

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

AMG Engineers & Contractors

Case No. 07-265-PWH

From a Notice of Withholding issued by:

Office of Contract Compliance

ORDER DENYING RECONSIDERATION

AMG Engineers & Contractors (“AMG”) seeks reconsideration of the Decision of the Director issued on July 22, 2009 (“Decision”), on the basis that the Decision incorrectly assessed liquidated damages under Labor Code section 1742.1, subdivision (a), and incorrectly assessed Labor Code section 1775 penalties at the maximum allowable rate of \$50.00 per violation. AMG, the prime contractor for the underlying project, argues that liquidated damages are not due because the enforcing agency, the Office of Contract Compliance withheld the sum of \$117,000, which was in excess of the amount of wages and penalties due.

AMG relies on the current version of Labor Code section 1742.1, subdivision (b) [Stats 2008, ch. 402, § 3, SB 1352, eff. 1/1/09], authorizing deposit of the full amount of an assessment in escrow with the Department of Industrial Relations pending administrative and judicial review as a means to avoid liquidated damages. However, this version of Labor Code section 1742.1, subdivision (b) did not take effect until January 1, 2009; the prior version had no provision for depositing wages to avoid liquidated damages. Because the 60-day time after service of the Assessment for payment of unpaid prevailing wages had run prior to the amendment’s effective date, the version in effect at that time, which did not authorize deposits in escrow, remains applicable to this case.

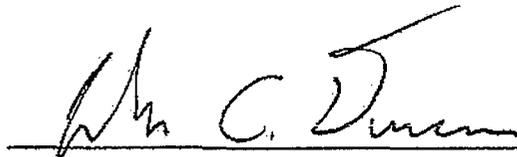
AMG further seeks reconsideration on the basis that the Decision incorrectly assessed Labor Code section 1775 penalties at the maximum allowable rate of \$50.00 per violation.

AMG asserts that it had a good faith belief that it did not owe the workers more money, based on the directive of the Mayor of Los Angeles limiting work on the streets to six hours per day, and further that it had no "past violations" because this was AMG's first contract with the City of Los Angeles.

The Decision thoroughly examined, and rejected, AMG's contentions regarding the six-hour day issue. It said nothing about "past violations" on other projects, but rather that OCC had cited "prior violations on the *same* project." (Emphasis supplied.) As stated in the Decision, the burden was on AMG to prove that OCC had abused its discretion in setting the penalty amount under section 1775. AMG failed to meet that burden.

Accordingly, AMG's request for reconsideration is denied.

Dated: 8/4/09

A handwritten signature in black ink, appearing to read "John C. Duncan", written over a horizontal line.

John C. Duncan Director of
Industrial Relations

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

AMG ENGINEERS & CONTRACTORS

Case No. 07-0265-PWH

From a Notice of Withholding issued by:

OFFICE OF CONTRACT COMPLIANCE

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

Affected contractor AMG Engineers & Contractors (“AMG”) submitted a timely request for review of the Notice of Withholding (“Notice”) issued by City of Los Angeles Office of Contract Compliance (“OCC”) with respect to the Hollywood-Central City North STMC Street Lighting Project (“Project”) in Los Angeles County. OCC withheld contract funds from AMG in the amount of \$108,513.10 for failing to pay prevailing wages and associated penalties. A Hearing on the Merits was conducted on May 8, July 2, and August 11-12, 2008, in Los Angeles, California, before Hearing Officer Douglas P. Elliott. Kenneth S. Grossbart appeared for AMG, and James Patrick Nollan appeared for OCC. The case was submitted on October 31, 2008. On December 15, 2008, the Hearing Officer ordered the submission vacated and reopened the hearing for additional argument and evidence on several issues. A supplemental hearing was held on May 19, 2009, at which AMG was represented by its president, Albert Gharagozian. The matter was resubmitted on May 21, 2009.

The issues for decision are:

- Whether the Notice correctly found that AMG’s workers generally worked eight hours per day on the Project as reported on AMG’s Certified Payroll Records (“CPRs”).
- Whether the Notice correctly found that AMG had failed to pay its Laborer

and Electrician Employees the required prevailing wage rates for their work on the Project.

