

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Tek-up Construction, Inc.

Case No. 10-0046-PWH

From a Civil Wage and Penalty Assessment issued by:

**Office of Contract Compliance for the City of
Los Angeles**

**DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL
RELATIONS**

Affected contractor Tek-up Construction, Inc. (Tek-up), submitted a timely request for review of a Notice of Withhold of Contract Payments (Notice) issued by the Office of Contract Compliance for the City of Los Angeles (OCC) with respect to work performed on the Brand Park Recreational/Community Building (Project) in Los Angeles County. The Notice determined that \$526,391.48 in unpaid prevailing wages and statutory penalties were due.¹ A Hearing on the Merits occurred on June 30, July 1, July 2, July 9, and September 13, 2010, before hearing officer, Christine Harwell. James Patrick Nollan appeared for OCC, Michael C. Robinson, Jr., and Derek S. Chaiken appeared on behalf of Tek-up. Mark Oertel and Julissa Galvan appeared for surety Lincoln General Insurance Company (LGIC), who appeared as an interested party under Rule 8(b) [Cal. Code Regs., tit. 8, §17208, subd. (b)]. On August 26, 2010, after hearings were concluded, OCC moved to amend the Notice (Amended Notice). The matter was reopened for argument on this motion and was submitted on January 11, 2011.

The issues for decision are:

- Whether Tek-up failed to maintain accurate Certified Payroll Records (CPRs) of its em-

¹ This amount was a reduction from the original amount determined to be due when the Notice was served. During the course of preparing for the hearing, OCC reduced the claimed underpayment as Tek-up produced evidence that the listed workers were in fact employed by subcontractors whose payments to the workers could be verified.

employees and underreported their hours of work.

- Whether Tek-up misclassified its employees.
- Whether Tek-up's daily lump sum payments to its employees were below the required prevailing hourly wage rate and overtime.
- Whether Tek-up is liable for underpayment of prevailing wages and penalties for the work of Luis Garcia.
- Whether Tek-up, as prime contractor, is liable for OCC's assessment attributed to the employees of subcontractors where OCC has not named or served the subcontractors with the Notice.
- Whether Tek-up is liable for penalties under section 1775 for the failure to pay prevailing wages.
- Whether Tek-up is liable for penalties under section 1813 for the failure to pay overtime prevailing wages.
- Whether Tek-up is liable for liquidated damages on unpaid wages.
- Whether OCC's Motion to file an Amended Notice, filed after Hearing on the Merits and which increases the assessment of unpaid wages and penalties, should be granted.

The Acting Director finds that Tek-up has mostly failed to carry its burden of proving that the basis of OCC's Notice was incorrect. The Director dismisses the Notice as to Garcia, employees of Rester Plumbing, and for specific days in November 2008. The Director grants OCC's motion to Amend the Notice and modifies the amount of the Amended Notice to conform to the evidence. The Decision, however, remands to OCC to recalculate its Amended Notice in accordance with the Decision.

FACTS

Tek-up was the general contractor for the Project. The parties stipulated that the Project was a public work subject to prevailing wage requirements of California Labor Code sections

1720 et seq.² The Project was advertised for bid on December 6, 2006. Tek-up's bid provided that it would perform demolition, concrete, framing, drywall, painting, plaster, and flooring. Tek-up was the lowest bidder and was awarded the contract on July 18, 2007.

Applicable Prevailing Wage Determinations (PWDs): The following applicable PWDs and scopes of work were in effect on the bid advertisement December 6, 2006:

- Carpenter (SC 23-31-2-2006-2)
- Cement Mason (SC-23-203-2-2006-1)
- Various Bricklayers, Stonemasons, Drywall Finishers, Painters, Plasterers, Plumbers, Roofers, Tile Layers, etc. (LOS-2006-2)
- Laborers, Groups 1 - 5 (SC 23-102-2-2006-2)
- Iron Workers (C-20-X-1-2006-1)
- Fence Builder (Carpenter) (SC-23-31-2005-1)
- Operating Engineers, Group 8 (SC-23-63-2-2006-2)

The Dispute: The Notice generally assessed unpaid prevailing wages for 35 named workers and 34 unknown workers for the period from July 30, 2007, to January 11, 2009. OCC determined that Tek-up did not report all its workers on its Certified Payroll Records (CPRs), nor did it accurately report the wages paid or the hours worked. The Notice further determined that Tek-up did not accurately pay workers the proper prevailing wage for the type of work the workers actually performed.

Tek-up challenges the Notice based on the lack of credibility of witnesses Ernesto Torres (Torres), Luis Garcia (Garcia), Eliasab Rodriguez (Rodriguez), Benito Carbajal (B. Carbajal) Roman Perez (Perez) and Edgar Perez Sandoval (Sandoval). Tek-up also challenges the Determination that unpaid wages are owed to Garcia, whom Tek-up claims was a subcontractor, and to workers employed by subcontractor Rester Plumbing.

² All further references are to the Labor Code, unless otherwise indicated.

Tek-up further challenges the Notice on the basis that:

- Tek-up was a low bidding “mom & pop” enterprise that has enriched the City by its completion of the Project. Because of the City’s greed and the bad economy, the City was seeking a windfall not to pay what it owed Tek-up;
- Torres and Garcia conspired against Tek-up as retribution for Tek-up’s inability to continually employ them;
- Prior to Torres’s and Garcia’s disputes with Tek-up, no workers claimed to have been underpaid, and union rates were adequate;
- The City’s financial predicament caused OCC to rely on speculative testimony and altered documents from disgruntled former employees as a desperate cash grab; and
- OCC’s successive audits showed a “trend” of a decrease in unpaid prevailing wages to known workers and an increase in unpaid prevailing wages to unknown “Doe” workers without giving Tek-up credit for wages actually paid.

