STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

FEI Enterprises Inc. Case No. **09-0215-PWH**

From a Notice of Withholding issued by:

Los Angeles Community College District.

ORDER DENYING RECONSIDERATION

On December 30, 2010, the Decision of Director in above entitled matter was issued. On January 10, 2011, the Enforcing Agency filed a Motion for Reconsideration. On January 12, 2011, the Contractor filed a Motion for Reconsideration.

The Enforcing Agency requests that that interest pursuing to Labor Code section 1741, subdivision (b) should have been awarded.[1] The Contractor opposes arguing that the Enforcing Agency waived interest by not raising the issue at trail.

Section 1741, subdivision (b) provides "[i]nterest shall accrue on all due and unpaid wages at the rate described in subdivision (b) or Section 3289 of the Civil Code. The interest shall accrue from the date that the wage were due and payable as provided in Part 7 (commencing with Section 1720) of Division 2, until the wages are paid." Imposition of interest is statutorily set and cannot be waived by the parties. (*Azteca Construction Inc. v. ADR Consulting Inc.* (2004) 121 Cal.App.4th 1156.)

The omission of the language awarding interest was simply a clerical error. The Decision as to the Finding paragraph 3 shall be amended to read:

> "3. The total amount of the wages due to these workers is $10,387.52. The total amount of training fund contribution due on behalf of these workers is $105.60. In addition, interest is due and shall continue to accrue on all unpaid wages as provided

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

in section 1741, subdivision (b)."

The Contractor requests reconsideration seeking waiver of liquidated damages. At no time during the hearing or in its two closing briefs, the Contractor ever raised the issue of wavier of liquidated damages. The argument is therefore waived. The Contractor argues that because the identity of the workers were unknown and not listed on its CPRs, it would be unfair to assess liquidate damages. However, nothing in the Decision suggests anything other than the Enforcing Agency was unable to identify which of 4 workers employed by the Contractor did work on any particular day. In addition, the Decision of Director expressly found that the Contractor's violation of the prevailing wage law was intentional and there was no subjective or objective basis to contest the Notice of Withholding was in error.

The Contractor's argument that it complied with section 1742.1, subdivision (b) [depositing the assessment with the Department of Industrial Relations] is meritless. This provision specifies that an affected contractor must deposit the full amount of wages and penalties due under a Notice of Withholding with the Department of Industrial Relations in order to avoid liquidated damages. Leaving the money with the awarding body does not satisfy the plain meaning of the statute.

Therefore, the Contractor's motion for reconsideration is denied.

This Order is an Order Denying Reconsideration. It is not a modified or reconsidered Decision under California Code of Regulations, title 8, section 17261, subdivision (d).

SO ORDERED

Dated: January 13, 2011

John C. Duncan, Director of Industrial Relations

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

FEI Enterprises Inc. Case No. **09-0215 PWH**

From a Notice of Withholding issued by:

Los Angeles Community College District.

DECISION OF DIRECTOR

INTRODUCTION

Affected contractor, FEI Enterprises, Inc. ("FEI") requested review from a Notice of Withholding ("Notice") issued by the Los Angeles Community College District ("District") regarding Instructional Building – Culinary and Faculty Project ("Project"). As amended at the hearing without objection, the Notice assessed FEI for unpaid prevailing wages in the amount of $40,949.57, unpaid training fund of $473.20, penalties under Labor Code sections 1775 and 1813 in the amount of $6,175.00.[1] Hearing on the Merits was initially conducted on May 17, 2010, June 14, 2010, June 28, 2010, and August 16, 2010 in Los Angeles before Hearing Officer Makiko I. Meyers. The case was re-opened and further testimony was taken on November 15, 2010. EFI was represented by Robert G. Klein, Esq. and the District was initially represented by David M. Huff, Esq. but was later represented by Sima Salek, Esq.

The issues for decisions are:

1. Whether FEI failed to report the hours worked by Emmanuel Martinez, Miguel Martinez, Rogelio Rafael, Jorge Yanez, Oscar Chavez, and Jesus Hernandez.
2. Whether FEI misclassified some of the hours worked by Jesus Hernandez as Drywall Finisher rather than Drywall Installer.

[1] All unspecified section references are to the Labor Code, unless otherwise specified.

3. Whether the District abused its discretion when it assessed section 1775 penalty at the maximum rate of $50 per violation.

4. Whether the District properly assessed penalty under section 1813.

5. Whether FEI should be liable for liquidated damages.

The Director finds that FEI has carried its burden on the misclassification issue and the Notice's determination of unpaid wages to be too high. Therefore, this decision modifies and affirms the Notice.

