Labor Commissioner, State of California Department of Industrial Relations Division of Labor Standards Enforcement 5555 California Ave., Suite 200 Bakersfield, CA 93309 661-395-3855 FAX: 661-395-3872	
DATE: November 16, 2007	In Reply Refer to Case No. 40-18549/010

CIVIL WAGE AND PENALTY ASSESSMENT

Awarding Body State of California Dept. of Water Resources	Work Performed in County of Alameda, Kern, Los Angeles, Merced, San Luis Obispo...
PROJECT NAME Copper Communications Cable Voice & Data Equipment--Monitoring-Testing & Repair for California Aqueduct	Project No C51301
Prime Contractor Adesta Limited Partnership; Adesta Management Group, Inc., and Adesta LLC, Partners	
Subcontractor Shasta General Engineer, Inc., A California Corp; and Rush Personnel Services, Inc., A California Corporation	

After an investigation concerning the payment of wages to workers employed in the execution of the contract for the above-named public works project, the Division of Labor Standards Enforcement (the "Division") has determined that violations of the California Labor Code have been committed by the contractor and/or subcontractor identified above. In accordance with Labor Code section 1741, the Division hereby issues this Civil Wage and Penalty Assessment.

The nature of the violations of the Labor Code and the basis for the assessment are as follows:
Violation of Labor Code Sections 1771 and 1774; workers not paid the general prevailing rate of per diem wages specified for straight time, Saturday work, holiday and overtime work- workers were misclassified as Telephone Installers and Laborers and consequently underpaid for some of their work; others were not paid the proper reimbursement for mileage expense; some workers did not receive the specified per diem wage rate for work performed as Telecommunications Technician; Failure to pay the required wage for overtime, in violation of Section 1815 resulted in penalties assessed pursuant to Section 1813.

The attached Audit Summary further itemizes the calculation of wages due and penalties under Labor Code sections 1775 and 1813.

The Division has determined that the total amount of wages due is: $30,822.10

The Division has determined that the total amount of penalties assessed under Labor Code sections 1775 and 1813 is: $11,000.00

The Division has determined that the amount of penalties assessed against eral Engineering, Inc.; Rush Pe rsonnel S under Labor Code section 1776 is: $0.00

Please refer to page 4 for specific withholding obligations pertaining to these amounts.

STATE LABOR COMMISSIONER

By: _____
Sherry Gentry
Deputy Labor Commissioner

PW 33 (Revised - 4/2002)

Notice of Right to Obtain Review - Formal Hearing

In accordance with Labor Code Section 1742, an affected contractor or subcontractor may obtain review of this Civil Wage and Penalty Assessment by transmitting a written request to the office of the Labor Commissioner that appears below within 60 days after service of the assessment. **To obtain a hearing, a written Request for Review must be transmitted to the following address:**

Labor Commissioner, State of California
Civil Wage and Penalty Assessment Review Office
2031 Howe Ave., Suite 100
Sacramento, CA 95825

A **Request for Review** either shall clearly identify the Civil Wage and Penalty Assessment from which review is sought, including the date of the assessment, or it shall include a copy of the assessment as an attachment, and shall also set forth the basis upon which the assessment is being contested. In accordance with Labor Code section 1742, the contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the Labor Commissioner's receipt of the written **Request for Review.**

> **Failure by a contractor or subcontractor to submit a timely Request for Review will result in a final order which shall be binding on the contractor and subcontractor, and which shall also be binding, with respect to the amount due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. Labor Code section 1743.**

In accordance with Labor Code section 1742(d), a certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the State against the person assessed in the amount shown on the certified order.

(continued on next page)

Opportunity for Settlement Meeting

In accordance with Labor Code section 1742.1(b), the Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of this Civil Wage and Penalty Assessment, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee **to attempt to settle a dispute regarding the assessment.** The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking a hearing as set forth above under the heading Notice of Right to Obtain Review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. This opportunity to timely request an informal settlement meeting is **in addition** to the right to obtain a formal hearing, and a settlement meeting may be requested even if a written **Request for Review** has already been made. Requesting a settlement meeting, however, does not extend the 60-day period during which a formal hearing may be requested.