Tek-up’s CPRs For its Employees: Over the course of 22 months, work was performed under the supervision of Tek-up president, Kambiz Maleki (Maleki) and Tek-up’s superintendent, Ernesto Torres (Torres).³ The City’s Bureau of Contract Management ordered Makeki off the site after disagreements that the work on the Project was too slow and was improperly performed. Tek-up’s only consistent presence on-site was Torres. Torres managed the Project, hired workers and maintained the day-to-day paperwork. Torres kept daily track of the hours each worker worked on a computer program that was e-mailed to Tek-up’s Office. Torres kept two types of reports, a Daily Construction Report (Torres’s Report), which identified the type of work performed, and the number of Tek-up and subcontractor workers (without identifying the names of the workers). For Tek-up employees only, Torres kept a Payroll and Hour Log (Log) on which he daily recorded who worked, their classification and how many hours each day the individuals worked.

³ Torres was originally named in the Notice as an underpaid worker. In the Amended Notice, Torres was eliminated as a worker subject to payment of prevailing wages as he did not meet the requirement of section 1774.

Maleki prepared Tek-up's CPRs at Tek-up's offices but did not turn them in weekly to OCC, as required by the City's contract with Tek-up. At the beginning of the Project, Tek-up supplied CPRs to the City that only listed Carpenter union members as working on the Project. These CPRs did not list other, non-union, Tek-up employees, whom Torres recorded as working on the Project. Maleki turned in CPRs in which many of the weeks were reported as "no pay-roll" or otherwise listed only a few of Tek-up's workers. Sometimes the CPRs listed Torres as a journeyman carpenter or as a carpenter's apprentice. Toward the end of the project Tek-up did not timely supply CPRs.

The City's inspectors had a trailer on the Project site and they also kept daily records of the work performed. The City's inspector, Shahin Shahbazian (Shahbazian), Senior Inspectors George Espindola (Espindola) and Michael Hames (Hames) daily recorded the work performed and the number of workers present on the site for part of the day (Inspector Reports). Torres's Reports and Logs generally correspond to the Inspector Records but differ from Tek-up's CPRs. The Inspectors did not know which workers were paid by Tek-up. The inspectors testified that when they inquired whether certain workers present on the Project site were subcontractors' employees, Torres told them that the workers were Tek-up employees. Torres testified that Maleki ordered him to tell inspectors that all the workers were Tek-up employees because Maleki used subcontractors who had not been approved by the City. Torres confirmed that he told the inspectors that all the workers were employed by Tek-up.

The CPRs Maleki prepared for OCC not only listed fewer workers than actually worked but also reported fewer hours of work by workers than the hours reported to Tek-up by Torres. In 2009, during OCC's inquiry of Tek-up, Maleki required Torres to change his Logs to correspond to the hours Maleki had reported on the CPRs to OCC (Changed Logs). Torres testified that he made the changes Maleki demanded because Maleki told him that he would lose his job unless he changed the records. Torres continued to work for Maleki until November 2009 when he was laid off. After Torres stopped working for Tek-up, he provided OCC with the computer disc that contained some of his original Logs. The Logs differed from Maleki's CPRs and the Changed Logs, which Torres changed because of Maleki's threats.

OCC used the information from Torres's computer disc, complaining worker statements, and the City's Inspector Reports that recorded the number of workers present to determine Tek-up's underpayments. The Inspector Reports were generally the most accurate record of the number of workers on the Project each day. Because Tek-up's CPRs were both incomplete and inaccurate, OCC used the Inspector Reports to determine the number of workers on the Project. For workers whom OCC could not identify specifically as having worked on any particular day, OCC listed these workers as named "John Doe" (Doe Workers). All Doe Workers were listed as Tek-up employees based on Torres's representations.

Tek-up's Classification and Payment of Workers: The evidence at trial showed that Tek-up did not classify or pay its workers correctly. For example:

- Rodriguez testified that he was a First Period indentured apprentice Carpenter. Tek-up's CPRs reported paying him at union rates (\$14.20 per hour and \$21.28 per hour for overtime). Rodriguez normally worked 10 hours a day but was paid a flat rate of \$120 per day, which is an average of \$12.00 per hour. Tek-up incorrectly reported on its CPRs that Rodriguez worked less than a full 8 hours in a day. Sometimes Rodriguez was not reported on Tek-up's CPRs on days he claimed he worked. He was paid half his wages with a check and half in cash. He testified that he operated the bobcat, backhoe and jackhammer, which are not tasks within the scope of work for a carpenter and are subject to higher prevailing wages rates for journey level Operating Engineer.
- R. Carbajal testified that he was a Fourth Period indentured apprentice Carpenter. His work included forming walls and framing; he also worked with the bobcat. Tek-up's CPRs reported paying him at union rates (\$23.08 per hour, straight time, and \$32.57 per hour for overtime). R. Carbajal received a flat rate of \$120 per day from Tek-up. His pay did not change when he performed work within the operating engineer classification. He was paid part by check and part by cash. His pay checks did not list the hours worked or rate of pay.
- Benito Carbajal (B. Carbajal) testified he was not indentured as an apprentice. He was not reported on Tek-up's CPRs but was paid \$120 per day. B. Carbajal worked 8 or 9

hours per day. His work included framing, drywall, and concrete work. He was paid in cash and by check. His pay checks did not list the hours worked or rate of pay.

