STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

KOO Construction, Inc. Case No. 09-0126-PWH

From a Notice of Withholding issued by:

Contractor Compliance and Monitoring, Inc.

DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor KOO Construction, Inc. ("KOO") submitted a timely request for review of a Notice of Withholding ("Notice") issued by Contractor Compliance and Monitoring, Inc. ("CCMI") with respect to work performed by KOO on the Seismic Corrections Phase 4 Project ("Project") at the University of California, Davis ("University") in Yolo County. The Notice determined that KOO owed $220,432.88 in unpaid prevailing wages and statutory penalties. A Hearing on the Merits occurred on September 29 and October 28, 2009, in Sacramento, California, before Hearing Officer Nathan D. Schmidt. Cassandra Ferrannini appeared for KOO and Deborah Wilder appeared for CCMI.

The issues for decision are:

- Whether the Notice correctly found that KOO paid the affected workers performing work subject to the Laborer prevailing wage rates less than the prevailing wages required for their work on the Project.[1]
- Whether the Notice correctly reclassified ten of the affected workers from Laborer prevailing wage rates to the Carpenter prevailing wage rate for some or all of their work

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[1] The Notice found that KOO had underpaid 30 of its workers on the Project. KOO concedes the accuracy of the assessed unpaid prevailing wages as amended at hearing for 14 of those workers. The assessed unpaid prevailing wages for 16 workers remain in dispute.

on the Project.

- Whether the Notice correctly found that three workers who performed supervisory duties, Sidney Whitehouse, Steve Reeves and Ryan Wen, were nonetheless entitled to receive prevailing wages for some of the work they performed on the Project.
- Whether the Notice correctly found that KOO failed to report and pay the required prevailing wages for work performed on the Project by Anthony Gordon.
- Whether CCMI properly denied KOO credit against unpaid prevailing wages for profit sharing contributions made to the 401(k) accounts of some of the affected workers.
- Whether the Notice correctly assessed unpaid training fund contributions for all of the affected workers.
- Whether CCMI abused its discretion by assessing penalties under Labor Code section 1775, subdivision (a) at the maximum rate of $50.00 per violation.[2]
- Whether KOO is liable for penalties under section 1813 for failing to pay the proper overtime rate of pay.[3]
- Whether KOO is liable for liquidated damages under section 1742.1, subdivision (a).

The Acting Director finds that KOO has failed to carry its burden of proving that the basis of the Notice was incorrect with the sole exception of crediting an additional amount for wages paid to Gordon. Since KOO made a timely deposit of the full amount of the Notice pursuant to section 1742.1, subdivision (b), it is not liable for liquidated damages. Therefore, the Acting Director issues this Decision affirming in part and modifying in part the Notice as amended at hearing.

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

[3] KOO admits that it failed to pay its workers the proper overtime prevailing wage rates for their work on the Project. Because the assessed overtime hours are based on KOO's own undisputed time records, the only issue is the imposition of a penalty for the failure.

FACTS

The University advertised the Project for bid on September 14, 2006. KOO contracted with the University as "Design Builder" for the Project on or about January 7, 2007. The Project involved the design and construction of seismic retrofitting for seven University buildings. KOO employees worked on the Project from approximately June 19, 2007, through the completion of construction in December 2008. The Project required multiple shifts to accommodate the needs of the University and its class schedule. Some employees were required to work evening shifts and on weekends in addition to normal day shift work. The applicable prevailing wage rates for all work subject to the Notice are the Area 2 Laborer Group 3 rate under NC-23-102-1-2006-1 (Laborer and Related Classifications for Northern California) and the Area 3 Carpenter rate under prevailing wage determination (PWD) NC-23-31-1-2006-1 (Carpenter and Related Trades for Northern California). Both PWDs contain predetermined pay rate increases that went into effect during KOO's work on the Project. Both PWDs required higher pay rates when workers worked during second or third shift periods.

KOO submitted certified payroll records ("CPRs") to the University for the first seven weeks of work on the Project, through the week ending August 15, 2007. CCMI took over management of labor compliance on the Project for the University in late November or early December 2007. Soon thereafter, CCMI informed KOO that KOO and its subcontractors would be required to submit their CPRs via an electronic payroll reporting program, LCP Tracker. KOO began resubmitting its CPRs via LCP Tracker in April 2008. Yvonne Nickles, the CCMI analyst assigned to the Project reviewed KOO's CPRs and notified Trinity Schuster, KOO's "Office Manager/Labor Compliance Officer," (and later Monica Cervantes and Sabrina Newbill, who subsequently took over responsibility for KOO's CPRs) on an ongoing basis of deficiencies that she observed.