A written request to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding this assessment must be transmitted to Sherry Gentry
at the following address: 5555 California Ave., Suite 200
Bakersfield, CA 93309

Liquidated Damages

In accordance with Labor Code section 1742.1, after 60 days following the service of this Civil Wage and Penalty Assessment, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment 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 of the Department of Industrial Relations that he or she had substantial grounds for believing the assessment or notice to be an error, the Director shall waive payment of the liquidated damages.

The Amount of Liquidated Damages Available Under this Assessment is **$30,822.10**

(continued on next page)

Statutory Withholding Obligations

1. Awarding Body Withholding Obligations

In accordance with Labor Code section 1727(a), before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy this Civil Wage and Penalty Assessment. The amount required to satisfy this Civil Wage and Penalty Assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

The amount which must be withheld and retained by the awarding body pursuant to this Civil Wage and Penalty Assessment is:

Wages Due:	$30,822.10
Penalties Due Under Labor Code sections 1775 and 1813:	$11,000.00
Penalties Due Under Labor Code sections 1776:	$0.00
Total Withholding Amount:	$41,822.10

2. Prime Contractor Withholding Obligations:

In accordance with Labor Code section 1727(b), if the awarding body has not retained sufficient money under the contract to satisfy this Civil Wage and Penalty Assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. This amount shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

[X] **If this box is checked,** the Labor Commissioner hereby requests that the prime contractor withhold the following amount from money due the subcontractor and transfer the money to the awarding body to satisfy this assessment:

Wages Due:	$30,822.10
Penalties Due Under Labor Code sections 1775 and 1813:	$11,000.00
Penalties Due Under Labor Code sections 1776:	$0.00
Total Withholding Amount:	$41,822.10

Distribution:

Awarding Body
Surety(s) on Bond
Prime Contractor
Subcontractor

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Shasta General Engineering, Inc. Case No. 08-0023-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

ORDER DENYING RECONSIDERATION

Adesta Limited Partnership, Adesta Management Group, Inc., and Adesta Partners, LLC (collectively "Adesta") seek reconsideration of the Decision of the Director issued on April 28, 2009 ("Decision"), on the basis that the Decision incorrectly assessed liquidated damages under Labor Code section 1742.1, subdivision (a). Adesta, the prime contractor for the underlying project, argues that liquidated damages are not due because it had deposited a check with the Division of Labor Standards Enforcement ("DLSE") for the amount of the assessed prevailing wages and penalties within 60 days after service of the civil wage and penalty assessment ("Assessment"). DLSE has filed a response and Adesta has filed a reply. Based on my review of Adesta's and DLSE's arguments, and the relevant parts of the record, I deny reconsideration for the following reasons.

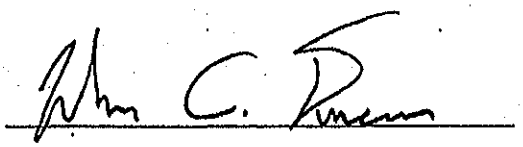
First, Adesta neither requested review of the Assessment nor sought to intervene in Shasta's request for review. This means it has never become a "party" to these proceedings. The right to seek reconsideration is reserved to parties. (See, Cal. Code Regs., tit. 8, §§ 17261 & 17262.) Adesta's failure to exhaust its administrative remedies by requesting review of the Assessment means that Adesta is not a party in this case and therefore lacks standing either to request reconsideration or to seek judicial review of the Decision. Adesta's participation in the case as an "interested Person" under California Code of Regulations, title 8, section 17208, subdivision (d) does restore the rights and interests that it forfeited as a result its failure to file a timely request for review. (Cal. Code. Regs., tit. 8, § 17208, subd (e).)

Next, the January 17, 2008, letter, and accompanying check dated January 16, 2008, from Brian Crone to Sherry Gentry, was not introduced into evidence at the hearing. It has not been authenticated nor otherwise admitted into evidence. It is therefore not part of the administrative record of this case and may not form a basis for reconsideration.

Finally, Adesta 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 DLSE 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 nearly one year 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.

