

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

DJM Construction Co., Inc.

Case No. 11-0049-PWH

From a Notice of Withholding issued by:

Los Angeles Unified School District

**DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL
RELATIONS**

Affected contractor DJM Construction Co., Inc. (DJM) submitted a timely request for review of the Notice of Withholding (Notice) issued by Los Angeles Unified School District (LAUSD) with respect to the Byrd Middle School Reconfiguration/Construction of New Gymnasium, number 56.40071 (Project) in Los Angeles County. The Notice determined that \$25,196.04 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits was conducted on June 8, 2011, August 8, 2011 and August 29, 2011, in Los Angeles, California, before Hearing Officer Christine Harwell. James W. Biedebach appeared for DJM, and Fabiola Rivera appeared for LAUSD. The matter was submitted for decision on September 20, 2011, at the time of the parties' filing of closing briefs.

The issues for decision are:

- Whether the Notice correctly found that DJM had failed to report and pay the required prevailing wages for all straight time and overtime hours worked on the Project by its workers.
- Whether the workers who performed the portion of this work related to installation of metal handrails were entitled to be paid the prevailing wage rate for Iron Worker, or whether they could be paid the lower rates for the classifications of Carpenter or Laborer without violating prevailing wage requirements.

- Whether one worker, Jesus Reyes, who was required to use a jackhammer on one or more days, was entitled to be paid the prevailing wage rate for Laborer Group 3 when that work was performed, or whether he could be paid the lower rates for the classification of Laborer Group 1 for that work.
- Whether training fund contributions on the assessed unpaid wages in the Notice were required.
- Whether Los Angeles Unified School District (LAUSD) abused its discretion in assessing penalties under Labor Code section 1775¹ at the maximum rate of \$50.00 per violation.
- Whether DJM failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813.
- Whether DJM has demonstrated substantial grounds for appealing the Notice, entitling it to a waiver of liquidated damages.

The Acting Director finds that DJM has failed to carry its burden of proving that the basis of the Notice was incorrect. Carpenter prevailing wages are not appropriate for metal handrail installation, which should have been paid at the Iron Worker prevailing wage rate, and Jesus Reyes should have been paid as a Laborer, Group 3 for the days he worked utilizing a jack hammer. However, some of the days LAUSD assessed were not substantiated and DJM has carried its burden of disproving the basis of the Notice as to the unpaid wages and associated penalties assessed for those days; the Notice is modified accordingly. Penalties under section 1775 are affirmed, as modified, and DJM has failed to prove grounds for waiving liquidated damages. Therefore, the Acting Director of Industrial Relations modifies and affirms the Notice.

Facts

The Los Angeles Unified School District (LAUSD) advertised the Project for bid on February 4, and February 11, 2008; it awarded the contract to DJM on April 11, 2008. DJM performed services reconfiguring and constructing a gymnasium for Byrd Middle

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

School over the period May 18, 2008, through September 6, 2009, utilizing 15 workers. As part of the Project, DJM upgraded cement walkways, refinished floors, reconfigured the bathrooms, installed lighting and installed new handrails in walkway areas. DJM paid its workers based on the prevailing wage rates for Laborers, Groups 1 and 3, and for Carpenters. DJM paid the training funds respectively to the Construction Laborers Trust Fund and Carpenters Trust Fund. In July, 2009, the Sheet Metal Workers International Association, Local Union 105, filed a complaint with LAUSD advising that DJM failed to pay fringe benefits to Local 105 and improperly used carpenters to install metal handrails; work that should have been performed by Iron Workers. An audit was conducted that assessed DJM for violations for misclassification of the workers, some as Iron Workers, others as Cement Masons, and Jesus Reyes at a higher Laborer, Group 3 classification on the few days Reyes was required to use a jackhammer. Additionally, the Notice found that DJM failed to report and underpaid some of the workers based on review of DJM's Certified Payroll Records (CPRs) and workers' weekly payroll statements (Weekly Statements) when compared to the sheets on which the workers signed in and out of the jobsite each day (Daily Sign-In).

