

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Angeles Contractor, Inc.

Case No. 08-0224-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Angeles Contractor, Inc. (“Angeles”), filed a timely request for review of a Civil Wage and Penalty Assessment (“Assessment”) issued by the Division of Labor Standards Enforcement (“Division”) with respect to work performed on the Huntington Beach Union High School District, Fountain Valley High School Modernization – Building A, C and F (“Project”) in Orange County. A hearing on the merits was held Wednesday, April 8, 2009, before hearing officer, Christine Harwell. David D. Cross appeared for the Division and William J. Inglesbe appeared on behalf of Angeles. After reopening and briefing, the matter was submitted June 10, 2009.

The issues for decision are:

- Whether Arnel Apar Bernabeo was employed by affected subcontractor Powercon Construction, Inc. (“Powercon”)¹ when working on the Project.
- Whether Powercon underpaid inside wiremen Antonio De Dios and Bernabeo for their work on the Project.
- Whether Angeles, as prime contractor, is liable for Powercon’s underpayments and penalties as assessed by the Division.

This decision modifies and affirms the Assessment.

¹ Powercon, an electrical subcontractor of Angeles, did not request review of the Assessment.

FACTS

Angeles was the general contractor for the Project; Powercon was Angeles's electrical subcontractor from May 27, 2007 to October, 13, 2007. Fountain Valley High School's bid notice was first published April 12, 2006, and work on the project began in July, 2006. Powercon stopped work on the Project before completion due to its own financial difficulty. The applicable prevailing wage determination ("PWD") is the General PWD for Orange County (ORA-2006-1) which includes the classification of Inside Wireman, Technician.

The Division served the Assessment on October 24, 2008. The Assessment found that Powercon had underpaid De Dios and Bernabeo in the amounts of \$49,699.72 and \$12,217.27, respectively,² and assessed penalties under Labor Code sections 1775 and 1813³ in the amount of \$7,975.00.

Bernabeo's Employment on the Project:⁴

Bernabeo installed EMP pipes, metal boxes for electrical wiring, and J boxes to panels (eliminating existing wires and pipes not needed), and helped to pull wires. Bernabeo worked on the Project primarily weekends from July 28, 2007 through October 13, 2007. The only weekday hours he worked were on Monday, Tuesday and Wednesday during the week commencing August 20, 2007, when there was an urgent need for his work on the Project. Bernabeo was not listed as a Powercon worker on any of its Certified Payroll Records ("CPRs").

Powercon's president and CEO, Oscar Gonzales, denied that Powercon employed Bernabeo, who was not a certified electrician. Gonzales admitted that Bernabeo worked on the Project, primarily on weekends, but he claimed that Bernabeo worked for De Dios, as an apprentice, and not for Powercon. Gonzalez stated that he had no idea how many hours Bernabeo worked on the Project.

² The Assessment found that De Dios and Bernabeo should have been compensated as Inside Wireman, Technician at a total straight time rate of: \$48.01 for the period ending August 31, 2007, and \$49.40 for the period thereafter, erroneously applying the wage rates from the PWD in effect when the work was performed, ORA 2007-2, rather than the one in effect when the Project was bid, ORA-2006-1.

³ All further statutory references are to the California Labor Code, unless otherwise indicated.

⁴ At hearing, Angeles raised the issue of whether Powercon or De Dios employed Bernabeo, if he worked at all. Angeles posed that if Bernabeo did work, then whether De Dios's or Bernabeo's reports of hours worked were credible.