FACTS

FEI was the general contractor for the Project. The bid advertisement date on the Project was May 27, 2008, and the applicable prevailing wage determination was LOS-2008-1. The total hourly prevailing wage for a Drywall Installer was $47.03 (including fringe benefits) and training fund contribution of $0.56 per hour and the total hourly prevailing wage rate for a Drywall Finisher was $44.73 (including fringe benefits) and training fund contribution of $0.25 per hour.[2]

FEI's Certified Payroll Records ("CPR's") listed two workers Jesus Hernandez ("Hernandez") and Antonio Sanchez ("Sanchez") as a drywall installer or drywall finisher. The District, however, withheld contract payments for wages allegedly unpaid to Emmanuel Martinez ("Emmanuel"), Miguel Martinez ("Miguel"), Rogelio Rafael ("Rogelio"), Jorge Yanes ("Jorge"), and Oscar Chavez ("Oscar"). The District's withholding was based primarily on Emmanuel's statement that he had an oral subcontracting agreement with FEI and that he hired his own crew, namely Miguel, Rogelio, Jorge, and Oscar. Emmanuel claimed that he was entitled to prevailing wages because he actually performed labor and did not simply supervise. Emmanuel submitted calendars ("calendars") which purportedly recorded the date and hours worked by each worker, including himself.

[2] The amended audit shows audited period as November 4, 2008 through January 11, 2009.

Emmanuel initially testified that he performed superintendent duties for FEI in the morning and performed actual labor with others in the evenings. He then changed his testimony that the physical work was sometimes done in the mornings. Despite this testimony, the calendars show that most of the physical work was performed in the morning. Emmanuel initially presented the calendars as the evidence of hours of actual labor performed pursuant to his alleged oral subcontract and not the hours he spent as superintendent. However, during the cross examination, he admitted that the hours reported on the calendars are total hours worked on the Project as the superintendent as well as a worker under the alleged subcontract.

FEI's project manager, Phillip Butte ("Butte") and FEI's principal Gabriel Fedida ("Fedida") denied existence of the oral subcontract between FEI and Emmanuel. They also testified that Miguel, Rogelio, Jorge, and Oscar never worked on the project, that Emmanuel was instructed not to work with tools, and that the drywall work on this project was performed only by Hernandez and Sanchez, who were paid at appropriate rates. Butte and Fedida also testified that all hours worked by Hernandez and Sanchez were recorded on FEI's time sheets ("time sheets") and reflected on the CPR's.

However, it is undisputed that on December 4, 2008, during a routine on-site visit, Reima McDade from the District observed Emmanuel performing physical labor. She also observed Hernandez, Miguel, and Rogelio installing drywall on December 4, 2008. Yet, the CPR for December 4, 2008, shows no work by drywall workers. On this day, the inspector's daily log ("IOR Daily') showed work by four drywall workers.

The inspector of record, Linden Soholt ("Soholt") testified that he kept his IOR Daily every day based on his own observation. Soholt also testified that he usually made headcounts of the workers himself, as FEI failed to provide them. Soholt testified that Emmanuel had his own crew, which came to work sporadically and generally consisted of two to four workers. Generally speaking, the IOR Daily recorded more workers than the CPR's but fewer workers than the calendars.

As to reclassification of hours reported for Hernandez as Drywall Finisher to Drywall Installer, the District's Labor Compliance Officer, Veronica Martinez testified that drywall installation and finishing normally do not take place simultaneously, and thus the workers could not have been classified as Drywall Finisher and Drywall Installer during the same period. However, Butte testified that the Project called for installation of a type of drywall called "fire wall" for which installation and finishing work had to occur simultaneously. The IOR Daily shows that FEI installed fire walls during the period subject to the Notice.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers 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 o 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 non public 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, 9877 [citations omitted].) A Labor Compliance Program ("LCP"), such as the District, enforces prevailing wage requirements not only of 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 standard." (§ 90.5, subd. (a); 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 notice of withholding under section 1741.

Upon determining that a contractor or subcontractor has violated prevailing wage requirements, an LCP issues a notice of withholding, which an affected contractor or subcontractor may appeal by filing a request for review under section 1742. In such an appeal, "[t]he contractor or subcontractor shall have the burden of proving that the basis of the [notice of withhold] is incorrect." (§ 1742, subd. (b).)

