

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**2K Roofing, LLC**

Case No. 14-0375-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected subcontractor 2K Roofing, LLC (2K Roofing) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the Jordan Starr Middle School Modification and New Construction (Project) performed for the Palo Alto Unified School District (District) in the County of Santa Clara. The Assessment determined that 2K Roofing owed \$162,074.78 in unpaid prevailing wages and \$59,050.00 in penalties under Labor Code section 1775, subdivision (a).<sup>1</sup> The affected contractor, S.J. Amoroso Construction Co., Inc. (Amoroso), who also requested review of the Assessment, paid the assessed unpaid wages to DLSE in full settlement of its joint and several liability and withdrew its Request for Review on or about June 5, 2015.<sup>2</sup> DLSE's settlement with Amoroso left unpaid training funds, the assessment of penalties and liquidated damages under section 1742.1, subdivision (a) in issue.

A Hearing on the Merits was held on July 1, 2015, in Oakland, California, before Hearing Officer Ed Kunnes. Galina Velikovich appeared for DLSE. Erika Ibaibariaga appeared by telephone as the representative of 2K Roofing.<sup>3</sup> The matter was submitted for decision on July 1, 2015.

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<sup>1</sup> All further statutory references are to the California Labor Code, unless otherwise indicated.

<sup>2</sup> Case number 14-0434-PWH.

<sup>3</sup> The parties consented to Ibaibariaga's appearance on behalf of 2K Roofing by telephone. Ibaibariaga explained at the beginning of the hearing that 2K Roofing was a revoked Nevada limited liability company for which she had worked under her father, Guillermo Ibaibariaga, a member and principal. California applies the law of the state of

At trial, the parties stipulated to the issues for decision as follows:

- Were the hours the workers actually worked on the project correctly listed on the Certified Payroll Records (CPRs)?
- Were all workers who worked on the project reported on the CPRs?
- Were all workers fully compensated for all hours actually worked on the project?
- Were required training fund contributions paid in full to an approved plan or fund?
- Is 2K Roofing liable for penalties under section 1775?
- Is 2K Roofing liable for penalties under section 1813?<sup>4</sup>
- Is 2K Roofing liable for liquidated damages?

For the reasons stated below, the Director finds that 2K Roofing failed to carry its burden to prove that the basis of the Assessment was incorrect. Additionally, 2K Roofing provided no grounds for waiver of liquidated damages. The record establishes, however, and DLSE acknowledges, that penalties under section 1775 were over assessed due to an error in DLSE's audit spreadsheet and should be revised downward from \$59,050.00 to \$27,700.00.

Accordingly, the Director affirms the Assessment in part and modifies the Assessment in part.

#### FACTS

The following witnesses testified at the Hearing on the Merits: Deputy Labor Commissioner Jerry McClain and Ibaibbarriaga. The facts stated below are based on the testimony of the witnesses, the documentary evidence submitted by the parties and the other documents in the Hearing Officer's file.

The District advertised the Project for bid on December 8, 2011, and subsequently awarded the contract to Amoroso. Amoroso subcontracted with 2K Roofing to perform roofing work on the Project. The applicable prevailing wage determination (PWD) is STC-2011-2 (General PWD for Santa Clara County) and the applicable job classifications for all affected workers are Sheet Metal Worker (total sheet metal contract of \$200,000.00 or less) and Roofer, Kettleman. The applicable basic hourly rate for Sheet Metal Worker was \$48.85 and the

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incorporation to determine its legal existence. *Capital Gold Group, Inc. v. Nortier* (2009) 176 Cal.App. 4<sup>th</sup> 1119, 1127. Nevada law, as opposed to California law, allows a revoked corporation to sue and defend. *AA Primo Builder, LLC v. Washington* (2010) 245 P.3d 1190, 1195.

<sup>4</sup> The Labor Commissioner did not assess penalties under section 1813, and therefore, the issue of section 1813 penalties, as raised by both parties, is not relevant to, and will not be addressed in, this Decision.

applicable basic hourly rate for Roofer, Kettleman was \$32.43. 2K Roofing performed roofing work using 14 sheet metal workers and 24 roofers on the Project from July 16, 2012 to April 18, 2013.

McClain conducted an investigation based upon a complaint made by five 2K Roofing workers: Sergio Santillano, Jesus Rivera, Jesus Gomez, Jesus Flores and Ramon Rene Salazar. McClain found that 2K Roofing's Certified Payroll Records (CPRs) were inconsistent with hours and days reportedly worked by 2K Roofing workers who responded to the Labor Commissioner's questionnaires. McClain interviewed the workers who responded to the questionnaire and found that 2K Roofing's CPRs only reported a fraction of the hours those workers stated that they worked on the Project. McClain also compared 2K Roofing's CPRs to Amoroso's Daily Reports for the Project which recorded that more 2K Roofing workers were present and working on the Project site than were reported in the CPRs.

