STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Southern Bleacher Company, Inc; **Biland Construction Company and** **Genoa Construction Co., Inc**	Case Nos. 07-0308-PWH; 07-0309-PWH; 07-0310-PWH; 07-0311-PWH

From Civil Wage and Penalty Assessments issued by:

Division of Labor Standards Enforcement

ORDER DENYING RECONSIDERATION

I have read the Request for Reconsideration filed by the requesting parties on February 14, 2011. Based on my review of the requesting parties' arguments and relevant parts of the record, I find no grounds for reconsideration of the Decision of the Director issued on January 31, 2011. Accordingly, the Request for Reconsideration is denied.

Dated: 2/15/11

John C. Duncan
Director of Industrial Relations

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DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Southern Bleacher Company, Inc., and affected subcontractors, Biland Construction Company and Genoa Construction Co., Inc. (collectively "Requesting Parties"), submitted timely requests for review of Civil Wage and Penalty Assessments ("Assessments") issued by the Division of Labor Standards Enforcement ("DLSE") on November 30, 2007, with respect to work performed installing metal bleachers as part of the Novato High School Track Renovation project located in Marin County. The parties submitted the matters for decision on stipulated facts and exhibits at a telephonic status conference before Hearing Officer Nathan D. Schmidt on May 5, 2009. Robert Fried appeared for the Requesting Parties and Ramon Yuen-Garcia appeared for DLSE. The Hearing Officer vacated submission on January 6, 2010, to take further evidence on issues not fully covered by the stipulated facts and exhibits. The matter was resubmitted for decision on October 21, 2010.

The issues for decision are:

- Whether the workers who performed the portion of this work exclusive of erection of the steel framework for the bleachers were entitled to be paid the prevailing rate for the classification of Iron Worker, as found in the Assessments, or whether they could be paid the lower rate for the classification of Carpenter without violating prevailing wage requirements.
- Whether the settlement between Requesting Parties and complainant, CANDO Contract Compliance, negotiated outside of the hearing process without the participation

of DLSE, constitutes a binding resolution of the Assessment.

- Whether DLSE abused its discretion by assessing penalties under Labor Code section 1775[1] at the maximum rate of $50.00 per violation.
- Whether Requesting Parties have demonstrated substantial grounds for believing the Assessment to be in error, entitling them to a waiver of liquidated damages.

The Director finds that Requesting Parties have failed to carry their burden of proving that the basis of the Assessments was incorrect. Therefore, the Director issues this Decision affirming the Assessments in full. Requesting Parties have not proven the existence of grounds for a waiver of liquidated damages.

SUMMARY OF FACTS

The parties' stipulated facts are set forth verbatim:

"BILAND CONSTRUCTION COMPANY, INC.

"1. On March 14, 2006, the Novato Unified School District, published a notice for bids for the work of improvement known as the Novato High School Track Renovation ("Project"), in Novato, County of Marin, California. (Joint Exhibit 1)

"2. On May 2, 2006, the Novato Unified School District entered into a contract with Southern Bleacher Construction Company, Inc. ("Southern Bleacher") for the construction of the Project. (Joint Exhibit 2)

"3. Southern Bleacher entered into a Project Work Order with the Biland Construction Company, Inc. ("Biland") to perform part of the construction of the Project. (Joint Exhibit 3)

"4. The work performed on the Project by Biland included site improvements, foundations and the installation of metal bleachers on the home side of the track of the Project.

"5. The contract of Biland includes the installation of metal bleachers which consisted of assembling reinforcing cages for spread footings, alignment and erection of beams onto the piers, installing stringers for bleacher seating, bolting in place, lining up framing braces and

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

bolting, installing vertical hand rails, decking, cross bracing, stairs, planks, wedge anchor bolts. (Joint Exhibit 9)

"6. Biland had classified some of the workers as Carpenter.

