STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Durham Construction, Inc.

Case No. 08-0157-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

ORDER MODIFYING DECISION OF THE DIRECTOR

The sentence at the end of the second paragraph of the Decision (bottom of page 1 to top of page 2) is modified as follows. Delete all text after the word "assessment" so that the sentence states in full, "I therefore modify and affirm the assessment."

In all other respects the Decision shall stand as issued.

Dated: September 8, 2009

John C. Duncan
Director of Industrial Relations

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Durham Construction, Inc. Case No. 08-0157-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Durham Construction, Inc. ("Durham") filed a timely request for review from a civil wage and penalty assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("Division") with respect to work performed by subcontractor Rich Mead Tile ("Mead") on the Clovis Fire Station No. 1 Reconstruction Project ("Project") in the County of Fresno. A hearing on the merits was held in Fresno, California on January 27, 2009, before hearing officer John Cumming. Jason S. Epperson appeared for Durham, and Ramon Yuen-Garcia appeared for the Division. Following the filing of post-hearing briefs, the hearing officer issued a Tentative Decision under Rule 52(c) [Cal. Code Reg., title 8, §17252c)] and provided the parties with an opportunity to respond to his proposed findings. Following the filing of those responses, this matter was submitted for decision on July 6, 2009.

The Division determined that Mead and Durham were liable for the underpayment of $62,279.42 in wages to Durham's workers, plus $10,360.00 in penalties under Labor Code sections 1775 and 1813,[1] and potentially an additional $62,279.42 in liquidated damages under section 1742.1. Durham does not dispute that Mead underpaid his workers. It contends that the Assessment is too high due to an overstatement of the hours worked by Mead's employees and the use of a higher-paying classification than was required for some of the work performed by those employees. For the reasons set forth below, I find that the record supports Durham on the issue of overstated hours but not on the issue of classification. I therefore modify and affirm the as-

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

sessment and waive Durham's liability for liquidated damages.

Facts

On September 29, 2006, Durham entered into a contract with the City of Clovis to perform and serve as prime contractor on the Project, which involved the complete reconstruction of a city fire station. Durham used over two dozen subcontractors on the Project, including Mead, who was hired to perform "all thin brick, cast stone, and expd [sic] polystyrene core cast stone work" on the Project. Mead commenced work on the Project on April 24, 2007, and used over a dozen workers at various times on the Project. The prevailing wage requirements for this work were set forth in the Director's General Prevailing Wage Determination FRE-2006-1. Mead decided to pay his workers tile setter and tile finisher rates in light of his own status as a licensed Ceramic and Mosaic Tile Contractor.

Mead was required to prepare certified payroll records (CPRs) in accordance with section 1776, and to send them regularly to Durham for review while working on the Project. Mead failed to do so, despite receiving numerous verbal warnings and requests and written notices from Durham over the course of several months. After Durham's efforts failed, it stopped making progress payments to Mead, while continuing to pay Mead's suppliers so that work could continue. Mead stopped working on the Project after October 24, 2007, and still had not prepared or submitted any CPRs to Durham.[2]

Durham subsequently hired some Mead's workers to complete Mead's portion of the Project. Durham immediately began paying these workers the prevailing wage rate for bricklayers. This had the effect of alerting the workers to the fact that they had been paid the wrong rates by Mead, and it motivated at least one worker to complain to the Division.

The Division sent Mead a request for CPRs, which Mead prepared and provided the reports to the Division sometime in December 2007. Mead also acknowledged in a December 21, 2007, telephone conversation with the Division's investigator that his employees only performed

[2] Richard Mead did not appear as a witness, and counsel for both parties said that they had tried but been unsuccessful in their efforts to communicate with Mead. According to the testimony of other witnesses and notes in the Division's file notes, Mead blamed his staff for not preparing the CPRs and himself for not overseeing their work. He also claimed that he had underbid the job and that it effectively had put him out of business.

work within the brick layer scope of work, but said he thought he could pay tile setter and finisher rates because he was licensed as a tile contractor.[3]

It is unknown what information Mead used to produce the CPRs, which showed an aggregate total of over 5100 hours worked by Mead's employees on the Project. The Division in turn based its Assessment strictly on the hours reported in Mead's CPRs. None of the employees who testified or answered questionnaires for the Division had kept separate track of his hours separately, and none complained about not being paid for all hours worked as opposed to not receiving the correct rate.

The only precise and contemporaneous information about the number of hours worked by Mead's employees came through the daily logs that were prepared by both the City of Clovis's project manager Zack Rix and Durham's superintendent Larry McCrain. Each prepared his own daily report which listed, among other things, the names of subcontractors and the number of employees and total number of hours worked by those employees on that day. Each walked through the job site several times each day and based head counts on direct observation. McCrain also took photographs to document work activities progress on the Project.

