

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Cal-Pacific Construction Company, Inc.

Case Nos.: **08-0088-PWH,**
08-0127-PWH

From Notices of Withholding issued by:

Alliant Consulting Labor Compliance Program

**ORDER DENYING RECONSIDERATION AND AMENDING FINDINGS
TO CORRECT CLERICAL ERROR.**

I have read the Motion for Reconsideration filed by Cal-Pacific Construction Company, Inc. ("Cal-Pacific"), on November 17, 2009. Based on my review of Cal-Pacific's arguments and relevant parts of the record, I find no grounds for reconsideration of the Decision of the Director issued on November 4, 2009. Accordingly, Cal-Pacific's Motion for Reconsideration is denied.

Alliant Consulting Labor Compliance Program ("Alliant") seeks correction of a clerical error in the Decision of the Director issued on November 4, 2009. Alliant asserts that the combined sum of the Wages found due, penalties due under Labor Code section 1775 (a), and Liquidated Damages under section 1742.1, as determined at page 20 of the Decision of the Director, paragraph 8 of the Findings, comes to a total \$35,670.48 and not the sum of \$35,560.48 as set forth. Cal-Pacific has not submitted a response to this request, however, based upon my review and addition of the figures set forth in paragraph 8 of the Findings, I agree with Alliant's calculations.

ORDER

IT IS THEREFORE ORDERED that finding number 8 of the Decision of the Director issued on November 4, 2009, is amended to correct a clerical error in addition as set forth below:

“8. The amount found due in the Notice as modified and affirmed by this Decision is as follows:

Wages Due: \$16,260.24

Penalties Under section 1775 (a) \$3,150.00

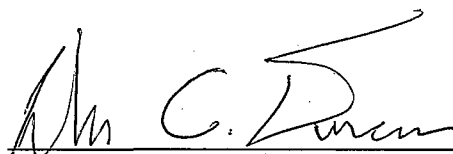
Liquidated Damages under section 1742.1 \$16,260.24

TOTAL: \$35,670.48

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

Dated:

11/18/09



John C. Duncan
Director of Industrial Relations

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DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected sub-contractor, Cal-Pacific Construction Company, Inc. ("Cal-Pacific"), timely filed two separate Requests for Review from two Notices of Withholding of Contract Payments issued on behalf of the Lancaster School District by Alliant Consulting ("Alliant"), a duly authorized Labor Compliance Program with regard to construction work performed at the Endeavor Middle School project in the City of Lancaster, Los Angeles County, California. The two cases involve the same parties, the same project, overlapping facts and issues, and were therefore consolidated for hearing. By stipulation of the parties, the original Notices of Withholding Contract Payments were amended to reflect a single combined Notice ("Notice") determining that \$17,152.08 in unpaid prevailing wages and Labor Code section 1775¹ penalties was due. A Hearing on the Merits occurred on April 14, 2009, in Los Angeles, California, before Hearing Officer William A. Snyder. Alliant's Labor Compliance Director, Vickie Westfall, appeared for Alliant and Bruce Rudman appeared for Cal-Pacific.

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

The Hearing Officer vacated submission on September 1, 2009, to take official notice of the applicable Scope of Work Provisions pertaining to the Drywall Installer and Carpenters and Related Trades ("Carpenters") prevailing wage determinations ("PWDs") listed below, including but not limited to the Scope of Work Provisions pertaining to the Stocker, Scrapper classification.² The matter was resubmitted on September 17, 2009.

The primary issues to be decided are:

- Whether Cal-Pacific improperly used the Stocker, Scrapper pay rate from PWD SC-31-X-41-2005-1A for work performed by three workers (Emilio Flores, Richard Batiste, and Christopher Jones) during periods specified in the Notice instead of the Carpenter wage rate from PWD SC-23-31-2-2006-1;
- Whether Cal-Pacific improperly paid Flores the Stocker, Scrapper wage rate for work he performed after he was indentured as a Carpenter Apprentice; and
- Whether Cal-Pacific failed to report and pay for one day of work performed by five workers (Flores, Jesus Osuna, Carlos Hernandez, Oscar Travez, and Rosario