De Dios and Bernabeo's wage claims:

Powercon employed De Dios, a certified general electrician, as electrical foreman and inside wireman on the Project. In addition to performing electrical work himself, De Dios supervised the workers in installing ten feet of raceway, terminating and splicing of more than 50 volts of power source, and pulling wires.⁵

From nearly the start of the Project, Powercon issued checks with insufficient funds to De Dios and to the other Powercon workers De Dios supervised. De Dios spoke to Gonzales, about not being paid. Gonzales told De Dios that he and the other workers would be paid when Powercon was paid by Angeles. In approximately August, 2007, after a series of insufficient funds checks from Powercon to De Dios and other workers, De Dios loaned Gonzalez \$19,000 so work could continue on the project. In October 2007, De Dios arranged for Angeles to issue checks payable jointly to Powercon and De Dios for the purposes of paying workers and buying materials. Angeles issued four joint checks to Powercon and De Dios that totaled \$59,552.17. Gonzales would sign Angeles's joint checks and then give them to De Dios who would then also endorse them and deposit them into his personal checking account. De Dios paid wages to eleven workers (including \$930.00 to Bernabeo) and purchased materials with those funds. De Dios retained \$17,861.00 of the payments from Angeles for himself that he considered to be partial repayment of the \$19,000.00 he had loaned to Gonzales.

Powercon reported some of De Dios's claimed hours on its CPRs.⁶ No Powercon CPRs were introduced for the period September 30 through October 20, 2007, but De Dios claimed he worked in excess of eight hours daily, including weekends, from Sunday, September 30 through Thursday, October 18, 2007, a total of 194 hours over 19 days. Powercon did not maintain time cards or require daily entry of time worked.

⁵ Angeles posed the issue of whether De Dios, as a corporate principal, was entitled to prevailing wages. Though Angeles established that De Dios had signed a document that named him as director, De Dios explained that Gonzales wanted De Dios to become a Director but the arrangement was never completed and De Dios did not agree to become an official of Powercon. The Division established that the Contractor's State License Board does not reflect that De Dios was a corporate officer of Powercon by producing a document from the Contractor's State License Board(CSLB) printed March 24, 2009, that reflects that for the period November 12, 2006 through April 22, 2008 Oscar Gonzales was responsible managing officer (RMO), chief executive officer (CEO) and its president with others, but not De Dios, as officers of the corporation

⁶ Powercon's CPRs are incomplete, the first CPR commences with Monday, May 28, 2007 and the last one ends with the week ending Saturday, September 29, 2007.

De Dios kept a record of his time separately. Gonzales admitted that Powercon's CPRs were not accurate and that Powercon was financially unable to pay De Dios or the other workers.

During the Division's investigation, Bernabeo told the Division that he had never been paid anything by Powercon. He recalled at hearing, however, that he had been paid \$930.00 by De Dios, but had returned the money to De Dios because the money was owed from Powercon and not from De Dios. He also explained that Powercon did not keep time cards and that he had recorded his time himself. Bernabeo's calendar reflects that he worked 19 days, only 3 of which were weekdays, for a total of 193 hours,(24 regular time hours, 108 hours at the overtime/Saturday Rate, and 60 hours at the Sunday rate).

Victor Reyes was Angeles's project superintendent for the Project. He prepared daily reports of the work of the subcontractors on the Project ("Inspector Logs"). Reyes believed the Project work was performed mostly on weekdays, but, if he was informed that weekend work had taken place he would record those activities on the following Monday.⁷

The Inspector Logs record the number of Powercon workers present on the Project on weekends based on the information provided to Reyes. A comparison of the Inspector Logs to Powercon's CPRs reveals numerous differences in the number of Powercon workers reported as present on the job each day. Of 96 entries regarding the number of Powercon workers present each day, only 20 agree with the number of Powercon workers reported on the CPRs. The Inspector Logs do not record the names of the workers present but do describe the type of work performed by each of the subcontractors on each day. For example:

- On Saturday, September 8, 2007 when De Dios and Bernabeo each claim to have worked over 10 hours, Powercon's CPRs report no workers, but

⁷ Reyes gave two different explanations about subcontractor weekend work, first he explained that the Project grounds were locked when no workers were present. In that explanation he described that if weekend work was to be done when Reyes was not present, he would give the subcontractor a key to allow entry onto the project site. However, in a different explanation, Reyes described that the Project grounds were locked in a "daisy chain" of padlocks wherein each subcontractor had a lock interlocked with others. The subcontractors had their own separate key that could be used to enter the Project property on weekends without their having to use Reyes' key.

the Inspector Log reflects that there was demolition of existing switchgear, electrical rough-in and power lighting work, performed by four Powercon workers on that day.

