project. Fletcher further testified that the final disbursement to Alexander had not been made until after Alexander had submitted a Final Affidavit certifying payment of prevailing wages on or about April 4, 2008.[8] Fletcher stated that Nelson did not receive

[7] Park testified that he did not know how the pay rates had been calculated or why they had changed from week to week.

[8] The record contains two essentially identical Final Affidavits prepared by Alexander, one date February 29, 2008, and the other dated April 4, 2008. Neither Fletcher nor Park could explain why two affidavits had been prepared.

notice that there had been a complaint against Alexander on the Project until late June 2008 when he was contacted by Ellberg.

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 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."

The Three Affected Workers Are Entitled To Unpaid Prevailing Wages For Overtime And Weekend Work They Performed On The Project That Was Not Reported On Alexander's CPRs.

Consideration of the record as a whole shows that Alexander has failed to carry its burden of proving that the basis of the Assessment was incorrect on the issue of whether the affected workers worked overtime and weekend hours that were not reported on Alexander's CPRs.

The hearing officer believed that both Marquez and Park were credible witnesses, despite the inconsistencies in their testimony. Marquez's testimony had weaknesses: Espinoza's calendar and Meade's statements, as related by Ellberg, are somewhat inconsistent with Marquez's testimony; Espinoza's calendar showed an earlier end time each day than did Marquez; and Meade recalled that he locked up after two Alexander workers rather than three.

The inconsistencies in Alexander's CPRs and pay records, the different hourly rates reported for the affected workers for every week that they worked on the Project, and the original CPR submitted for the week ending August 19, 2007, reporting work by the three affected workers through August 16, the day Marquez testified that the affected workers quit, all add weight, however, that favors Marquez's version of the facts. While Zermeno's failure to mention such a significant underpayment in his February 2008 complaint letter to Park lends some support to Alexander's position, the fact that Zermeno immediately returned to work for Alexander on the Project and the lack of any definitive statement from him that he had not worked any overtime during the period in question ameliorates the negative effect of his letter.

Park's version was weakened by his candid admissions that he did not have personal knowledge of key elements of Alexander's version of the events. Specifically, Park admitted that he did not go to the job site until late in the Project and was not present when Zaldana allegedly fired the affected workers on August 9, 2007. Though Park denies having authorized any overtime or weekend work, Park's absence from the job site makes it impossible for him to testify with certainty that none occurred. To the contrary, Espinoza's Employee Questionnaire and

calendar claiming to have worked ten hours per day and Ellberg's testimony that Meade confirmed having locked the job site behind Alexander workers on weekends, even though hearsay, are admissible as corroboration of Marquez's version of the events. (Cal. Code Regs., tit. 8, § 17244, subd. (d).)

Alexander's proffered time sheets with statements purportedly signed by Marquez and Espinoza acknowledging full payment undercut Alexander's arguments because they match neither the CPRs nor the paychecks issued to those workers. Marquez denied signing the statements and Park, the only witness for Alexander, admitted that he did not witness the signatures himself. Moreover, the date of the purported signatures, August 24, 2007, is four days after Marquez signed his wage complaint against Alexander claiming a substantial number of unpaid hours. It seems unreasonable that Marquez would sign a statement contradicting his complaint only a few days after filing it. Further, the proffered time sheets do not include the critical week ending August 12, 2007, when Park testified that the affected workers were fired. The final paychecks themselves are highly suspect as well, paradoxically showing a pay date of August 13 for a pay period stated as running from August 13 through August 19, 2007. Nor does the testimony of the other Alexander workers, more than two years after the fact, that they did not recall having seen the three affected workers during the few days they worked on the job site outweigh Marquez's credible testimony and the evidence of both Nelson and Alexander's daily reports recording three more workers on the job site than are reported on the corrected CPR for the week ending August 19, 2007.

For the above reasons, Alexander has failed to carry its burden of proving that the basis of the Assessment is incorrect with regard to the affected workers.[9] The Assessment is therefore affirmed as to the affected workers. The other elements of the Assessment have been admitted by Alexander and need no further discussion here. (See footnote 4, above.)

DLSE's Penalty Assessment Under Section 1775 Is Appropriate.

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[9] When an employer fails to maintain accurate time records, a claim for wages may be sustained based on credible estimates from other sources. *Anderson* v. *Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687-88; *Hernandez* v. *Mendoza* (1988) 199 Cal.App.3d 721,726-7.

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.[10]

Abuse of discretion is established if the Labor Commissioner "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." (Code of Civil Procedure section 1094.5, subdivision (b).) In

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[10] Section 1777.1, subd. (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."

reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment "because in [his] own evaluation of the circumstances the punishment appears to be too harsh." *Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage Assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Rule 50(c) [Cal. Code Reg. tit. 8 §17250, subd. (c)].)

In this case, the weight of the evidence establishes that Alexander intentionally underreported the days and hours worked by the affected workers on the Project. Moreover, although Alexander now admits its error in underpaying three other workers for hours they worked during the week ending August 19, 2007, it correctly reported those hours and the prevailing wage rate due on its corrected CPR for that week but took no action to correct the actual underpayments prior to the hearing.

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The record shows that DLSE considered the prescribed factors for mitigation and determined that a penalty of $45.00 per violation was warranted in this case. The Director is not free to substitute his own judgment. Alexander has not proven that the Labor Commissioner abused her discretion and, accordingly, the assessment of penalties as assessed is affirmed.