- Whether the Notice properly reclassified Jonathan Lanzetti from apprentice electrician to journeyman.
- Whether the Notice properly reclassified Heriberto Jara from Laborer to Transportation Systems Technician.
- Whether the Notice correctly assessed unpaid prevailing overtime wages for Saturday work.
- Whether the Notice properly assessed unpaid training fund contributions from January 15, 2006, to the end of the project.
- Whether OCC abused its discretion in assessing penalties under section 1775 at the maximum rate of \$50.00 per violation for failure to pay prevailing wages and \$10.00 per violation for failure to pay training fund contributions when the correct prevailing wage was paid.
- Whether the Notice properly assessed penalties under section 1813 for failure to pay the prevailing overtime wage rate for hours worked in excess of eight per day, or 40 per week or on Saturday.

This decision modifies and affirms the Notice.

FACTS

AMG employees worked on the Project between November 2005 and December 2006 in Los Angeles County. The Project involved upgrading street lighting at designated locations within the City of Los Angeles. All of the work performed was subject to the payment of prevailing wages under Labor Code sections 1720 *et seq.*¹ The Bid Advertisement Date was March 2, 2005. All work was performed between November 2005 and December 2006 in Los Angeles County. The applicable Prevailing Wage Determinations (“PWDs”) are LOS-2005-1 (Electrician) and SC-23-102-2-2004-1 (Laborer), both of which required predetermined increases during the period when

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

AMG's work on the Project was performed.

OCC requested and obtained approval of forfeitures and penalties from the Division of Labor Standards Enforcement ("DLSE") for alleged prevailing wage violations affecting 14 AMG workers. On August 27, 2007, OCC served the Notice on AMG, informing AMG that \$108,400.00 in contract payments was being withheld. OCC found that AMG's history of prior violations on the same project justified the assessment of section 1775 penalties at the maximum rate of \$50.00 per wage violation, and at a mitigated rate of \$10.00 per occurrence for failing to pay training fund apprentice programs when the correct prevailing wage was paid to the workers. Following the Hearing on the Merits, OCC presented a recalculation of the wages, training funds, and penalties it believed are due based on its interpretation of the evidence. This Summary of Modified Wage Restitution and Penalty Log Per Hearing Testimony ("Modified Wage Summary") recalculated that the unpaid wages and penalties equal \$96,676.06.

Hours of Work: OCC's audit found that AMG's employees on the Project generally worked eight hours per day, Monday through Friday, and sometimes worked additional hours on Saturdays. OCC's inspector on the Project, Kevin Martin, and AMG employees Heriberto Jara and Jonathan Lanzetti, all testified that the normal workday began at the AMG yard between 7:00 and 7:30 a.m. The employees were transported from there to the Project site, and were transported back to the yard in the afternoon, where they ended the work day between 3:30 to 4:00 p.m. Thus, with a 30 minute lunch break, the normal work day was eight hours. The CPRs similarly reported eight hours of work per day in most instances, consistent with the above testimony. The hearing record as a whole, including the construction project diary prepared by Martin, employee timecards, and employee interview forms and complaint forms, supports OCC's findings for the hours worked.² The evidence shows that the CPRs are inaccurate in that they

² During the course of the supplemental proceedings, AMG belatedly sought to impeach the credibility of Martin on the grounds that in a deposition in a civil action Martin produced a personal calendar that revealed certain discrepancies with the Project General Log ("PGL"). AMG contends that Martin's entire testimony lacks credibility. OCC responded in part that the argument is untimely; AMG failed to show any errors in the Assessment related to the asserted discrepancies; and the issues raised are collateral and have little or no probative value. OCC's arguments are well-founded. Martin's personal calendar and related

show work being performed when in fact none was according to Martin. The Modified Wage Summary reduced the claimed unpaid hours accordingly.

AMG bid the Project based on the assumption that it could work on the streets for eight hours a day; but after AMG was awarded the contract, the Mayor of Los Angeles issued an executive directive prohibiting work on the streets before 9:00 a.m. and after 3:30 p.m. Gharagozian stated that the workers insisted on being paid for eight hours of work per day and that he had to agree to this demand to retain his crew.