Accordingly, Adesta's request for reconsideration is denied.

Dated: 5/13/09



John C. Duncan
Director of Industrial Relations

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Shasta General Engineering, Inc. Case No. 08-0023-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Shasta General Engineering, Inc. ("Shasta") submitted a request for review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("DLSE") on November 16, 2007, with respect to work performed by Shasta on the Copper Communications Cable and Voice and Data Equipment – Monitoring, Testing and Repair, California Aqueduct State Water Facilities project ("Project") in eleven counties. The Assessment determined that $41,822.10 in unpaid prevailing wages and statutory penalties was due. DLSE filed a motion to dismiss Shasta's request for review because it was mailed 63 days after service of the Assessment. A Hearing on the Merits occurred on August 6, 2008, in Sacramento, California, before Hearing Officer Nathan D. Schmidt. Mark J. Hansen and Monica Hansen, appeared for Shasta, and Ramon Yuen-Garcia appeared for DLSE. The Hearing Officer vacated submission after the conclusion of briefing, on February 5, 2009, to take official notice of additional prevailing wage determinations ("PWDs") brought into issue for the first time by the briefing. The matter was resubmitted on February 13, 2009.

The issues for decision are:

- Whether Shasta's request for review of the Assessment was timely filed.
- Whether the Assessment correctly found that Shasta paid Laborers Carl Bartaldo, John Ross and Walt Moskal less than the prevailing wages required for work performed in San Luis Obispo County.

- Whether the Assessment correctly found that Shasta paid Telecommunications Technicians Daryol Fuller and John Norton less than the prevailing wages required for work performed in Los Angeles County on November 22, 2005.
- Whether the Assessment correctly reclassified Bartaldo and Ross from Laborer to Operating Engineer for work operating a backhoe.
- Whether the Assessment correctly reclassified Donald Lancaster, James Floyd and James Long from Telephone Installer to Telecommunications Technician for work performed in Alameda, Kern, Los Angeles and Merced Counties.
- Whether the Assessment correctly found that Long and Lancaster were underpaid for overtime worked during the weeks ending July 22 and July 29, 2006.
- Whether the Assessment correctly found that Lancaster was entitled to be paid at the holiday rate for one hour of work on President's Day, February 20, 2006.
- Whether the Assessment correctly found that Shasta paid Fuller, Norton and Long less than the mileage reimbursement rate required by the Travel and Subsistence Provisions for Telecommunications Technician.
- Whether the Assessment correctly found that Lancaster was entitled to $17,688.85 in unpaid mileage reimbursement.

In this Decision, the Director finds that Shasta's request for review was timely filed. On the merits of the case, this decision affirms the Assessment on all but two issues, finding that Fuller and Norton were fully paid for their work in Los Angeles County on November 22, 2005, and that Lancaster was not entitled to holiday pay for February 20, 2006. Therefore, the Director of Industrial Relations issues this decision affirming and modifying the Assessment.

FACTS

Shasta employees worked on the Project from approximately August 4, 2005, to August 24, 2006, in Contra Costa, Alameda, San Joaquin, Santa Clara, Merced, Fresno, Kings, Kern, San Luis Obispo, Los Angeles and San Bernardino Counties. The eleven counties in which work

on the Project took place encompass four divisions of the Department of Water Resources ("DWR"), including the San Luis Field Division. The Certified Payroll Reports ("CPRs") for Shasta's work on the Project were prepared by Rush Personnel Services ("Rush") under a pre-existing contract with Shasta and identify the workers as joint employees of Rush and Shasta.

Timeliness of Request For Review: DLSE served the Assessment by mail on November 16, 2007. The Assessment found that eight workers had been underpaid prevailing wages by Rush and Shasta in the amount of $30,822.10, and assessed penalties pursuant to Labor Code sections 1775 and 1813 in the amount of $11,000.00.[1] DLSE found that Rush's history of two prior instances of prevailing wage violations supports the imposition of penalties under section 1775 at $50.00 per violation. Rush did not request review. Shasta's Request for Review ("Request") was postmarked January 18, 2008; 63 days after DLSE mailed the Assessment.