- On Saturday, September 15, the CPRs report four workers, one of whom was De Dios, for 14 hours, but there is no Inspector Log for that day.
- On Sunday, September 16, 2007, the Inspector Logs record seven workers doing “C200 electrical rough work continues; corridor C250 panel, and 31B landing cables,” while Powercon’s CPR reports only four workers (Gonzales, De Dios, Joe Torres and W. Torres) who each worked 18 hours on September 16, 2007. De Dios and Bernabeo claim they worked 15 and 10 hours respectively on that day.

After Powercon stopped preparing CPRs, the Inspector Logs show intense Powercon work on the project on weekends, which the Division contends was performed by De Dios and Bernabeo. No other records establish an account of who actually performed the work or how many hours were worked each day.

Based on the CPRs, the Inspector Logs and De Dios’s own records and description of his work, the Division calculated that De Dios worked 731 hours at regular wages, 171.5 hours at the Saturday/overtime rate, and 69 hours at the Sunday/Holiday rate on the Project from May 27, 2007, through October 2, 2007. The Assessment found that De Dios was underpaid \$49,699.72. De Dios claimed he was only paid wages of \$3,140.43 for that work. When De Dios filed his claim in March, 2008, he did not tell the Division either that Angeles paid him over \$59,552.17, or that he had retained \$17,861.00 of that sum as partial repayment of the \$19,000.00 he loaned Gonzalez.

The Division’s Assessment varied from Bernabeo’s claims by assessing 48 hours worked at regular time, 68.5 hours overtime and 61.5 Sunday/Holiday hours worked, for total unpaid wages due of \$12,068.61.

After the hearing, in the post trial briefing on June 12, 2009, the Division agreed to apply credits of \$930.00, based on Bernabeo’s testimony that he was paid that amount by De Dios, and \$17,861.00 for the amount De Dios retained from money paid by checks

from Angeles. On recalculation of the wages, minus the credits, and because the bid date was in April 2006, the Division applied prevailing wage determination ORA -2006-1 for which Inside Wireman, Technicians were to be paid regular time at \$48.97 per hour; \$66.46 per hour for Saturday/overtime and \$83.96 per hour for Sunday/Holiday work. The resulting wage assessment was reduced to \$31,986.77 for De Dios and to \$11,136.61 for Bernabeo.

The Division also revised and reduced penalties in the amended assessment. The amount of the penalty assessment for each violation under section 1775 was reduced from \$50.00 per violation to \$10.00, and, due to application of credits, the number of violations were reduced from 104 to 64 (from \$6,100.00 to \$640.00). The combined number of overtime violations under section 1813 at \$25.00 was reduced from 67 to 54, and total penalties from \$1,675.00 to \$1,350.00. Because none of the back wages were paid within sixty days following service of the Assessment, Angeles's potential liability includes an additional \$43,043.38 in liquidated damages

DISCUSSION

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

The overall purpose of the prevailing wage law, as noted earlier, 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. (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 123 ("Ericsson"); *O. G. Sansone Co. v. Department of Transportation, supra*, 55 Cal.App.3d at pp. 458-460.)

Lusardi Construction Co. v. Aubry (1992) 1 Cal. 4th 976, 9857.

The Division enforces the statutory 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(a); see *Lusardi, supra*, 1 Cal. 4th at 985.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received 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 unpaid wages, if those wages are not paid within sixty days following the service of the civil wage and penalty assessment.

If the Division determines that a violation of the prevailing rate has occurred, the Division will issue a Civil Wage and Penalty Assessment 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 "the contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect."

Prevailing Wages Were Required for All Electrical Work by Powercon.

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. (*Ericsson, supra*, 221 Cal. App. 2d at 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*.)