Durham's compilation of Rix's daily logs, McCrain's daily field reports, and Mead's CPRs, shows that Rix's and McCrain's reports were in near total agreement for the entire six month period that Mead worked on the Project, while more often than not Mead's CPRs reflected either more hours, or in several instances, fewer hours worked by employees than had been recorded by Rix and McCrain. The photographs also documented instances in which there was no Project work activity on certain days for which the CPRs showed work being performed. The Division did not challenge this compilation, except in a few minor details, which Durham promptly corrected. The compilation shows that Mead employees worked 4,626 hours in aggregate on the Project without any overtime hours. This total is about ten percent less than the total hours reported on Mead's CPRs.[4] Durham's liability for back wages based on this adjusted

[3] Mead blamed Durham for not telling him to pay brick layer rates and also claimed that Durham had never asked for his payroll.

[4] Mead's CPRs attribute a large number of hours to himself, while others testified that Mead rarely was on the job site. There also appear to be several instances in which individual CPRs simply repeat data and dates from previous CPRs or clearly misstate gross earnings in light of other reported data.

number of hours paid at the applicable brick layer rates is $36,420.57.[5]

Durham further argued that the workers were properly compensated as tile setters for thin brick installation work during certain portions of their work for Mead. This argument was based on the dimensions of the thin brick, which Durham characterized as the equivalent of tile and not the same as "true" brick, which is normally heavier and thicker. The argument affects about twenty percent of the adjusted back wage total above and a related amount of penalties.

In addition to back wages, the Division determined that Mead and Durham were liable for $9,885.00 in penalties under section 1775 (based on 659 violations assessed at the rate of $15.00 per violation), plus an additional $475.00 in penalties under section 1813 (based on 19 overtime violations assessed at the rate of $25.00 per violation). Durham's compilation and related evidence show only 608[6] violations under section 1775, and no overtime violations under section 1813, yielding total penalties in the revised amount of $9,120.00. Durham does not dispute the Division's determination to assess section 1775 penalties at the rate of $15.00 per violation, but contends that it is not liable for those penalties in light of the factors set forth in section 1775(b). Regarding these factors, the evidence shows that the requisite Labor Code sections were attached to Mead's subcontract; that Durham was unaware of Mead's wage violations while they were occurring; that Durham responded to Mead's failure to provide CPRs by issuing notices and warnings and eventually stopped payment to Mead; and that Durham later increased the wages of Mead's workers, as previously noted.

There is no evidence that any of the assessed amounts have been paid, which means that Durham is also liable for liquidated damages under section 1742.1, unless those damages are waived by the Director.

---

[5] This figure was calculated by multiplying the total numbers of hours worked times the correct brick layer rates and subtracting the total wages paid by Mead, as follows:

751 total hours worked through 6/30/07 @ 43.65/hour	= $ 32,781.15
3,875 total hours worked after 6/30/07 @ $45.65/hour	= $ 176,974.55
Total Wages due	= $ 209,755.70
Total Wages paid by Mead	($ 173,335.13)
Net Wages due	= **$ 36,420.57**

[6] This figure is drawn from the Division's reaudit information (provided in response to the hearing officer's tentative decision), which counts the number of Mead workers reported on the daily reports. .

DISCUSSION

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

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

Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987 (citations omitted). The Division 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(a), and *see Lusardi, supra.*)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who received 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 the service of a civil wage and penalty assessment.

When the Division 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 that assessment by filing a Request for Review under section 1742. In that appeal the contractor or subcontractor "ha[s] the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§1742(b).)

Durham Is Liable For $30,440.17 In Back Wages.

With regard to the number of hours worked, Durham carried its burden to prove that the basis for the Assessment was incorrect. Mead's CPRs were produced well after the fact and on their face are of questionable accuracy. Durham presented better and more credible evidence of

the "precise amount of work performed" (*Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687) through the contemporaneous daily logs and reports prepared by Rix and McCrain.

Conversely, on the issue of reclassification, the weight of the evidence supports the Division's determination that Mead's workers were entitled to brick layer rates for all worked. Mead admitted that this was the correct classification, and it is the classification that Durham used after hiring Mead's employees to complete the job. Durham's effort to equate thin brick with tile, as described in the Scope of Work provisions for the Tile trades, is not sufficient to establish either that thin brick is a form of "tile," the only substance the Tile Setter scope of work covers. The scope of work for bricklayer, however, covers all forms of installation of brick materials.

I find Durham's compilation evidence and its recomputation of hours worked for which for back wages are due to be accurate and credible. As adjusted, Durham's liability for back wages is reduced to $36,420.57.[7]

Durham is Liable for Penalties under Section 1775.

Section 1775(a) provides generally for the assessment of a penalty for each worker who is paid less than the required prevailing wage on a given calendar day. The Division has the discretion to set the penalty amount based on specified factors up to a maximum amount of $50.00 per violation. In this case, the Division set penalties at the rate of $15.00 per violation, and Durham does not dispute the Division's discretion to choose that amount. However, Durham contends that it is not liable for these penalties in light of the safe harbor provisions of section1775, which state in relevant part as follows:

> If a worker employed by a subcontractor on a public works project is not paid the general prevailing rate of per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

[7] The evidence used to reduce this liability does not identify individual workers and thus does not offer any guidelines for readjusting individual entitlements. Since Durham's liability is strictly to the Division on the Assessment and not to the workers (*see Violante v. Communities Southwest Development and Construction Co.* (2006) 138 Cal. App.4th 972), Durham has no direct interest in the issue of how individual entitlements are recalculated or how any recovery is distributed. Accordingly, the reallocation of individual wage entitlements apportionment of any recovery is being left to the discretion of the Division.