Nickles audited KOO's work by reviewing the CPRs KOO submitted to check the workers' names, job classifications, hours worked and amounts reportedly paid. Nickles compared the information reported on the CPRs against KOO's daily project logs and sign-in

sheets, workers' time cards and KOO's payroll journals.[4] The worker time cards and the daily sign in sheets were filled in by the workers almost every day contemporaneously with the work; Michael Bailey, KOO's construction superintendent for the Project was on the job site 95 percent of the time and personally reviewed and approved the workers' time cards. As a result, Nickles gave the greatest weight to the workers' individual time cards and the daily sign in sheets when she found a conflict between the information reported on the CPRs and KOO's other employment records. When KOO's records reported a worker in different job classifications during the same work shift, Nickles calculated the prevailing wages owed to that worker at the higher paid classification for audit purposes.

CCMI served the Notice by certified mail on April 13, 2009. The Notice found that KOO failed to report and pay the required prevailing wages, including failure to pay shift differentials, overtime, weekend and holiday pay, misclassified employees, failed to report all of its employees performing work on the Project on its CPRs, and failed to make the required training fund contributions for any of the affected workers. Within 60 days after service of the Notice, on or about June 12, 2009, KOO deposited a bond in the full amount of the Notice in escrow with the Department of Industrial Relations ("DIR") pursuant to section 1742.1, subdivision (b).

Underpayment Of Required Prevailing Wages To Workers Performing Laborer Work On The Project: KOO reported that almost all of its workers were paid at one or more Laborers' pay rate. For those workers that the Notice determined properly should have been paid at the Laborer Group 3 rate, KOO was required to pay a prevailing wage rate of $37.28 per hour for work performed from the beginning of the Project through June 29, 2008. A prevailing wage rate of $39.13 per hour applied to work performed from June 30, 2008, through the end of the Project. The hourly wage rates KOO actually paid for that work were generally lower than required, ranging from $26.91 to $42.00 per hour. Similarly, KOO failed to pay any of its laborers either the required shift differential for evening work or the prevailing overtime wage

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[4] Nickles also compared the LCP Tracker CPRs to the CPRs that KOO had originally submitted to the University during the first seven weeks of the Project and found that the entries in the CPRs and LCP Tracker CPRs reported the same pay rates but used different job classifications for the same work.

rates for work over eight hours per day or 40 hours per week.

Newbill prepared a self-audit which accepted the hours in the Notice and pay classifications (with one exception). The self-audit shows that underpayments occurred, but not to the extent determined in the Notice. The self-audit contains significant flaws, however, including, the failure to apply the applicable shift differential and overtime rates to second shift and overtime hours, all of which were paid at the straight time rate. Even so, KOO concedes that, with the exception of Gordon, all of these workers were paid less than the prevailing wages due for their work.

Reclassification Of Workers From Laborer To Carpenter: CCMI identified ten of the affected workers who were reportedly paid at the lower Laborers' prevailing wage rate when the work listed on their time cards, KOO's daily project logs, and the sign-in sheets showed they were entitled to be paid the higher Carpenters' prevailing wage rate for some or all of their work on the Project. Nickles reclassified workers from laborer to carpenter only for the days and hours that KOO's own documentation showed that the workers did carpentry work. Whitehouse, and Reeves testified that they performed only carpentry work on the Project; Robert Carillo testified that he performed a mixture of laborer and carpentry work. CCMI reclassified Whitehouse and Reeves from laborer to carpenter for all hours reported on KOO's CPRs.[5] Carillo was reclassified to carpenter for the two days when KOO's daily reports and sign-in sheets indicate that he performed carpentry work.

KOO only presented testimony directly challenging the reclassification of one worker, Ignacio Flores, from laborer to carpenter. Pattison, Whitehouse and Bailey, all of whom are current KOO employees, testified that I. Flores had been hired to perform laborers' work and that they had only observed him performing laborers' work. I. Flores worked on the Project from approximately August 2007 through November 2008, and was generally reported to have performed as a laborer on his time cards. KOO's witnesses offered no explanation, however, for

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[5] KOO did not report additional hours of work by Whitehouse and Reeves during times when KOO considered Whitehouse and Reeves to be "assistant superintendents." This issue is discussed below.

numerous days of work between August 2007 and February 2008, when KOO's own records, such as I. Flores's time cards, show that he performed carpenters' work. KOO has not disputed the accuracy of its own records of the work performed on the Project by each worker.

KOO has not challenged the determination that the work performed, and reported in its time records as carpenter work, fits within the Carpenters' scope of work rather than the Laborers' scope of work. KOO's witnesses defended the lower rates paid by focusing on two issues: whether the affected workers owned their own tools and the general qualifications for the trade of carpentry. The witnesses noted that carpentry is a skilled trade requiring a four year apprenticeship; carpenters are able to read and interpret plans, lay out work, and determine what materials are needed for each task. By contrast, laborers cannot read plans or lay out work. The applicable Laborer scope of work includes "all Laborers' work necessary to tend the carpenters ..." Stephen Pattison, KOO's chief estimator, testified that the laborers' role is limited to carrying material and helping the carpenters place it.

