STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Lewis C. Nelson & Sons, Inc.** Case No. 09-0054-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

# ORDER DENYING RECONSIDERATION

The Division of Labor Standards Enforcement (DLSE) seeks reconsideration of the Decision of the Director issued on June 22, 2011 (Decision). I have read both DLSE's Motion for Reconsideration and the opposition filed by Lewis C. Nelson & Sons, Inc. (Nelson). Based on my review of DLSE's and Nelson's arguments, and the relevant parts of the record, I find no grounds for reconsideration of the Decision. Accordingly, the Division's Motion for Reconsideration is denied.

Dated: 7/4/2011

Christine Baker
Acting Director of Industrial Relations

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# DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Lewis C. Nelson & Sons, Inc. (Nelson) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on February 4, 2009, with respect to work performed by its sub-contractor, H.G.E. Construction, Inc. (HGE) on the New Superior Court Facility project (Project) in Paso Robles, California. The Assessment determined that $105,221.09 in unpaid prevailing wages and statutory penalties was due. HGE did not request review of the Assessment. A Hearing on the Merits occurred on October 29, 2009, in Fresno, California, before Hearing Officer Nathan D. Schmidt. D. Michael Schoenfeld appeared for Nelson and Ramon Yuen-Garcia appeared for DLSE.

The issues for decision are:

- Whether the Assessment correctly reclassified ten of the affected workers from the Laborer Group 1 prevailing wage rate to the Cement Mason prevailing wage rate for some of their work on the Project.
- Whether the Assessment correctly found that HGE failed to report and pay seven of the affected workers for work performed on Sunday, June 24, 2007.
- Whether DLSE properly determined that HGE's contributions to the 401(k) accounts of

the affected workers must be annualized resulting in an underpayment of the fringe benefit component of the required prevailing wages to all 23 affected workers.

- Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775[1] at the maximum rate of $50.00 per violation.
- Whether Nelson is jointly and severally liable with HGE for penalties assessed under section 1775 for violations by HGE.
- Whether HGE failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813.
- Whether Nelson has demonstrated substantial grounds for appealing the assessment, entitling it to a waiver of liquidated damages.

In this Decision, the Acting Director finds that Nelson has disproven the basis of the Assessment for all but $578.40 of the assessed unpaid wages owed to one of the affected workers, comprising two violations of section 1775, subdivision (a). Nelson has also established that DLSE abused its discretion in assessing penalties at the maximum rate under section 1775, subdivision (a). Therefore, the Acting Director of Industrial Relations modifies the Assessment and remands it for the redetermination of penalties under section 1775, subdivision (a). Nelson has not established that it is entitled to relief from penalties under section 1775, subdivision (b) and thus remains jointly and severally liable for the penalties assessed upon HGE under section 1775 as modified and redetermined on remand. Nelson has, however, proven the existence of grounds for a waiver of liquidated damages.

## FACTS

The County of San Luis Obispo (County) published a Notice Inviting Formal Bids for the Project in November 2006. Nelson, the general contractor for the Project, subcontracted with HGE to "furnish and install all Cast-In-Place Concrete work, all Reinforcing Iron work, and all Lightweight Concrete Deck work" required for the Project. HGE employees worked on the

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

Project from approximately April 12, 2007, to November 1, 2008.

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

Laborer and Related Classifications for Southern California (SC-23-102-2-2006-2): The Laborer Group 1 prevailing wage rate is the prevailing wage rate used in the Assessment for all laborer work. HGE paid this rate both for general laborer work and for concrete work that did not require finished concrete. A predetermined pay rate increase was required for laborers during the relevant period.[2] Laborer Group 1 includes the following sub-classifications related to concrete work: "Cleaning and Handling of Panel Forms," "Concrete Screeding for Rough Strike-Off," "Concrete, Water Curing," "Plugging, Filling of Shee-Bolt Holes; Dry Packing of concrete and Patching," "Slip Form Raisers," and "Wire Mesh Pulling – All Concrete Pouring Operations." In relevant part, the applicable advisory scope of work incorporates the following language from the Southern California Laborers 2003-2006 Master Labor Agreement, Memorandum of Agreement:

**Additions reflected in bold underline** . . .

* * *

4. **Amend Article 1 (Coverage), Paragraph F(3), to reflect**

> All work in connection with concrete work, including all concrete tilt-up, including chipping and grinding, patching, sandblasting, water blasting, mixing, handling, shoveling, rough-strike off of concrete, **concrete that may be hand worked by any method or means,** conveying, pouring, handling of the chute from ready mix trucks, walls, slabs, decks, floors, foundations, footings, curbs, gutters and sidewalks, concrete pumps and similar type machines, grout pumps, nozzlemen, (including gunmen and potmen), vibrating, guniting and otherwise applying concrete whether

[2] From the beginning of work on the Project through June 30, 2007, the prevailing hourly wage rate for Laborer Group 1 was $36.15 comprised of a base rate of $22.84, fringe benefits totaling $12.84 and a training fund contribution of $0.47. From July 1, 2007, through the completion of HGE's work on the Project, the prevailing hourly wage rate for Laborer Group 1 was $38.15 comprised of a base rate of $24.63, fringe benefits totaling $13.05 and a training fund contribution of $0.47. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

done by hand or any other process; and wrecking, stripping, dismantling and handling concrete forms and false work, cutting of concrete piles and filling of cracks by any method on any surface. [Emphasis in original.]

A Notice Regarding Advisory Scope of Work for the Southern California Laborers' General Prevailing Wage Determination (Advisory Notice), dated August 22, 2006, provided that the prevailing wage rates for specific classifications were not recognized and did not apply "on public works projects for the associated type of work." These classifications included:

**Group 1**

* * *

Concrete Curb and Gutter Laborer

* * *

Laborer, Concrete

* * *

**Group 4**

Concrete Handworking by any method or means

Cement Mason for Southern California (SC-23-203-2-2006-1): This is the prevailing wage rate used in the Assessment for all concrete work. HGE paid this wage rate only for work requiring finished concrete. A predetermined pay rate increase was required for cement masons during the relevant period.[3]

DLSE served the Assessment on February 4, 2009. The Assessment found that HGE: failed to pay the required prevailing wages to the affected workers for straight time, overtime and weekend work on the Project; failed to report all Saturday and Sunday work on the Project; falsified its CPRs "by submitting multiple reports in which the numbers were manipulated to make the calculations appear to be correct; and falsely reporting that previously unreported/unpaid

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[3] From the beginning of work on the Project through June 30, 2007, the prevailing hourly wage rate for Cement Mason was $42.45 comprised of a base rate of $26.05, fringe benefits totaling $16.02 and a training fund contribution of $0.38. From July 1, 2007, through the completion of HGE's work on the Project, the prevailing hourly wage rate for Cement Mason was $38.15 comprised of a base rate of $28.00, fringe benefits totaling $16.14 and a training fund contribution of $0.52. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

overtime was paid;" and misclassified work within the scope of ironworkers and cement masons. The Assessment found a total of $75,746.09 in underpaid prevailing wages. Penalties were assessed under section 1775 in the amount of $50.00 per violation for 525 violations, totaling $26,250.00. In addition, penalties were assessed under section 1813 for 129 overtime violations, at the statutory rate of $25.00 per violation, totaling $3,225.00.

Nelson stipulated at hearing to the underpayment of one HGE worker, Ernie Glynn, in the amount of $578.40 for 16 hours worked on two days in the pay period ending April 14, 2007, because a check for these days was never cashed.