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

Laborer, for Southern California (SC23-1-102-2-2007-1), Group 1: This rate specifically applies to 25 listed categories of Laborer Group 1 work with such items as panel forms, concrete, demolition, clean-up; and as described by the August 22, 2007, Notice regarding advisory scope of work for the Southern California Laborers' General Prevailing Wage Determination, which includes:

Certified Confined Space Laborer; Concrete Curb and Gutter Laborer; Environmental, Remediation, Monitoring Well, Toxic Waste, Geotechnical Drill Helper; Expansion Joint Caulking by any method (including preparation and clean-up); Laborer, Concrete; Laborer, Asphalt-Rubber Material Loader, and, Traffic Control Pilot Truck, Vehicle Operator in connection with all Laborer's work.

Laborer, for Southern California (SC23-102-2-2007-1), Group 3: This rate specifically applies to 20 listed categories of Laborer Group 3 work with such items as

Buggymobile man; Compactor; Concrete Cutting Torch; Concrete, Pile Cutter; Driller, Jackhammer, and other listed tasks; and as described by the August 22, 2007, Notice regarding advisory scope of work for the Southern California Laborers' General Prevailing Wage Determination, which includes: "Asphalt Installation of all fabrics, Bushing Hammer, Guardrail Erection/Guardrail builders; Shot Blast Equipment operators; and Small Skid Steer Loader."

Carpenter, for Los Angeles County (SC-23-31-2-2007-2): This is the rate used by DJM for concrete form work, as described by the advisory Scope of Work Provisions dated February 22, 2007, that apply section 102.5.7 of the July 1998 Carpenters Master Labor Agreement²:

All concrete form work, including, but not limited to the fabrication, construction, placing, erection, rigging and hoisting, stripping and removing of all forms and operation of the fork lift, leod, pettibone or mobile equipment in reference all of the above work.

Iron Worker for Southern California (C-20-X-1-2007-1): This is the rate used in the Notice for "work involving field fabrication and/or erection of structural, ornamental and reinforced steel ...," as described in the applicable scope of work for Iron Worker.

Use of Carpenters and Laborers to Install Metal Handrails: The Notice determined that DJM paid Rob Frazer at the Carpenter's rate, Reyes at the Laborer's Group 3 rate, and Lino Herrera at the Laborer's 1 rate during the period from April 2 through April 4, 2009. The Notice determined that these workers should have been paid using the Iron Workers pay rate during that period.

Frazer, Reyes, and Herrera installed prefabricated heavy metal rails into predrilled holes in concrete walls, leveled them and applied grout cement to set and affix them in the holes. Nancy Morada, LAUSD'S Labor Compliance Officer, testified that the sole basis for reclassifying the three workers to Iron Workers was because they were installing heavy metal, as reported to her by the Inspector.

² That agreement, adopted by Prevailing Wage Determination SC-23-31-2-2007-2, is between Associated General Contractors of California, Inc., Building Industry Association of Southern California, Inc., Southern California Contractors Association, Inc., Millwright Employers Association, Inc. and Southern California Conference of Carpenters on behalf of the District Councils and Local Unions in the Eleven (11) Southern California Counties Affiliated with United Brotherhood of Carpenters and Joiners of America.

After receiving the Notice and attending a July 7, 2010, meeting with LAUSD, DJM's project manager, Jason Murray countered LAUSD's Iron Worker reclassification by writing July 9, 2010:

The handrails for this project were prepared in full offsite and galvanized offsite by our miscellaneous metal suppliers. They were delivered complete FOB to the job site. My carpenters took the handrails and installed them in predrilled holes in the concrete stairs/ramps. The handrails were shored up in place with wood framing materials at the proper elevations and then non-shrink grout was used to secure them in place. When cured, the shoring was removed by my carpenters. We feel this handrail installation is covered under the Carpenters' acceptable scope of work provisions.