- Roman Perez (R. Perez) worked on the Project for six to eight months. He was not an indentured apprentice until his last two months on the Project (in about March, 2008), when he joined the Carpenters union. R. Perez did not know at what level of apprenticeship he entered. Tek-up's CPRs reported paying apprentice prevailing wages for a Sixth Period Apprentice (\$26.63 per hour and \$33.51 per hour for overtime). OCC reclassified R. Perez as a journeyman Carpenter, laborer, and Fourth Period apprentice during various periods of R. Perez's employment. R. Perez testified that he worked as a carpenter framing and building forms for cement slabs and walkways. He was paid a flat rate of \$120 per day, originally all in cash. Eventually, he was paid in part by check. His pay checks did not list the hours worked or rate of pay.
- Edgar Perez Sandoval (Sandoval) originally was not indentured as an apprentice; he joined the union on an unspecified date during the Project. He was reported by Tek-up as a Fourth Period indentured carpenter apprentice throughout the Project. He testified that he worked as a carpenter doing foundations and framing for cement walkways, working with cinder blocks, making sidewalks and walls. At first Sandoval was paid completely in cash. Eventually, Sandoval was paid partly by check. He was paid between \$13 and \$15 per hour. He complained to Torres about the pay but Torres told him he was paid correctly.

Tek-up only reported paying its workers based on the Carpenters union wage rates.

Workers who complained to OCC said that many workers worked in various capacities other than as carpenters, such as cement masons and equipment operators. The Notice assessed unpaid prevailing wages based on the tasks actually performed, not the classification Tek-up gave the workers. Tek-up did not provide evidence that any of these reclassifications were incorrect.

Most of the workers were paid partly by check and partly by cash based on a daily rate

between \$120 to \$200 per day.⁴ Overtime was rarely recorded, and overtime rates were never paid. Torres explained that the lowest level laborers were considered by Tek-up to be “pre-apprentices” and apprentices⁵ who received the lowest daily rate of \$120; that carpenters with some knowledge of carpentry, but who were not journeymen, received \$150 day; and that journeymen and above received \$200.00 per day. Torres advised non-union employees he hired of the daily rate: “If you want to work, this is how much you’ll get paid, and in cash.” Torres picked up pay envelopes from Tek-up’s office; those envelopes usually contained both a check and cash.

Tek-up contends that Maleki’s CPRs are evidence that Tek-up paid its workers based on union scale and criticizes the Notice as based on the falsified reports of disgruntled workers. Tek-up produced two workers as evidence that the workers were paid correctly:

- David Castro (Castro) was a First Period apprentice carpenter provided to Tek-up through the union apprenticeship program. He was shown two Tek-up checks for one week of work but could not tell if they were correct. He only recalled receiving one check. He relied on the amount given as being correct.

Castro signed the Changed Log for October 1, 2007, through October 7, 2007, that indicated he had only worked three days, even though, at hearing he realized he had actually worked all five days that week. He testified that Maleki came to his home in May 2010 and ordered him to sign a statement that the Changed Log was correct. At hearing, in reviewing the Changed Log, Castro realized the error and he said he could not be sure that the figures Maleki presented were true.

- Jorge Cruz (Cruz) was hired by Torres after being dispatched by the Carpenters union as

⁴ The Logs contain individuals’ names identified as “Edgar Chavarria, Edgar Sandoval, Alfredo Garcia, Ernesto Sandoval, roman (sic), Sebastian, Enrique, benito (sic), abel (sic), fausto (sic), Jaeby pena (sic), Antonio, George L. cruz (sic), rudy (sic), ismael (sic), armando (sic), hector (sic)” marked as “120 or 150” to represent the amount they were paid on a daily basis. Most of these workers were never listed on Tek-up’s CPRs.

⁵ Torres defined a “pre-apprentice” as someone lower than an apprentice, before they joined a union. He identified Salazar, Pena and Benito Carbajal as “pre-apprentices,” but contended that Rodriguez, Cruz and Chavarria were apprentices.

a journeyman carpenter. He testified that he did cement work on sidewalks, footings and a block wall. He was paid union rate; when shown a record that he was paid for six hours on a particular day, he could not recall if he actually worked eight hours. Some of the work he performed on the Project, such as when he dug a ditch, was paid in cash at \$25.00 per hour. When Cruz worked for cash only, he received no proof of payment.

Maleki visited Cruz on May 15, 2010, with forms to sign. Cruz speaks and reads only Spanish; Cruz's girlfriend wrote the words requested by Maleki: "These are my correct hours of work during that time and this acknowledgement covers the hours on pages 1 through 31 [referring to an accumulation of documents that included the Changed Logs regarding Cruz' hours]." Cruz signed the statement at the request of Maleki even though Cruz could not read what was shown to him.

Several other workers who did not testify completed the same pre-printed forms that memorialized that Tek-up had accurately recorded their hours and that they were paid correctly. These workers also signed the records Torres modified pursuant to Maleki's orders saying that the records were correct. The other workers who submitted statements did not testify about the circumstances under which they worked or were paid, or the circumstances that motivated them to sign the statements Tek-up submitted.

Tek-up's Arrangement with Luis Garcia: OCC claims Garcia was entitled to unpaid prevailing wages for his work on the Project as a journeyman carpenter. Garcia worked on the Project from November 2007 to November 2008 as both a foreman and a carpenter. Garcia was not a member of the carpenters union for the period of time he worked on the Project. Tek-up, however, reported paying some fringe benefits payments to the union trustee for some of Garcia's hours. Garcia read plans and specifications and performed carpentry. Garcia testified that he "built the whole community building at Brand" including framing, installing dry wall, building cinderblock walls, finishing cement, painting, and driving a fork lift. Garcia claimed Tek-up paid him \$200 per day, partially by cash and partially by check. He testified that Maleki gave him permission to hire additional workers to be paid by Tek-up.

Tek-up asserts that Garcia is not entitled to prevailing wages because, commencing in

September, 2008, Garcia worked as a subcontractor under the name “Garcia Construction” (*Garcia Construction*).⁶ Garcia denied he was a subcontractor; he told OCC that he consistently worked for Tek-up as a day-rate worker for eight hours per day. OCC determined that Garcia was a Tek-up employee and subject to the payment of prevailing wages. The Notice treated the workers determined to be working under Garcia as Tek-up employees. The following discussion is only about Garcia’s right to prevailing wages as a subcontractor during the period of September through November 2008.