"7. The work covered under the craft of the Carpenters is contained in the Scope of Work Provision for Carpenters and Related Trades, for Alameda, et al. counties, California, under Prevailing Wage Determination ["PWD"] No. NC-23-31-1-2005-1. (Joint Exhibit 4)

"8. The applicable prevailing wage determination for the craft of Ironworker [*sic*][2] is contained in Prevailing Wage Determination for Commercial Building, Highway, Heavy Construction and Dredging Projects, No. C-20-X-1-2005-1, for the craft of Ironworker for all counties in California, which includes a Predetermined Rate Increase. (Joint Exhibits 5 & 6)

"9. The compensation relating to travel for the craft of Ironworker is contained in the Travel and Subsistence Provision for Prevailing Wage Determination No. C-20-X-1-2005-1. (Joint Exhibit 8)

"10. The work covered under the craft of Ironworker is contained in the Scope of Work Provision for Ironworker in all locations within the State of California, under Prevailing Wage Determination No. C-20-X-1-2005-1. (Joint Exhibit 7)

"11. The parties stipulate that the amount of the wages due is $12,060.10 as shown on the amended audit of April 15, 2009. The sum of $11,794.07 is attributable to the reclassification of the workers from carpenters to ironworkers. (Joint Exhibit 11)[3]

"12. The penalties assessed under Labor Code section 1775 is [*sic*] at the rate of $50.00 per violation, for a total sum of $6,200. (Joint Exhibit 10) The sum of $450.00 in penalties is not associated with the reclassification of the workers from carpenters to ironworkers.

"13. The penalties assessed under Labor Code section 1813 is [*sic*] in the sum of $425.00.

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[2] In the stipulated facts submitted by the parties the term "ironworker" appears as a single word. Throughout the remainder of the decision, however, it appears as the two-word phrase "iron worker" in accord with the applicable prevailing wage determination.

[3] Per Requesting Parties' post-hearing briefing, Biland does not dispute the balance of $266.03 assessed for alleged violations unrelated to the reclassification of its workers from carpenter to iron worker and had paid, or was in the process of paying, that amount prior to the submission of this matter.

"14. In assessing the penalties under Labor Code section 1775, DLSE had considered (1) 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; and (2) whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

"15. Prior to the issuance of the Civil Wage and Penalty Assessment, DLSE advised counsel for Biland of the violations of the prevailing wage law. (Joint Exhibit 13)

"16. There is no record of a previous violation by Biland.

"17. No wages found to be due in the Civil Wage and Penalty Assessment have been paid by Biland as of this date.

"GENOA CONSTRUCTION CO., INC.

"18. Southern Bleacher Construction Company, Inc. entered into a Project Work Order with Genoa Construction Co., Inc. ("Genoa") to perform part of the construction of the Project. (Joint Exhibit 12)

"19. The work performed on the Project by Genoa involved the installation of the metal bleachers on the visitors side of the track.

"20. The installation of the metal bleachers consisted of assembling reinforcing cages for spread footings, alignment and erection of beams onto the piers, installing stringers for bleacher seating, bolting in place, lining up framing braces and bolting, installing vertical hand rails, decking, cross bracing, stairs, planks, wedge anchor bolts. (Joint Exhibit 9)

"21. Genoa has classified some of the workers as ironworkers and others as carpenters.

"22. The parties stipulate that the amount of wages due is $2,303.20 as shown on the amended audit of April 15, 2009. The sum $1,603.20 is attributable to the reclassification of the workers from carpenters to ironworkers. (Joint Exhibit 15)[4]

[4] Per Requesting Parties' post-hearing briefing, Genoa does not dispute the balance of $700.00 assessed for alleged violations unrelated to the reclassification of its workers from carpenter to iron worker and had paid or was in the process of paying that amount prior to the submission of this matter.

"23. The penalties assessed under Labor Code section 1775 is [*sic*] at the rate of $50.00 per violation, for a total sum of $1,400.00. (Joint Exhibit 14) All of the penalties relate to the reclassification of the carpenters to ironworkers.

"24. In assessing the penalties under Labor Code section 1775, the DLSE had considered (1) 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; and (2) whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

"25. Prior to the issuance of the Civil Wage and Penalty Assessment, DLSE advised counsel for Genoa of the violations of the prevailing wage law. (Joint Exhibit 13)

"26. There is no record of a previous violation by Genoa.