² Cal-Pacific objected to the Hearing Officer's notice of intent to take official notice on the grounds that the Drywall Installer Scope of Work which was attached to the Hearing Officer's notice "is not the Union agreement in place at the time the work took place . . . (and is not) the entire Union agreement for drywallers." Attached to Cal-Pacific's letter was a copy of a Master Agreement between the Drywall/Lathing Conference of the Western Wall & Ceiling Contractors Association, Inc. and the Southwest Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America in effect from July 1, 2006 to June 30, 2010. The Master Agreement submitted by Cal-Pacific is disregarded as it is not the Director's PWD which was in effect on the bid advertisement date. *See Pipe Trades Dist. Council No. 51 v. Aubry* (1996) 41 Cal App.4th 1457.

Section 1773.4 and related regulations set forth procedures through which Cal-Pacific could have petitioned the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (*See Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by section 1773.4].) In the absence of a timely petition under section 1773.4, contractors and subcontractors are bound to pay the prevailing rate of pay applicable to the work performed, as determined by the Director, as of the bid advertisement date. [*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1084-1085.]

Preciado) in three different classifications (Drywall Installer, Drywall Finisher, and “Apprentice-1”).

This Decision affirms the Notice except to find that Cal-Pacific did not fail to report or properly pay for work performed by Hernandez, Travez, or Preciado on the Project. Therefore, the Director of Industrial Relations issues this decision affirming and modifying the Notice.

FINDINGS OF FACT

On March 9, 2006, Alliant entered into an agreement with the Lancaster School District (“District”) to provide labor compliance consultant services for various school construction projects, including the Endeavor Middle School Project (“Project”) in Lancaster, California. The bid advertisement dates are March 12, 2006, and March 19, 2006. The Bid Deadline was April 4, 2006. On November 14, 2006, Cal-Pacific began working as a sub-contractor of Webb Brothers Construction on the Project. The work performed by Cal-Pacific included framing walls and partitions, erecting the same, installing drywall, and finishing drywall.

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

SC-31-X-41-2005-1A establishes \$10.00 per hour as the basic hourly rate for the “Stocker, Scrapper” classification in Southern California, and classified this classification as a sub-trade of the “Drywall Installer/Lather (Carpenter)” craft. The Scope of Work provisions for “Stocker, Scrapper”³ describes “Stocker, Scrapper” work to:

³ As of the bid advertisement date Prevailing Wage Determination SC-31-X-41-2005-1A established a prevailing wage for “Stocker, Scrapper” in Southern California, but there was no separate “scope of work” advisory issued for Southern California. (See <http://www.dir.ca.gov/dlsr/2006-1/PWD/Southern.html>.) A Northern California “scope of work” advisory for this classification (see <http://www.dir.ca.gov/dlsr/2006-1/PWD/Scope/Northern/NC-031-X-16-Sco.pdf>), was incorporated by reference by DLSR at <http://www.dir.ca.gov/dlsr/2006-1/PWD/index.htm>, “(i) if you have not found your craft in steps 1, 2, or 3, choose the county where work is being performed to examine the subtrades.”

include the placement of materials on job sites or at the shop, moving of materials at job sites, removing scrap construction materials from job sites, disposal of scrap construction materials, scraping of floors, driving scrap truck to or from the shop or disposal sites, and doing general clean up work at job sites. *Stocker-scrapers shall at no time wear or use any tools of the trade*, including, but not limited to, tool belts, pouches, screw guns, snips of any kind, saws of any kind, routers, power actuated tools, drywall knives, t-squares, plumb bobs, chalk lines, hammers, hatchets, or measuring tapes. The only exception to the use of a tool would be the use of a knife, snips, or nippers to facilitate the opening of bundles or cartons of materials to be placed on the job site. They shall not do any type of construction work that is traditionally done by drywall/lathers and/or apprentice drywall/lathers. (Emphasis added.)