Reclassification from Laborer Group 1 prevailing wage rate to Cement Mason prevailing wage rate: The Assessment reclassified ten of the affected workers from the Laborer Group 1 prevailing wage rate to the Cement Mason prevailing wage rate for some or all of their work on the Project. Nelson disputes the reclassifications because any concrete work performed by those workers was properly paid at the Laborer Group 1 prevailing wage rate.

Franklin Johnson, Nelson's superintendent for Project, testified that he was on the Project site every day. Johnson prepared a daily job journal tracking the work performed by each subcontractor. Johnson received and reviewed daily work reports from each subcontractor, including HGE, all of which he daily compared to his own job journals. If Johnson found a discrepancies between his daily job journal and a subcontractor's daily work report for the same day he would contact the subcontractor for corrections. Johnson testified that HGE workers only performed work on the Project that required finished concrete on three days: June 25 and June 26, 2007, when the first floor slabs were poured and finished, and September 18, 2007, when the second floor was poured and finished. HGE reported cement masons on the Project on those days. Johnson testified that the remainder of the concrete work performed by HGE workers, such as the pouring of the unfinished concrete slabs at the bottom of the elevator pits on April 23 and April 24, 2007, and the pouring of concrete for the elevator walls on May 15 and May 16, 2007, did not require finished surfaces but only required rough strike-off which could be done by laborers. The source of Johnson's testimony was his daily job journals and the daily reports for the Project prepared by the County's inspector (inspector's reports).

Sherry Gentry, the Deputy Labor Commissioner who conducted DLSE's investigation, testified that the reclassifications were based entirely on the inspector's reports. DLSE reclassified some HGE workers from laborer to cement mason for several days when the inspector's reports report that concrete was delivered to the Project site and HGE workers "placed concrete" but no cement masons are reported on HGE's CPRs. The inspector's reports summarize the work performed and list the number of workers, trades represented, and hours worked by each subcontractor working on the Project each day. The inspector's reports are typewritten and unsigned. Gentry did not identify or interview the County's inspector for the Project during her investigation. Nelson objected to the inspector's reports as hearsay on this basis. DLSE did not produce any documentary evidence describing the specific tasks performed by HGE workers on any of the days the workers were reclassified. None of the affected workers testified at the hearing.

The only statement from an HGE worker in the record is an employee questionnaire completed by Angel Diaz in the course of DLSE's investigation. Diaz is one of the workers that DLSE reclassified from laborer to cement mason. In his responses to the questionnaire, Diaz identified himself as a "laborer" and described the work that he performed on the Project as "traffic control, concrete clean-up." Diaz stated that he was paid $13.00 per hour for straight time work on the Project, significantly less than the required prevailing wage rate for either Laborer Group 1 or Cement Mason. Diaz's questionnaire does not contain a declaration that it was completed under penalty of perjury, and Nelson objected to it as hearsay. The record shows that Diaz worked on the Project for only two days in May and June 2007. HGE's CPRs and the corresponding cancelled checks produced by Nelson show that Diaz was paid the applicable Laborer prevailing wage rate of $36.15 per hour for his work.

<u>Failure to report or pay seven workers for work performed on Sunday, June 24, 2007:</u> The inspector's report for June 24, 2007, a Sunday, reported concrete work by HGE workers; HGE's CPRs did not report work for that day. The Assessment found that HGE had failed to report and pay the required Sunday double-time prevailing wage rate to seven of the affected workers for work performed on that day. Johnson testified that no work was performed on the

Project on June 24, 2007, and that the inspector's report was erroneously dated June 24 for work that was actually performed on June 25, 2007. Johnson testified that all the records initially noted the date as June 24 but were later changed. Johnson further testified that concrete could not have been placed on a Sunday, because ready mix concrete suppliers do not deliver concrete on Sundays. Johnson testified that the County's inspectors, the subcontractors' foremen and he often shared information when filling out their reports at the end of the day, which he believed explained the common error.