The affected contractor and subcontractor are jointly and severally liable for penalties under section 1775 unless the contractor can establish that it is entitled to relief from those penalties under section 1775, subdivision (b) if certain factors are met. Subdivision (b) provides in pertinent part that:

> If a worker employed by a subcontractor on a public works project is not paid the general prevailing rate of per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the

specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

The general contractor has to prove it had no knowledge that the underpayments were occurring, and that it complied with the specified requirements in subdivisions (b)(1)-(4). Nelson has done so. First, there is no evidence in the record that Nelson knew of the underpayments by Alexander. While the weight of the evidence shows that Alexander underreported the time worked by the affected workers, the CPRs submitted by Alexander, as corrected, appear on their face to report payment to all workers at or in excess of the correct prevailing wage due for the hours reported. With the exception of the speculation by Meade that Nelson must have known weekend work was going on, there is no evidence to establish that Nelson knew or had reason to know that Alexander was underreporting hours before Fletcher learned that a complaint had been filed in June 2008.

Nelson has also shown that it complied with all four requirements of section 1775, subdivision (b): (1) the required statutory provisions were included in Nelson's subcontract; (2) Nelson monitored Alexander's CPRs and requested correction of discrepancies appearing in the CPRs originally submitted for the time period subject to the Assessment; (3) there is no evidence

that Nelson was aware of any underpayment by Alexander before it had made the final disbursement to Alexander and the record shows that it promptly cooperated with DLSE's investigation after it was made aware of the complaint; and (4) Nelson obtained the required affidavit from Alexander before making the final disbursement.

Because Nelson has established that it complied with all four requirements, it is entitled to relief from penalties under section 1775, subdivision (b). Consequently, Nelson is not liable for the penalties assessed against Alexander under section 1775.

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

Section 1813 states as follows:

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

Section 1815 states in full as follows:

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

The record establishes that Alexander violated section 1815 by paying less than the required prevailing overtime wage rate on 76 occasions. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, limit liability only to the affected subcontractor, nor provide authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813 is affirmed in full.

There Are No Grounds For A Waiver Of Liquidated Damages.

At all times relevant to this Decision, section 1742.1, subdivision (a) provided in perti-

nent 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, or portion thereof, that still remain unpaid. If 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. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the . . . notice to be in error, the director shall waive payment of the liquidated damages.[11]

Rule 51, subdivision (b) [Cal.Code Reg. *tit. 8* §17251, subd. (b)] states as follows:

> To demonstrate "substantial grounds for believing the Assessment . . . to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment . . . was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment . . .

Absent waiver by the Director, Alexander and Nelson are jointly and severally liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is closely tied to their positions on the merits and specifically whether there was an "objective basis in law and fact" for contending that the Assessment was in error.

As discussed above, the weight of the evidence establishes that Alexander's violations were intentional and it has shown neither a subjective nor an objective basis for contenting that the Assessment was in error. Because the assessed back wages remained due more than sixty days after service of the Assessment, and neither Alexander nor Nelson has demonstrated grounds for waiver, they are also liable for liquidated damages in an amount equal to the unpaid wages.

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[11] Section 1742.1 was amended effective January 1, 2009. [Stats 2008 ch 402 § 3 (SB 1352).] Because the 60 day time after service of the Notice for payment of unpaid prevailing wages had run prior to the amendment's effective date, however, the version in effect at that time remains applicable to this case.

FINDINGS

1. Affected contractor Lewis C. Nelson & Sons, Inc. and affected subcontractor J. Alexander Company filed timely Requests for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Alexander underpaid A. Contreras, D. Contreras and Medina for their work on the Project in the aggregate amount of $3,001.18, as detailed in footnote 4, comprising 8 violations. Alexander is also liable for unpaid training fund contributions in the amount of $1.02 for Medina's work on the Project.

3. Alexander underpaid Espinoza, Marquez and Zermeno for their work on the Project in the aggregate amount of $18,375.44, as detailed above, comprising 81 violations. Alexander is also liable for unpaid training fund contributions in the amount of $341.85 for their work on the Project.

4. In light of Findings 2 and 3, above, Alexander underpaid its employees on the Project in the aggregate amount of $21,719.49, including unpaid training fund contributions.

5. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of $45.00 per violation, and the resulting total penalty of $4,005.00, as assessed, for 89 violations is affirmed. Nelson has demonstrated, however, that it is entitled to relief from penalties under section 1775, subdivision (b) and is not liable for the penalties assessed upon Alexander under section 1775.

6. Penalties under section 1813 at the rate of $25.00 per violation are due for 76 violations on the Project, for a total of $1,900.00 in penalties.

7. The unpaid wages found due in Finding No. 4 remained due and owing more than sixty days following issuance of the Notice. Alexander and Nelson are therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of $21,719.49, and there are insufficient grounds to waive payment of these damages.

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

are as follows:

Wages Due:	$21,376.62
Training Fund Contributions Due:	$342.87
Penalties under section 1775, subdivision (a) (Alexander only):	$4,005.00
Penalties under section 1813:	$1,900.00
Liquidated Damages:	$21,719.49
TOTAL:	**$49,343.98**

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

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

Dated: 9/28/10

John C. Duncan
Director of Industrial Relations