SC-23-31-2-2006-1 establishes \$31.71 per hour as the basic hourly rate for the “Carpenter” classification in Los Angeles County. The Scope of Work provisions for “Carpenters” under this Prevailing Wage Determination describes Carpenter work to include:

- 105.1 All Drywall work, including but not limited to installation, carrying, transportation, handling, stocking, scraping of all materials and component parts of walls and partitions regardless of their material composition or method or manner of installation, attachment, or connection, including but not limited to hangers, carrying channels, cross furring, stiffeners, braces, all bars, regardless of material or method of attachment, all integrated gypsum wallboard ceiling heat panels, all radiant heat ceiling backing, all main tees, all cross tees, all splines, all wall and ceiling angles or moldings, all backing board and all finish ceiling materials, regardless of method or manner of installation.

The Director’s Apprentice Wage Sheet for Carpenter Apprentices in Los Angeles County, APP-23-31-2-2005-1 establishes the basic hourly rate for an Apprentice Carpenter working within the first 600 hours of his or her apprenticeship (“Apprentice-1”) as \$12.68 per hour and the total hourly rate (including fringe benefits) as \$19.33 per hour.

LOS-2006-1 establishes the basic hourly rate for "Drywall Finishers" in the Antelope Valley section of Los Angeles County (which includes Lancaster, California) as \$24.89 per hour and the total hourly rate (including fringe benefits) as \$35.39 per hour. As relevant here, the Scope of Work provisions for Drywall Finishers under this Prevailing Wage describes Drywall Finisher work to include, but not be limited to:

1. . . . all work operations after the initial unloading of the drywall material on the job site, including distribution to the point of application.
2. Work or services pertaining to the preparation, spotting, pointing, detailing, taping, flushing, sanding, finishing, and installation of interior and/or exterior gypsum, drywall, thin wall, concrete, steel, wood, and plaster surfaces.

Misclassification of Workers: Cal-Pacific is a union contractor. The Southwest Regional Council of Carpenters recognizes a "Pre-Apprentice" classification for the "Drywall and Lathing" craft. Pursuant to the Southern California Drywall/Lathing Master Agreement for the 11 Southern California Counties Outside of San Diego, pre-apprentices are paid at 35% of the journeyman carpenter wage rate. The Director of Industrial Relations has not recognized such a classification for purposes of establishing a prevailing wage rate.

Alliant issued a written Labor Compliance Program ("Program") for the work to be performed on the Project. The Program admonished contractors: "Pre-apprentice trainees, trainees in non-apprenticeable crafts, and others who are not duly registered will not be permitted on public works projects unless they are paid full prevailing wage rates as journeypersons." There was no evidence offered to establish that Cal-Pacific was provided with a copy of the Program.

Yousef Yousefpor, Cal-Pacific's President and its Project Manager, certified that Cal-

Pacific's Certified Payroll Reports ("CPRs") were true and correct copies of original payroll records of actual disbursements made to the individuals named in the CPRs for work performed on the Project. The CPRs for the period subject to the Notice reflect that Cal-Pacific reported Flores, Batiste, and Jones to be classified as "pre-AP, [pre-apprentices]" except that, starting May 14, 2007, Cal-Pacific re-classified Flores as "AP # 1 [Carpenters Apprentice, Period 1)]." The CPRs also reflect that when Cal-Pacific classified Flores, Batiste, and Jones as "pre-apprentices," it paid them a wage rate of \$11.76 per hour.

At various times from January 3 through May 11, 2007, Cal-Pacific assigned Flores, Batiste, and Jones, to place materials on the job site, move materials at the job site, remove scrap construction materials from the job site, dispose of scrap construction materials, scrape floors, and perform general clean up work at the job site. Flores was occasionally told to drive a forklift to or from the job site or disposal sites. The persons classified by Cal-Pacific as "pre-apprentices," including Flores, Batiste, and Jones, were also permitted by Cal-Pacific to occasionally use tools, such as saws, to cut scrap lumber to make it easier to fit in disposal containers.

The Notice classified Flores, Batiste, and Jones as "Carpenters," because they used tools on the job. Cal-Pacific contends that although it erroneously classified these workers as "pre-apprentices" on its CPRs, the work they actually performed was within the "Stocker, Scrapper" scope of work. Accordingly, they were paid at or above the "Stocker, Scrapper" wage rate. Cal-Pacific argues that requiring it to pay Flores, Batiste, and Jones at the journeyman Carpenter wage rate would elevate form over substance.