Careful review of the subsequent reports prepared by the County's inspector, Johnson and HGE's foreman corroborate Johnson's testimony that the work was actually performed on Monday, July 25 rather than Sunday, July 24, 2007. A comparison of the inspector's reports dated June 24 and June 25, 2007, shows that both reports are identical, listing the same work performed by HGE workers and reporting an identical amount of concrete delivered to the job site. In addition, both reports bear the same report number, "68," and list the same cumulative total hours worked on the Project to date. The following inspector's report, for Tuesday, June 26, 2007, is numbered "69" and reports an increase in the cumulative hours worked on the Project. Both Johnson's and HGE's daily reports with the dates corrected from June 24 to June 25 also report consecutive report numbers with their reports for Tuesday, June 26, 2007; "65" and "66" for Johnson and "55" and "56" for HGE, with the report numbers continuing in an unbroken sequence for the remainder of the daily reports in evidence.

Based on the record as a whole, the most reasonable conclusion is that either Johnson, the County's inspector or HGE's foreman reported the wrong day of the month on his report and led the others astray. The error appears to have been caught and corrected in all three sets of reports, but the County's inspector apparently failed to remove the erroneous report dated June 24 after he created a duplicate with the same information and report number correctly dated June 25, 2007. The record therefore supports a finding that no work on the Project was performed by HGE workers on Sunday, June 24, 2007. On this basis, Nelson has disproved the basis of the Assessment's finding that HGE failed to report and pay for Sunday work on June 24, 2007.

Failure to pay the required fringe benefits to the affected workers and credit for 401(k) contributions: Paul Hilliard, HGE's president, testified that he set up a pension plan for HGE to insure that the required fringe benefits were paid correctly for the Project. Hilliard testified that each of the affected workers set up a 401(k) account into which HGE deposited the full fringe benefit amount owing for the applicable prevailing wage rates. Hilliard further testified that HGE did not pay any fringe benefits on private work. HGE only did one subsequent public works project, which did not commence until late 2008 when HGE's work on the Project was nearly completed.

The record shows that, at all times relevant to this Decision, HGE maintained a qualified 401(k) plan (Plan) for its workers that was sponsored and administered by a third party administrator, Plan Benefit Services, Inc. Plan funds were invested and held in trust by Reliance Trust Company. For public works projects only, HGE made "employer prevailing wage contributions" (PW contributions). Pursuant to the Master Plan Adoption Agreement, HGE made PW contributions to the Plan for workers entitled to receive prevailing wages as follows:

> . . . Employer Prevailing Wage Contributions shall be contributed and allocated at the hourly rate for that Employee's employment category, employment classification, age, service, status, and the type of hours, as specified on the Schedule A of this Adoption Agreement. . . .

Participating HGE workers also had the option of contributing to the Plan via elective salary deferral contributions. Only one of the affected workers, Armando Casillas, elected to make salary deferral contributions in addition to the PW contributions made to his account by HGE. Both salary deferral contributions and PW contributions vested immediately and were nonforfeitable. Nelson submitted copies of contribution summaries for HGE's 401(k) plan from January 1, 2006, through December 31, 2008, a plan statement of the same period, and bank statements and cancelled checks confirming that all reported contributions had been made and that the fringe benefits owed to all of the affected workers had been paid in full.

DLSE determined that HGE must have been paying fringe benefits on private work as well as on public work because five individuals who were not reported on HGE's CPRs for the Project, including Hilliard, had 401(k) account balances reported on HGE's 401(k) plan state-

ment for the time period of the Project and because some of those individuals showed contributions to their accounts prior to the commencement of work on the Project. HGE's 401(k) plan statement also reports that Casillas had an account balance prior to the Project. On that basis, DLSE determined that the PW contributions HGE made for the affected workers had to be annualized pursuant to section 1773.1, subdivision (d). Gentry divided the PW contributions reported for each of the affected workers on HGE's CPRs by 2080 hours (40 hours times 52 weeks) and then multiplied the resulting hourly figure by the number of hours worked by each of the affected workers on the Project. DLSE credited that reduced amount against the assessed unpaid wages for each worker in its revised audit.