Gharagozian testified that AMG's workers actually only worked six hours per day but were paid for eight hours and that AMG's CPRs reported the hours paid rather than the hours actually worked. He did not normally arrive at AMG's yard until 8:30 to 8:45 a.m., at least an hour after Jara and Lanzetti reported to work. Further, the CPRs report numerous occasions on which employees worked less than eight hours a day. AMG offered no explanation as to why this would be so if the CPRs merely reflected the employees' insistence on being paid for eight hours even if they actually worked fewer hours.

Underpayment of Prevailing Wages: The CPRs report that AMG paid its Laborers as little as \$17.50 per hour, as opposed to the required prevailing straight-time rate of \$34.03, during the period of January 15 through March 25, 2006. In addition, the CPRs, construction project diary prepared by Martin, employee timecards, and employee interview forms and complaint forms show that AMG made smaller underpayments, including failure to pay required prevailing overtime pay for hours worked in excess of eight hours per day and forty hours per week, on occasion during the remainder of its work on the Project.

AMG contends that it satisfied its prevailing wage obligations on the Project because its workers actually worked only six hours per day, even though they were paid for, and reported on the CPRs as working, eight hours per day, as described above.

Reclassification of Jonathan Lanzetti: Lanzetti began his employment with AMG as a registered apprentice in an apprenticeship program operated by the Associated

arguments are disregarded for the reasons stated by OCC and for the additional reason that they are beyond the scope of the supplemental proceedings ordered by the Hearing Officer.

Builders and Contractors, Inc., LA/Ventura Chapter Electrical Unilateral Apprenticeship Committee (“ABC”). On June 19, 2006, ABC sent a letter to AMG stating that Lanzetti had been advanced to the journeyman electrician level as of June 1, 2006, and “must be paid the state prevailing wage or journeyman wage on all applicable projects.” The CPRs report that AMG continued to pay Lanzetti at the apprentice electrician rate through July 15, 2006, and thereafter paid him at the rate of \$44.43 for straight time instead of the prevailing journeyman electrician rate of \$46.85, resulting in a total underpayment of \$2,493.22. AMG submitted no substantial evidence to the contrary.

Reclassification of Heriberto Jara: The CPRs report that Jara was paid as a Laborer throughout his employment on the Project. The Notice reclassified Jara from Laborer to Transportation Systems Technician from the pay period ending June 4, 2006, through November 12, 2006, and assessed AMG for failing to pay Jara the prevailing rate of \$38.71 per hour required for that classification.

The Project’s Street Lighting Special Specifications require that:

The Contractor shall designate a Foreman who shall be on the jobsite continuously while any work is being performed, and who shall have the authority to act for the contractor on all matters. The Foreman shall be a Journey Level Transportation Systems Electrician and may be in charge of up to eleven workers. The crew may be comprised of Transportation Systems Electricians, Transportation Systems Technicians, Laborers and Apprentices.

On March 1, 2006, AMG designated Jara as “Labor Forman [*sic*]” and Alfredo Melendez as “Electrical Forman [*sic*].”

The Scope of Work for Electrician, which includes Transportation Systems Electrician and Transportation Systems Technician, covers: “electrical work on public streets and freeways, above or below the ground;” including “[a]ll work necessary for the installation, maintenance, renovation, repair or removal of Intelligent Transportation Systems, CCTV, Street Lighting and Traffic Signal work or systems ...” Specifically included is:

All cutting fitting and “bandaging” of such ducts, raceways and all conduits. The cleaning and rodding and installation of ‘Fish and Pull Wires.’

The excavating, setting, leveling and grouting of precast manholes, vaults and pull boxes, including ground rods, or grounding systems and rock necessary for leveling and drainage, as well as the pouring of concrete envelopes, if needed.

The handling of all material from the first point of delivery on the jobsite to the final installation.

Duties that may be performed by a Transportation Systems Technician, paid at 75% of the Journeyman rate, consist of:

Distribution of material at job sites, manual excavation and backfill, installation of system conduits and raceways for electrical, telephone, cable television and communications systems. Pulling, terminating and splicing of traffic signal and lighting conductors and electrical systems including interconnect, detector loop, fiber optic cable and video/data.

Jara testified that he performed numerous tasks, including digging, sometimes with a bobcat and other times with a shovel; connecting and installing lamps; work on pull boxes; and helping the electrician finish connections for fuses. On cross-examination, he acknowledged that he has no professional licenses and is not an electrician by trade.