Tek-up claims that the work performed by *Garcia Construction* during this period was included drywall, painting and staining. Maleki testified that Garcia asked to do the work through his father’s contractor’s license. There is no evidence as to the father’s identity or of his contractor’s license status. Tek-up introduced two hand written documents it claims to be the subcontract agreements. The documents neither list *Garcia Construction* nor are dated. Each document lists various construction tasks, such as staining doors, windows, and soffits. One document is on the letterhead of Penhall Company (Penhall document); the other document has no heading but has “Luis Work” handwritten at the top. Each document lists various amounts of money with dates and a place for a signature. On both sheets, there appear to be various signatures of “Luis Garcia” next to the amounts paid. The amounts paid appear to equal \$13,095.40 (\$10,595.40 and \$2,500.00). Tek-up introduced these two documents as evidence of its subcontract with *Garcia Construction*. Torres testified he prepared most of the Penhall document, as “something that Luis [Garcia] and Kambiz [Maleki] told him to write up.” There was no testimony who prepared the other document, except Maleki said he witnessed Garcia sign it. The handwriting on the two documents appears to be by several different people. It is not clear that the signatures that appear on both documents are the same.

Tek-up introduced seven cancelled checks made payable to *Garcia Construction* for \$38,625.00 for work denoted as for “Brand,” apparently referring to the Project.⁷ At most, one

⁶ The name “*Garcia Construction*” is italicized for easy differentiation between Luis Garcia and the purported entity Garcia Construction in the foregoing discussion.

⁷ The Tek-Up checks for the purported separate contract with *Garcia Construction* were as follows: #2004 for \$5,000.00, noted “Plaster Stain Brand” dated 9/25/0 endorsement unreadable signature

of those checks appears to be signed by a Luis Garcia; the remainder were signed by someone with an illegible signature or by “Hilda Garcia,” who was never identified. Garcia denies any knowledge of a Hilda Garcia.

At hearing, Garcia testified he is not a licensed contractor. He denied any knowledge or connection with *Garcia Construction*. Garcia denied having been paid by Tek-up as *Garcia Construction*; he denied receiving the checks listed in footnote 7, *supra*. He denied doing work that Tek-up claims *Garcia Construction* performed. Garcia asserts he was only a foreman on walkways, a gazebo, plywood sheeting and digging foundations on the Project between June 2007 and November 22, 2008. When shown the two handwritten documents for work that he was purportedly paid separately to do starting in September, 2008, Garcia denied signing the documents or performing the listed work. At a further hearing on September 13, 2010, Garcia again testified that he did not sign the documents; he did not perform any of the listed tasks; and did not receive payment for doing so. He stated that an individual by the name of “Oracio” performed dry-walling, taping, painting and wood staining. But Garcia maintained that he had nothing to do with that type of work. There are no records that list “Oracio” working on the Project. Garcia maintained that he worked daily with others he claimed he supervised. These workers were paid by Tek-up to pour and finish cement for walkways, gables, sheeting. These workers also dug foundations. Garcia provided OCC with a handwritten calendar of carpentry work that he and three to five other workers performed during this period. Tek-up’s CPRs reported “no payroll” for the majority of the time during this period.

The work Garcia testified that he and others performed in this period is not listed on either the Inspector Records or by Torres. Torres’s Report lists “*Garcia Construction*” doing work that was the subject of the contract (stain, paint). The records of Inspector Hames reflect a dif-

#2005 for \$5,000.00 noted Stain & Paint, Brand, dated 9/25/08 endorsement: unreadable signature.
#2006 for \$2,000.00, noted: “Drywall Brand” dated 9/25/08 endorsement: unreadable signature.
#2022 for \$13,000.00, noted: “Tapin_ Brand” dated 10/2/08 endorsement: unreadable signature “L----“
#2027 for \$7,000.00 noted: “Brand Stain Wood” dated 10/10/08 endorsement: unreadable signature “L---“
#2077 for \$2,625.00, noted “Brand Paint” dated 11/4/08 endorsed by a person named “Hilda Garcia”
#2058 for \$4,000.00 noted: “Paint Brand” dated 11/10/08 endorsed by a person named “Hilda Garcia”

ferent number of workers than Tek-Up's CPR's overall but generally correspond with the counts in Torres's Report. OCC's assessment nearly mirrors the Inspector Reports for the number and type of workers present on-site daily during this period.

Tek-up relied entirely on the two handwritten documents and its cancelled checks to *Garcia Construction*. Tek-up did not introduce any evidence as to Garcia's independent control over the manner or means of production or his exercise of discretion. Tek-up's evidence did not establish that Garcia normally operated as an independent company on the Project. Tek-up admitted that Garcia worked as an employee on other Tek-up projects other than at Brand during the time the project was being worked on, and that Garcia was separately paid for that other work.

Subcontractors' Employees: The Notice included unpaid prevailing wages for employees of Rester Plumbing (Rester).⁸ Tek-up never specified Rester as a subcontractor to the City but did timely submit CPRs. OCC found discrepancies between Rester's CPRs and the records maintained by Torres and the Inspectors.⁹ OCC assessed Tek-up for unpaid wages for any discrepancies of plumbers reported by Rester. Neither the Notice nor the Amended Notice named Rester as a subcontractor, and OCC did not serve the Notice or the Amended Notice on Rester. OCC's theory for Tek-up's liability for Rester's employees is premised on the argument that since a contractor is jointly and severally liable for underpayments and penalties with a subcontractor, OCC can proceed against only Tek-up. Tek-up also claims OCC committed calculation errors for the Rester employees.

Original and Amended Notice: OCC compared Tek-up's CPRs, the complaint statements from workers, the Inspector Reports, and Torres's Reports and the Logs. From these documents, OCC determined that Tek-up misclassified its employees and failed to make appropriate payments to its workers. This included assessing for workers not reported by Tek-up and paying

⁸ Tek-up also claimed that the Amended Notice assessed unpaid wages for employees of other subcontractors but never presented evidence as to which employees were employed by specific subcontractors.