In support of Cal-Pacific's contention, Yousefpor testified that he called the union hall

and asked the dispatcher to send a "Stocker, Scrapper" to help clean the floors in preparation for drywall installation and that Flores was the person the union sent him in response. Yousefpor implied that Batiste and Jones were hired in the same manner, but he did not explicitly testify to that effect.

Flores did not use tools the first week of his employment, but after his first week of employment, he operated a forklift, used tools, and carried a tool belt. Before he became an Apprentice Carpenter he was referred to as a "pre-apprentice," not a "Stocker, Scrapper." As a "pre-apprentice" he helped stock materials, picked up scrap lumber, delivered lumber to Carpenters at the job site, and used an electric saw to cut lumber and to cut nails from scrap lumber; he occasionally used an electric saw to cut lumber to measured sizes or to cut the ends off of scrap lumber in order to re-use it. While he was a "pre-apprentice," he also observed Batiste using these tools, but did not witness Jones using them. Batiste corroborated aspects of Flores' testimony by testifying that he was also referred to at Cal-Pacific as a "pre-apprentice" before he became indentured as an apprentice carpenter. While working as a "pre-apprentice," Batiste also stocked materials, delivered materials to the carpenters, cleaned up, and occasionally used a saw to cut lumber so as to fit the pieces in the trash. Jones did not testify.

Yousefpor did not rebut Flores or Batiste, although he was their direct supervisor at times. Richard Orozco, an apprentice carpenter, level 4, testified that he never asked Flores to assist him; he only saw Flores "clean up" or "pick up" drywall, and never saw Flores with a tool bag. Orozco admitted, however, that he did not keep his eyes on Flores and did not know whether other carpenters asked Flores for assistance.

According to the Notice, Flores was employed on the Project beginning on January 3,

2007. From January 3 through May 8, 2007, Flores worked a total of 644 hours over 84 work days, for which he was paid by Cal-Pacific at the rate of \$11.76 per hour as a "Pre-Apprentice," when he should have been paid at the rate of \$31.71 per hour as a Carpenter. As a result of this misclassification, Cal-Pacific underpaid Flores \$19.95 per hour for 644 hours (total \$12,847.80). On May 9, 2007, Flores became indentured as an apprentice carpenter and began working within the first 600 hours of his apprenticeship. Cal-Pacific employed Flores on the Project on May 9, 10, and 11, 2007, for a total of 24 hours, during which it continued to pay Flores as a "Pre-Apprentice." According to the Notice, Cal-Pacific should have classified Flores as an apprentice carpenter, Period 1, and paid him at the rate of \$12.68 per hour. As a result of this misclassification, Cal-Pacific underpaid Flores by \$.92 per hour for 24 hours of work performed over three work days (total \$22.08).

Cal-Pacific employed Richard Batiste on the Project from February 27, 2007, through March 16, 2007, during which he worked a total of 112 hours over 14 work days, and was paid at the rate of \$11.76 per hour as a "Pre-Apprentice." According to the Notice, Cal-Pacific underpaid Richard Batiste by \$19.95 per hour for 112 hours (total \$2,234.40).

Cal-Pacific paid Christopher Jones as a "Pre-Apprentice" for March 19, 20, 21, 22, and 23, 2007; and, according to the Notice, should have paid Jones as a "Carpenter." During those five work days Jones worked a total of 36 hours and was paid by Cal-Pacific at the rate of \$11.76 per hour. According to the Notice, Cal-Pacific underpaid Christopher Jones \$19.95 per hour for 36 hours of work (total \$718.20).

Misreporting of Work by Employees:

1. Misreporting on May 16, 2007: The Notice assessed Cal-Pacific for 8 hours of

wages due "Carlos Hernandez," at the Drywall Finisher classification; and for 8 hours of wages due "Oscar Travez," at the Drywall Installer classification, for work performed by them on May 16, 2007.