At hearing Murray said essentially the same, and explained that the workers had predrilled holes where the handrail was supposed to go on the ramp and sidewalk. The workers would then take the handrails, support them with their formwork at the proper elevation, set them in the holes and install them with grout. It took no assembly of the metal rails; the forms used by the workers were wooden and the workers did the grout work. Murray relied on section 102.5.7 of the Carpenters scope of work quoted above. Murray had not been present when the handrails were installed, so there was no evidence to confirm the process as described by Murray. Murray, who started working on the Project after it began, did not know if DJM asked the Division of Labor Statistics and Research if the advisory scope of work for carpenters could be used for the installation of the metal rails.

Herrera was the only one of the three workers who installed the handrails who testified at trial, but neither DJM nor LAUSD asked him about the handrail installation process.

Misclassification of Reyes as Laborer, Group 1: The Notice also reclassified Reyes, who was paid as Laborer, Group 1, for work on August 24, 2008, April 5, 2009, and May 3, 10, and 17, 2009, when Reyes performed jack hammering of concrete. Reyes did not testify. At hearing Murray stated that LAUSD considered that some demolition work around some concrete slabs in one of the classrooms was necessary so that DJM's electricians could fix the conduit that was broken underneath the concrete. The work did

require use of a jack hammer for chipping and grinding. Murray believed that work fell under the scopes of work for Laborer Groups 1, 3 or 4. DJM paid Reyes at the Laborer Group 1 rate for that work because that subclassification includes concrete work.

Failure to Report and Pay Days of Work: LAUSD determined that DJM had under reported the hours its workers worked on the Project. Morada stated that when investigating the installation of handrails, DJM's payroll records came under scrutiny. DJM required the workers to sign in and out each day on the Daily Sign-Ins, which Morada considered to be the best source of information of the actual days and hours worked. She interviewed workers, some of whom testified at hearing, who agreed the Daily Sign-Ins were true statements of their hours.

DJM maintained the Daily Sign-Ins as well as Weekly Statements for each worker, which it required the workers to sign before being paid. DJM did not allow workers to compare whether the Weekly Statements coincided with the hours on the Daily Sign Ins. Morada concluded the discrepancies between the Daily Sign-Ins and the Weekly Statements showed that DJM had underreported hours.

DJM contends that the Daily Sign-Ins were not intended to be records of hours worked by the workers. Instead, the Weekly Statements were DJM's primary source, and the workers were expected and required to sign-off as to the accuracy of the hours the Weekly Statements contained. Yvonne Dominguez, DJM's Payroll Administrator, testified that the Weekly Statements were prepared by someone "in the field," and the source of the information was not known to Dominguez. Dominguez never saw the Daily Sign Ins until LAUSD demanded production of all of its documents. DJM produced several workers who stated that they did not consider that the Daily Sign-Ins were time-keeping documents. Each stated they believed they were paid correctly by DJM for their time. The workers posited that even though the workers may have signed in at one time, they often began work later after gathering their tools and heading to their particular work site.

- George Banzon, a Carpenter, testified that he was required to sign the Weekly Statement and he would check to see if it was correct. If he was unable to sign

the Daily Sign-In, DJM would pay him for his hours anyway. He signed the Daily Sign-Ins when he arrived and when he left; each time he would write down the time he arrived and that time he left. He did not consider the Daily Sign-In accurate. He sometimes would sign in and spend up to 15 minutes to prepare his tools and other implements.

