STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Rocky Coast Framers, Inc.

Case No. 08-0079-PWH

From a Notice of Withholding issued by:

Contractor Compliance & Monitoring, Inc.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

Affected contractor Rocky Coast Framers, Inc. ("Rocky Coast") submitted a timely request for review of the Notice of Withholding ("Notice") issued by Contractor Compliance & Monitoring, Inc. ("CCMI") with respect to the Otay Ranch Village 7 Elementary School ("Project"), a public works project in San Diego County. CCMI withheld contract funds from Rocky Coast, claiming that the contractor failed to pay required overtime for Saturday hours voluntarily worked by certain employees. In lieu of a Hearing on the Merits, the parties agreed to submit the case to assigned Hearing Officer Douglas P. Elliott on stipulated facts, joint exhibits and briefs. Chad T. Wishchuk appeared for Rocky Coast, and Deborah Wilder appeared for CCMI. For the reasons set forth below, the Director issues this decision affirming and modifying the Notice.

FACTS

On August 11, 2008, the parties stipulated to certain facts. Those stipulated facts are set forth verbatim (references to exhibits deleted):

"1. The location of the project is San Diego County.

"2. The applicable prevailing wage determination is Carpenter Determination SD-23-31-4-2006-1.

"3. The certified payroll reports submitted by Rocky Coast accurately reflect the hours worked by, and amounts Rocky Coast paid to, its employees on the project.

"4. According to those certified payroll reports, the following Rocky Coast carpenters worked on the following Saturdays as indicated:

Name	Saturday	Hours Worked
Antonio Arguelles	April 14, 2007	2.5
Jose Cardenas	April 14, 2007	8
	April 28, 2007	8
James Gaughan	April 14, 2007	8
Sean Lancaster	April 14, 2007	8
	May 5, 2007	7
Alfonso Mendez	April 14, 2007	8
Jose Mendez	April 14, 2007	8
Joel Valenzuela	April 14, 2007	8
Eduardo Vazquez	April 14, 2007	8
Miguel Barrientos	April 21, 2007	4
Ramon Chavez	April 21, 2007	8
Alberto Cruz	April 21, 2007	8
	April 28, 2007	4
Justin Haskins	April 21, 2007	8
	April 28, 2007	8
Armando Leyva	April 21, 2007	4.5
Willie Sprankles	April 21, 2007	7
Luis Gonzalez	April 28, 2007	3.5
Stephen Coats	May 5, 2007	2
Tim Farrell	May 5, 2007	1.5

"5. These carpenters voluntarily worked on these Saturdays, none of which were contractually recognized holidays.

"6. In no instance did the Saturday hours worked by the Rocky Coast carpenters result in any carpenter working more than 40 hours in the particular workweek.

"7. Rocky Coast paid these carpenters the full straight-time hourly rate for each of the Saturday hours worked.

"8. Rocky Coast contends and would testify that the reasons why these carpenters were unable to complete 40 hours during Monday through Friday were beyond the control of Rocky Coast.

"9. The project was not shut down during the weeks in question due to inclement weather, major mechanical breakdown, or lack of material deliveries.

"10. Reasons for the carpenters' inability to complete 40 hours during Monday through Friday on the project included the following:

(a) Beginning employment for Rocky Coast mid-week;

(b) Taking a vacation day off during the week;

(c) Taking a personal day off during the week;

(d) Being transferred mid-week from another Rocky Coast project following the completion of, or inclement weather shutdowns at, the other Rocky Coast project; and

(e) Taking a sick or family leave day off during the week.

"The 2005-2008 Collective Bargaining Agreement For Building Construction Between Associated General Contractors of America, San Diego Chapter, And Southwest Regional Council of Carpenters provides the following at 'Section 21, Work Periods:[1]

> Forty (40) hours worked from Monday through Friday shall constitute a week's work. Any work actually performed in excess of eight (8) hours in one day or forty (40) hours during any work week, and any work performed on a Saturday shall be payable at the rate of one and one-half (1 ½) times the employee's straight-time hourly rate; except that an employee who does not complete a full forty (40)

[1] The above paragraph is unnumbered in the stipulation.