Latisha Carter-Woods, Labor Compliance Consultant, testified that on May 16, 2007, she arrived at the Project site to interview workers. Members of Cal-Pacific's crew scattered on her arrival. It appeared to her that they did not want to speak to her. She interviewed a person who identified himself as "Oscar Travez." Travez told her that he was a drywall apprentice, level 2. She thought Travez appeared to be nervous, uncooperative, and fearful of talking to her. She asked Travez for his social security number, but he gave her an incomplete number. She also interviewed a person who identified himself as "Carlos Hernandez." Hernandez claimed to speak only Spanish and refused to speak to her until he obtained permission to do so from the drywall supervisor, Lenin Chavez, who translated for them. Hernandez identified himself to her as a "drywall taper, level 2 apprentice." She found "Carlos Hernandez" to be "unbelievable."

Carter-Woods' interview form states: "I really don't know what he [Chavez, the "interpreter"] was saying to Carlos." There was no evidence offered to establish that Carter-Woods verified Travez' or Hernandez' self-identification by asking to see their respective drivers' licenses or state identification cards. Cal-Pacific objected to Carter-Woods' testimony regarding statements made by Travez and Hernandez on the grounds of hearsay. Neither Travez, nor Hernandez testified at the hearing.

Flores could not recall ever working with anyone by the names of "Oscar Travez;" and neither Flores nor Batiste remembered "Carlos Hernandez." Cal-Pacific's CPRs have no record of employees by the name of Carlos Hernandez or Oscar Travez. Neither Flores nor Batiste had

any apparent motive to fabricate their testimony in favor of Cal-Pacific.

2. Misreporting on July 12, 2007: The Notice assessed Cal-Pacific for 8 hours of wages due to Rosario Preciado and Jesus Osuna at the drywall finisher wage rate for July 12, 2007. Cal-Pacific asserts that Osuna did not work at the Project on July 12, 2007, and that it never employed a person by the name of Rosario Preciado.

As regards this aspect of the Notice, the CPRs reflect that Jesus Osuna worked for Cal-Pacific for 7 hours on July 9, and 8 hours on July 10 and 13, 2007; that he worked in the "Taper" classification, and that he was paid at the base rate of \$35.51 per hour. The CPRs do not report anyone by the name of Rosario Preciado working.

Carter-Woods testified that on July 12, 2007, she interviewed two men working at the Project site taping drywall. One of the individuals identified himself as to Carter-Woods as Jesus Osuna, who described his position as that of a "Taper," and provided her with a social security number, which Carter-Woods recorded on her interview form. Carter-Woods could not understand the other person because he spoke only Spanish. Carter-Woods asked this individual to write his name and social security number on an interview form, after which he wrote the name Rosario Preciado and a social security number on the form. There was no evidence offered to establish that Carter-Woods asked to verify Preciado's self-identification by asking to see his driver's license or state identification card.

Preciado did not testify at the hearing. Emilio Flores did not recall working with anyone by the name of Rosario Preciado, and Yousefpor testified that no one by the name of Rosario Preciado had ever worked for Cal-Pacific on this project.

Cal-Pacific produced three pieces of documentary evidence in support of its claim that

Osuna had not worked on July 12, 2007: (1) A "Weekly Time Sheet" signed by Chavez for the period July 8 through July 13, 2007, which was purportedly Osuna's; (2) a signed "waiver and release" ostensibly signed by Osuna, with a signature date of July 13, 2007; and (3) a copy of a check issued to Jesus Osuna on July 13, 2007, in the sum of \$644.00. No evidence was offered to authenticate the "Time Sheet" as being an accurate record of the time worked by Osuna, or that the signature on the "waiver and release" actually was that of Osuna.

3. Misreporting on July 25, 2007: The Notice assessed Cal-Pacific for 8 hours of wages due to Emilio Flores at the "Apprentice-1" classification for work performed by him on July 25, 2007. The CPRs do not reflect that Flores worked on July 25, 2007.

Carter-Woods testified that Flores was working at the project on July 25, 2007, when she interviewed him. Flores corroborated that he was interviewed by Carter-Woods, but he could not recall the date of his interview.