FEI Failed to Report All Hours Worked by its Workers

"Each contractor and subcontractor shall keep accurate payroll records, showing the name ... work classification, straight time and overtime hours worked each day and week ..." (§ 1776, subdivision (a); see, Cal. Code Regs., tit. 8, § 11160, subd. (6)(a)(1).) When a contractor fails to comply with its statutory obligations to keep accurate records, a trier of fact may determine the hours worked and the wages due based on other evidence. If there is sufficient evidence to show the amount and extent of unpaid work, a just and reasonable inference of the evidence supports a finding, even if the result is only approximate. (*Hernandez v. Mendoza* (1998) 199 Cal.App.3d 721, 727.) The burden then shifts to the employer to produce evidence to specifically negate the inference. (*Id.*)

FEI's time cards and CPR's did not list all the workers nor reflect all the hours worked by FEI's drywall workers. The undisputed evidence shows that FEI's Time Cards and CPR's failed list four workers on December 4, 2008. FEI time cards and CPR's do not show hours by Emmanuel's crew, who were observed by Soholt at various times. At the same time, Emmanuel's testimony was internally inconsistent and was inconsistent with the calendars that he prepared. Thus, neither FEI's nor Emmanuel's evidence can be the basis for a determination of whether unpaid prevailing wages are owed. This leaves the IOR Daily, kept every day based on Soholt's observation, as the best evidence from which to determine the number of workers performing the job each day; consequently, these records provide for the basis for an inference of how many were unlisted and unpaid.

Although the IOR Daily does not show the name of the workers nor the precise number of hours worked by each worker, it is still sufficiently precise to rely on for an inference

of wages owed for each day worked. There is no record that the hours worked for these unidentified workers exceeded eight hours of work each day. In the absence of evidence of a different number of hours, there is a basis for reaching the inference that the unidentified workers worked a standard eight hour day; no overtime wages are due.

The failure of the IOR Daily to identify specific workers does not bar the District's enforcement and collection of the prevailing wages. The contractor's liability is to the enforcing agency, and not to the individual workers. (See *Violante v. Communities Southwest Development and Construction Co.* (2006) 138 Cal.App.4th 972.) The enforcement agency may collect unpaid wages and then locate the aggrieved workers. (§§ 96.7, 1743; *Division of Labor Standards Enforcement v. Fidelity Roof Company* (1997) 60 Cal.App.4th 411.) Accordingly, this Decision finds the number of workers who performed work on each day, the number of hours worked, and their classification only. Allocation and disbursement of the collected funds to each aggrieved worker is left to the District.

The number of hours and classification of the unidentified workers, as recorded in the Daily IOR, are found to be as follows:

Date	Number of Unidentified Workers	Classification
November 4, 2008[3]	1	Drywall Installer
November 6, 2008	1	Drywall Installer
November 10, 2008	1	Drywall Installer
November 12, 2008	2	Drywall Installer

[3] The CPR on November 4, 2008, shows three workers – Jesus Hernandez and Antonio Sanchez as drywall installers and Hector Rodriguez as a laborer. IOR Daily shows four drywall workers but no laborer. The inspector must have counted Hector Rodriguez as one of drywall workers since he was an FEI employee. Likewise, the Inspector appears to have counted Hector Rodriguez as a drywall worker although his proper classification was laborer on November 7, 2008, and November 25, 2008.

November 13, 2008	1	Drywall Finisher
November 14, 2008	4	Drywall Finisher
November 17, 2008	2	Drywall Finisher
November 18, 2008	1	Drywall Finisher
November 21, 2008	1	Drywall Installer
November 26, 2008[4]	1	Drywall Installer
December 1, 2008	3	Drywall Installer
December 2, 2008	2	Drywall Installer
December 3, 2008	2	Drywall Installer
December 4, 2008	4[5]	Drywall Installer
January 2, 2009	2	Drywall Installer

On all above referenced date, the workers worked 8 hours a day.[6] Thus, there is a total of 160 hours for Drywall Installer ($7,524.80 for unpaid wages and $89.60 for training fund contributions), and a total of 64 hours for Drywall Installer ($2,862.72 for unpaid wages and $16.00 for training fund contributions). Accordingly, the amount unpaid wages due is $10,387.52, and the amount of training funds due is $105.60.

[4] The CPR on November 26, 2008, shows three workers – Jesus Hernandez and Antonio Sanchez as drywall installers and Hector Rodriguez as a laborer. IOR Daily notes three drywall workers and one laborer.

[5] Undisputed evidence shows that these four workers were Hernandez, Emmanuel, Rogelio, and Miguel.

[6] On each day listed for November, FEI Time Cards and CPRs show that Drywall Installer or Finisher worked eight (8) per day. The number of hours worked by unidentified worker is inferred from FEI Time Cards and CPR's. As to December 1, 2008, December 2, 2008, December 3, 2008, December 4, 2008, and January 1, 2009, no drywall worker is reported on the CPR's. However, Emmanuel reported eight (8) hours of work each day as a superintendent on the FEI Time Cards. The hours of work by unidentified workers are inferred based on Emmanuel's FEI Time Cards.

The District Erroneously Re-Classified Drywall Finisher Hours To Drywall Installer Hours

The District reclassified hours reported on CPR's for Hernandez as Drywall Finisher to Drywall Installer based solely on the Labor Compliance Officer's assumption that drywall installation and finishing could not have occurred simultaneously. However, Butte's testimony that the Project called for installation of fire walls for which installation and finishing work must occur simultaneously was unrebutted; in fact, it was corroborated by the IOR Daily. Accordingly, the Notice incorrectly reclassified Hernandez reported as a Drywall Installer.