Applicable Prevailing Wage Determinations: There are four applicable PWDs, including the relevant scopes of work and travel reimbursement provisions:

Laborer for Northern California (NC-23-102-1-2004-2): This is the rate Shasta claims is due for backhoe operation. It includes the sub-classification of "Composite Crew Person (Operation of vehicles when in conjunction with Laborer's duties)."

Laborer for Southern California (SC-23-102-2-2004-1): A Notice Regarding Advisory Scope of Work for the Southern California Laborers' General Prevailing Wage Determination, dated August 22, 2004, provides in pertinent part: "The following classifications have not been adopted for public works projects: . . . Vehicle Operator in connection with all Laborers' work."

Operating Engineer for Southern California (SC-23-63-2-2004-1): This is the rate used in the Assessment for backhoe operation. It includes the sub-classification of "Backhoe Operator (up to and including ¾ yds.) small ford, case or similar."

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

Telephone Installation Worker (C-422-X-10-2001-1) is expressly limited to work done "within Del Norte, Inyo, Mono and San Bernardino, and Santa Barbara Counties."

Telecommunications Technician (C-422-X-1-2003-2 and C-422-X-1-2003-2B): The Travel and Subsistence Provisions for Telecommunications Technician state in part:

> A personal automobile may be used for Company business or to facilitate transportation provided that:
>
> * * *
>
> Such usage shall be reimbursed at the Internal Revenue Service (IRS) reimbursement rate for mileage. In the event that the IRS increases the reimbursement rate for mileage, the Company will adjust the mileage reimbursement rate to the maximum allowable rate as soon as practical, not to exceed 60 days from the effective date of the increase.

Underpayment of Prevailing Rate for Work Performed in San Luis Obispo County: From January 29 through February 25, 2006, Bartaldo, Ross and Moskal worked in San Luis Obispo County; they did not receive the applicable prevailing wage rate. Shasta disputed this finding for the first time in its post-hearing briefing, contending that the work actually occurred in DWR's San Luis Field Division, which is located in Merced County, whose prevailing wage is higher than the three men received.

For these weeks, the time cards for Bartaldo, Ross and Moskal, report the location of their work as "Copper Comm. San Luis." Shasta's proposed interpretation that the location noted on the time cards refers to the DWR Field Division where the work took place, rather than being an abbreviation for San Luis Obispo County, is not plausible because all the time cards in evidence refer to the counties in which the work was performed, not the DWR division. There is no support for a finding that Shasta departed from its normal practice of identifying work location by county for this time-period alone.

Underpayment of Prevailing Rate for Work Performed in Los Angeles County: The Assessment found that Telecommunications Technicians Fuller and Norton were both underpaid for eight hours of work in Los Angeles County on November 22, 2005. The evidence shows that both workers' pay was incorrectly reported on the CPRs. The paycheck stubs for the relevant

pay period establish that both were both paid the correct prevailing wage ($35.50 per hour).

Reclassification from Laborer to Operating Engineer: The Assessment reclassified two workers, Bartaldo and Ross, from Laborer to Operating Engineer, for work operating a backhoe during the pay period ending February 11, 2006. The equipment that Bartaldo and Ross operated was not a "true backhoe," but rather a piece of equipment with backhoe functions that attached to the back of a truck. Bartaldo testified that he used the backhoe attachment to excavate trenches approximately 24 inches in depth and that operating the backhoe attachment was different from his normal Laborer work. Shasta produced no contradictory evidence.

Reclassification from Telephone Installation Worker to Telecommunications Technician: Lancaster, Long and James Floyd, were paid as Telephone Installation Workers for multiple weeks of work that the evidence shows was performed in Alameda, Kern, Los Angeles and Merced counties. This prevailing wage rate was not available in those counties. All other work on the Project by these workers was reported on the CPRs, and paid, at the higher Telecommunications Technician rate, which the rate the Assessment used for this work.

Underpayment of Overtime: The CPRs report that Long and Lancaster worked ten hours per day on six days during the weeks ending July 22 and July 29, 2006. They were paid at the straight time rate for the full ten hours each day. The Assessment found that Long and Lancaster were entitled to the be paid at the overtime rate for the hours worked in excess of eight hours per day, a total of 12 hours of overtime per worker during the two week period. Shasta admits its failure to pay the overtime rate for these hours.