Cal-Pacific produced a "Weekly Time Sheet" in Flores' name for the period July 23 through July 27, 2007, over the signature of Chavez, the Project's drywall supervisor. The time sheet did not reflect that Flores worked on July 25, 2007. Although Chavez testified at the hearing, he was not asked to authenticate Flores' purported time sheet, nor did he testify that he accurately recorded Flores' work hours for the week of July 23, 2007. Cal-Pacific also submitted a form "Waiver and Release," signed by Flores in which he attests to having been paid all the wages owed to him for various work weeks. However, Flores' last signature date on the "Release" form is July 13, 2007, prior to the date in question.

Penalties and Liquidated Damages: The Notice determined that Cal-Pacific is liable for 108 violations of section 1775 at the rate of \$30.00 per violation (\$3,240.00)

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.

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). The prevailing wage requirements are enforced, 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.*)

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 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 the service of a civil wage and penalty assessment or Notice.

Section 1726, subdivision (b) establishes that where an awarding body determines as a result of its own investigation that there has been a violation of the prevailing wage laws, it may withhold contract payments, but if it does so, it shall follow the procedures set forth in section 1771.6. Section 1771.6, subdivision (a) sets forth the notice requirements. Section 1771.6,

subdivision (b) provides that the withholding of contract payments shall be reviewable under Section 1742 in the same manner as if the notice of withholding was a civil penalty order of the Labor Commissioner, i.e., by filing a Request for Review under section 1742. In such an appeal the contractor or subcontractor "ha[s] the burden of proving that the basis for the civil wage and penalty assessment [or Notice] is incorrect." (§1742, subd. (b).)

Cal-Pacific is Liable for the Assessed Unpaid Prevailing Wages, Subject to Modifications.

The prevailing rate of pay for a given craft, classification, or type of work is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. The Director determines these rates and publishes general wage determinations 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. (See §1773.2 and *Ericsson, supra*.)

Cal-Pacific's Misclassification Of Workers.

Cal-Pacific argues that the "Stocker, Scrapper" classification is applicable to the stocking, scrapping, prep-work, and clean-up work done on the Project and that the Notice incorrectly reclassified the work as subject to the Carpenter wage rate.

The critical aspect of the Scope of Work governing the "Stocker, Scrapper" wage rate for this case is the restriction that "stocker-scrappers shall at no time wear or use any tools of the trade, including, but not limited to . . . saws of any kind . . ." Flores and Batiste testified that they

used saws to cut lumber while working in that classification; and as there was no direct testimony to the contrary, their testimony is believed to be true. Two of the three persons who were incorrectly paid as “pre-apprentices” testified about their duties without direct rebuttal, and Cal-Pacific did not introduce evidence that Jones’s activities varied from Flores or Batiste. Cal-Pacific failed to carry its burden of proof, therefore, that the three individuals did not use electric saws or carry tool belts.

As the Carpenter’s Scope of Work includes “[a]ll Drywall work, including but not limited to installation, carrying, transportation, handling, stocking, scrapping of all materials and component parts of walls and partitions,” and the “Stocker, Scrapper” Scope of Work explicitly precludes the use of tools, such as saws, it is concluded that the Notice did not incorrectly determine that Flores, Batiste, and Jones should have been paid at the Carpenter prevailing wage rate before they became indentured and were paid as apprentice carpenters.

Misreporting Of Days Of Work.

With regard to that aspect of the Notice concerning Cal-Pacific’s alleged misreporting of work performed by five workers, the validity of the Notice comes down to two elements: (1) whether Carter-Woods was accurate in her testimony and her record-keeping regarding the dates that she interviewed the five workers at issue (Travez, Hernandez, Preciado, Osuna, and Flores), and; (2) whether the information relayed to Carter-Woods by the persons she interviewed was accurate and reliable. There was no apparent motive for Carter-Woods to fabricate her records and/or testimony regarding when the interviews took place; her testimony was consistent with her contemporaneous records, and her testimony regarding when the interviews took place was not directly contradicted by conflicting testimony. The conflicting documentary evidence was

not authenticated. Therefore, it is concluded that Carter-Woods' testimony concerning *the dates that she interviewed people* is credible and that she accurately recorded the dates that she conducted the interviews.