KOO's own documentation of the work performed each day supports CCMI's reclassifications in that the work described was carpentry. KOO's CPRs and time records establish that KOO did not pay the workers the required Carpenters' prevailing wage regardless of whether they were listed on the CPRs as "laborers" or "carpenters." None were paid the required shift differential for evening work.

KOO's defense to the Notice on the issue of reclassification, as for the other workers, is based on Newbill's self-audit. As with the laborers discussed above, KOO contends that the unpaid wages assessed by CCMI are higher than are warranted by the evidence. Nonetheless, even according to Newbill's calculations, KOO concedes that, with the exceptions of Reeves and G. Flores, all of these workers were paid less than the prevailing wages due for their work.[6]

Failure To Report And Pay Prevailing Wages To Reeves And Whitehouse: CCMI found that KOO had also failed to report and pay prevailing wages for substantial periods of time when

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[6] While KOO concedes that Reeves and G. Flores were paid less than the required prevailing wages according to their CPRs, it contends that the short fall was made up by profit sharing contributions that KOO made to their 401(k) accounts as discussed below.

Reeves and Whitehouse had performed carpentry worked on the Project. During those periods, KOO had considered Reeves and Whitehouse to be "assistant superintendents" and paid them on salary at below the Carpenters' prevailing wage rate. Both Reeves and Whitehouse testified that they worked primarily as carpenters but also performed limited supervisorial duties. The time cards support this testimony, providing adequate details to justify the Notice's calculations of hours worked as carpenters. KOO did not present any evidence to contradict this testimony or to throw doubt onto its own records.

Failure To Report And Pay Wen For Work As Laborer And Carpenter: Wen was employed by KOO and paid a salary as a project engineer/assistant superintendent on the Project from June 25, 2007, through approximately August 2008. The majority of Wen's duties on the Project were administrative and supervisory. Wen testified that he was also assigned additional duties throughout the Project, which required him to perform work covered by the Laborers' and the Carpenters' PWDs.

Wen normally worked evening shifts on the Project as assistant superintendent for a building in which work on the Project was taking place. Wen reported for work one hour before the beginning of the evening shift to insure the job site was ready for subcontractors working in that building to commence work at the beginning of their shift. Wen testified that preparing the job site for the subcontractors involved clearing out classrooms, moving equipment, covering furnishings and equipment in the classrooms, removing acoustic ceiling tiles, setting up barricades and other similar tasks which he performed either on his own or with the assistance of laborers. At the end of the shift, Wen was responsible for putting the classrooms back in order for the morning classes. He performed those duties either on his own or with the assistance of laborers. When welding was done on the shift, Wen would also be responsible for "fire watch" at the end of the shift to confirm that metal that had been heated by the welding had cooled sufficiently that no fire danger was presented.[7]

In an email to Nickles on October 9, 2008, Wen estimated that "[a]bout 10% to 15% of

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[7] "Fire watcher" is one of the job duties specified in the applicable PWD for the Laborer Group 3 subclassification.

the time, I helped out as a laborer if we were short of manpower." At hearing, Wen revised this estimate upward to 30 to 40 percent, although he seemed uncertain of the revised estimate when questioned about it on cross-examination. In addition to daily work preparing the job sites, Wen also testified that he worked on several weekend days and evenings assisting laborers and carpenters with demolition, water cleanup and other duties. KOO's daily project logs for February 14 and 15, 2008, report Wen as performing carpentry work because Whitehouse was not on the job those days.

To determine whether Wen had been paid the required prevailing wages for the covered work he claimed to have performed, Nickles divided his salary by 40 hours per week to get an hourly pay rate. The resulting rate of $25.24 per hour was significantly below the applicable prevailing rates for either laborer or carpenter. Based on KOO's daily project logs and Wen's initial estimate that ten to 15 percent of his work was as a laborer, CCMI calculated that Wen had performed 457.05 hours of work as a laborer and 6.3 hours of work as a carpenter. The Notice found that Wen was owed an additional $3,957.47 for that work.

KOO's president, Keith Odister testified that Wen had been instructed to "get that work done" but not to perform it personally. Odister did not observe the work that Wen actually performed. Bailey, who did have personal knowledge testified that he had directed Wen to remove ceiling tiles, clean up and do fire watch, among other tasks. Bailey observed Wen doing so on some occasions, even though he considered the tasks incidental to Wen's responsibilities as a supervisor.