Entitlement to Holiday Pay: The Assessment found that Lancaster had worked for one hour on the President's Day holiday, February 20, 2006, and had been underpaid at the straight time rate rather than the holiday rate as reported on the CPRs. Lancaster's time card for that day, however, shows that he was incorrectly reported on the CPRs as working on the Project when he was actually off work for the holiday.

Mileage Reimbursement: The Assessment found that Shasta had underpaid the mileage reimbursement owed to Telecommunications Technicians Fuller, Norton and Long. Shasta paid these three workers reimbursement at the rate of $0.41 per mile for all of their reimbursable

mileage incurred on the Project. The IRS Optional Standard Mileage Rate ("reimbursement rate") in effect from the commencement of Shasta's work on the Project through August 31, 2005, was $0.405 per mile. The reimbursement rate increased to $0.485 per mile from September 1 through December 31, 2005, and was reduced to $0.445 per mile from January 1, 2006, through the completion of Shasta's work on the Project. Shasta presented no evidence that paying the applicable reimbursement rate was impractical.

Failure to Pay Mileage Reimbursement to Lancaster: Lancaster, also a Telecommunications Technician, and Shasta's Vice President, was paid no reimbursement for any of the reimbursable mileage he had incurred on the Project. Lancaster's estimate that he drove approximately 50,000 business miles on the Project from August 29, 2005, through August 26, 2006, is accepted in the absence of contrary evidence from Shasta. Lancaster's assumption of payments on a Ford F250 pick-up owned by Shasta is further evidence that the mileage was incurred as an employee on the Project, not as an officer of Shasta.

DLSE used an average reimbursement rate of $0.465 per mile because neither Shasta nor Lancaster could show when in relation to the various reimbursement rates specific miles were driven. Based on the evidence, this appears to be a reasonable estimate; Shasta has presented no evidence to rebut the estimate. This results in a total of $23,250 in mileage reimbursement owed to Lancaster, less $5,561.15 in truck expense reimbursements Shasta paid to Lancaster during the Project. The total unpaid mileage reimbursement is $17,688.85.

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 em-

ployment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [*citations omitted*].) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (Section 90.5, subdivision (a), and *see Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and 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 Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty Assessment is incorrect."

Shasta's Request For Review Was Timely.

Section 1742, subdivision (a) provides that "an affected contractor or subcontractor may obtain review of a civil wage and penalty assessment . . . by transmitting a written request . . . within 60 days after service of the assessment." DLSE contends that Shasta's request for review, mailed 63 days after mailing of the Assessment, is not timely because the 60-day filing deadline is not extended by the time extension rules of Code of Civil Procedure section 1013. DLSE argues that the 60-day time limit for filing a request for review under section 1742(a) is analogous to section 3725, and is therefore not extended by Code of Civil Procedure section 1013. According to DLSE, section 1742, subdivision (a) "does not refer to service of anything. Rather, to ob-

tain the right to a hearing, Respondent must initiate action to file a timely Request for Review." (DLSE Motion to Dismiss, August 1, 2008.) DLSE's argument misinterprets both its own authority and the plain language of section 1742.

In *Department of Industrial Relations v. Atlantic Baking Co.* (2001) 89 Cal.App.4th 891, 894, relied on by DLSE, the court of appeal distinguishes statutory time limits that are triggered by "service of a document to which a response is directed," and which are therefore extended by Code of Civil Procedure section 1013, from time limits that are triggered by "an act other than service," which are not extended by section 1013. In *Atlantic Baking*, the court held that the 45-day time period for filing a petition for writ of mandate under section 3725 was not extended by section 1013, because it "runs from the 'mailing' of the notice of findings and findings issued by the Labor Commissioner" and makes no reference to "service." (*Id.* at p. 895.)