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813."

To escape liability, the general contractor must meet all of these tests. That is, it must have had no knowledge that the underpayments were occurring, and it also must have complied with the four enumerated performance standards.

Durham met the initial test of having had no knowledge that Mead was underpaying his workers while Mead remained on the Project. Durham also met the subsection (b)(1) test by including copies of the specified code sections in Mead's subcontract. However, Durham did not meet the subsection (b)(2) test of monitoring payment of the specified wage by periodic review of Mead's CPRs. While Durham can accurately claim that it was frustrated in its efforts to comply by Mead's failure to submit CPRs, it is also true that Durham was aware of the failure and allowed it to persist for several months without taking any further action to compel Mead to submit the forms nor making any alternative effort to determine whether the Mead's employees were being paid properly. The corrective action that Durham eventually took, which was to stop paying Mead but continue paying his suppliers, helped move the project forward but had no effect on prevailing wage compliance.

In light of Durham's failure to meet the requirements of subsection (b)(2), it is not necessary to consider whether Durham complied with subsections (b)(3) or (b)(4). Durham remains liable for section 1775 penalties in the modified amount of $9,120.00, based on 608 violations.

Durham is not liable for penalties under section 1813, as there was no overtime work by Mead.

Durham is Liable for Liquidated Damages.

At the time the Division issued its Assessment, section 1742.1(a) provided in pertinent part as follows:

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

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

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

In accordance with the statute, Durham is liable for liquidated damages only on the wages found due in the Assessment as modified by this Decision, or a total of $36,420.57. Since those wages remain unpaid, an equivalent amount of liquidated damages must be awarded unless Durham demonstrated substantial grounds for believing the Assessment to be in error.

As to this remainder, Durham offered only an insubstantial classification dispute which, by Durham's calculation, only would have reduced its wage liability by another $6,000 or 7,000. As to remaining almost $30,000 in assessed wages, Durham raised no dispute whatsoever. Consequently, Durham had no substantial grounds for believing the Assessment to be in error as to the wages that remain due. Even had Durham succeeded on its classification claim, the Assessment would not have been substantially reduced further.

Durham argues that it meets the test for waiver under Rule 51(b), when looking at the

Assessment as a whole. While Durham faced some difficulty in ascertaining the correct hours and amounts due from the inflated figures relied upon by the Division, this is not an unusual situation. By proving that certain wages were not owed, Durham eliminated its potential liability for liquidated damages for those amounts. Because liquidated damages are "payable only on the wages found to be due and unpaid" (§1742.1(a)), entitlement to waiver necessarily focuses on the same "wages found to be due and unpaid." As noted above, Durham had no substantial grounds for believing the Assessment to be in error as to these wages, and thus it is not entitled to have those damages waived.

FINDINGS

1. Affected contractor Durham Construction, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the work performed by subcontractor Rich Mead Tile (Mead) on the Clovis Fire Station No. 1 Reconstruction Project.

2. Mead's workers worked an aggregate total of 4,626 hours on the Project while employer by Mead and were compensated by Mead at the applicable prevailing rates for Tile Setters and Tile Finishers.

3. Mead's workers were entitled to be compensated at the applicable prevailing wage rates for Brick Layers for work performed on the Project.

4. In light of Findings Nos. 2 and 3 above, the net amount of wages due under the Assessment is $36,420.57, rather than $62,279.42, as determined in the Assessment.

5. The record establishes 608 violations under section 1775 rather than 659 as determined in the Assessment. The Division did not abuse its discretion in assessing penalties at the rate of $15.00 per violation. In light of the reduced number of violations, the total penalty assessment under section 1775 is reduced to $9,120.00.

6. Durham failed to comply with its duty to monitor the payment of prevailing wages under section 1775(b)(2). Accordingly, Durham remains jointly liable for the penalties assessed under section 1775 as modified by Finding No. 5 above.

7. There were no overtime violations under sections 1810-1815, and consequently there is no liability for penalties under section 1813.

8. In light of Finding No. 4 above, the potential liquidated damages due under the Assessment is reduced to $36,420.57. No part of the back wages found due in the Assessment as modified by Finding No. 4 has been paid, and Durham has not demonstrated that it had substantial grounds for believing the Assessment to be in error as to this amount. Accordingly, Durham is liable for liquidated damages in the amount of $36,420.57 under section 1742.1(a).

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

Wages Due:	$ 36,420.57*
Penalties under section 1775(a)	$ 9,120.00
Liquidated damages under section 1742.1(a):	$ 36,420.57
TOTAL	**$ 81,961.14**

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

ORDER

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

Dated: 8/20/09

John C. Duncan
Director of Industrial Relations