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 [under California Labor Code, all employers are required to keep accurate records of the hours an employee works; if it fails to do so, the trier of fact can determine the hours as a matter of just and reasonable inference].)

The prevailing wage laws themselves impose further record-keeping requirements together with a duty to ultimately certify the accuracy of those records to the Labor Commissioner. (§ 1776.) Because Gonzales admitted in his testimony that Bernabeo worked mostly on weekends installing lighting under the supervision of De Dios, and, that the CPRs he prepared were inaccurate, there is sufficient evidence, beyond the testimony of De Dios and Bernabeo, that Bernabeo worked on the project. There is also sufficient evidence that De Dios worked for more days and times than the CPRs recorded. Both Bernabeo and De Dios testified credibly in regard to the hours and days they worked on the Project, and the Inspector Logs give substantial evidence that work was generally performed as described on the days claimed. The Inspector Logs provide evidence that the work done on the days claimed was actually performed by someone employed by Powercon, in spite of Angeles's attempt to discredit them.

Angeles has not proven that the days and hours that the Division assessed, based on De Dios's and Bernabeo's journals, were incorrect, and has therefore failed to carry its burden of disproving the basis of the Assessment. First, the evidence does not support Angeles's assertion that the omissions and variances between the Inspector Logs and the CPRs establish that De Dios and Bernabeo did not perform the work as claimed. The record shows that Reyes did not have a firm knowledge of whether or not work was performed on weekends, or how many hours work was performed. Further, with regard to weekends, when he was not present on the Project site, Reyes contradicted his initial testimony that subcontractors had to obtain a key and permission from him to be present on weekends by explaining that subcontractors could easily open the "daisy chain" padlock with their own key. There is thus no evidence that Reyes had personal

knowledge of which workers were or were not present on weekends when work was performed. Moreover, Gonzales admitted knowing that Bernabeo worked on weekends, but he omitted Bernabeo from the CPRs based on his erroneous interpretation that Bernabeo was an apprentice employee of De Dios. After September 29, 2007, when no Powercon CPRs exist, the Inspector Logs provide ample evidence that Powercon workers were present working on the project as claimed by De Dios and Bernabeo. Hence, Angeles's reliance on omissions in both the inspector records and the CPRs as evidence that work was not performed is not substantial evidence.

Angeles also contends that De Dios was not entitled to be paid prevailing wages for the work he performed because of his assumption of management control of Powercon. It is undisputed, however, that De Dios performed as both supervisor and electrician on the Project. Because he performed electrical work he must be paid the applicable prevailing wage for Inside Wireman, Technician. The wage law does not separate workers according to their status in the business that contracted to do the work. All workers performing public work must be paid prevailing wage. (§§ 1772, 1774.)

Bernabeo was entitled to be paid prevailing wages for journey level electrical work he performed, even though he was not a certified electrician.⁸ A contractor or subcontractor may not subcontract work to another to avoid the requirements of paying prevailing wages. Any electrical work done on a public works job must be paid at the prevailing wage under the appropriate prevailing wage determination. (§ 1774.)

For these reasons, Angles has failed to meet its burden of proving that De Dios and Bernabeo did not perform work on the Project as claimed. The affected workers are therefore entitled to be paid prevailing wages for the hours claimed and the Assessment is affirmed as modified.

⁸ Bernabeo was not a registered apprentice in a state approved apprenticeship program, and thus must be paid the full prevailing wage for his work on the Project. (§1777.5.) Gonzales' belief that Bernabeo was De Dios's apprentice is thus irrelevant to the determination of his wage rate for the Project.

Angeles Is Entitled To A Partial Credit For The \$59,552.17 In Joint Payments To De Dios and Powercon.

Section 1773.1, subdivision (b) (3) states:

Employer payments are a credit against the obligation to pay the general prevailing rates of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing.