Section 1741, subdivision (a) expressly requires that service of a civil wage and penalty assessment be completed by mail "pursuant to Section 1013 of the Code of Civil Procedure," and, contrary to DLSE's assertion, section 1742, subdivision (a) expressly calculates the 60-day time limit for transmitting a request for review from "*service* of the assessment." (Emphasis added.) Because the time limit begins to run from service of the Assessment, Code of Civil Procedure section 1013 extends the time limit for filing a request for review by an in-state contractor or subcontractor to 65 days from the date the Assessment is served by mail.[2] Shasta's Request for Review, postmarked 63 days after the date that DLSE served the Assessment, was therefore filed timely. DLSE's motion to dismiss Shasta's Request for Review as untimely is denied.

Shasta Was Required To Pay The Prevailing Rate For Operating Engineer For Backhoe Operation.

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 for each locality (as defined in section 1724) and publishes general wage determinations such as Laborer and Operating Engineer to inform all inter-

[2] *See also* Rule 03, subdivision (a) [Cal. Code Regs., tit. 8, §17203, subd.(a)].

ested parties and the public of the applicable wage rates for the "craft, classification and type of work." (Section 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.) Ultimately, it is the trier of fact who determines the proper pay classification for a type of work based on the Director's PWDs.

Shasta argues that the backhoe attachment was "not really a backhoe" because it attached to the back of a truck and therefore the Operating Engineer PWD did not apply. Shasta contends that it properly paid Bartaldo and Ross at the Laborer rate for the work, under the Composite Crew Person sub-classification that covers "operation of vehicles when in conjunction with Laborer's duties." As noted above, the Composite Crew Person sub-classification does not exist in the Southern California Laborer PWD applicable to San Luis Obispo County where the work was performed. In fact, the August 22, 2004, Notice Regarding Advisory Scope of Work for the Southern California Laborers' General Prevailing Wage Determination specifically states that vehicle operation "in connection with all Laborers' work" is not included in the Scope of Work for public works projects.

The Operating Engineer PWD applies to backhoe operation, without excluding the type of backhoe attachment used here. For these reasons, Shasta has not met its burden to prove that DLSE's use of the Operating Engineer, Backhoe Operator rate of pay was incorrect. Consequently, because Shasta did not pay Bartaldo and Ross the prevailing wages specified for the Operating Engineer classification, it violated its statutory obligation to pay prevailing wages. The Assessment is therefore affirmed as to this issue. The total unpaid wages owing to Bartaldo and Ross are $609.76 for 32 hours of straight time and 6 hours of overtime worked on 4 days.

Shasta Is Required To Reimburse Its Telecommunications Technicians At The Maximum IRS Mileage Reimbursement Rate.

The Travel and Subsistence Provisions for Telecommunications Technician unambiguously provide that personal automobile usage "shall be reimbursed at the Internal Revenue Service (IRS) reimbursement rate for mileage," and that, if the IRS reimbursement rate changes, the company's mileage reimbursement rate will be adjusted "to the maximum allowable rate as soon

as practical." It is undisputed that Shasta paid mileage reimbursement owed to Telecommunications Technicians Fuller, Norton and Long at the rate of $0.41 per mile for all of their reimbursable mileage incurred on the Project, even though the maximum IRS reimbursement rate was $0.485 per mile from September 1 through December 31, 2005, and $0.445 per mile from January 1, 2006, through the completion of Shasta's work on the Project.

Shasta contends that it was not required to pay the increased reimbursement rates, because these rates are characterized by the IRS as "optional" rates. On that basis, Shasta argues that it was free to choose whether to pay the increased rate or not. IRS's interpretation of how to calculate its mileage rates in other situations is not at issue here; the obligation to pay the prevailing wage determined by the Director is a matter of state law, which includes the applicable Travel and Subsistence Provisions governing mileage reimbursement to the Telecommunications Technicians. These provisions require reimbursement at the maximum IRS reimbursement rate and the implementation of any increases in that rate "as soon as practical."

Shasta has provided no evidence to show that immediate increases were not practical in this case and has thus failed to meet its burden to disprove the basis of the Assessment. Consequently, because Shasta did not reimburse Fuller, Norton and Long at the correct mileage reimbursement rate, it violated its statutory obligation to pay prevailing wages. The Assessment is therefore affirmed as to this issue.