⁹ The Rester employees were Bryan Malik, Francisco Amaro, Greg Rester, Greg Weller, Juan Rodriguez, and Leslie Birchfield.

workers as laborers or carpenters for work subject to higher paid classifications. It also included paying workers as apprentices who were not properly indentured in a recognized program or were working in trades not subject to their apprenticeship training. The Notice determined that Tek-up had underpaid 35 identified workers and 34 Doe Workers, in the amount of \$433,045.50, plus \$6,070.98 in unpaid training funds. OCC determined that the failure to pay the proper prevailing wage rate was intentional and assessed the maximum penalty of \$50.00 for each underpayment under section 1775. OCC assessed penalties under sections 1775 and 1813 in the amount of \$87,275.00.

After giving credit for wages reported on various subcontractors' CPRs, the Notice was reduced on the first day of the Hearing on the Merits to \$422,516.60. OCC reduced the section 1775 penalties as it reduced the number of violations.

During the hearing Tek-up and LGIC, for the first time, questioned why individual names of workers were listed as workers entitled to prevailing wages when there was no record of who actually performed the work on the days for which work was credited to the workers. In the Notice, OCC used the names of known workers who told OCC the dates of their work and the payment they received even if neither Torres's more accurate Log nor the Inspector Reports provided the names of these workers. Tek-up introduced no records of who was present, or who was paid, other than its CPRs. Based on Tek-Up's and LGIC's objection, OCC sought leave to amend the Notice in part to substitute Doe Workers for the names of workers OCC assumed had worked on specific days. Both Tek-up and LGIC agreed that the Notice should be so amended.

Under this agreement, OCC sought to amend the Notice, which added additional Doe Workers. OCC also eliminated the claimed unpaid wages for Torres because Torres did not perform work subject to the payment of prevailing wage. The Amended Notice did not give credit for wage payments for the Doe Workers it had previously credited to the named workers. This resulted in a net increase in the total assessment. The resulting amendment increased the assessment to \$502,074.36, for which OCC filed its motion to amend.

Because none of the back wages were paid within sixty days following service of the Notice, Tek-up's potential liability included an additional \$342,407.68 in liquidated damages.

DISCUSSION

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

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987 [citations omitted] (Lusardi).)

A Labor Compliance Program like OCC enforces prevailing wage requirements not only for the benefit of workers but also “to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” (§ 90.5, subd. (a), and *Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Notice of Withholding under section 1776.1.

When OCC determines that a violation of the prevailing wage laws has occurred, a written Notice of Withholding is issued pursuant to section 1771.6. An affected contractor or subcontractor may appeal the Notice of Withholding by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the Notice of Withholding is incorrect.”

Prevailing Wages Were Required for All Construction Work by Tek-Up.

Section 1774 states:

The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rate of wages to all workmen employed in the execution of the project.

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. The Director determines these rates and publishes general wage determinations to inform all interested parties and the public of the applicable wage rates for the “craft, classification and type of work.” Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standard Enforcement v. Ericsson Information Systems* (1990) 221 Cal. App. 2d 114, 125.) The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (See § 1773.2 and *Ericsson, supra.*) A contractor may not substitute union rates for prevailing rates, if union rates are lower, but may pay a worker in excess of prevailing rates. (§§ 1770, 1773)

Under limited circumstances, workers can receive less than the published prevailing journey level wage rate. “Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered and shall be employed only at the work of the craft or trade to which he or she is registered.” (§ 1777.5, subd. (b).) The only apprentices eligible for apprentice prevailing wages are those actually indentured in a state approved program. (§ 1777.5, subd. (c).) Thus, Tek-up could pay those workers who were indentured in the Carpenters union’s apprenticeship program the applicable apprentice wage only for those hours in which the workers were employed in “the craft or trade to which he or she is registered.” (§ 1777.5, subd. (b).)

The Labor Code requires an employer on a public work for which prevailing wages are required to be paid to prepare and maintain contemporaneous records of the hours an employee works. (§ 1776, subd. (a); see, also, Cal. Code Regs., tit. 8, § 11160(6)(a)(1).) Where, as here, the employer fails to maintain the required payroll records, the employee may demonstrate his

hours by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. (see, *Hernandez v. Mendoza*, (1988) 199 Cal App.3d 721 citing with approval *Anderson v. Mt. Clemens Pottery Co* (1945) 328 U.S. 680 (*Mt. Clemens*).

The burden then shifts to the employer to produce evidence of the precise number of hours worked or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. (*Hernandez, supra*.) If the employer fails to produce such evidence, a court may then award wages to the employee, even though the result may be imprecise. In *Mt. Clemens, supra*, the Court considered whether estimate-based overtime claims under the Fair Labor Standards Act were "unsustainable because based upon surmise and conjecture." *Ibid.*, 328 U.S. at 686. Noting that the Fair Labor Standards Act imposed specific record-keeping requirements on the employer, the Court reasoned that an employer's violation of that very responsibility should not have the effect of preventing employees from ever proving a claim about the amount of wages due. The Court then fashioned the following rule.

In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result may be only approximate.

(*Mt Clemens, supra*, 328 U.S. at pp. 687-88.)

Tek-up was required to keep specific records of hours worked by any employees subject to federal and state overtime laws (29 U.S.C. § 211, subd. (c), and §1174, subd. (d)) irrespective of whether those employees are engaged in prevailing wage work. Section 1776 imposes further record-keeping requirements, including the duty to certify the accuracy of those records, for prevailing wage projects. Tek-up provided OCC with demonstrably inaccurate and incomplete CPRs as can be seen both from the other records that exist and from Torres's testimony. The evidence shows Tek-up failed to fulfill its legal responsibility to keep accurate records of who it employed, the hours its employees worked and amounts its employees were paid. Thus, the rule

in *Mt. Clemens* applies, particularly in light of Tek-up' burden of proof under section 1742 to show that the basis for OCC's Assessment was incorrect.