Saturday Work: The applicable PWDs specify that an overtime rate (generally 1.5 times the straight time rate) must be paid for Saturday work, regardless of whether the worker has already worked 40 hours in a given week. The Notice determined, and the CPRs and time cards show that AMG failed to pay workers the correct overtime rate for Saturday work. AMG produced no contradictory evidence.

Underpayment of Training Fund Contributions: The Notice found that AMG had underpaid its required training fund contributions. The Modified Wage Summary calculates the unpaid contributions in the amount of \$2,712.78, consisting of \$889.91 owed to the ABC Electrical training fund and \$1,822.87 owed to the Laborers training fund, for the period January 9, 2006, to November 3, 2006.

The record shows that AMG failed to make any training fund contribution to ABC for electrician Alfredo Melendez, it made only one payment of \$36.00 for then electrical apprentice Lanzetti in April 2006, and failed to make any contributions to the Laborers training fund from January 2006 to November 2006.

Additionally, AMG paid ABC \$60.00 on March 28, 2006, for a pipe bending class attended by three journeyman electricians and \$300.00 on February 14, 2006, for the annual subscribing employer fee required to be a member of ABC eligible to request apprentices. These payments are separate and distinct from the hourly training fund contributions required by the applicable PWDs. AMG produced no evidence regarding its failure to make the required training fund contributions to the Laborers training fund.

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].)

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 section 1775, subdivision (a) 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 1776.1.

A Labor Compliance Program such as OCC 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), and *see Lusardi, supra.*)

When OCC determines that a violation of the prevailing wage laws has occurred,

a written Notice of Withholding is issued pursuant to section 1771.6. An affected contractor or subcontractor may appeal the Notice of Withholding by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that the contractor or subcontractor shall have the burden of proving that the basis for the Notice of Withholding is incorrect.

AMG Is Required To Pay Its Workers Prevailing Wages For The Hours Reported On Its CPRs For The Project.

Section 1776, subdivision (a) requires that:

Each contractor and subcontractor shall keep *accurate* payroll records, showing the name, address, social security number, work classification, straight time and overtime *hours worked* each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

- (1) The information contained in the payroll record is true and correct.
- (2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project. [Emphasis added.]

Thus, AMG had a legal obligation under the prevailing wage law to accurately report the hours **worked** on its CPRs and was required to verify the accuracy of each week's report. Additionally, section 226, subdivision (a) requires every employer to furnish employees with a statement showing, among other things, "all applicable hourly rates in effect during the pay period and the corresponding **number of hours worked** at each hourly rate by the employee." (emphasis added.)

AMG essentially contends that its CPRs for the Project are inaccurate, reporting eight hours of work per day for most workers when only six hours per day were actually worked. Consideration of all the testimony and evidence, however, shows that AMG has failed to carry its burden of proving that its workers actually worked fewer hours on the Project than were reported on the CPRs. AMG's only evidence in support of its contention that the CPRs are inaccurate is Gharagozian's testimony that AMG's workers

regularly worked only six hours per day but were paid for eight. Gharagozian's testimony alone, however, is insufficient to impeach the credibility of the CPRs and timecards, both of which show that the workers normally worked eight hours per day.

First, the testimony of employees Jara and Lanzetti, and that of City inspector Martin, are essentially consistent with the CPRs and timecards and support a finding that those records accurately report the time worked by AMG employees on the Project. Further, it is undisputed that the workers reported to AMG's yard in the morning, were transported from there to the Project site, and were transported back to the yard in the afternoon. With the possible exception of the portion of the work done on Olympic Blvd. near the AMG yard, a significant amount of time obviously was needed to load the trucks, transport the workers, equipment and supplies to the worksite, and return to the yard at the end of the day. Unless one assumes that AMG accomplished these tasks during the six and one-half hours that it was allowed on the streets, they necessarily must have been done outside those hours.

Finally, the CPRs continued to report eight hours per day, in most instances, even after AMG began paying the correct prevailing rate. Contrary to AMG's contentions, the CPRs also report numerous occasions when employees worked less than eight hours per day. AMG offered no explanation why this would be so if the CPRs merely reflected its employees' insistence on being paid for eight hours even if they had actually worked fewer hours.