Failure To Report And Pay Gordon For Work That He Performed On The Project: The Notice assessed unpaid prevailing wages and unpaid training fund contributions for 117.5 hours that Gordon worked on the Project between July 6 and July 27, 2007. The Notice also assessed unpaid training fund contributions for an additional 17 hours in August 2008, when Gordon was paid the required prevailing wages but no contributions were reported. KOO's daily project log, sign-in sheets and time sheets for July 2007, and KOO's CPRs for the week ending July 20, 2007, list Gordon as working for KOO on the Project on the days for which unpaid prevailing wages were assessed. KOO's payroll journals for that period do not report any payments to

Gordon for the hours worked.

KOO acknowledges that Gordon worked on the Project as a laborer in July 2007, but denies that he was employed by KOO at that time. Newbill testified that Gordon was actually employed by one of KOO's subcontractors, Total Team Construction ("Total Team") and was fully paid for his work by Total Team. KOO produced payroll journals from Total Team showing that Gordon had been paid $3,305.20 for the assessed hours (which did not include training fund contributions) by Total Team and that CCMI had not credited to Gordon as pay. KOO did not explain why Gordon completed KOO time sheets and appeared on KOO's daily project logs. There is no evidence that the required training fund contributions were made on Gordon's behalf by either Total Team or KOO.

Nickles testified that Total Team had never been identified by KOO as a subcontractor on the Project and that no CPRs from Total Team were ever submitted to CCMI for work on the Project. Moreover, the records from Total Team that are in evidence indicate overlapping staffing between KOO and Total Team. For example, both I. Flores and J. Flores, who were undisputedly KOO workers, were listed on some Total Team payroll journals. In addition, Schuster and Tim Gayles, KOO's operations manager, were listed as receiving 401(k) profit sharing contributions from Total Team. No witnesses representing Total Team testified at the hearing.

Credit for 401(k) contributions: KOO maintains a 401(k) plan for its workers that is administered by a third party administrator, Associated Pension Consultants. The plan funds are invested and held in trust by Merrill Lynch. KOO's 401(k) plan is a defined contribution plan with a three year vesting schedule. Participating KOO workers contributed to the plan with salary deferral contributions; KOO made matching contributions ("matching contributions"). In addition, KOO made profit sharing contributions to some workers' 401(k) accounts, based in part on hours the workers worked on the Project ("profit sharing contributions"). KOO deposited profit sharing contributions to these 401(k) accounts once per year, between nine and twelve months after the end of the calendar year for which the contributions were made. In the revised audit accompanying the amended Notice, CCMI gave KOO credit for the value of its

documented matching contributions. CCMI did not give KOO credit for its profit sharing contributions.

The records produced by KOO establish that it made profit sharing contributions equivalent to 10.75 percent of total compensation for 2007 to the 401(k) accounts of Reeves, G. Flores, Ramirez and Gregory Dupree on December 10, 2008. KOO made profit sharing contributions equivalent to 4.33 percent of total compensation for 2008 to the 401(k) accounts of Reeves, G. Flores, I. Flores, Joel Flores, Whitehouse and Dupree on September 15, 2009.[8] KOO calculated the value of the profit sharing contributions that it claims as an offset to the underpayment of prevailing wages for these workers by dividing the annual profit sharing contribution for each worker by 2080 hours (40 hours x 52 weeks) to derive an hourly benefit rate. The hourly benefit rate derived was then multiplied by the number of hours the worker had worked on the Project. For example, J. Flores received $2,962.20 in profit sharing for 2008 from which KOO derives an hourly rate of $1.43 when divided by 2080 hours. KOO multiplied that rate by the 2,343.6 hours that J. Flores worked on the Project to derive the amount of $3,351.34 that it claims as a credit against his assessed unpaid prevailing wages. KOO assumes, with no evidence in the record, that each worker worked 2080 hours in 2007 and 2008 to derive an hourly benefit rate. KOO then erroneously calculates its claimed credit using the total hours worked on the Project instead of limiting the calculation to the hours worked in the year for which the profit sharing contribution was received. In the J. Flores example above, the clearly erroneous result of this method is that KOO claims a credit of nearly $400.00 in excess of the amount that Flores actually received in profit sharing for 2008.

KOO's General Defenses: KOO admits that it underpaid most of the affected workers and that its CPRs for the Project were inaccurate but denies that the CPRs were intentionally falsified. KOO attributes the majority of the errors to Schuster's lack of familiarity with

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[8] KOO also seeks credit for 2006 profit sharing contributions that were paid in late 2007. Even if KOO were to be entitled to credit for some portion of its 2007 and 2008 profit sharing contributions, there would be no basis for a similar credit for profit sharing contributions based on 2006 payroll, because none of the work subject to the Notice was performed in 2006. Consequently, this decision will only address KOO's contention that it is entitled to credit for the value of profit sharing contributions associated with the wages earned for work on the Project in 2007 and 2008.