The records upon which the parties rely are voluminous, and few correspond to the other. This has made fact-finding at best difficult as to which workers are entitled to unpaid prevailing wages and the amounts owed to each. The parties' varying versions of the actual number of workers present on a daily basis are at odds. In the end, the only substantial evidence on which to rely is a combination of the Inspector Reports and Torres's Reports and Log. Since OCC used these records for its Amended Notice, the Amended Notice will be accepted as accurate, except as to any portion that Tek-Up proves to be incorrect. (§ 1742, sub. (b).)¹⁰

Tek-up's records are clearly fabricated as demonstrated by Torres's testimony and the Inspector Reports. The CPRs, therefore, are of no evidentiary value. Tek-up's CPRs understated the hours worked, the number of workers and what they were paid. The CPR's erroneously list work on holidays when neither the inspector nor Torres reported workers, the CPRs list workers paid as apprentices when the workers were not indentured apprentices or performed work outside their trade.¹¹ Very few CPRs list a full day's work, while the workers reported working full days, often including overtime. Very few CPRs list the full complement of workers present when compared with the Inspector Reports or Torres's Reports. Torres testified that Maleki required Torres to change his records to correspond to Maleki's CPR's, even though Maleki had no personal knowledge of who was present and who was not. Additionally, the workers complained that their paychecks were delayed and only partially paid. Even when the workers were paid, there was no accounting of the hours or rate of pay, so the workers lost track of whether all their time was accounted for in the pay they received. (see, § 227.) The written statements prepared by Maleki for former employees' signatures are not substantial evidence as to the accuracy of

¹⁰ OCC did not explain which prevailing wage determination applied to the HVAC work OCC claimed was performed by John Does numbers 8 and 9 on November 10 as LOS 2006-2 does not contain such a classification. The work described appears to be covered by the Sheet Metal classification in LOS 2006-2. On remand, OCC will have to clarify this problem.

¹¹ The Notice and Amended Notice list workers whom OCC claimed were improperly paid at an apprentice rate because the workers were not indentured. Tek-up has not contested this determination as to those workers.

Tek-up's records. Torres's admission that he told the inspectors that all workers were Tek-up employees means that the workers listed in the Notice and Amended Notice were Tek-Up employees absent evidence to the contrary. Tek-up provided no such evidence.

Thus, Tek-up has provided no controverting evidence to the Inspector Reports or Torres's Reports or Log. Tek-up has merely attacked the accuracy of the assessment as based on surmise. This does not overcome Tek-up's burden to prove the Amended Notice incorrect with specific evidence. (*Hernandez, supra*, 199 Cal App.3d 721.) The testimony of most of the workers shows that Tek-up systematically under reported hours of work, misclassified its employees, and failed to pay prevailing wages to every worker over the course of the Project.

As seen below, however, the Amended Notice is not accurate based on the record as a whole. OCC will have to recalculate the assessment as described more fully in the Remand Order.

As to the Doe Workers, the failure to identify specific workers does not bar OCC's enforcement and collection of the prevailing wages. The contractor's liability is to the enforcing agency not to the individual workers. (See *Violante v. Communities Southwest Development and Construction Co.* (2006) 138 Cal.App.4th 972.) The enforcing agency may collect unpaid wages and then locate the aggrieved workers. (See, §§ 96.7, 1743, *Division of Labor Standards Enforcement v. Fidelity Roof Company* (1997) 60 Cal.App.4th 411.) The Inspector Reports and Torres's Reports and Log are adequate support for the Doe Worker determinations in the Amended Notice. OCC has nearly mirrored the inspector's records, which are the most reliable; and Tek-up has not met its burden to prove that the days and hours in the Amended Notice were inaccurate.

Luis Garcia Was Paid In Excess Of The Prevailing Wages Owed By Tek-Up, He Is Not Owed Wages

Whether Garcia was a subcontractor does not have to be determined here. Tek-up has met its burden of proving that Garcia was paid more than the prevailing wage. While Garcia denied receiving the checks listed in footnote 7, *supra*, it is clear from the hearing record as a whole (including the emails between Garcia and Maleki) that Garcia was being paid throughout

this period in an amount in excess of what the Amended Notice determined was due. Therefore, the Amended Notice incorrectly included Garcia in the workers who were underpaid and incorrectly assessed section 1775 and 1813 penalties for Garcia's work.¹²

Subcontractors' Employees: Section 1741 provides that a Notice shall issue against "a contractor or subcontractor, or both." This section is clearly intended to provide the employer with notice of a violation as well as any party jointly and severally liable (§ 1743.) OCC did not serve Rester with the Notice nor in anyway give Rester notice that OCC determined Rester failed to comply with its obligations to pay prevailing wages. It would be a violation of due process to find a violation by Rester in these circumstances. To do so would allow either Tek-up or OCC to withhold funds owed to Rester without providing Rester the ability to challenge this determination.

Here, Tek-up proved that Rester was the employer of the workers listed in footnote 9, *supra*, whom OCC determined were not paid prevailing wages. Because of OCC's error, the Director has no choice but to dismiss Tek-up's liability for wages to identified workers of Rester Plumbing entirely. However, Tek-up did not meet the same burden as to other workers listed in the Notice and Amended Notice whom it claimed were in fact employed by subcontractors.

Tek-Up Owes Prevailing Wages On All Work At Brand, Except To Garcia, Torres And The Rester Employees. OCC Must Redetermine The Hours and Days Worked, However.