With regard to the accuracy and reliability of what Carter-Woods was told, however, the results are mixed.

1. May 16, 2007.

The self-identification of the persons who identified themselves to Carter-Woods as "Oscar Travez" and "Carlos Hernandez" on May 16, 2007, was unreliable hearsay. Hearsay evidence is admissible in these proceedings but may not be the sole basis for a finding. (Cal. Code Regs., tit. 8, § 17244, subdiv. (c).) There was no corroborating documentation or testimony to establish that persons by the names of Travez and Hernandez had worked on the Project, and Cal-Pacific's evidence shows that neither worked for it. Given the evasive circumstances surrounding her interview of these two persons, Cal-Pacific has met its burden to prove the Notice to be incorrect.

2. July 12, 2007.

As regards the Notice for not paying Jesus Osuna for work on July 12, 2007, this part of the Notice is upheld because Cal-Pacific's CPRs report that Jesus Osuna actually worked on the Project for Cal-Pacific during the week of July 12, 2007. Although the CPRs do not reflect Osuna worked on July 12, 2007, Carter-Woods testimony that she interviewed Osuna while he was working at the job site that day was reliable. Lastly, the evidence suggesting that Cal-Pacific paid Osuna all wages that he was due was not properly authenticated. Thus, Cal-Pacific failed to meet its burden of proof to establish that the Notice was in error as to Osuna.

As regards the Notice as it pertains to misreporting work performed by Rosario Preciado, however, the result is different. Preciado did not testify; Cal-Pacific's CPRs do not report Preciado ever having worked for it on this project; Flores testified that he did not recall working with anyone by the name of Rosario Preciado; and Yousefpor testified that no one by the name of Rosario Preciado had ever worked for Cal-Pacific on this project. Thus, Cal-Pacific has met its burden to prove the Notice to be incorrect as to Preciado.

3. July 25, 2007.

As regards the Notice's determination that Cal-Pacific failed to pay Flores for work on July 25, 2007, Cal-Pacific argues from the absence of a July 25, 2007, entry on the "Flores Weekly Time Sheet" that Flores did not work that day. However, the "time sheet" lacked proper authentication and Flores' signature on the "Release" form was prior to the date in question; consequently those items carry no evidentiary weight. Since it is the employer's burden to prove that the Notice is in error, Cal-Pacific failed to sustain its burden of proof with regard to this aspect of the Notice.

Accordingly, except for the elimination of the prevailing wages for Travez, Hernandez, and Preciado, the Notice for unpaid prevailing wages due and the number of violations determined is sustained.⁴ The Notice is therefore modified to reduce the unpaid prevailing wages due by the amount of \$891.84 and the corresponding number of violations under Labor Code section 1775 is reduced by 3.

Cal-Pacific is Liable for Penalties Under Labor Code Section 1775.

⁴ The specific reductions are calculated as follows based on Alliant's assessment:

<u>Employee</u>	<u>Wages Assessed for 1 day's work</u>	<u>Reductions in Notice</u>	<u>Number of Violation</u>
Carlos Hernandez	\$283.12	\$283.12	1
Oscar Travez	\$325.60	\$325.60	1
Rosario Preciado	\$283.12	\$283.12	1

Labor Code section 1775, subdivision (a) provides in relevant part as follows:

(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 by subdivision (b), by any subcontractor under the contractor.

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

(i) Whether 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; and

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

* * *

(D) The determination . . . as to the amount of the penalty shall be reviewable only for abuse of discretion.

In reviewing for abuse of discretion, 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 at 107. Nevertheless, "[t]he scope of discretion always resides in the particular law being applied [;] . . . Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and [therefore] an 'abuse' of discretion." *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287 at 1297.