"27. No wages found to be due in the Civil Wage and Penalty Assessment have been paid by Genoa as of this date."

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

- The specific work performed by each of the affected workers on each day subject to the Assessments, and
- The nature of the materials used in the performance of that work (e.g. wood, aluminum, fiberglass, steel, etc.).

In response, DLSE submitted a detailed breakdown of the tasks performed by each of the affected workers on each day of work on the Project between July 28 and August 29, 2006 (including the materials used) based on the Project inspector's logs and the subcontractors' certified payroll records ("CPRs"). Requesting Parties stipulated to the accuracy of DLSE's breakdown. In summary, the disputed work consisted of the layout and installation, by bolting in place, of metal bleacher parts described as follows: steel bars, beams, bolts, braces, verticals and wheelchair ramp pads; galvanized nuts and bolts; aluminum bleacher planks, seat-

ing, walks, decking, rods, bolts and ramps; iron nuts, bolts, piers, stringers, cross ties, bracing, brackets, handrails and guardrails; and metal decking, planks, bolts, posts and stair railings, treads and risers.

The advisory scopes of work issued by the Director for the relevant PWDs provide in pertinent part as follows:

Carpenter and Related Trades: This is the rate Southern Bleacher and Genoa paid for the disputed work.

WORK COVERED

All carpentry work on all construction, including, but not limited to, construction, erection, alteration, repair, modification, demolition, addition or improvement of or to a building or any other structure or construction.

* * *

Work in connection with new methods of construction or use of materials established or developed during the term of this Agreement, and the use and application of tools, devices, metal or plastic studs or any substitute thereof . . .

* * *

All carpentry work in connection with plywood decking, beam sides and beam soffits and all concrete form work.

* * *

All work in connection with self supporting scaffolds over fourteen feet (14') in height whether patent or otherwise constructed.

* * *

Iron Worker: This is the rate used by DLSE in the Assessments.

SECTION 3. Craft Jurisdiction

A – This Agreement shall cover all work in connection with field fabrication and/or erection of structural, ornamental and reinforcing steel work coming within the jurisdiction of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers recognized by the Building and Construction Trades Department of the American Federation of Labor – Congress of Industrial Organizations.

* * *

C – The Iron Workers jurisdictional claims for its journeyman and apprentice Iron Workers shall include but not be limited to job classifications of Architectural and Ornamental, Machinery Movers, Erectors and Riggers, Reinforcing

Iron Workers, Structural, Stone Derrick Men, Welders, Fence Erectors and Sheeters and shall include but not be limited to the following:

> All work in connection with field fabrication and/or erection or deconstruction of structural, ornamental and reinforcing steel, including but not limited to the fabrication and erection of all iron and steel . . . all barrier railings, handrail, . . . the erection and installation of playground equipment to include bolding [*sic*], fastening, welding of swings, slides, jungle gyms, footings and other related equipment . . . metal furniture, seats . . . stairways including pre-engineered stairs . . . metal forms and false work pertaining to concrete construction; . . . scaffolding, . . . metal and steel supports of all types; . . .

Outside of the hearing process, and without the participation of DLSE, Requesting Parties negotiated directly with the complainant, CANDO Contract Compliance ("CANDO"),[5] and executed a "Stipulation of Fact and Settlement" ("Settlement") on May 13, 2010, purporting to resolve the Assessments. The pertinent provisions of the Settlement are as follows:

> 1. This dispute involves a performance of the erection of certain bleachers at the Novato High School by Biland Construction and Genoa Construction.
>
> 2. Biland improperly classified certain employees as Carpenters and Laborers where they should have been classified as Iron Workers.
>
> * * *
>
> 4. The matters in dispute recited above involve only Biland Construction which did the erection of the bleachers. There are no matters in dispute as to Genoa Construction.
>
> 5. The parties have carefully reviewed the payroll records and the job records and have concluded that based upon the misclassifications agreed upon, Biland should pay $7,702.04 as back pay to the improperly classified workers. Due to the good faith dispute as to workplace classifications no additional penalty amounts are included in this settlement. No payments are required of Genoa Construction.
>
> * * *