Shasta Is Required To Reimburse Lancaster For His Mileage Attributable To The Project.

Like the other employees paid as Telecommunications Technicians, Lancaster was entitled to be reimbursed for his personal automobile usage on the Project at the maximum IRS reimbursement rate. Shasta contends that Lancaster was not entitled to reimbursement for his mileage because he was an officer and part-owner of Shasta and "had company obligations," though it has provided no evidence concerning any such obligations or legal argument justifying an exemption from reimbursement on that basis. Shasta's sole argument disputing the 50,000 miles claimed by Lancaster for his work on the Project from August 29, 2005, through August 26, 2006, is that it is an approximate figure and is not supported by mileage logs. Shasta pro-

vided no evidence that Lancaster's figure is inaccurate. The burden is on Shasta to disprove the basis of the Assessment, and it cannot shift that burden simply by saying that it disagrees with the evidence underlying the Assessment.

Shasta has provided no evidence to dispute either the 50,000 miles that Lancaster states he accrued working on the Project or his entitlement to reimbursement for those miles and has thus failed to meet its burden to disprove the basis of the Assessment. Consequently, because Shasta did not fully reimburse Lancaster for his personal vehicle mileage accrued on the Project, it violated its statutory obligation to pay prevailing wages. The Assessment is therefore affirmed as to this issue. The unpaid mileage reimbursement owing to Lancaster is $23,250 for 50,000 miles at the average reimbursement rate of $0.465 per mile, less $5,561.15 in documented truck expense reimbursements which DLSE credited in the Assessment, for a total of $17,688.85.

DLSE'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.[3]

Abuse of discretion is established if the Labor Commissioner "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." (Code of Civil Procedure section 1094.5, subdivision (b).) In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment "because in [his] own evaluation of the circumstances the punishment appears to be too harsh." *Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage Assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Rule 50(c) [Cal. Code Reg. tit. 8 §17250, subd. (c)].)

DLSE's reliance on Rush's history of prior prevailing wage violations as a basis for the imposition of penalties against Shasta at the maximum rate of $50.00 per violation is not supported by the record, as there is no evidence to establish joint and several liability between Rush and Shasta under section 1775; the explicit provisions for joint and several liability under section 1775 are for contractors and subcontractors, which was not the relationship here.

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[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."

Nonetheless, the burden is on Shasta to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the maximum rate of $50.00 per violation. Shasta's defense against the penalty award, tied to its arguments on the merits, is that there were no prevailing wage violations; therefore penalties cannot apply. Shasta has introduced no evidence of abuse of discretion by DLSE. The number and variety of prevailing wage violations committed by Shasta, and Shasta's lack of reasonable defenses to all but a few of them, supports a finding that Shasta's violations were willful.

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The Director is not free to substitute his own judgment. Shasta has not shown an abuse of discretion and, accordingly, the assessment of penalties at the maximum rate of $50.00 is affirmed.

The Assessment found a total of 205 prevailing wage violations subject to penalties under section 1775. Shasta has disproved the basis of the Assessment for three of the assessed violations, showing that Fuller and Norton were fully paid for their work in Los Angeles County on November 22, 2005, and that Lancaster was not entitled to holiday pay for February 20, 2006. This decision therefore reduces the total assessed violations subject to penalties under section 1775 by three, to 202.

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 record establishes that Shasta violated section 1815 by paying less than the required prevailing overtime wage rate to Lancaster and Long, who were paid for overtime hours on six days at the straight time rate, and to other workers who were underpaid for overtime work as a result of being paid less than the required prevailing wages; a total of 30 violations. Unlike section 1775 above, section 1813 does not give DLSE 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, as assessed, is affirmed.

Shasta Is Liable For Liquidated Damages.

At all times relevant to this Decision, section 1742.1, subdivision (a) provided 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. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the . . . notice to be in error, the director shall waive payment of the liquidated damages.[4]

Rule 51, subdivision (b) [Cal.Code Reg. *tit. 8* §17251, subd. (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

[4] Section 17542.1(a) was amended effective January 1, 2009. [Stats 2008 ch 402 § 3 (SB 1352).] Because the 60 day time after service of the Notice for payment of unpaid prevailing wages had run prior to the amendment's effective date, however, the version in effect at that time remains applicable to this case.