California prevailing wage requirements and difficulties that she encountered with transferring prior payrolls to LCP Tracker several months into the Project. KOO also contends that many of the problems could have been avoided but for CCMI's late entry as the labor compliance program for the Project. Odister freely admitted that KOO did not pay its workers overtime because he "feels that he gives them enough money." KOO also admitted that it did not pay the required training fund contributions for any of its workers on the Project. Newbill testified that she worked closely with Nickles to get payroll errors corrected. She further testified that, after four initial restitution checks were issued, Nickles instructed KOO to wait to issue any further restitution checks or pay arrears training fund contributions until CCMI's audit was completed.

Amended Notice: On the first day of hearing, CCMI moved to amend the Notice downward based on a revised audit in which CCMI gave KOO credit for previously uncredited payments to some of the affected workers. The Hearing Officer granted CCMI's motion, resulting in a reduction of approximately $3,000.00 because there was no objection. As amended, the Notice found a total of $109,793.36 in unpaid prevailing wages and $5,922.81 in unpaid training fund contributions. The Notice divides the assessed training fund contributions into two categories: $4,660.52 designated as "Training Due (for wage violations)" and $1,262.29 designated as "Additional Training Due (non wage violations)."[9] CCMI did not assess penalties under section 1775 for the latter category of unpaid training funds. Penalties were assessed under section 1775 at the maximum rate of $50.00 per violation based on CCMI's finding that KOO had intentionally falsified its CPRs. The Notice calculated 1,443 violations of the obligation to pay prevailing wages, which resulted in $72,150.00 in section 1775 penalties. In addition, penalties were assessed under section 1813 for 1,222 overtime violations; at the statutory rate of $25.00 per violation, this totaled $30,550.00.

CCMI submitted two additional revised audits with its opening brief that, among other things, increased the assessed unpaid wages for Wen to $8,857.16. This was based on Wen's testimony that 30 to 40 percent of his time had been spent performing laborer and carpenter

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[9] This refers to payments not made to a training fund for hours in which the affected workers were paid the correct prevailing wage rate.

work. The revised audits also eliminated the credits for 401(k) matching contributions that CCMI had given KOO in the amended Notice approved on the first day of hearing. In the absence of a motion to amend the Notice, and because increasing the assessed unpaid wages after the conclusion of the hearing would prejudice KOO, CCMI is bound by the amounts assessed in the Notice as amended on the first day of the hearing.

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 ("LCP"), like CCMI, 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), 1771.6, 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 of Contract Payments under section 1771.6.

When CCMI determines that a violation of the prevailing wage laws has occurred, a written Notice of Withholding of Contract Payments is issued pursuant to section 1771.6. An

affected contractor or subcontractor may appeal the Notice 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."

KOO Has Failed To Prove That The Basis Of The Assessed Underpayment Of Prevailing Wages For Laborers' Work Is Incorrect.

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 for each locality (as defined in section 1724) and publishes general wage determinations such as Laborer and Carpenter to inform all interested parties and the public of the applicable wage rates for the "craft, classification and type of work." (§ 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.) Ultimately, it is the trier of fact who determines the proper pay classification for a type of work based on the Director's PWDs. That determination is based on the nature of the work actually performed by each affected worker.

The record as a whole shows that KOO has failed to carry its burden of proving that the basis of the Notice for the assessed underpayment of prevailing wages for Laborers' work on the Project was incorrect. The one exception is Gordon, whose claim is discussed below. With this one exception, the evidence is clear that KOO failed to pay the proper prevailing wage for work subject to the Laborers' prevailing wage rate, as more fully described.

KOO's CPRs and time records establish that even when KOO had classified the affected workers correctly as subject to the pay rate in the Laborers' PWD, the workers were still paid less than the required prevailing wage rates in most instances. None of the affected workers were paid the required shift differentials for evening work. KOO concedes, with a handful of exceptions discussed more fully below, that its workers were underpaid for their work on the Project. KOO admits that it did not pay the applicable overtime wage rates for work in excess of eight hours per day and forty hours per week. KOO also admits that it failed to pay the required

training fund contributions for any of its workers. The only issue is the precise amount of the underpayment.

The Notice, as amended, is based on an audit conducted by Nickles, which involved an exhaustive review of KOO's records. With the exception of additional hours of work at the applicable Laborer wage rate assessed on the basis of Wen's testimony, all of the assessed unpaid wages are based on KOO's records, with particular reliance on the contemporaneously prepared time cards that were reviewed and approved by KOO's superintendent for the Project. Newbill's self-audit for KOO purports to show that the unpaid prevailing wages assessed by CCMI are higher than are warranted by the evidence. The self-audit's methodology, such as ignoring the obligation to pay shift and overtime rates, makes the self-audit unreliable as rebuttal of the Notice.