> hour week for any reason, except a contractually recognized holiday, may voluntarily work on Saturdays at straight time. Work on Sundays shall be paid at double time.

(Emphasis added [by the parties].)

"11. Carpenter Determination SD-23-31-4-2006-1 adopts the wage rates of the 2005-2008 Collective Bargaining Agreement For Building Construction Between Associated General Contractors of America, San Diego Chapter, And Southwest Regional Council of Carpenters.

"12. Rocky Coast contends and would present testimony that the intent of the parties to the collective bargaining agreement from which the language of the Saturday footnote in Carpenter Determination SD-23-31-4-2006-1 came was to permit voluntary Saturday work at straight-time rates in every circumstance where a 40-hour week has not been completed, except in the case involving a contractually recognized holiday.

"13. In SD-23-31-4-2006-1, the relevant portion of footnote 'a' states: 'Saturday in the same workweek may be worked at straight time for the first 8 hours if the employee was unable to complete the 40 hours during the normal workweek for reasons beyond the control of the Employer, such as inclement weather.'"

(Remaining paragraphs of stipulation omitted.)

DISCUSSION

Labor Code 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.[2] 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.

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

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

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

A Labor Compliance Program ("LCP") such as CCMI enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and *see Lusardi, supra.*)

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

1. Rocky Coast Was Required To Pay The Prevailing Rate For Carpenters For The Work Performed On The Project In Light Of The Information Publicly Available From DIR.

The prevailing rate of pay for a given craft, classification, or type of work is determined by the Director of Industrial Relations. (Lab. Code, §§1773, 1773.9, and *see 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 SD-23-31-4-2006-1, 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. (Lab. Code, § 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 Director does not enforce private agreements between the parties.

The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (*See* Lab. Code, §1773.2 and *Ericsson, supra.*)

This case turns on the meaning of footnote "a" of Carpenter Determination SD-23-31-4-2006-1, which states in part: "Saturday in the same workweek may be worked at straight time for the first 8 hours if the employee was unable to complete the 40 hours during the normal workweek for reasons beyond the control of the Employer, such as inclement weather." This provision can be interpreted by the plain meaning of the words used. In this context, the noun "control" means the "power to direct or regulate." *Webster's New World Dictionary* (3d College Ed. 1989) at p. 303. Thus, an employee is unable to complete 40 hours during the normal workweek "for reasons beyond the control of the Employer" when he misses work due to circumstances that are not within the Employer's power to direct or regulate. For the most part, there is no factual basis for concluding that the stipulated reasons for workers not working 40 hours during the regular work week meet this standard. The fact that an employee began employment with Rocky Coast in mid-week was not beyond the control of Rocky Coast. The same is true of an employee being transferred mid-week from another Rocky Coast project. Similarly, there is no evidence that Rocky Coast had no control over employees taking vacation days or personal days during the regular workweek.[3] Thus, these absences are within the employer's power to direct or regulate.

[3] For example, Rocky Coast reported to CCMI that James Gaughan "worked 8 hours straight time due to taking Friday, April 13th off, *per his request.*"

On the other hand, an employee's inability to work due to illness is a circumstance beyond the employer's power to direct or regulate. By extension, an employee's absence to care for a sick family member may be beyond the control of the employer. Absence due to doctor's appointment, though, is only beyond the control of the employer if the employee is unable to obtain an appointment outside working hours. Car trouble is similar to illness, in that it may arise suddenly unexpectedly, and may render it impossible for an employee to report for work. It thus would constitute a circumstance beyond the control of the employer.

This means that restrictions in the footnote are not the same as in the Collective Bargaining Agreement ("CBA") between the Associated General Contractors of America, San Diego Chapter ("AGC") and the Southwest Regional Council of Carpenters (Carpenters) as Rocky Coast argues. Nor does it mean that the qualifier "such as inclement weather" denotes only jobsite conditions that would prevent any employees from working on the jobsite, as CCMI argues. While inclement weather is, indeed, a jobsite condition, it is stated not as an example of such, but rather as an example of a reason beyond the control of the employer. If it had been the intent of the Director to limit the exception to jobsite conditions, footnote "a" would have been stated in such terms, rather than in the broader term "reasons beyond the control of the Employer ..."