The record shows that four of the five individuals with 401(k) account balances who did not work on the Project made only salary deferral contributions and received no contributions that were paid by HGE. Similarly, the only 401(k) contributions reported prior to the commencement of work on the Project by HGE were salary deferral contributions. The fifth individual who did not appear on the CPRs for the Project, Matt Baeta, is reported as entering the plan on August 11, 2008, after nearly all of the work subject to the Assessment had been completed. Baeta received only PW contributions. The record indicates that Baeta only performed work on HGE's subsequent public works project.

Oversight of HGE by Nelson: The Subcontract Agreement (Subcontract) between Nelson and HGE, executed on or about January 5, 2007, required HGE to submit its CPRs to Nelson as a condition precedent to payment. The Subcontract also contains the full text of sections 1771, 1775, 1776, 1777.5, 1813 and 1815 as required by section 1775, subdivision (b)(1). Nelson's compliance officer, Yvette Florendo, wrote to HGE on March 22, 2007, approximately three weeks before HGE workers first worked on the Project, detailing HGE's labor compliance reporting requirements under the Subcontract. Among other things, HGE was required to submit its original CPRs to Nelson on a weekly basis within three working days of the payroll date. HGE was also required to submit a daily report to Nelson's project superintendent by the end of each work day.

The correspondence between Florendo and HGE establishes that Nelson reviewed HGE's CPRs and daily reports on an ongoing basis, identified and requested correction of inconsistencies and errors, confirmed that the identified errors had been corrected and followed up with HGE when CPRs were not submitted in a timely fashion. On August 7, 2007, for example, Florendo wrote to HGE requesting an explanation and correction of the following discrepancies: no overtime was reported as being paid for work on May 28, 2007, which was a holiday; the deductions reported for Casillas did not add up; and daily reports had been submitted for some days of work without corresponding hours reported on HGE's CPRs. HGE addressed and corrected the issues identified within approximately one week.

Hilliard testified the Project was HGE's first public works job and that neither he nor his staff had ever prepared CPRs before. Hilliard admitted that there were numerous errors early in the Project, but his staff worked closely with Nelson to identify and correct errors promptly. Hilliard testified that revised CPRs were prepared, and correction checks were promptly issued, to workers as errors were corrected. HGE had submitted three sets of revised CPRs by the end of its work on the Project. Hilliard retained an accountant, Gina Stone, to do an audit of HGE's CPRs, daily reports and payroll for the Project to make sure that all prevailing wages and fringe benefits had been properly paid. Stone testified that she was familiar with California prevailing wage requirements. Stone testified that she conducted a painstaking audit and was able to confirm that all workers were reported as having been paid correctly. Stone also testified that she had been able to match cancelled payroll and correction checks to HGE's CPRs for all but one payment and to confirm that all required fringe benefits had been deposited to the affected workers' 401(k) accounts. Stone testified that the only check that she could not confirm had cleared was payroll check number 103 issued to Ernie Glynn in the amount of $578.40 for 16 hours worked on two days in the pay period ending April 14, 2007.

DLSE served a Notification of Complaint Filed on HGE and Nelson on April 23, 2008. Charles Fletcher, Nelson's controller, wrote to Hilliard forwarding a copy of the Notification of Complaint via facsimile on April 29, 2008. Hilliard responded to Nelson the same day, stating that he was already in touch with DLSE and was submitting the requested documentation. Nel-

son did not make a final disbursement to HGE until after HGE submitted a Final Affidavit certifying payment of prevailing wages on or about October 2, 2008. At the time of the final disbursement, Stone had not yet completed her audit. Nelson introduced no evidence to explain why it paid HGE in full when it knew that the complaint was pending with DLSE.