Requesting Parties ask that the Settlement be adopted as the Director's order in these matters. DLSE has objected.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the

[5] Although the complainant had full knowledge of the proceedings, it never sought party status. (See Cal. Code Regs., tit. 8, § 17208, subd. (c).)

payment of prevailing wages to workers employed on public works construction projects. Specifically:

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

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [*citations omitted*].) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (Section 90.5, subdivision (a), and *see Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty Assessment is incorrect."

Biland and Genoa Are Required To Pay The Prevailing Rate For Iron Worker For The Disputed Work.

The single 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. (*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153

Cal.App.4th 1071, 1082.) The Director determines these rates and publishes general wage determinations such as C-20-X-1-2005-1 and NC-23-31-1-2005-1 to inform all interested parties and the public of the applicable wage rates for each type of worker that might be employed in public works. (Section 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.) In the unusual circumstance when the advisory scopes of work for two prevailing rates overlap, a conflict is created because no single prevailing rate clearly applies to the work in issue. In this limited situation, a contractor may pay either of the applicable prevailing wage rates for the work.

In this case, the parties agree that the disputed work falls clearly within the Iron Worker scope of work. The question is whether the disputed work also falls clearly within the Carpenter scope of work entitling the affected subcontractors to pay the lower Carpenter rate for the work. I find that it does not and therefore affirm the Assessments' reclassification of the affected workers from Carpenter to Iron Worker.

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

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (*See Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by section 1773.4].) No such petition was submitted for this Project. In the absence of a timely petition under section 1773.4, the contractor and subcontractors are bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers, supra,* at pp. 1084-1085.)

The parties agree that the work performed on the Project by Biland workers consisted of site improvements, foundation work and the installation of metal bleachers on the home

side of the track, and the work performed on the Project by Genoa workers consisted of the installation of the metal bleachers on the visitor's side of the track. In both cases, the work required for the installation of the metal bleachers consisted of assembling reinforcing cages for spread footings, alignment and erection of beams onto the piers, installing stringers for bleacher seating, bolting in place, lining up framing braces and bolting, installing vertical hand rails, decking, cross bracing, stairs, planks and wedge anchor bolts. Both Biland and Genoa employed a combination of Iron Workers and Carpenters to complete the bleacher installation, with the Iron Workers erecting the structural steel frameworks for the bleachers and the Carpenters completing the work, including assembly and installation of the bleacher seating, decking and planking.[6]

DLSE contends that the disputed work is covered exclusively by the Iron Worker classification. Focusing on the description of the work as involving the installation of "metal bleachers" and the exclusively metal components comprising the bleachers, DLSE argues that the disputed work cannot fall under the Carpenter classification because the Carpenter scope of work provisions do not refer to "iron" or "metal" and do not mention "bleachers." On that basis, DLSE reclassified all of the hours reported under the Carpenter classification by both subcontractors, after completion of the initial demolition and foundation work by Biland, to Iron Worker.

Requesting Parties point out that the Iron Worker scope of work does not specifically mention "bleachers" either and argue that the Carpenter scope of work overlaps in the context of steel-framed bleacher projects. They contend that the disputed work is equally covered by the broad Carpenter scope of work that encompasses "all construction, including . . . construction, erection, . . . addition or improvement of or to a building or any other structure or construction."

While it is the Director's responsibility to define advisory scopes of work and set prevailing wages for "crafts, classifications and types of work" that might be employed in public works, the awarding body is "responsible in the call for bids [to determine] what 'category of

[6] Both subcontractors also employed Laborers for portions of the bleacher installation work, and Biland employed Laborers and Carpenters for the demolition and foundation phases of the Project, and Operating Engineers for portions of the foundation and erection phases of the Project. As noted in footnotes 3 and 5, above, all

worker' is required." (*Pipe Trades District Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1473.) The contract documents submitted into evidence do not specify the applicable crafts or classifications required for the Project, but the parties have stipulated to the types of work required for the bleacher installation phase of the Project.