Based on the completed questionnaires and interviews, McClain found that 2K Roofing had failed to report the five sheet metal workers who had filed the initial complaint on its CPRs. With the exception of Rivera, all of these unreported sheet metal workers had completed and returned questionnaires to the Labor Commissioner. After speaking to these workers, McClain concluded that, Salazar had brought them to work on the Project at the request of 2K Roofing. Salazar informed McClain that he had received a lump sum payment from 2K Roofing which was to be divided between him and these other workers at an hourly rate significantly below the required prevailing wage.

As a result of his investigation, McClain concluded that 2K Roofing had shaved the hours it reported for the workers that were reported on its CPRs and failed to report some workers on its CPRs at all. Based on 2K Roofing's CPRs, the Daily Reports and the workers' questionnaires and interviews, McClain determined that 2K Roofing had paid its workers at well below the required prevailing wage rates paying workers over \$25.00 per hour in only a few instances and paying several workers under \$25.00 per hour. McClain also determined that 2K Roofing had failed to pay the required training fund contribution for all the hours worked on the Project. In all, McClain found that 2K Roofing had underpaid its workers a total of \$162,074.78 constituting 554 violations of section 1775, subdivision (a) for failure to pay the required prevailing wages.

Senior Deputy Labor Commissioner, Christopher Kim, determined that these violations were willful and assessed the maximum penalty of \$50.00 per violation, as allowed by the then operative version of section 1775,<sup>5</sup> totaling \$27,700.00 for 554 violations.

Ibaibbarriaga testified that Jorge Cruz, a member of 2K Roofing, and Julian Alvarez, 2K Roofing's foreman on the Project, used the Project to further their overall goal to undermine 2K Roofing by gathering workers who would testify against 2K Roofing. Additionally, Ibaibbarriaga testified that 2K Roofing was not aware of the discrepancy between the number of workers reported to be present at the jobsite and those listed on its CPRs because 2K Roofing relied upon the names of the workers who clocked in at the jobsite. However, Ibaibbarriaga presented no timesheets for this Project. Nor did Ms. Ibaibbarriaga offer any exhibits into evidence.

### 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. 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." (§ 90.5, subd. (a). See, too *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and 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 unpaid wages, if those wages and penalties are not deposited with the Department of Industrial Relations within 60 days following an assessment.

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 may appeal that assessment by filing a request for review under section 1742. At the

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<sup>5</sup> Section 1775 prior to 2012 allowed a maximum penalty of \$50.00. The Labor Commissioner used the advertised bid date, December 8, 2011, to set the penalty. As of January 2012, the maximum penalty was raised to \$200.00.

hearing the contractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (§ 1742, subd. (b).) DLSE’s determination “as to the amount of the penalty shall be reviewable only for abuse of discretion.” (§ 1775, subd. (a)(2)(D).) Accordingly, DLSE’s evidence constitutes prima facie support for an assessment.

DLSE provided evidence both through testimony and exhibits that 2K Roofing failed to report all workers who worked on the Project, failed to report all hours worked on the Project, and failed to fully compensate its workers for all hours actually worked on the Project. Employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) DLSE proved that 2K Roofing failed to keep accurate CPRs in violation of section 1776. The Assessment, however, cited 2K Roofing for prevailing wage violations, only.

2K Roofing in response to DLSE’s evidence stated only that it relied upon the time clock at the jobsite for determining the wages owed to its workers. This response was insufficient to rebut DLSE’s evidence that the CPRs were deficient with regard to reporting the total number of workers at the jobsite and the total hours worked. DLSE’s evidence showed that 2K Roofing arranged for payment of the five unreported workers separate and apart from 2K Roofing’s payroll system established for the other workers. That is, as stated above, Salazar received payment from 2K Roofing to be divided between him and these other unreported workers. Thus, the time clock was not relevant to refuting the presence of the unreported workers. Time clock evidence may have been somewhat relevant, although not necessary determinative, to address the discrepancy in the hours stated by other workers. 2K Roofing, however, supplied no timecards so that a comparison could be made of these time cards to its CPRs.

Also, 2K Roofing’s testimony regarding the time clock does not support a finding that 2K Roofing lacked knowledge of the CPRs’ defects. 2K Roofing’s failure to deny the cash payments via Salazar to the five unreported workers acted an admission of 2K Roofing’s knowledge of the five unreported workers and knowledge of the deficiency within the CPRs.