For these reasons, KOO has failed to carry its burden of proving that the basis of the Notice's assessment of unpaid prevailing wages to workers performing work subject to the Laborers' prevailing wage rate, as amended, is incorrect. Therefore, with the exception of the wages assessed for Gordon, which are modified below, the Notice is affirmed on this issue.

KOO Has Failed To Prove That CCMI's Reclassification Of Workers From Laborer To Carpenter Is Incorrect.

To the extent that KOO disputes the reclassification of certain workers from Laborer to Carpenter pay rates, it relies on general testimony regarding the training and qualifications required to become a journeyman carpenter and whether the affected workers possessed their own tools. The determination of the correct pay rate for specific work, however, turns on whether the affected workers actually performed work covered by a PWD's scope of work. Unless qualifications to receive a specific rate are described in a scope of work, the contractor's belief as to the necessary formal qualifications or training of a given worker is irrelevant to the determination. KOO has not presented any evidence that either the Laborer or Carpenter PWD contained any such requirement for formal qualifications.

KOO only provided testimony regarding the actual work performed by one of the affected workers, I. Flores. Pattison's, Whitehouse's, and Bailey's testimony that I. Flores had

been hired as, and performed only as, a laborer is contradicted by KOO's own records, including I. Flores's time cards. These time cards were reviewed and approved by Bailey and record that I. Flores performed Carpenter's work on numerous days of work between August 2007 and February 2008.

KOO's time cards and other reliable records similarly contradict their CPRs and support the reclassification of nine other affected workers from the Laborers' pay rate to the Carpenters' pay rate for some or all of their work. KOO has admitted the inaccuracy of its CPRs and has submitted no evidence that would put the accuracy of its other records for the Project in question. For these reasons, KOO has not met its burden to prove that CCMI's reclassification of some or all of the work performed by ten of the affected workers from Laborer to Carpenter was incorrect. The Notice is therefore affirmed as to this issue.

Whitehouse, Reeves And Wen Are Entitled To Receive Prevailing Wages For All Of The Work Subject To The Laborers' Or Carpenters' Prevailing Wage Rates That They Performed On The Project.

Section 1771 requires, that "not less than the general prevailing rate of per diem wages for work of a similar character in the locality . . . be paid to all workers employed on public works." Section 1774 requires "[t]he contractor to whom the contract is awarded, and any subcontractor under him, [to] pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract." As with the determination of the proper prevailing wage rate applicable to the work performed, the focus for determining whether a worker is entitled to receive prevailing wages is on the work actually performed.

The undisputed testimony of Reeves and Whitehouse establishes that the vast majority of their work on the Project was carpentry work; KOO presented no evidence of the proportion of Reeves' and Whitehouse's hours spent supervising, if any, that was not subject to prevailing wages. KOO's treatment of these workers as "assistant superintendents" does not eliminate its liability to pay prevailing wages for all of the carpentry work that Reeves and Whitehouse performed. The hours for which the Notice reclassified Reeves and Whitehouse are supported by KOO's own records.

The majority of Wen's time was spent in supervisory and administrative activities, not subject to prevailing wages. However, Wen's testimony and KOO's daily project logs report Wen performing carpentry work on two days. This establishes that some portion of the work Wen performed was subject to prevailing wages. Wen's testimony is corroborated by Bailey, who admitted that he assigned carpentry work to Wen and observed Wen performing carpentry and laborer related work. CCMI did not assess prevailing wages for Wen's supervisory hours.

For these reasons, KOO has not met its burden to prove that the Notice as amended is incorrect as to Reeves, Whitehouse or Wen. The Notice as amended is therefore affirmed as to these workers.

KOO Has Established Entitlement To Credit For Wages Paid To Gordon.

KOO contends that it is not liable for any underpayment of prevailing wages that may be owed to Gordon for his work on the Project, because Gordon was an employee of Total Team. KOO's position is not supported by the evidence or the applicable law. While KOO has produced payroll journals reporting payments to Gordon by Total Team, it has not explained why Gordon submitted KOO time cards and was listed on KOO's daily project logs and sign-in sheets for the period of the assessment.[10] Even if the evidence clearly established that Gordon was an employee of Total Team, and not of KOO, the obligation to pay prevailing wages remains joint and several. (§§ 1774, 1743.) KOO, the contractor, is jointly and severally liable for any unpaid prevailing wages owed by its subcontractors. For these reasons, there is no basis to overturn the Notice's determination that Gordon was KOO's employee.