After service of the Assessment, Nelson subpoenaed copies of HGE's bank statements, payroll records, cancelled checks and pension deposit records, all of which were produced in evidence. Fletcher testified that he conducted his own detailed audit of HGE's final revised CPRs, cross-referencing them against the Inspector Reports, the daily job journals prepared by Johnson and HGE's daily work reports to confirm that the correct hours and prevailing wage rates were reported for each of the affected workers on each day of work on the Project. Fletcher compared the information reported on HGE's revised CPRs against HGE's bank statements, payroll records, cancelled checks and pension deposit records to confirm that all of the reported amounts had been paid. In collaboration with Stone, Fletcher was able to confirm that the reported amounts had been paid to all of the affected workers with the exception of the one check to Glynn noted above. Nelson submitted a detailed analysis of HGE's final revised CPRs at hearing, with copies of the applicable cancelled checks and payroll journals matched to each week's CPR to support Fletcher's audit.

Revised Audit: Based on the additional information provided by Nelson after service of the Assessment, DLSE produced a revised audit at the hearing that reduced the assessed unpaid wages by nearly 25 percent to $59,424.19. Penalties continued to be assessed under section 1775 at the maximum rate of $50.00 per violation with no reduction in the total amount of the penalties. Though HGE had no record of prior prevailing wage violations, DLSE determined that the maximum penalty of $50.00 per violation was warranted by its finding that HGE had falsified its CPRs. DLSE did not formally move to amend the Assessment downward; but, because the facts clearly warrant the reduction, the amounts in the revised audit are accepted as the assessed unpaid wages under the Assessment.[4]

[4] Nelson objected to DLSE's production of the revised audit into evidence as a violation of its due process rights

**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*).) 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 *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 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

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because it had not received the revised audit and supporting worksheets in advance of the hearing. Nelson contends that it was prejudiced because it could not prepare a response to the revised audit in advance of the hearing. Because no additional workers were added to the revised audit and the assessed unpaid wages were reduced by nearly 25 percent, I find that Nelson was not prejudiced by DLSE's introduction of the revised audit at hearing.

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."

Nelson Has Disproven The Basis Of DLSE's Reclassification Of Workers From Laborer Group 1 To Cement Mason.

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. It is the rate paid to the majority of workers; if there is no single rate payable to the majority of workers, it is the single rate paid to most workers (the modal rate). On occasion, the modal rate may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. (§§ 1773, 1773.9, and *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.) The Director determines these rates and publishes general wage determinations, such as SC-23-102-2-2006-2 and SC-23-203-2-2006-1, to inform all interested parties and the public of the applicable wage rates for the "craft, classification and type of work" that might be employed in public works. (§ 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.)

The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (§ 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.

The sole evidence supporting DLSE's reclassification of ten of the affected workers from laborer to cement mason for some or all of their work on the Project are the hearsay inspector's reports which report concrete work being performed by HGE workers on some days when no cement masons were reported on HGE's CPRs. As described by Johnson, the only witness with personal knowledge of the work actually performed, the disputed work appears to be covered by

the applicable Laborer Group 1 PWD which expressly includes concrete related classifications such as "Cleaning and Handling of Panel Forms," "Concrete Screeding for Rough Strike-Off," "Slip Form Raisers," and "Wire Mesh Pulling – All Concrete Pouring Operations." In addition, the applicable advisory scope of work includes "mixing, handling, shoveling, . . . conveying, pouring, handling of the chute from ready mix trucks."

DLSE has produced no documentary evidence to rebut Johnson's testimony, relying only on the general description contained in the unverified inspector's reports which Nelson objects to as hearsay.

Rule 45 (d) [Cal. Code Reg. tit. 8 §17245, subd. (d)] provides in relevant part:

> Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it either would be admissible over objection in a civil action or no Party raises an objection to such use. . . .

The inspector's reports are indisputably hearsay to which an objection was made. Under Rule 45, these reports alone cannot support a finding that the work in dispute must fall within the applicable Cement Mason scope of work as argued by DLSE.