- Herrera, a Laborer, Group 3, testified that he signed the Daily Sign-Ins and started working as soon as he signed and stopped working at the time he signed out. All the workers would sign in at the time they started to work, at least by 6:30 AM. Herrera would keep his time on a personal memo, but, after signing off on the Weekly Statement, he would throw away his personal memo of hours that he had worked.
- Eduardo Martinez, a Carpenter, did not agree that all who signed in began working right away. His hours were from 6:00 AM to 2:30 PM, but because they were working in a residential area, work that created noise could not begin until later. According to Martinez, the purpose of signing in was to allow DJM to know who was present. After Martinez signed in, he would begin bringing out his cables and tools for the construction. When he signed out, he had already picked up his materials.
- Gerardo Zamora, a Carpenter, testified that the Daily Sign-Ins reflected the actual hours he worked each day. When asked what he did when he signed in, Zamora said it would depend: if they started at 6:30 it meant he would sign in and go to his place and start working. He explained that he did not have to gather his tools because there were laborers who would bring materials to him to work with so he would go straight to work. When he signed out, he might have still picked up his tools. Before he went home he would always sign out, which was required.
- David Lopez, a Carpenter, testified that he signed in and out on the Daily Sign-In, with the time noted when he arrived and when he left, and that the Daily Sign-Ins were an accurate representation of the time he spent working on the

Project. One day was missing an entry for Lopez, but he was paid anyway; Lopez could not explain why that occurred. Lopez was also required to sign the Weekly Statements, which he did not compare to the Daily Sign-Ins.

The testimony about the Daily Sign-In rosters versus the Weekly Statements and the Inspector of Record's (IOR) reports was extensive. The variances in time were mostly small incidences of overtime for about ½ hour past an 8 hour day; however there were several entire work-days, mostly on weekends, that DJM had reported no workers.

Morada said that she compared the Daily Sign-ins to the CPRs and found some days entirely unreported. However, DJM showed that the IOR daily diary of who was present confirmed there was no work at all on many weekend days for which LAUSD said workers were not paid or listed on the CPRs but for which Morada considered there to be Sign-In rosters. DJM contended that the Sign-In rosters themselves had obvious errors that provided evidence that none of the Sign-Ins were accurate. Many were contradicted by the IORs. At hearing the District stipulated to the withdrawal of the assessment for eight workers on June 14, 2009, because, even though there appeared to be a Daily Sign-In roster signed on that day, the IOR reports and the CPRs had no work for that day.³ DJM identified two other days, May 9, and May 16, 2009, for which there were Daily Sign-Ins but no IORs or CPRs that reported work. Nevertheless, the Notice claims eight hours unpaid for Banzon on May 9, 2009, and eight hours each for DeGeneffe, Toscano, Navarro, Banzon and Frazer on May 16, 2009.

There was further testimony about December 13, 2008, for which the Daily Sign-In showed workers signing in but not out. Morada realized while testifying that this document was a duplicate of the December 12, 2008 Sign-In roster which had been misidentified for December 13, 2008.⁴ Even after determining at hearing that there had

³ Nevertheless, despite that stipulation, LAUSD submitted a chart with its post hearing brief that still assessed 8 unreported hours for Sunday, June 14, 2009 for workers: George Banzon, Christian DeGeneffe; Daniel Toscano; David Navarro; Reyes; Herrera and Frazer.

⁴ Morada claimed she had never received the right December 13 Sign-In roster from DJM, but DJM established that she had been provided with it prior to the hearing.

been an error for December 13, 2008, LAUSD continued its assessment for two workers for December 13, 2008.

Dominguez explained that the Notice incorrectly assessed wages on April 17, 2009, for Banzon who actually had worked on April 18, 2009; a Saturday. Banzon worked in the office on that date for five hours and was paid separately. It was DJM's input processor, Carla, who erred in attributing Banzon's non-prevailing wage office work as prevailing wage work on the CPR for the prior day, Friday, April 17.

Joe Fuchs, DJM's supervisor who would have been the best source to explain why the Daily Sign-Ins were not a time-keeping document, or how he determined the work hours for the workers' payments, did not testify. No LAUSD inspector testified.