For these reasons, AMG has not met its burden of proving that its employees worked fewer hours than were reported on the CPRs for the Project. The affected workers are therefore entitled to be paid prevailing wages for all hours reported on the CPRs, and the Notice is affirmed as modified on this issue.

AMG Is Required To Pay Heriberto Jara The Prevailing Rate For Journey Level Transportation Systems Technician For Work He Performed As Foreman.

The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (*See* §1773.2.) Section 1773.2 requires the body that awards the contract to "specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for

each craft, classification, or type of worker needed to execute the contract.”

Alternatively, the awarding body may inform prospective bidders that the rates are on file in the body’s principal office and to post the determinations at each job site. (*Ibid.*)

Here the bid specifications required the contractor to designate a Foreman, and to pay the designated employee at the prevailing rate for Journey Level Transportation Systems Electrician. These specifications do not distinguish between “Electrical Foreman” and “Laborer Foreman,” and it is undisputed that AMG designated Jara as the Laborer Foreman on March 1, 2006, the same day AMG designated Melendez as the Electrical Foreman. Moreover, the record establishes that Jara was performing duties within the Transportation Systems Technician scope of work from the pay period ending June 4, 2006, through November 12, 2006, the period for which the Notice reclassified him from Laborer to Transportation Systems Technician. AMG has not met its statutory burden of proving that the Notice was incorrect in this respect, or that it was justified in paying Jara at the Laborer rate. Consequently, AMG violated its statutory obligation to pay prevailing wages to Jara.

AMG Underpaid The Required Training Fund Contributions.

Section 1771 requires, with certain exceptions not relevant here, that “not less than the general prevailing rate of per diem wages for work of a similar character in the locality . . . be paid to all workers employed on public works.” Similarly, section 1774 requires “[t]he contractor to whom the contract is awarded, and any subcontractor under him, [to] pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.” 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. The first two components (also known as the total prevailing wage) must be paid to the worker or on the worker’s behalf and for his or her benefit. An employer cannot pay a worker less than the basic hourly rate; the balance must either be paid to the worker as wages or offset by credit for “employer payments” authorized by section 1773.1.

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

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

The payment required by section 1777.5 is distinct from the per diem wages due to workers under section 1773.1, and must be distinguished from apprenticeship or training programs offered as an employee fringe benefit under section 1773.1, subdivision (a)(6). It is not a direct employee fringe benefit since it is never paid to the worker and may be paid to programs that do not necessarily have a direct connection to the workers employed on the project.

The record establishes that AMG failed to make any of the required contributions to the Laborers training fund, and substantially underpaid the required contributions to the ABC Electrical training fund. AMG is not entitled to credit for payments made to ABC for items other than the hourly training fund contribution required by section 1777.5. Accordingly, AMG is liable for unpaid training fund contributions owing to ABC in the amount of \$899.91 and to the Laborers training fund in the amount of \$1,882.87. The Notice is therefore modified on this issue to reflect the correct amounts.

OCC's Penalty Assessment Under Section 1775 Is Appropriate.

Section 1775(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 [enforcing agency] 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 [enforcing agency] determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^[3]

Abuse of discretion is established if the enforcing agency “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(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.

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 [enforcing agency abused its] 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(c)].)

³ 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.”

The Notice assessed AMG \$53,180.00 in section 1775 penalties, representing \$50.00 per wage violation, and \$10.00 per occurrence for training fund violations where the correct wage otherwise was paid. Following the Hearing on the Merits, OCC reduced the total penalties assessed under section 1775 to \$51,280.00 to reflect the reduced number of violations. OCC asserts that the maximum penalty of \$50.00 per wage violation was justified because AMG had previously been investigated and penalized for prior violations on the same project and had failed to promptly correct the violations.

The burden is on AMG to prove that OCC abused its discretion in setting the penalty amount under section 1775 at the maximum rate of \$50.00 per violation. AMG's defense against the penalty award, tied to its arguments on the merits, is that there were no prevailing wage violations because its workers only worked six hour per day rather than the eight hours reported on the CPRs for most days, and that therefore penalties cannot apply. AMG has introduced no evidence of abuse of discretion by OCC.

Section 1775, subdivision (a)(2) grants the enforcing agency the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The record shows that OCC considered the prescribed factors for mitigation and determined that the maximum penalty of \$50.00 per wage violation was warranted in this case. The Director is not free to substitute his own judgment. The record does not establish an abuse of discretion and, accordingly, the assessment of penalties is affirmed as modified.