It is theoretically possible that the broad Carpenter scope of work could overlap with the Iron Worker scope of work on some projects. The Project here is not one of those possibilities. The disputed work, which consisted entirely of the layout and installation, by bolting in place, of metal bleacher parts, clearly falls within the Iron Worker scope of work which encompasses:

> All work in connection with field fabrication and/or erection . . . of structural, ornamental and reinforcing steel, including but not limited to the fabrication and erection of all iron and steel . . . all barrier railings, handrail, . . . metal furniture, seats . . . stairways including pre-engineered stairs . . . metal and steel supports of all types; . . .

While neither scope of work explicitly refers to "bleachers," or uses any similar term specifically related to athletic stadium seating, the metal railings, handrails, seating, stairways and supports identified as component parts of the bleachers that the affected contractors installed on the Project are explicitly included within the Iron Worker scope of work. The Requesting Parties have not established that the disputed work also clearly falls within the broad and somewhat vague Carpenter scope of work which covers "carpentry work on all construction" but contains no specific references to the components, sub-structures or materials assembled in the course of performing the disputed work. I therefore find that there is no overlap between the Iron Worker and Carpenter classifications with regard to this Project and that the single prevailing rate applicable to the disputed work is Iron Worker.

> The Settlement Between Requesting Parties And CANDO Cannot Constitute A Binding Resolution Of The Assessment Without The Involvement Of DLSE.

Requesting Parties argue that DLSE's investigation arose from a good faith jurisdictional dispute between the Carpenters and Iron Workers over the proper distribution of work between the crafts on bleacher work and that DLSE's enforcement actions should therefore

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issues except the reclassification of workers from Carpenter to Iron Worker were resolved before these matters were submitted for decision.

have ceased when the Requesting Parties resolved the dispute with the complainant. Alternatively, Requesting Parties request that the Settlement, which stipulates to substantial misclassification of workers by Biland but not by Genoa, should be adopted as the Director's finding of fact on this issue. Requesting Parties assert that the settlement represents how the work is actually distributed on such projects in the industry. Because of the good faith nature of the jurisdictional dispute, Requesting Parties request that all penalties be waived.

The record shows that Requesting Parties and the non-party complainant entered into global settlement discussions to resolve the jurisdictional issue between the unions and to resolve DLSE's enforcement action against the contractors. DLSE declined to participate in any settlement discussion with non-parties to its enforcement action. There does not appear to have been any attempt by Requesting Parties to negotiate solely with DLSE, and I do not find that DLSE's refusal to participate in settlement negotiation with non-parties was unreasonable on its face. Further, it is noteworthy that one "non-party," CANDO, had a right to participated in this proceeding under Rule 8 and did not do so.

As to Requesting Parties and the unions' resolution of the jurisdictional issue, I cannot adopt it as a ruling here. The Director's responsibility in setting prevailing wage rates and scopes of work for public works projects is "determining 'what the prevailing wage for that category of worker should be.'" (*Pipe Trades, supra,* at p. 1473.) The focus is therefore on the worker and the specific work performed. It is not within the Director's authority to resolve union jurisdictional disputes. Absent a timely petition under section 1773.4, the classifications as published must be the basis of any assessment under section 1742. (*Id.* at pp. 1473-1474; see also, *Sheet Metal Workers, supra.*) Proceedings under section 1742 have a different focus from the rate setting process and the two should not be confused. The aim of enforcement is to guarantee that every individual performing the same work on public work projects receives the same pay based on published prevailing wage rate determinations.