DLSE argues that the Advisory Notice, which states that the classification of "Laborer, Concrete" is not recognized on public works, must be read as notice that no concrete work of any kind can be performed by laborers. DLSE's reading is overbroad. By its terms, the Advisory Notice only bars work added by certain 2006 amendments to the underlying laborers agreement. The only amendment regarding concrete work was the addition of the following language: "concrete that may be hand worked by any method or means." Even when that language is excluded, the concrete pouring, shoveling and rough strike-off work described by Johnson as the concrete work performed by HGE worker on the Project is explicitly included in applicable Laborer scope of work that was in effect at the time of bid. For these reasons, this Decision finds that HGE properly paid the Laborer Group 1 prevailing wage rate for the disputed work. Nelson has therefore satisfied its burden to disprove the basis of the Assessment's reclassification of HGE workers from laborer to cement mason.

Nelson Has Established That HGE Is Entitled To Full Credit For The 401(k) Contributions That It Made To The Affected 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:
>
> (1) Health and Welfare.
>
> (2) Pension
>
> * * *
>
> (b) Employer payments include all of the following:
>
> (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.[5]

In this case, Nelson has proven that HGE maintained a qualified 401(k) plan for its workers. The records show that HGE made contributions to the 401(k) accounts of all of the affected workers in the full amount of the required fringe benefit contributions for their applicable prevailing wage rates based solely on the hours that they worked on the Project. The revised audit gave HGE credit only for the annualized value of those contributions, as calculated by Gentry, resulting in an underpayment of the fringe benefit payments owing to all of the affected workers.

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[5] Training fund contributions are not in issue in this case.

The issue for decision is whether those contributions were properly annualized by DLSE under section 1773.1, subdivision (d). I find that annualization is not required in this case.

Section 1773.1, subdivision (d) provides, in pertinent part as follows:

> (d) The credit for employer payments shall be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, except where one or more of the following occur:
>
> * * *
>
> (4) The director determines that annualization would not serve the purposes of this chapter.

As DLSE correctly explains in its post hearing opening brief, the primary purpose of this provision is to prevent an employer from using public projects to subsidize private projects.

The contributions made by HGE are not the sort of benefits that require annualization under section 1773.1. The prevailing wage contributions made by HGE to the affected workers' 401(k) accounts were made in the precise amount of the fringe benefit component of the applicable prevailing wage rates and were made for public work only. The amount of the PW Contributions for each worker were reported on HGE's CPRs for the Project and the record shows that all of the reported contributions were made. Moreover, the contributions vested immediately for the workers' benefits and were non-forfeitable.

The fact that HGE employees also made voluntary salary deferral contributions to their 401(k) accounts for work on both public and private construction projects does not convert the PW Contributions into a "year-long" fringe benefit requiring annualization. For these reasons, I find that annualization of these contributions would not serve the purposes of section 1773.1. Nelson has therefore established that HGE is entitled to full credit for the fringe benefit contributions that it made to the affected workers.

Nelson Has Established That DLSE Abused Its Discretion In 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 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.[6]

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 of Civil Procedure section 1094.5, subdivision (b).) In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment "because in [his] own evaluation of the circumstances the punishment appears to be too

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[6] Section 1777.1, subd. (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."

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 Reg. tit. 8 §17250, subd. (c)].)

The record establishes two violations that justify the imposition of penalties under section 1775, subdivision (a), reduced from an original assessment of 525 violations, totaling $26,250.00. The assessment of those penalties at the maximum rate of $50.00 per violation cannot be sustained based on the factors cited by DLSE. DLSE determined that the maximum penalty of $50.00 per violation was warranted by its finding that HGE had falsified its CPRs in spite of the lack of any prior violations by HGE. As seen above, it is clear that there is no factual basis to support DLSE's finding that HGE had falsified its CPRs. With the sole basis for DLSE's decision not to mitigate penalties under section 1775 in this case disproven, the failure to mitigate penalties is an abuse of discretion. Because the discretion to set penalties under section 1775 is committed solely to the Labor Commissioner, this part of the Assessment must be vacated and remanded to DLSE for redetermination of the penalties in light of the appropriate factors and the other Findings in this Decision.