FEI Is Liable For Penalties Under Labor Code Section 1775

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

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
>
> (2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
>
> (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
>
> (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
>
> (B)(i) The penalty may not be less than ten dollars ($10) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly

> and voluntarily corrected when brought to the attention of the . . . subcontractor.
>
> (ii) The penalty may not be less than twenty dollars ($20) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
>
> (iii) The penalty may not be less than thirty dollars ($30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[7]

Abuse of discretion is established if an 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 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.)

Here, the District assessed penalties under section 1775 at the maximum rate of $50 per violation. The Labor Compliance Officer testified that she found FEI's violations to be willful and that the maximum rate is justified by on the records of prior violations reported by other awarding agencies and prior forfeitures. As seen above, there were 28 violations.

FEI argues it should not assessed penalties because its good faith error is shown by the fact that it was not aware of the other workers performing work despite sufficient supervision and control over the project. FEI argues that its manager Phillip Butte "was on site regularly" and "his visits were random without advanced notice." (See FEI's Closing Brief 8:24 and 28.) FEI does not explain, however, the discrepancy between its Butte's observations and the Daily IOR. If FEI truly exercised due diligence, FEI would have discovered the discrepancy and the number of the actual workers performing work. It then would have realized that its

[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 fails or refuses to comply with its provisions."

CPR's did not reflect all the workers and all work hours. This evidence falls short of proof of a good faith error. FEI also did not prove that it corrected its error when brought to its attention. Therefore, FEI has not met it burden that setting the penalty amount at $50.00 per violation was an abuse of discretion.

Therefore, the District's determination that FEI's violation was willful and assessment of penalty at the maximum rate of $50 per violation was not abuse of discretion. Thus, $1,400 in section 1775 penalty is appropriate.

FEI Is Not Liable For Penalties Under Section 1813

Section 1813 provides:

> The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contact is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required to permitted to work more than 8 hours in any one calendar day and 40 hours in an one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the division of Labor Standards Enforcement.

Section 1815 states in full as follows:

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

The Notice determined there were 39 overtime violations that required $975.00 in overtime penalties. As stated above, none of the unidentified workers worked overtime. Accordingly, there was no failure to pay the proper overtime rate, and no penalties under section 1813 should be assessed.

FEI is Liable for Liquidated Damages

Section 1742.1 provides:

> "(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.
>
> Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment or notice with respect to a portion of the unpaid wages covered by the assessment or 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. Any liquidated damages shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.
>
> (b) Notwithstanding subdivision (a), there shall be no liability for liquidated damages if the full amount of the assessment or notice, including penalties, has been deposited with the Department of Industrial Relations, within 60 days following service of the assessment or 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 and entities who are found to be entitled to such funds."

Rule 51(b) (Title 8 of California Code of Regulations §17251(b)) states:

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

Absent waiver by the Director, FEI is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Notice. FEI did not submit any additional evidence to justify waiver of liquidated damages. Entitlement to a

waiver of liquidated damages in this case, therefore, is closely tied to FEI's position on the merits and specifically whether there was an "objective basis in law and fact" for contending that the Notice was in error. As discussed above, the weight of the evidence establishes that FEI's violations were intentional, and it has shown neither a subjective nor an objective basis for contenting that the Notice was in error, except to the extent that the wages due have already been reduced. Because the resulting back wages remained due more than sixty days after service of the Notice, and FEI has not demonstrated grounds for waiver, it is also liable for liquidated damages in an amount equal to the unpaid wages. The total amount of unpaid wages remained unpaid after 60 day of the Notice is $10,387.52. FEI is liable for liquidated damages of $10,387.52.

FINDINGS

1. Affected Contractor FEI Enterprises, Inc. filed a timely Request for Review from a Notice of Withholding issued by the Los Angeles Community College district.
2. Based on the Daily IORs, FEI failed to pay prevailing wages to some workers for the drywall installation and for drywall finishing.
3. The total amount of the wages due to these workers is $10,387.52. The total amount of training fund contributions due on behalf of these workers is $105.60.
4. The District did not abuse its discretion by setting the penalty under section 1775 at the maximum rate of $50 per violation. Thus, FEI is liable for the penalty under section 1775 in the amount of $1,400.00.
5. Penalties under section 1813 are denied.
6. FEI is liable for liquidated damages in the amount of $10,387.52. FEI presented no evidence to justify waiver of liquidated damages.

ORDER

The Notice of Withholding is modified as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served together with this Decision.

SO ORDERED

Dated: December 28 2010

John C. Duncan, Director of Industrial Relations