KOO has established that Gordon was paid $3,305.20 for the work subject to the Notice. The Total Team payroll journals produced at hearing demonstrate payments of which CCMI was unaware but clearly were made to Gordon for work on the Project. Even with this additional credit, however, the record shows that Gordon was paid less than the required prevailing wage rate for each day of his work on the Project for which the Notice found underpayments. The

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[10] Equally problematic for KOO is that the same evidence could be found to show that I. Flores and J. Flores were also Total Team employees, yet they were similarly listed on the time cards as KOO employees and were paid by KOO.

assessed unpaid wages for Gordon are therefore reduced by that amount to $836.98, but there is no reduction in the assessed penalties under either section 1775 or 1813.

KOO Has Not Established Entitlement To Credit For The 401(k) Profit Sharing Contributions That It Made For Some Workers.

Section 1773.1 defines "per diem wages" for purposes of both establishing prevailing wage rates and crediting employer payments toward those rates, providing in pertinent part as follows:

> (a) Per diem wages . . . shall be deemed to include employer payments for the following:
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> (1) Health and Welfare.
>
> (2) Pension
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> * * *
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> (b) Employer payments include all of the following:
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> (1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.
>
> (2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

There are three components to the prevailing wage: the basic hourly rate, fringe benefit payments and a contribution to the California Apprenticeship Council ("CAC") or an approved apprenticeship training fund. (§ 1773.1, Cal. Code Regs., tit. 8, § 16000.) The first two components (also known as the total prevailing wage) must be paid to the worker or to a bona fide trust fund on the worker's behalf. If an employer does not make fringe benefit payments on the worker's behalf totaling at least the amount required by the applicable PWD, the balance must be paid to the worker as wages.

In this case, KOO has proven that it maintains a qualified 401(k) plan for its workers. The records show that KOO made both matching and profit sharing contributions to the 401(k) accounts of some of the affected workers based in part on the hours that they had worked on the Project. The Notice as amended gave KOO credit for the value of its documented matching contributions but denied any credit for KOO's profit sharing contributions. The issue for decision is whether KOO is entitled to credit toward the balance of the fringe benefit portion of

its prevailing wage obligation for the profit sharing contributions it made to some of the affected workers based on hours that they worked in 2007 and 2008. KOO has not established that it is entitled to such a credit.

KOO's calculation of the credit it claims for the profit sharing contributions made to some of the affected workers is flawed, as described above, because KOO claims credit for the total hours worked on the Project instead of limiting the credit to hours worked in the years for which the profit sharing contributions were made. Moreover, in the absence of any evidence in the record to show the total hours actually worked by the workers receiving the contributions on all projects, KOO's calculation of the hourly benefit value is speculative.

While KOO's profit sharing contributions might have qualified as employer payments under section 1773.1, subdivision (b) if calculated properly, any credit for those contributions would be limited to offsetting the fringe benefit component of the applicable prevailing wage rate as these contributions cannot be credited against the basic hourly rate. Neither the amended Notice nor the underlying audit distinguish between the basic hourly rate and fringe benefit components of the assessed unpaid prevailing wages, and there is insufficient evidence in the record to determine whether any of the assessed unpaid prevailing wages are attributable to underpayment of the required fringe benefit payments. As a result, even if an accurate value for the profit sharing contributions had been calculated, KOO has not established that there are any unpaid fringe benefits remaining to be offset. For these reasons, KOO has failed to establish that it is entitled to a credit for the profit sharing contributions.

KOO Is Liable For All Of The Assessed Unpaid Training Fund Contributions.

Mandatory apprenticeship training contribution is established by section 1777.5, subdivision (m)(1), which provides that:

> A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an

approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

KOO admits that it did not make the required training fund contributions for any of its workers on the Project. It contends that the portion of the unpaid training fund contributions assessed for hours when no prevailing wage violations were found cannot be adjudicated under the section 1742 hearing process. KOO contends that CCMI's characterization of such unpaid training fund contributions as "Additional Training Due (non wage violations)" in its audit, and failure to request the forfeiture of penalties under section 1775 for these violations, demonstrates that the failure to pay the training fund contributions required by the applicable PWD cannot, without more, constitute a violation of the prevailing wage laws. This argument has no merit as the failure to pay any part of the prevailing wage is a violation of section 1771 and enforceable by LCPs under section 1771.6. Though training contributions are not paid to the worker, they are no less a required component of the required prevailing wages than the basic hourly rate and fringe benefit components. Consequently, the failure to pay required training fund contributions alone constitutes a violation of the prevailing wage laws subject to the same penalties as any other violation. KOO is therefore liable for the full amount of uncontested training funds assessed by the Notice.

CCMI's Penalty Assessment Under Section 1775 Is Appropriate.

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

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

(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly

and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B)(i) The penalty may not be less than ten dollars ($10) . . . unless the failure of the contractor . . . 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 . . .

(ii) The penalty may not be less than twenty dollars ($20) . . . if the contractor . . . 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.[11]

Abuse of discretion is established if the LCP "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 Acting Director is not free to substitute her own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

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)].)