In this regard, Requesting Parties appear to misperceive the nature of DLSE's role in these cases, casting DLSE simply as one of the participants to a civil dispute rather than in its true role as the entity exercising the state's police powers to enforce the prevailing wage laws. The affected workers, or their labor organization, were free to negotiate directly with their immediate employer or the general contractor to resolve any prevailing wage disputes that

may have arisen from their work on the Project. Alternatively, they could pursue a private right of action against their immediate employer for unpaid prevailing wages. In such cases, the parties would be free to negotiate their own settlement of those disputes without the involvement or approval of DLSE

Once DLSE issues an Assessment, the private parties cannot simply negotiate a settlement; DLSE must be involved in any settlement. The scope of DLSE's enforcement ability is different from private parties. Only DLSE can assess and enforce joint and several liability against the affected contractor and subcontractors for unpaid prevailing wages and penalties under section 1741 and 1743. (*Violante v. Communities Southwest Development and Construction, Co.* (2006) 138 Cal.App.4th 972, 979.) The affected workers have no private rights of action against the general contractor or to pursue penalties under sections 1775 or 1813. Neither the workers nor the complaining union have the ability to waive or mitigate statutory penalties once penalties have been assessed by DLSE. Absent some bad faith or unreasonable conduct by DLSE, a private settlement cannot be the basis of findings of fact if DLSE objects. Here there is no evidence of unreasonableness, and I therefore decline to interfere with DLSE's decision to take this matter to hearing rather than accepting the settlement between Requesting Parties and CANDO.

For the above reasons, I find that Biland and Genoa have failed to disprove the basis of the Assessments' reclassification of the affected workers from Carpenter to Iron Worker and are therefore required to pay the applicable Iron Worker rate for the disputed work. Because the balances of the Assessments are undisputed, I affirm both Assessments in full.

DLSE Did Not Abuse Its Discretion By Assessing Penalties Under Section 1775 At The Maximum Rate.

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

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
>
> (2)(A) The amount of the penalty shall be determined by the Labor Commis-

sioner based on consideration of both of the following:

> (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
>
> (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
>
> (B)(i) The penalty may not be less than ten dollars ($10) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.
>
> (ii) The penalty may not be less than twenty dollars ($20) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
>
> (iii) The penalty may not be less than thirty dollars ($30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[7]

Abuse of discretion is established if the Labor Commissioner "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc. §1094.5, subd. (b).) In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment "because in [his] own evaluation of the circumstances the punishment appears to be too harsh." *Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage Assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Rule 50(c) [Cal. Code Regs., tit. 8, §17250, subd. (c)].)

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[7] Section 1777.1, subdivision (c) defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately

The stipulated facts show that DLSE considered the prescribed factors for mitigation and determined that the maximum penalty of $50.00 per violation was warranted in this case. Requesting Parties have offered no evidence or argument to show that DLSE abused its discretion in assessing penalties at the maximum rate. The two statutory factors for mitigation of penalties are 1) a contractor's good faith error **and** prompt correction and 2) no history of prior violations. The stipulations prove that DLSE considered both of these factors and that DLSE contacted the Requesting Parties before issuing the Assessment to inform them of their mistake. The stipulations also prove that there is no prior history of violations by either Requesting Party. However, there is no evidence of a good faith error. At most the Requesting Parties have shown there was a disagreement between two unions over which wage rate applied. It is well settled, however, that the question of the correct rate has to be addressed to the Director during the bidding process, pursuant to section 1773.4, and not after a contract has been awarded. (*Sheet Metal Workers, supra,* at pp. 1084-1085.)

The record does not establish that DLSE abused its discretion and, accordingly, the assessment of penalties under section 1775 is affirmed against Biland in the amount of $6,200.00 for 124 violations and against Genoa in the amount of $1,400.00 for 28 violations. Southern Bleacher is jointly and severally liable with both subcontractors.

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

Section 1813 states, in pertinent part, as follows:

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

Section 1815 states in full as follows:

> "Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be per-

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fails or refuses to comply with its provisions."

mitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1½ times the basic rate of pay."

The stipulated record establishes that Biland violated section 1815 by paying less than the required prevailing overtime wage rate to its workers on 17 occasions. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813 is affirmed in the amount of $425.00 for 17 violations. Biland and Southern Bleacher are jointly and severally liable for these penalties

There Are No Grounds For A Waiver Of Liquidated Damages.