Based on the variances between Daily Sign-Ins and Weekly Statements, LAUSD asserts that workers were not paid overtime or weekend wages they were entitled to receive. Nearly every increased assessment included an overtime assessment, resulting in additional straight time wages due for 59 days, and adding 164.75 hours of unpaid overtime (including 5 hours of double-time) and penalties under section 1813 for each day in excess of 8 hours, or for weekend work.

Underpaid Fringe Benefit Payments Based on Misclassification or Underreported Hours

Based on the underreported hours and failure to pay appropriate Iron Worker or Laborer 3 classification, LAUSD assessed DJM with failure to pay appropriate fringe benefits and training funds.

The Notice: The Notice found that DJM failed to pay the required prevailing wages, including failure to pay the required prevailing wage rate for overtime, misclassified employees and failed to make the required training fund contributions for any of the affected workers. The Notice found a total of \$17,421.86 in unpaid prevailing wages, including \$149.78 in unpaid training fund contributions. Penalties were assessed under section 1775 in the amount of \$50.00 per violation for 113 violations, totaling \$5,650.00. LAUSD determined that the maximum penalty was warranted by its findings that workers systematically were misclassified and were not paid for all their hours, that

DJM had prior incidents of complaints, including pending complaints against its subcontractors, and that the violations were willful and intentional. In addition, penalties were assessed under section 1813 for 79 overtime violations, at the statutory rate of \$25.00 per violation, totaling \$1,975.00. On the first day of hearing, the Notice was amended to reduce the amount to \$17,094.35 in unpaid prevailing wages,⁵ including \$145.94 in unpaid training fund contributions. Penalties under sections 1775 and 1813 remained the same for a total due of \$24,865.29.

Discussion

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects.

Specifically:

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987 [citations omitted]

(Lusardi).)

An Awarding Body like LAUSD 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 *Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1,

⁵ A reduction of one hour of Saturday work (from a nine hour to an eight hour workday, which was only one rather than two hours of alleged underreporting) was made as to Herrera for February 7, 2009.

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.

When LAUSD 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 “[t]he contractor or subcontractor shall have the burden of proving that the basis for the [Notice of Withholding] is incorrect.”

DJM Was Required To Pay The Prevailing Rate For Iron Workers For The Handrail Installation Work.

The prevailing rate of pay for a given craft, classification, or type of work is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. It is the rate paid to the majority of workers; if there is no single rate payable to the majority of workers, it is the single rate paid to most workers (the modal rate). On occasion, the modal rate may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. (§§ 1773, 1773.9, and *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.) The Director determines these rates and publishes general wage determinations, such as Iron Worker PWD C-20-C-2007-1 or Carpenter PWD SC-23-31-2-2007-2, 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 (*Ericsson*).

The applicable prevailing wage rate is the one in effect on the date the public works contract is advertised for bid. (§ 1773.2 and *Ericsson, supra.*) Section 1773.2 requires the body that awards the contract to specify the prevailing wage rates in the call

for bids or alternatively to inform prospective bidders that the rates are on file in the body's principal office and to post the determinations at each job site.

Metal handrail installation falls clearly within the scope of work for Iron Workers as quoted above. The question is whether workers could also properly be paid at the Carpenter's or Laborer's rates for that work. The parties agree that handrail installation performed on the Project by DJM workers consisted in part in the setting and installation of the metal handrails into holes drilled in the concrete walls. That work consisted of predrilling holes where the handrail was supposed to go on the ramps and sidewalks. The workers supported the rails with their formwork at the proper elevation, set the rails in the holes and installed the rails with grout. It took no assembly of the metal rails; the forms used by the workers were wooden and the workers did the grout work. Focusing on the description of the material of the handrails as "heavy" metal and the exclusively metal components comprising the rails, LAUSD argues that the disputed work cannot fall under the Carpenter classification because the Iron Worker scope of work provisions expressly refer to "iron" or "metal" and do refer to handrails. No testimony was provided to make a determination between "light" or "heavy" metal.