The Director did not adopt the CBA language, opting instead for the much narrower exception in the Determination, which by its terms applies only when work is missed during the normal workweek "for reasons beyond the control of the employer ...." If Rocky Coast disagreed with the decision to include a narrower standard than is in the CBA, it should have challenged the Determination in accordance with section 1773.4. (*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1084-1085.)

California Code of Regulations, title 8, section 16200 (a regulation specifying the methodology for making prevailing wage determinations) does not provide any greater support for Rocky Coast.[4] Exceptions 2 and 4 are exceptions to the methodology

[4] Section 16200 provides in part:

normally used in making rate determinations; they do not override the language of the determinations themselves. The right to rely on the published determinations would be undermined if their meaning were dependent on the exceptions stated in the regulation specifying the methodology for making them. "To begin with, all parties and the public have a right to rely on the general determinations published by the Director on the DLSR website. Contractors and subcontractors are deemed to have constructive knowledge of those determinations." (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.)

By their own terms, the exceptions are inapplicable to the determination at issue. Exception 2 is inapplicable because the CBA does *not* provide "for Saturday and Sunday work at straight-time." It provides for Saturday work at one and one-half times straight time, with a narrow exception for work voluntarily done by employees who have not completed a full workweek under prescribed circumstances, and requires double time for Sunday work in all circumstances. Exception 4 is similarly inapplicable because Saturdays are not part of the "standard work week." Implicit in footnote "a" to the Determination is the recognition that the "normal workweek" is Monday through Friday. This is consistent with the CBA, which states: "Forty (40) hours worked from Monday through Friday shall constitute a week's work."

The Director shall follow those procedures specified in Sections 1773 and 1777.5 of the Labor Code and in these regulations when making a prevailing wage determination.
(a) Collective Bargaining Agreements or Wage Surveys.
* * *
(3) Adoption of Collective Bargaining Agreements.
(A) If the Director determines pursuant to Section 1773 of the Labor Code that the rate established by a collective bargaining agreement is the general prevailing rate of per diem wages for each craft, classification or type of worker and the Director adopts such rate by referral, the Director will publish such rate. Only those rates and employer payments specifically enumerated in the definition of "general prevailing rate of per diem wages" in Section 16000 shall be included in the rate adopted.
* * *
(F) Overtime. Overtime will be paid as indicated in the wage determination.
* * *
Exception 2: If the collective bargaining agreement provides for Saturday and Sunday work at straight-time, no overtime payment is required for the first eight hours on Saturday or Sunday.
* * *
Exception 4: No overtime payment is required for less than 40 hours in a standard work week or for less than eight hours in a calendar workday unless specified in the collective bargaining agreement used as the basis for the prevailing wage determination.

CCMI has not presented a compelling argument for interpreting footnote "a" in its narrow manner. Just as the language of that footnote cannot be interpreted as though it were synonymous with the language of the CBA, neither can it be interpreted to be synonymous with the language of other footnotes applicable to other trades and/or geographic areas.

Applying these principles to the specific instances in dispute, Rocky Coast has not proven that any employee was unable to complete forty hours for reasons beyond its control except as noted below:

- For the week ending April 21, 2007, Rocky Coast has demonstrated that it was correct in paying Armando Leyva straight time for 4.5 hours worked on Saturday, because he left work early on Wednesday due to his daughter's illness, a reason beyond the control of the employer. Rocky Coast was obligated to pay time and a half for all other Saturday work performed that week.[5]
- For the week ending April 28, 2007, Rocky Coast has demonstrated that it was correct in paying Justin Haskins straight time for 8 hours worked Saturday, because he missed work on Wednesday, April 25 due to car trouble, a reason beyond the control of the employer.[6]
- For the week ending May 5, 2007, Rocky Coast has demonstrated that it was correct in paying Sean Lancaster straight time for 7 hours worked Saturday because he missed work on Monday, April 30 and Tuesday, May 1, due to a non-industrial knee injury, a reason beyond the control of the employer.[7]

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[5] Sean Lancaster took Monday, April 9 off "to meet with his lawyer." Rocky Coast has not demonstrated that this absence was beyond its control, in that it has not established that Lancaster needed to meet with his lawyer during working hours, or that the meeting required a full day's absence.