At all times relevant to this Decision, section 1742.1, subdivision (a) provided 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 . . . notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the . . . notice to be in error, the director shall waive payment of the liquidated damages.

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

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

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

As discussed above, the plain language of the Iron Worker and Carpenter scopes of

work establish that there is no overlap between the two classifications with regard to the disputed work and thus the single prevailing rate applicable to the disputed work is Iron Worker. The Requesting Parties purported resolution of a jurisdictional dispute between the Carpenters and Iron Workers over the disputed work does not change that result. The remainder of both Assessments was undisputed. The Requesting Parties have therefore not shown an objective basis for contending that the Assessments were in error. Because the assessed back wages remained due more than sixty days after service of the Assessments, and the Requesting Parties have not demonstrated grounds for waiver, they are also liable for liquidated damages in an amount equal to the unpaid wages.

FINDINGS

1. Affected contractor Southern Bleacher Company, Inc., and affected subcontractors, Biland Construction Company and Genoa Construction Co., Inc., timely requested review of civil wage and penalty assessments issued by the Division of Labor Standards Enforcement with respect to the Novato High School Track Renovation in Novato, California.

2. The Assessments were issued timely.

3. Biland and Genoa failed to pay their workers at least the prevailing wage for the disputed work, as they paid their employees the Carpenter rate rather than the applicable Iron Worker rate. The portions of the Assessments reclassifying workers from carpenter to iron worker for that work, and the associated penalties assessed under sections 1775 and 1813, are therefore affirmed. The balances of both Assessments were undisputed and are therefore also affirmed in full. Biland underpaid its workers for their work on the Project in the aggregate amount of $12,060.10, comprising 124 violations, and Genoa underpaid its workers for their work on the Project in the aggregate amount of $2,303.20, comprising 28 violations.

4. DLSE did not abuse its discretion by setting the penalty for these violations under section 1775, subdivision (a) at the maximum rate of $50.00 per violation for 124 violations on the Project by Biland, totaling $6,200.00 in penalties, and for 28 violations on the Project by Genoa, totaling $1,400.00 in penalties. Southern Bleacher is jointly and severally

liable with both subcontractors for these penalties.

5. Penalties under section 1813 at the rate of $25.00 per violation are due for 17 violations on the Project by Biland, totaling $425.00 in penalties. Southern Bleacher is jointly and severally liable for these penalties.

6. In light of Finding 3, above, the potential liquidated damages due under the Assessments are $12,060.10 as to Biland and $2,303.20 as to Genoa. Though Requesting Parties assert that the some unpaid wages had been paid, or were in the process of being paid prior to the submission of this matter for decision, they have shown neither that any part of the undisputed unpaid wages were paid within 60 days following service of the Assessments nor that they had substantial grounds for believing the Assessments to be in error. Accordingly, Requesting Parties are liable for liquidated damages on the Project under Labor Code section 1742.1, subdivision (a) in the amounts of $12,060.10 as to Biland and $2,303.20 as to Genoa. Southern Bleacher is jointly and severally liable with both subcontractors.

7. The amounts found remaining due in the Assessment against Biland and Southern Bleacher as affirmed by this Decision are as follows:

Wages Due:	$12,060.10[8]
Penalties under section 1775, subdivision (a):	$6,200.00
Penalties under section 1813:	$425.00
Liquidated Damages:	$12,060.10
TOTAL:	**$30,745.20**

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

8. The amounts found remaining due in the Assessment against Genoa and Southern Bleacher as affirmed by this Decision are as follows:

[8] Biland is entitled to credit against this amount for any payments that were made on the undisputed portion of the Assessment prior to the issuance of this decision.

Wages Due:	$2,303.20[9]
Penalties under section 1775, subdivision (a):	$1,400.00
Liquidated Damages:	$2,303.20
TOTAL:	**$6,006.40**

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

ORDER

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

Dated: 1/31/11

John C. Duncan
Director of Industrial Relations

[9] Genoa is entitled to credit against this amount for any payments that were made on the undisputed portion of the Assessment prior to the issuance of this decision.