DJM has the burden of proving that the disputed work falls clearly within the Carpenter scope of work and Laborer scope of work. The broad Carpenter scope of work does not clearly include the installation of metal handrails. DJM's reliance on the portion of the Carpenter's scope of work that refers to form building and stripping cannot be interpreted to include metal handrail installation. DJM's argument is also undercut by its payment of Reyes and Herrera at the Laborer prevailing wage rate, rather than the Carpenter rate. For that reason LAUSD correctly reclassified all of the hours reported under the Carpenter or Laborer classifications for metal handrail installation work on the selected days to the Iron Worker's prevailing wage rate.

Reyes Was Underpaid As A Laborer, Group 1 For The Days He Operated The Jack Hammer.

Reyes, whose work spanned many areas, was required to jack hammer a cement floor on August 24, 2008. Laborer, Group 3, clearly includes the use of jack hammers; Group 1 only refers to the more generic "concrete work." Given that a jack hammer can

be used on material other than concrete, Group 1 is not the proper pay rate for a laborer operating a jack hammer. Therefore, DJM failed to carry its burden to disprove that Reyes was improperly paid on August 24, 2008.

The Affected Workers Are Entitled To Receive Prevailing Wages For Their Documented Work 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.) When an employer fails to maintain accurate time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount by a just and reasonable from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the reasonable estimate. (*Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687-688 [rule for estimate-based overtime claims under the federal Fair Labor Standards Act, 29 U.S.C. §§201 et seq.]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727 [applying same rule to state overtime wage claims]; and *In re Gooden Construction Corp.* (USDOL Wage Appeals Board 1986) 28 WH Cases 45 [applying same rule to prevailing wage claims under the federal Davis-Bacon Act, 40 U.S.C. §§3141 et seq.]) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

For DJM to prevail it would have to show that the Weekly Statements were contemporaneous and accurate records of the hours worked; DJM did not meet this burden. Although DJM required its workers fill in the Daily Sign-Ins, DJM paid for fewer hours each day than shown in the Daily Sign-Ins. Instead of relying on the time from the Sign-Ins, DJM would summarize the hours and require that the workers also sign the Weekly Summary, which contained different figures for which DJM has presented no factual basis. Most of the workers who testified said that they believed that

their work commenced when they signed in and ended when they signed out. Fuchs, DJM's representative at the Project, and the person who the workers claimed required them to sign in and out, did not testify.

As to the assessment of wages for December 12, 2008, the evidence is clear that LAUSD relied on an inaccurate document in reaching its conclusion based on the evidence described by Dominguez at hearing. Similarly, DJM proved that the Notice incorrectly assessed prevailing wages for Banzon for office work actually performed on April 18, 2009. In its post hearing brief, LAUSD submitted a chart of assessments per worker which eliminated this assessed underpayment.

Finally, even though LAUSD stipulated to withdraw the assessments for a full day of work for eight workers on June 14, 2009, it continued to list June 14, 2009, for seven workers assessed unpaid overtime for that day. Based on same analysis, the testimony at hearing and the documents submitted, LAUSD should have eliminated other full days of work assessed in the Notice as shown in the below chart. These reductions total 177.75 hours, for which LAUSD assessed penalties for 120 violations each under sections 1775 and 1813.

DATE of SIGN-IN	Workers/Hours	IOR/CPR	# of HOURS NOT ESTABLISHED
Sat. , May 16, 2009	Banzon, DeGeneffe, R. Frazer Navarro, Reyes; Toscano/ 4 hrs	No Work Scheduled/ No wages reported	48
Sat, June 6, 2009	Banzon, DeGeneffe, Frazer, Herrera, Reyes, Toscano/ 8 hrs each Navarro 5 hrs	No Work for DJM; Subcontractors only/ No wages reported	53
Sat. June 13, 2009	DeGeneffe, Navarro/ 8 hrs each Herrera/ 5 hrs, Reyes/ 1hr	No Worker for DJM; Subcontractors only/ No wages reported	17

Sun., June 14, 2009	Banzon, DeGeneffe, Frazer, Herrera, Reyes, Toscano / 8hrs. each Navarro/7.75 hrs	No Work Scheduled; No wages reported	59.75
---------------------	--	--	-------

LAUSD's Penalty Assessment Under Section 1775 Is Appropriate

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

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars (\$50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

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

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

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

(B)(i) The penalty may not be less than ten dollars (\$10) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.