Tek-up objects that the Notice and Amended Notice contain other workers who were employed by subcontractors not served with the Notice and therefore not the direct responsibility of Tek-up. Tek-Up's argument is flawed. Torres told the inspectors that everyone on the Project was a Tek-up employee. Except as the original Notice was modified prior to the first day of the hearing, Tek-up, the party with the burden of proof, failed to produce evidence that any employee currently subject to the Notice or Amended Notice was employed by someone other than

¹² While the defense that Garcia was a subcontractor does not have to be addressed here, it is worthy of note that the documents Tek-up relies on do not constitute a construction contract (Bus. & Prof. Code, §§ 7030, 7118), Tek-up did not comply with Labor Code section 1775, subdivision (b), Garcia could not be an independent contractor as a matter of law (Lab Code, § 2750.5, Bus. & Prof. Code, § 7026), and Tek-up's conduct violates Labor Code sections 1020 *et seq.* Were there to be a decision on whether Garcia could act as a subcontractor in this case, the answer would be no.

itself. Thus, except for the Rester employees, there is no factual basis on which to find that any of the employees listed in the Notice or Amended Notice were employed by anyone other than Tek-up.

Apprentices: Tek-up paid some workers as “apprentices” or “pre-apprentices”¹³ at less than the journey level rate. As seen above, apprentices were paid less than the applicable apprentice prevailing wage rate. Further, several indentured apprentices testified they did work that was not covered by the scope of work for carpenters. For example, Rodriguez testified that in addition to his carpentry work, he operated a bobcat and backhoe, without supervision. This work entitles him to payment as a journey level operating engineer, a higher paid classification. OCC reclassified some of the other employees from an apprentice wage to a journey level wage because the employees were not properly indentured, or, if they were, there was evidence that what the workers actually did was not apprentice work. Tek-up did not effectively contest this determination with evidence that proves it correctly paid the proper apprentice prevailing wage. As a result, Tek-up has not met its burden to disprove OCC’s re-classification of “apprentices” to journey level in that classification or in classifications other than as carpenters.

OCC’s analysis of the Inspector Reports and of Torres’s records allowed it to make determinations about who performed the work on particular days. Not having the benefit of accurate CPRs, OCC made as informed an analysis as possible. This is all that is required under *Hernandez, supra*. (199 Cal App.3d 721.) The burden then shifted to Tek-up to provide specific evidence to disprove OCC’s determination. It failed to do so.

However, there are evident errors not raised by Tek-up that need correcting, some of which are noted above. In addition, on November 11, 2008 (Veterans Day holiday), there is no report of work being performed, yet OCC attributed work to two carpenters, five painters, and two HVAC workers. On Thanksgiving weekend, November 27 and 28, 2008, there are no reports of work being performed, yet OCC attributed work to carpenters and painters on that day. On remand, OCC will remove all claims of unpaid wages for these days.

¹³ None of the Director’s Prevailing Wage Determinations for the relevant classifications provide for “pre-apprentices.”

OCC'S Motion To Amend The Notice Of Withhold To Include Assessment Of Additional Doe Worker Wages Is Granted, Subject To The Remand Order.

Rule 26, subdivision (a)(3) [Cal. Code of Regs., tit.8, § 17226, subd. (a)(3)] provides that a motion to amend an assessment to increase a claim for wages, damages or penalties based upon re-computation or the discovery of new evidence subsequent to the issuance of the original assessment or notice may be granted upon a showing of good cause when to do so is just.

The Amended Notice was agreed to by Tek-up and LGIC insofar as identified workers were removed and Doe Workers were added. Additionally, Tek-up cannot object to elimination of Torres as entitled to prevailing wages. For this reason, the Motion to Amend is granted with the following conditions:

Based on a careful review of the proposed Amended Notice, it is apparent that two workers who testified at trial were omitted from OCC's list of identified workers entitled to prevailing wage, perhaps being substituted with Doe Workers. There is substantial evidence that Benito Carbajal and Bernardino Carbajal were employed on the Project and underpaid for prevailing wages. On remand, the OCC will substitute the two Carbajal's for two of the currently listed Doe Workers.

Further, no credit was given for wage payments to Doe Workers. All of the workers who testified said they were paid at least \$120 per day; some said they were paid more. In light of the evidence that all workers were paid at least \$120 per day, the Amended Notice must reflect credit for such payments for all Doe Workers.

The Motion to Amend the Notice is therefore granted. OCC shall recalculate the wages due based on the Remand Order.

OCC'S Penalty Assessment Under Section 1775 Is Appropriate. The Total Amount Must Be Recalculated Pursuant To The Remand Order

Section 1775, subdivision (a), provides in relevant part as follows:

(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.

* * *

(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.”

Abuse of discretion by OCC is established if the “agency's nonadjudicatory action ... is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy.” (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment “because in [his] own evaluation of the circumstances the punishment appears to be too harsh.” *Pegues v. Civil Service Commission*, 67 Cal.App.4th 95, 107.

OCC assessed the penalty amount at the maximum of \$50.00 per violation per worker. Tek-up has not proved that OCC abused its discretion in setting the amount of each violation. The record does not establish an abuse of discretion in the assessed rate of \$50.00 based on Tek-up's willful failure to observe the basic requirements of record keeping and misrepresentation of its workforce and pay practices.

The total section 1775 penalty has been reduced because the number of violations have been reduced. The precise number of days and workers for which a penalty attaches cannot be determined at this point in light of the need to remand as described above. Thus, the \$50.00 per violation penalty under section 1775 is affirmed. The number of violations is to be re-determined on remand.

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Tek-Up Is Liable For Penalties For Its Failure To Pay Overtime Wages

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 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 Notice assessed section 1813 penalties. While Tek-up denies that any such violations occurred, it has produced no evidence to refute the claims of overtime being worked.

Unlike section 1775 above, section 1813 does not give the Division 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 and modified only insofar as the number of violations is reduced on remand.