There is substantial evidence to establish that KOO knowingly misclassified some or all of the work performed by the majority of its workers on the Project, failed to report and pay

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[11] Section 1777.1, subdivision (c), defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

prevailing wages for covered work performed by individuals that KOO classified as supervisors, failed to pay the required training fund contributions and underpaid even the workers that it had classified correctly on its CPRs for the Project. Moreover, KOO admits that it intentionally refused to pay the required overtime rates for any work on the Project in excess of eight hours per day or forty hours per week.

Section 1775, subdivision (a)(2) grants the LCP the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The record shows that CCMI considered the prescribed factors for mitigation when deciding to assess penalties at the maximum rate of $50.00 per violation. The Acting Director is not free to substitute her own judgment. KOO has not proven that CCMI abused its discretion in assessing penalties under section 1775 at the maximum rate and, accordingly, the assessment of penalties as amended and modified is affirmed for 1,443 violations.

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

Section 1813 states as follows:

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

Section 1815 states in full as follows:

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

The record establishes that KOO violated section 1815 by paying less than the required prevailing overtime wage rate on 1,222 occasions. Unlike section 1775 above, section 1813 does not give the enforcing agency any discretion to reduce the amount of the penalty, nor does it give

the Acting Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813 as amended and modified is affirmed in full.

KOO Is Not Liable For Liquidated Damages.

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 . . . 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 . . . notice with respect to a portion of the unpaid wages covered by 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.

Section 1742.1, subdivision (b), however, provides a safe harbor from liquidated damages when the full amount of the assessment is deposited with the Department, providing:

> Notwithstanding subdivision (a), there shall be no liability for liquidated damages if the full amount of the . . . notice, including penalties, has been deposited with the Department of Industrial Relations, within 60 days following service of the . . . notice, for the department to hold in escrow pending administrative and judicial review. The department shall release such funds, plus any interest earned, at the conclusion of all administrative and judicial review to the persons or entities who are found to be entitled to such funds.

It is undisputed that KOO deposited the full amount of the Notice with DIR within 60 days following service of the Notice. Nonetheless, CCMI contends that even if a deposit is made pursuant to subdivision (b), the contractor must still show substantial grounds for appealing the notice before liquidated damages can be waived. CCMI's position is directly contrary to the language of the statute. The first words of subdivision (b), "Notwithstanding subdivision (a) there shall be no liability for liquidated damages ...," clearly establishes that making a timely deposit of the amount of the Notice enables an affected contractor or subcontractor to escape liquidated damages independent of the requirements of subdivision (a). The record shows that

KOO made a timely deposit of the amount of the Notice pursuant to section 1742.1, subdivision (b). Accordingly, KOO has no liability for liquidated damages on the Project.[12]

FINDINGS

1. Affected contractor KOO Construction, Inc. filed a timely Request for Review of the Notice of Withholding of Contract Payments issued by CCMI with respect to the Project.

2. With the exception of the unpaid wages assessed for Anthony Gordon, for which KOO has established that it is entitled to an additional credit of $3,305.20, KOO has failed o prove that the basis of the assessed unpaid prevailing wages is incorrect. KOO is therefore liable for the underpayment of prevailing wages to the affected workers for their work on the Project in the aggregate amount of $106,488.16 comprising 1,443 violations of section 1775 and 1,222 violations of section 1815. KOO is also liable for unpaid training fund contributions in the amount of $5,922.81.

3. CCMI did not abuse its discretion in setting section 1775, subdivision (a) penalties at the maximum rate of $50.00 per violation and the resulting total penalty of $72,150.00 for 1,443 violations is affirmed.

4. Penalties under section 1813 at the rate of $25.00 per violation are due for 1,222 violations on the Project, for a total of $30,550.00 in penalties.

5. KOO deposited a bond in the full amount of the Notice in escrow with the Department of Industrial Relations within 60 days after service of the Notice pursuant to section 1742.1, subdivision (b). KOO therefore has no liability for liquidated damages under section 1742.1, subdivision (a).

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[12] In the alternative, CCMI requests that the Director award penalties against KOO under section 203 which entitles workers to continuation pay after termination of employment when any wages remaining due are not timely paid by the employer. The Acting Director's authority in these proceedings does not extend to such claims. (§§ 1741, 1742, subd. (g).)

6. The amounts found remaining due in the Notice, as affirmed and modified by this Decision, are as follows:

Wages Due:	$106,488.16
Training Fund Contributions Due:	$5,922.81
Penalties under section 1775, subdivision (a):	$72,150.00
Penalties under section 1813:	$30,550.00
TOTAL:	**$215,110.97**

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

The Notice of Withholding of Contract Payments as amended is affirmed in part and modified in part 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: May 5, 2011

Christine Baker

Christine Baker
Acting Director of Industrial Relations