(ii) The penalty may not be less than twenty dollars (\$20) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than thirty dollars (\$30) . . . if the Labor Commissioner determines that the violation was willful, as defined

in subdivision (c) of Section 1777.1.^[6]

The Acting Director's review of the Labor Commissioner'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 Acting 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.)

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)].)

After accounting for LAUSD's errors described above in its Notice, the record demonstrates that DJM failed to pay the required prevailing wages on 71 occasions resulting from its failure to pay based on the correct classifications and hours worked. Thus, DJM is liable for section 1775 penalties 71 violations.

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 neither mandates mitigation in all cases nor requires mitigation in a specific amount when the enforcing agency determines that mitigation is appropriate. The record shows that LAUSD considered the prescribed factors for mitigation and determined that the maximum penalty of \$50.00 per violation was warranted in this case. The Acting Director is not free to substitute her own judgment. DJM has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of \$50.00 is affirmed for 71 violations.

⁶ 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."

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

Section 1813 states, in pertinent part, 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 record establishes that DJM violated section 1815 by paying less than the required prevailing overtime wage rate on 16 occasions when hours exceeded 8 hours, or otherwise for weekend work. Unlike section 1775 section 1813 does not give LAUSD any discretion to reduce the amount of the penalty, nor does it give the Acting Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813, as assessed, is affirmed in the amount of \$400.00 for 16 violations.

DJM Is Liable For Liquidated Damages.

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

After 60 days following the service of 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 Acting Director, DJM 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 partially tied to DJM's position on the merits and specifically whether, within the 60 day period after service of the Notice, it had "substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment."

DJM established that LAUSD did not look at the variances between the IORs and the timesheets for weekend dates to which LAUSD attributed the majority of the assessed unpaid overtime for many workers; DJM prevailed on much of this defense. To the extent that DJM's positions were affirmed, DJM has been successful on the merits as the unpaid wages assessed by the Notice have been reduced. However, DJM did keep two sets of time records and paid based on the less contemporaneous and unauthenticated version. As a result almost all workers had their hours underreported and were underpaid. The Acting Director cannot in this case exercise her discretion to waive liquidated damages on the wages owed for this failure or DJM's classification errors.

Because the assessed back wages remained due more than sixty days after service of the Notice, and DJM has not demonstrated grounds for waiver, DJM is also liable for liquidated damages in an amount equal to the unpaid wages.

Findings

1. Affected contractor DJM filed a timely Request for Review of the Notice of Withholding issued by LAUSD with respect to the Project.
2. DJM failed to pay its workers at least the required prevailing wage for three workers who performed as Iron Workers and one worker that performed as a Laborer, Group 3 on the disputed work.
 - The portions of the Notice reclassifying workers from Carpenter or Laborer

8. The amounts found remaining due in the Notice as modified and affirmed by this Decision are as follows:

Wages Due:	\$7,024.76
Training Fund Contributions Due:	\$75.63
Penalties under section 1775, subdivision (a):	\$3,550.00
Penalties under section 1813:	\$400.00
Liquidated Damages:	\$7,100.39
TOTAL:	\$18,150.78

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 affirmed in part and modified in part. The Hearing Officer shall issue a notice of Findings which shall be served with this Decision on the parties.

Dated: 12/05/2011



Christine Baker
Acting Director of Industrial Relations