> 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 . . .

Shasta is liable for liquidated damages only for wages, including unpaid mileage reimbursement, that remained unpaid sixty days following service of the Assessment absent waiver by the Director. Entitlement to a waiver of liquidated damages in this case is closely tied to Shasta's position on the merits and specifically whether there was an "objective basis in law and fact" for contending that the assessment was in error.

As discussed above, Shasta's arguments on the merits are unsupported by either the law or the facts of this case for all but $74.19 of the unpaid prevailing wages included in the Assessment. Such arguments cannot be found to constitute an "objective basis in law and fact" for contending that the Notice was in error. Because the unpaid prevailing wages remained due more than sixty days after service of the Notice, and Shasta has not demonstrated grounds for waiver, Shasta is also liable for liquidated damages in an amount equal to the unpaid prevailing wages.

FINDINGS

1. Affected subcontractor Shasta General Engineering, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Bartaldo, Ross and Moskal performed work in San Luis Obispo County during the weeks ending February 4, through February 25, 2006, and were entitled to be paid the Laborer rate applicable to San Luis Obispo County for that work.

3. Shasta fully paid Fuller and Norton for work performed in Los Angeles County on November 22, 2005. The Assessment is therefore reduced by $23.52 in unpaid prevailing wages assessed for their work on that day.

4. Bartaldo and Ross performed work on the Project subject to the Operating Engineer classification during the weeks ending February 4, and February 11, 2006, and were entitled to be paid the Operating Engineer rate applicable to San Luis Obispo County for that work.

5. Lancaster, Long and Floyd performed work on the Project subject to the Telecommunications Technician classification for multiple weeks of work performed in Alameda, Kern, Los Angeles and Merced counties and were entitled to be paid the Telecommunications Technician rate applicable to those counties for that work.

6. Lancaster and Long were paid at the straight time rate rather than the overtime rate for a total of 24 hours of overtime worked on six days during the weeks ending July 22 and July 29, 2006.

7. Lancaster did not work on the President's Day holiday, February 20, 2006, and is not entitled to holiday pay for the one hour of work he was erroneously reported as having worked that day. The Assessment is therefore reduced by $50.67 in unpaid prevailing wages assessed for his work on that day.

8. Fuller, Norton and Long were entitled to receive mileage reimbursement at the maximum IRS reimbursement rate pursuant to the Travel and Subsistence Provisions for Telecommunications Technician. The applicable reimbursement rates were $0.405 per from the commencement of Shasta's work on the project through August 31, 2005, $0.485 per mile from September 1 through December 31, 2005, and $0.445 per mile from January 1, 2006, through the completion of Shasta's work on the Project.

9. Lancaster was entitled to receive unpaid mileage reimbursement at the maximum IRS reimbursement rate pursuant to the Travel and Subsistence Provisions for Telecommunications Technician for the 50,000 business miles he accrued on the Project from August 29, 2005, through August 26, 2006, in the amount of $17,688.85.

10. In light of Findings 2 through 9, above, Shasta underpaid its employees on the Project in the aggregate amount of $30,747.91.

11. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of $50 per violation, and the resulting total penalty of $10,100.00, as modified, for 202 violations is affirmed.

12. Penalties under section 1813 at the rate of $25.00 per violation are due for 30 violations on the Project, for a total of $750.00 in penalties.

13. The unpaid wages found due in Finding No. 10 remained due and owing more than sixty days following issuance of the Assessment. Shasta is liable for an additional award of liquidated damages under section 1742.1 in the amount of $30,747.91, and there are insufficient grounds to waive payment of these damages.

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

Wages Due:	$30,747.91
Penalties under section 1775, subdivision (a):	$10,100.00
Penalties under section 1813:	$750.00
Liquidated Damages:	$30,747.91
TOTAL:	**$72,345.82**

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

The Civil Wage and Penalty Assessment is affirmed in part and modified in part as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 4/27/09

John C. Duncan
Director of Industrial Relations