Angeles paid (jointly to Powercon and De Dios) \$59,552.16, which was intended to pay workers, including De Dios, and cover material costs. Angeles seeks credit of the entire amount to offset De Dios's wage claim. The Division agreed that the \$17,861.00 that De Dios retained from Angeles's payment should be credited to Angeles against De Dios's wage claim. The Division's recalculation applies the credit of \$17,581.00 to reduce the earliest Powercon violations to De Dios and mitigated the penalties arising from those violations. The result reduces not only the total wages due, but also the number of section 1775 penalties from 104 to 49. De Dios erroneously considered these payments to repay a loan he made to Gonzales; however, Angeles has proven that its sole reason to pay De Dios was to pay workers' wages and material costs. To the extent the \$17,861.00 reduces the straight time and overtime wages due by that amount, Angeles is entitled to a credit.

Angeles is also entitled to a credit for \$930.00 paid to Bernabeo by De Dios from Angeles's joint checks.

Penalties For Underpaid Prevailing Wages.

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 is established if the Labor Commissioner “has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence.” (Code Civ. Proc., § 1094.5, subdivision (b).) 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 at 107 (1998).

After the hearing, the Division reduced the rate for each penalty from the maximum (\$50.00 per violation) to \$10.00 per violation. Based on credit applied by the Division, the number of penalty assessments for the days (or parts of days) that prevailing wage violations actually occurred were reduced from 104 violations to 64. The reduction in penalty rate, and reduction to the number of days subject to penalty, is supported by the evidence taken at the hearing. The record does not establish an abuse of discretion and, accordingly, the assessment of penalties is affirmed, as modified.

Joint and Several Liability of Prime Contractor, Angeles, for Subcontractor, Powercon's Penalties.

Section 1775, subdivision (b) provides exceptions for contractor's liability for penalties assessed under section 1775, subdivision (a) for the subcontractor's violations:

(b) 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 for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1995, 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.

There is no evidence that Angeles actually knew of the underpayments by Powercon; once it became aware of the problem, it sought to remedy it by the joint checks payments. Thus the question is whether Angeles also complied with all four requirements of section 1775, subdivision (a), enabling it to escape joint and several liability for the penalties assessed against Powercon. Based on the evidence produced, Angeles has not met of three of the four criteria because:

1. The contract between Angeles and Powercon was not admitted into evidence. Nor was there any testimony that the contract included the required copy of the provisions of sections 1771, 1995, 1776, 1777.5, 1813 and 1815 as part of the contract.

2. No evidence was submitted that Angeles monitored the payment of the specified general prevailing rate of per diem wages by Powercon to the employees, or conducted periodic review of the certified payroll records of the subcontractor as required.

3. While Angeles did pay money to Gonzales and De Dios, who in turn paid workers, Angeles argues that De Dios should have used the money to pay himself all of his wages, and not pay the other workers and purchase materials. The spirit in which

Angeles argues its satisfaction of its obligation to De Dios does not meet its duty because the statute requires that “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,...” If De Dios had paid only himself and not the other workers, Angeles would be faced with at least eleven other prevailing wage claims because De Dios provided evidence that he paid those other workers with the Angeles joint check money.

Because Angeles has failed to establish that it satisfied all four requirements specified by section 1775, subdivision (a), it is jointly and severally liable for the penalties assessed against Powercon.

Penalties For Failure To Pay Prevailing 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 Assessment assessed section 1813 penalties in the amount of \$1,675.00, representing 67 overtime violations. The Division subsequently recalculated this figure to \$1,350.00, representing 54 overtime violations. While Angeles denies that any such violations occurred, the record established that overtime and weekend work was performed by De Dios and Bernabeo as assessed.

The record thus establishes that Powercon violated section 1815 by paying less than the required prevailing overtime rate to both De Dios and Bernabeo on a total of 54 occasions for a total of \$1,350.00 in penalties under section 1813. 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 as modified is affirmed.

Liquidated Damages.

Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, upon the failure to pay the back wages due within sixty days following service of a civil wage and penalty assessment under section 1741. Section 1742.1, subdivision (a) provides in pertinent part as follows:

After 60 days following the service of a civil wage and penalty assessment under Section 1741 ..., 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 assessment or 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 assessment or notice to be in error, the director shall waive payment of the liquidated damages.

Rule 51, subdivision (b) [Cal.Code Reg. tit. 8, section 17251(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...

In accordance with the statute, Angeles would be liable for liquidated damages only on 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 Angeles’s position 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, Angeles disputes the Assessment on the bases that De Dios was actually operating as Powercon, and thus his work was not subject to prevailing wages, and that Bernabeo had no proof that he had worked on the project. Neither assertion is supported by the facts of this case, and therefore cannot be found to constitute an "objective basis in law and fact" for contending that the Assessment was in error. Because the assessed back wages remained due more than sixty days after service of the Notice, and Angeles has not demonstrated grounds for waiver, Angeles is also liable for liquidated damages in an amount equal to the unpaid wages.

FINDINGS

1. Affected contractor, Angeles, filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. De Dios was entitled to be paid the applicable prevailing wage rate for inside wireman: 731 hours regular time, 171.5 hours overtime, and 69 hours double time for Sunday/Holiday work for the days of work covered by the Division's audit and Assessment. De Dios's retention of \$17,861.00 Angeles properly paid him for 12 days of work through part of August 18, 2009, but he was not paid for the additional 317 regular hours, 133 hours of overtime, and 89 hours of Sunday/Holiday double time for the period August 18 through October 20, 2007 by Powercon or Angeles. The Division's assessment of De Dios's wages at \$49,677.77 is reduced by \$17,681.00 to \$31,986.77.
3. Bernabeo was entitled to be paid the applicable prevailing wage rate for inside wireman for 48 hours regular time, 68.5 hours of overtime and 61.5 hours for Sunday/Holiday double time for the days of work covered by the Assessment. Bernabeo's return of \$ 930.00 to De Dios that De Dios received from Angeles is credited to Angeles. The Division's assessment of Bernabeo's wages at \$12,066.61 is reduced by \$930.00 to \$11,136.61.
4. No training fund contributions and wage differentials were alleged and none are found due in the Assessment to be due on underpaid work of De Dios and Bernabeo for the hours set forth in items 2 and 3 above.
5. The net amount of wages due under the Assessment is \$ 31,986.77 for De Dios's

wages, plus \$11,136.61 for Bernabeo's wages for a total of \$43,093.38.

6. The record establishes 15 violations under Labor Code section 1775 as to Bernabeo. As to De Dios, there were only 49 violations rather than 104 as determined in the original Assessment. The Division did not abuse its discretion in reducing the penalty for these violations from \$50.00 to the rate of \$10.00 per violation, and consequently Angeles is liable for the total remaining penalties of \$640.00.

7. Angeles is liable for penalties for not paying Bernabeo overtime on 13 separate days, and to De Dios on 41 days at the correct prevailing rate pursuant to Labor Code section 1813 at \$25.00 per violation in the amount of \$1,350.00.

8. The unpaid wages found due in Finding No. 5 remained due and owing more than sixty days following issuance of the Assessment. Angeles is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of \$43,093.38, and there are insufficient grounds to waive payment of these damages.

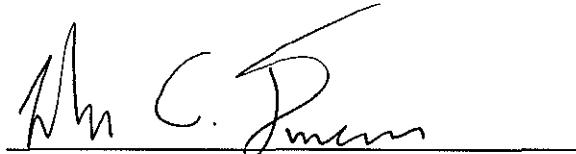
9. The amount found due in the Assessment as modified and affirmed by this Decision is as follows:

Wages Due:	\$ 43,043.38
Penalties under Labor Code section 1775 (a)	\$ 640.00
Penalties under Labor Code section 1813	\$ 1,350.00
Liquidated Damages	\$ 43,043.38
TOTAL:	\$ 88,076.76

ORDER

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

Dated: 9/15/09



JOHN C. DUNCAN
Director of Industrial Relations