Alliant determined that Cal-Pacific committed 108 prevailing wage violations. Cal-Pacific established that 3 of these violations did not occur, however the record established that 105 violations occurred because Cal-Pacific underpaid its workers prevailing wages. The contractor or subcontractor has the burden of proving that the basis for the penalty assessment is incorrect. (Lab. C. §1742, subd. (b).) In this instance Cal-Pacific failed to establish that its

failure to pay the correct prevailing wage rates with regard to the 105 prevailing wage violations sustained by the evidence was the result of its good faith mistake or that the error was promptly and voluntarily corrected when brought to its attention. Alliant assessed Section 1775 penalties at thirty dollars (\$30) per violation, less than the maximum rate of fifty dollars (\$50) per violation. (§ 1775 (a)(1).) Cal-Pacific has not shown an abuse of discretion; thus the penalty is affirmed for 105 violations at the rate of thirty dollars (\$30) per violation.

Cal-Pacific is Liable for Liquidated Damages.

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

After 60 days following the service of a civil wage . . . 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 assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment or notice with respect to a portion of the unpaid wages covered by the assessment or notice, the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Rule 51, subdivision (b) [Cal. Code of Reg., tit. 8, section 17251, subd. (b)] states as follows:

To demonstrate "substantial grounds for believing the Assessment or Notice to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment or Notice 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 or Notice.

In accordance with the statute, Cal-Pacific is liable for liquidated damages only on the wages found due in the Notice, as modified by this Decision, or a total of \$16,260.24. Since

those wages remain unpaid, an equivalent amount of liquidated damages must be awarded unless Cal-Pacific demonstrated substantial grounds for believing the Notice to be in error.

Cal-Pacific failed to prove it had a reasonable subjective belief that the Notice was in error, as there was no testimony or evidence offered to establish Cal-Pacific's subjective belief. Even assuming, however, that Cal-Pacific had a reasonable subjective belief that the Notice was in error and that the claimed classification error would have eliminated most of its liability for back wages and the Timesheet errors would have eliminated the balance of back wage liability, Cal-Pacific failed to establish that it had an objective basis in law and fact for classifying its Carpenters as "scalper-scrappers." Accordingly, there are no grounds for waiving liquidated damages on the Notice.

FINDINGS

1. Affected subcontractor Cal-Pacific Construction Company, Inc., filed timely Requests for Review from Notices of Withholding issued by Alliant, a bona fide Labor Compliance Program, with respect to the Endeavor Middle School Project.

2. The workers that Cal-Pacific classified as "pre-apprentices" were entitled to be paid the applicable prevailing wage rates for Carpenters for the days of work covered in Alliant's Notice.

3. Emilio Flores was entitled to be paid the applicable prevailing wage rates for an apprentice carpenter, Period 1, for the three days of work covered in the Notice and which took place after he became an indentured Carpenters Apprentice.

4. The Notice is modified because it is incorrect as to Oscar Travez, Carlos Hernandez, and Rosario Preciado.

5. In view of Findings No. 4, above, the net amount of wages dues under the Notice is reduced by \$891.84.

6. In view of Findings No. 4, above, the record establishes only 105 violations under section 1775 rather than 108 violations as determined in the Notice. Alliant did not abuse its discretion in determining the amount of penalties assessed per violation, and consequently the section 1775 penalty assessment is affirmed for 105 violations.

7. In light of findings No. 4 above, the potential liquidated damages due under the Notice is reduced to \$16,260.24. No part of the back wages found due in the Notice as modified by finding No. 4 has been paid, and Cal-Pacific has not demonstrated that it had substantial grounds for believing the Notice to be in error. Accordingly, Cal-Pacific is liable for liquidated damages in the amount of \$16,260.24 under section 1742.1(a).

8. The amount found due in the Notice as modified and affirmed by this Decision is as follows:

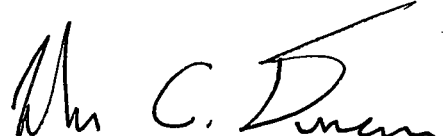
Wages Due:	\$16,260.24
Penalties Under section 1775 (a)	\$3,150.00
Liquidated Damages under section 1742.1	<u>\$16,260.24</u>
TOTAL:	\$35,560.48

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

ORDER

The Notice is modified and affirmed 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: 11/4/09



John C. Duncan
Director of Industrial Relations