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

Section 1813 states as follows:

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

Section 1815 states in full as follows:

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

The Notice assessed AMG penalties in the amount of \$2,200.00, representing 88 overtime violations. The Modified Wage Summary recalculated this figure to \$1,800.00, representing 72 overtime violations. OCC identified 31 overtime violations involving Saturday work, and determined that in each instance, the worker had worked more than 40 hours per week or more than eight hours for the day. The remainder of the overtime violations were for work performed for more than eight hours in a day. While AMG denies that any such violations occurred, its own CPRs and time cards support the assessment.

The record thus establishes that AMG violated section 1815 by paying less than the required prevailing overtime wage rate to twelve employees for a total of 72 violations. Unlike section 1775 above, section 1813 does not give OCC any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813 is affirmed.

AMG Is Liable For Liquidated Damages.

Labor Code section 1742.1(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. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the Assessment . . . to be in error, the director shall waive payment of the liquidated damages.

Rule 51(b) [Cal. Code Reg. tit. 8 §17251(b)] states as follows:

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

In accordance with the statute, AMG would be liable for liquidated damages only on any wages that remained unpaid sixty days following service of the Notice.

Entitlement to a waiver of liquidated damages in this case is closely tied to AMG’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, AMG’s argument on the merits is that it consistently paid its workers for two hours per day more than they actually worked, and that the resulting aggregate overpayments were sufficient to offset any underpayment of prevailing wages on an hourly basis. This claim is not supported by the facts of this case, and therefore cannot be found to constitute an “objective basis in law and fact” for contending that the Notice was in error. Because the assessed back wages remained due more than sixty days after service of the Notice, and AMG has not demonstrated grounds for waiver, AMG is also liable for liquidated damages in an amount equal to the unpaid wages.

FINDINGS

1. Affected contractor AMG Engineers & Contractors filed a timely Request for Review of the Notice of Withholding issued by the City of Los Angeles Office of Contract Compliance with respect to the Project.

2. AMG failed to pay the wage rates set forth in Prevailing Wage Determinations LOS-2005-1 (Electrician) and SC-23-102-2-2004-1 (Laborer) to its workers on the Project, including both straight time and overtime rates. The total unpaid wages due and owing are \$40,833.28.

3. AMG failed to make the required contributions to the Laborers training fund and underpaid its contributions to the ABC Electrical training fund. AMG underpaid the Laborers fund by \$1,822.87, and underpaid the ABC fund by \$889.91, for

a total of \$2,712.78 in training fund underpayments.

4. Jonathan Lanzetti was underpaid \$2,493.22 in wages, including underpayments attributable to his misclassification as an apprentice after becoming a Journeyman Transportation Systems Electrician as of June 1, 2006.

5. Heriberto Jara was underpaid \$5,045.46 in wages, including underpayments attributable to his misclassification as a Laborer while performing the work of a Transportation Systems Technician.

6. In light of Findings 2 through 5 above, AMG underpaid its employees on the Project in the aggregate amount of \$43,496.06, including unpaid training fund contributions.

7. OCC did not abuse its discretion in setting section 1775(a) penalties at the rate of \$50.00 per wage violation and \$10.00 per training fund violation, and the resulting total penalty of \$51,280.00, as modified, is affirmed.

8. Penalties under section 1813 at the rate of \$25.00 per violation are due for 72 violations on the Project, for a total of \$1,800.00 in penalties.

9. The unpaid wages found due in Finding No. 6 remained due and owing more than sixty days following issuance of the Notice. AMG is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of \$43,496.06, and there are insufficient grounds to waive payment of these damages.

10. The amounts found due by this Decision summarized are as follows:

Wages Due:	\$40,883.28
Training Fund Contributions Due:	\$ 2,712.78
Penalties under section 1775, subdivision (a):	\$51,280.00
Penalties under section 1813:	\$ 1,800.00
Liquidated Damages:	\$43,596.06
TOTAL:	\$140,272.12

In addition, interest is due and shall continue to accrue on all unpaid wages as

provided in section 1741, subdivision (b).

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 with this Decision on the parties.

Dated: _____

John C. Duncan
Director of Industrial Relations