[6] Alberto Cruz worked 4 hours at straight time on Saturday due to leaving 4 hours early on Thursday, April 26 for a doctor's appointment. Rocky Coast has not demonstrated that this was a reason beyond its control in that it has not shown that Cruz could not have scheduled an appointment outside working hours. Jose Cardenas worked 8 hours straight time on Saturday due to being off Tuesday, April 24 "for testing." (Exh. 5 at p.2.) Rocky Coast has not demonstrated that this was a reason beyond its control, in that it has not established the nature or necessity of the testing, or that it needed to be conducted during working hours.

[7] Stephen Coates worked 2 hours at straight time on Saturday "due to only having 6 hours worth of work on Tuesday, May 1st." (Exh. 5 at p.2.) Rocky Coast has not demonstrated that this was a reason beyond its control, in that it has not shown that it lacked the ability to schedule and apportion the work done by its

2. CCMI's Penalty Assessment Under Section 1775 Is Appropriate As Modified.

Section 1775(a) states in relevant part:

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

(2)(A) The amount of the penalty shall be determined by the 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.[8]

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crew on that particular date. Tim Farrell worked 1.5 hours at straight time on Saturday due to having to leave 1.5 hours early on Wednesday, May 2 "to sign papers." (Exh. 5 at p.3.) Rocky Coast has not demonstrated that this was a reason beyond its control, in that it has not shown that Farrell could not have signed the papers outside of working hours.

[8] Labor Code §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

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(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 [LCP] 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(c)].)

Rocky Coast has not proven that the violations, although made in good faith, were promptly corrected when it was notified. Therefore, there is no basis for a complete waiver of penalties. In light of this, the minimum penalty is $10.00 per violation, the amount CCMI used in its Notice. There is no abuse of discretion in setting the amount of each penalty.

The number of penalties to assess has been reduced from the original 21 to 18 based on the above discussion. Accordingly, the penalties under section 1776 are reduced from $210.00 to $180.00.

3. Rocky Coast Is Liable For Liquidated Damages.

Labor Code section 1742.1(a) provides in pertinent part as follows:

> After 60 days following the service of a civil wage and penalty Assessment under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the Assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she

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deliberately fails or refuses to comply with its provisions."

had substantial grounds for believing the Assessment . . . to be in error, the director shall waive payment of the liquidated damages.

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

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

Rocky Coast is potentially liable for liquidated damages only on any wages that remained unpaid sixty days following service of the Notice. Entitlement to a waiver of liquidated damages in this case is closely tied to Rocky Coast'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.

Rocky Coast insisted that the Saturday work provision in the Determination should be given the same meaning as that in the CBA, despite patent differences in the language. Rocky Coast may have believed it was justified in this position because it was a signatory to the CBA and was acting in compliance with its terms. This is not an objective basis in law and fact for the error claimed by Rocky Coast because the obligation to follow the published prevailing wage, rate and not private agreements, is well settled. CCMI has stated in its brief that it does not oppose a waiver. However, the decision to award liquidated damages rests solely with the Director. Here, the contractor has not proven a sufficient basis for a waiver.

FINDINGS

1. Affected contractor Rocky Coast filed a timely Request for Review of the Notice of Withholding issued by CCMI with respect to the Project.

2. Rocky Coast's employees were entitled to Saturday pay under the terms of Carpenter Determination SD-23-31-4-2006-1. After amending the Notice with respect to those employees who were unable to complete 40 hours of work during the normal workweek due to reasons beyond the control of Rocky Coast, the total unpaid wages due

and owing are $1,639.56.

3. CCMI did not abuse its discretion in setting section 1775(a) penalties at the rate of $10.00 per violation, and the resulting total penalty of $180.00, as modified, for 18 violations is affirmed.

9. The unpaid wages found due in Finding No. 2 remained due and owing more than sixty days following issuance of the Notice. Rocky Coast is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of $1,639.56 and there are insufficient grounds to waive payment of these damages.

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

Wages Due:	$1,639.56
Penalties under section 1775, subdivision (a):	$ 180.00
Liquidated Damages:	$1,639.56
TOTAL:	**$3,459.12**

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

ORDER

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

Dated: 10/3/08

John C. Duncan
Director of Industrial Relations