Additionally, 2K Roofing should have had sufficient oversight at the jobsite to determine generally the hours its employees worked and the number of workers on the Project regardless of the time clock.

The only other testimonial response provided by 2K Roofing was that a certain member of 2K Roofing together with an employee of 2K Roofing gathered witnesses against 2K Roofing for the Labor Commissioner's investigation. Whether true or not, the contention that certain individuals from 2K Roofing helped in the Labor Commissioner's investigation (and may have helped initiate the investigation) does not refute the evidence presented by DLSE. In fact, the alleged help from insiders may arguably lend credibility to the information compiled by the Labor Commissioner from the perspective that insiders could guide McClain to collect more detailed and accurate information than someone not familiar with 2K Roofing.

DLSE provided evidence both through testimony and exhibits that 2K Roofing failed to pay its workers the prevailing wage for the applicable trades, including failure to pay the required training fund contributions in full. None of 2K Roofing's testimony addressed or can rebut the irrefutable DLSE contention that 2K Roofing did not pay the required prevailing wage rates to its workers for the trades they performed on the Project. 2K Roofing has therefore failed to satisfy its burden to disprove the basis of the Assessment.

DLSE Properly Assessed Penalties Under Section 1775 At The Then  
Maximum Rate Of \$50.00 Per Violation.

Section 1775, subdivision (a), as it read at the relevant time, 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.<sup>[6]</sup>

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

The Director’s review of DLSE’s determination is limited to an inquiry into whether the action was “arbitrary, capricious or entirely lacking in evidentiary support . . .” (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the 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.

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<sup>6</sup> 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.”

The record shows that DLSE assessed penalties under section 1775 at the then maximum rate of \$50.00 per violation based on its determination that 2K Roofing's violations had been willful. 2K Roofing has offered no evidence or argument to show that DLSE abused its discretion in assessing penalties at the maximum rate.

The record does establish, and DLSE concedes, however, that, due to a computation error, the total section 1775 penalties assessed should have been \$27,700.00, rather \$59,050.00 for 554 violations at the rate of \$50.00 per violation. This Decision therefore modifies the assessed section 1775 penalties in accord with the evidence.

2K Roofing Is Liable For Liquidated Damages Under Section 1742.1.

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

After 60 days following the service of a . . . 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. . . .

Absent waiver by the Director, 2K Roofing is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Notice. Entitlement to a waiver of liquidated damages in this case is tied to 2K Roofing's position on the merits and specifically whether, within the sixty-day period after service of the Assessment, it had "substantial grounds for appealing the . . . notice with respect to a portion of the unpaid wages covered by the . . . notice." In this case, although the assessed unpaid wages were paid by Amoroso when it settled with DLSE prior to hearing, that settlement occurred well beyond the 60-day period for requesting review. Consequently, no wages were paid or deposited with Department of Industrial Relations under section 1742.1, subdivision (b) within 60 days after service of the Assessment so as to release 2K Roofing from the liability for liquidated damages.



2K Roofing has presented no evidence to show that it had substantial grounds for believing the Assessment was in error to support a waiver of liquidated damages under section 1742.1, subdivision (a). Liquidated damages are therefore affirmed against 2K Roofing in the amount of the assessed unpaid wages.

### FINDINGS

1. Affected subcontractor 2K Roofing filed a timely Request for Review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Affected subcontractor 2K Roofing underpaid the prevailing wages owed to its employees on the Project in the aggregate amount of \$162,074.78. None of these wages were paid or deposited in escrow with the Department within 60 days after service of the Assessment and 2K Roofing has not established any basis for waiver of liquidated damages under section 1742.1, subdivision (a). Accordingly, liquidated damages are due in the sum of \$162,074.78 under section 1742.1, subdivision (a).

3. 2K Roofing did not make the required contributions to the applicable training funds on the Project in the aggregate amount of \$5,066.04.

4. Penalties under section 1775 are due in the aggregate amount of \$27,700.00 for 554 violations at the rate of \$50.00 per violation.

5. The amounts found due in the Assessment, as affirmed and modified by this Decision, are as follows:

Training Fund:	\$5,066.04
Penalties under section 1775, subdivision (a):	\$ 27,700.00
Liquidated damages:	\$ 162,074.78
<b>TOTAL</b>	<b>\$194,840.82</b>

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

**ORDER**

The Civil Wage and Penalty Assessment 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: 3/25/2015

  
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Christine Baker  
Director of Industrial Relations