Nelson and HGE Are Jointly And Severally Liable For The Penalties Assessed Under Section 1775.

The affected contractor and subcontractor are jointly and severally liable for penalties under section 1775 unless the contractor can prove it was ignorant of a subcontractor's prevailing wage obligations and that it met four specific requirements:

> (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.
>
> (2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

> (3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.
>
> (4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(Section 1775, subdivision (b).)

While Nelson has shown that it complied with three of the four requirements of section 1775, subdivision (b), it has not established that it complied with subdivision (b)(3). The record shows that Nelson was aware of the complaint against HGE when it made the final disbursement to HGE in October 2008 and failed to retain any funds from the amounts owing to HGE to cover the Assessment if it proved to be accurate. Consequently, the record does not support a finding that Nelson took sufficient "corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project."

Because Nelson has not established that it complied with all four requirements, it is not entitled to relief from penalties under section 1775, subdivision (b). Consequently, Nelson remains jointly and severally liable for the penalties assessed against HGE under section 1775.

<u>Nelson Has Established A Sufficient Basis For Waiver Of Liquidated Damages.</u>

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

> After 60 days following the service of a civil wage and penalty assessment under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment . . . 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 . . . with respect to a portion of the unpaid wages covered by the assessment . . . , the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

In accordance with the statute, Nelson would be liable with HGE for liquidated damages only on any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is closely tied to Nelson's position on the merits and specifically whether it had "substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment."

Here, Nelson's position on the merits resulted in a reduction of the Assessed unpaid prevailing wages from $75,746.09 to $578.40, a reduction of more than 99 percent. The achievement of an almost complete elimination of the assessed unpaid wages constitutes sufficient grounds to exercise discretion to waive liquidated damages.

**FINDINGS**

1. Affected contractor Lewis C. Nelson & Sons, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. HGE underpaid Glynn in the amount of $578.40 for his work on the Project, as detailed above, comprising 2 violations. Nelson is jointly and severally liable for the unpaid prevailing wages owed to Glynn as modified. In addition, interest is due and shall continue to accrue on the unpaid wages as provided in section 1741, subdivision (b).

3. DLSE abused its discretion in setting section 1775, subdivision (a) penalties at the maximum rate of $50 per violation. The Assessment, as modified, of $100.00 in penalties under section 1775, subdivision (a) must therefore be vacated and remanded to DLSE for redetermination in light of appropriate factors and the other findings in this Decision. Nelson has not demonstrated that it is entitled to relief from penalties under section 1775, subdivision (b) and therefore remains jointly and severally liable for the penalties assessed upon HGE on remand under section 1775.

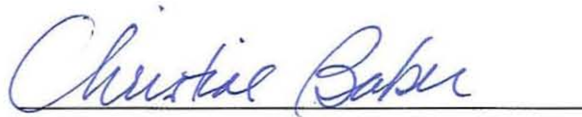
4. The unpaid wages found due in Finding No. 2 remained due and owing more than

sixty days following issuance of the Notice. As discussed above, Nelson has established sufficient grounds to waive payment of liquidated damages under section 1742.1, subdivision (a).

The Civil Wage and Penalty Assessment is modified 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.

As to all issues decided here, the Decision is final. With respect to the remanded portion of this Decision only, DLSE shall have 60 days from the date of service of this Decision to issue a new penalty assessment under section 1775, subdivision (a). Should DLSE issue a new penalty assessment, Nelson shall have the right to request review in accordance with section 1742, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for that purpose.

Dated: 6/20/2011



Christine Baker
Acting Director of Industrial Relations