Tek-Up Is Liable For Liquidated Damages On The Wages Due And Unpaid Pursuant To The Remand Order

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

After 60 days following the service of . . . a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the . . . the notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

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

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

Absent waiver by the Acting Director, Tek-up is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Notice. Entitlement to a waiver of liquidated damages in this case is tied to Tek-up's position on the merits and specifically whether, within the 60 day period after service of the Notice, it had "substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment."

Tek-up provided no satisfactory explanation why it paid daily rates well below the determined prevailing wage rate for classifications it used and omitted workers who were present working on the project. Similarly, Tek-up has no authority to support its decision to pay its workers less than prevailing wage on this public work, even if a portion of some of the workers pay was at union rates,¹⁴ because the union rates were below prevailing rates. Tek-up cannot claim to have had a good reason to challenge the Notice except insofar as it showed that Torres and Garcia were not underpaid. To the limited degree Tek-up was successful in its defense; it is not obligated to pay liquidated damages by statute (i.e. on the elimination as to Garcia and Rester employee wages, but not on the remaining wages).

Because the assessed back wages remained due more than sixty days after service of the Notice, and Tek-up has not demonstrated grounds for waiver, Tek-Up is therefore liable for liquidated damages in an amount equal to the unpaid wages

FINDINGS

1. The contract between City of Los Angeles and Contractor, Tek-Up Construction, Inc., concerning the Brand Park Recreational/Community Building in Los Angeles is a public works contract subject to the payment of prevailing wages to the workers employed in the execution of

¹⁴ In fact, the evidence is that no worker was actually paid for all their work at union rate because the workers were paid flat daily rates that averaged below the union rates for the hours actually worked.

this contract.

2. Affected contractor, Tek-Up, filed a timely Request for Review from a Notice of Withholding of Contract Payments issued by the Office of Contract Compliance of the City of Los Angeles.
3. Upon review of the evidence it is found that Tek-Up failed to maintain accurate payroll records and underreported the daily number of workers on their Certified Payroll Records; Tek-Up underpaid its workers by paying them a daily lump sum amount below the required prevailing hourly wage rate; Tek-Up misclassified workers paid as Carpenters, Laborers or as Apprentices from higher paid crafts and, Tek-up failed to record or pay workers required overtime.
4. OCC properly sought to amend the Notice after the Hearing on the Merits; OCC's motion to amend is granted. The operative Amended Notice is the one submitted on August 26, 2010. (Amended Notice)
5. The Amended Notice is dismissed as to Luis Garcia and Rester Plumbing workers Bryan Malik, Francisco Amaro, Greg Rester, Greg Weller, Juan Rodriguez, and Leslie Birchfield.
6. The Amended Notice is dismissed as to the claimed work on the following holidays: November 11, 2008, November 27, 2008 and November 28, 2008.
7. The Amended Notice is modified to include credit for payments to Doe Workers in the amount of \$120 per worker per day of assessed underpayment.
8. In all other respects, including but not limited to assessments of hours worked under the proper pay classification, the Amended Notice is affirmed in full.
9. Training fund contributions are found due, as recalculated by OCC.
10. OCC did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of \$50.00 per violation. OCC is to recalculate the number of violations in light of the dismissals of the Amended Notice in numbers 5 and 6, above. The District is to recalculate the number of violations in accordance with the above findings.
11. Tek-up is liable for penalties for not paying overtime under section 1813, at the correct

prevailing rate pursuant to Labor Code section 1813 at \$25.00 per violation. OCC is to recalculate the number of violations in light of the dismissals of the Amended Notice in numbers 5 and 6, above in accordance with the above findings.

12. The unpaid wages found due in this Decision remained due and owing more than sixty days following issuance of the Notice. There are insufficient grounds to waive payment of these damages. Tek-up is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount to be determined upon the recalculation of OCC.

This decision is final as to all issues not specifically subject to the Remand Order. Labor Code section 1742(c).

ORDER

Remand Order: The matter is remanded to OCC to recalculate the wages due as follows:

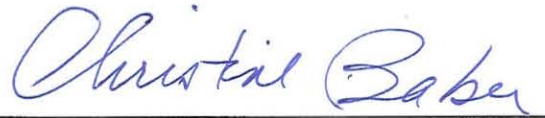
- a. OCC shall eliminate any assessment of wages, penalties, or other forfeitures for Luis Garcia and Rester Plumbing workers Bryan Malik, Francisco Amaro, Greg Rester, Greg Weller, Juan Rodriguez, and Leslie Birchfield.
- b. OCC shall eliminate any assessment of wages, penalties, or other forfeitures for work performed on November 11, 2008, November 27, 2008 and November 28, 2008.
- c. OCC shall reduce the assessment of unpaid wages for each Doe Worker by the sum of \$120 per day for each day OCC claims each Doe Worker performed labor on the Project.
 - a. All recalculation shall be based on the operative PWDs, enumerated above.
 - b. The classification and hours used in the Amended Notice shall be used in the new audit, except for the HVAC classification noted at footnote 10, *supra*.
 - c. OCC shall serve its new audit on Tek-up and LGIC within 60 days of the date of service of Notice of Findings. Tek-up shall have 60 days from service in which to request a hearing before the hearing officer, providing with specificity why OCC's calculations are erroneous. If such a hearing is requested, the scope shall be limited solely to the numerical accuracy of OCC's revised audit. That is, the only issue shall be whether OCC did its math correctly. All other is-

sues are final. The burden to show error shall remain on Tek-up. If no hearing is requested within 60 days, the revised audit shall become final and become the Amended Notice. Liquidated damages in the amount of unpaid prevailing wages as revised shall attach.

d. In complying with the remand order, OCC shall only rely on those documents admitted into evidence.

The Hearing Officer shall issue a Notice of the Findings which shall be served with the Decision on the parties.

Dated: 8/26/2011



Christine Baker
Christine Baker
Acting Director of Industrial Relations