

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Michael Moore Construction, Inc.
dba MMC Pavers**

Case No.: 12-0077-PWH

From a Notice of Withholding issued by:

Office of the City Attorney, City of Los Angeles

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected Subcontractor Michael Moore Construction, Inc. doing business as MMC Pavers (MMC) submitted a timely request for review of the Notice of Withholding of Contract Payments issued by the Labor Compliance Program of the City of Los Angeles (City) on November 9, 2011, with respect to the construction of improvements at the Port of Los Angeles Police Headquarters (Project) in Los Angeles County. The Notice of Withholding determined that \$50,980.04 in unpaid prevailing wages (including training fund contributions) and statutory penalties was due. A Hearing on the Merits was conducted on August 20, 2012, January 22, 2013, and January 25, 2013 before Hearing Officer John J. Korbol. Ben Moore and Limor Moore appeared without legal counsel on behalf of MMC; James Patrick Nollan appeared for City. After post-hearing briefs were submitted by both parties, the matter was submitted for decision on March 22, 2013.

The issues for decision are:

- Whether MMC maintained accurate payroll records.
- Whether MMC underpaid its workers by underreporting the number of hours worked on the Project.
- Whether MMC underreported the number of workers employed by MMC on the Project.
- Whether the Notice of Withholding correctly determined that MMC failed to pay required training fund contributions to an approved plan or fund.

- Whether City abused its discretion in assessing penalties under Labor Code section 1775¹ at the rate of \$50.00 per alleged violation.
- Whether MMC is liable for liquidated damages under section 1742.1, subdivision (a).

The Director finds that MMC has failed to carry its burden of proving that the basis of the Notice of Withholding was incorrect as to MMC's underreporting of hours worked and MMC's underreporting of the number of workers employed on the Project, as well as MMC's failure to pay certain training fund contributions. However, in light of City having conceded, during the hearing, that there was no issue with regard to misclassification of MMC's workers, City cannot assert that Hugo Velasco, MMC's supervisor, should be reclassified from superintendant to laborer and paid accordingly. In addition, although City has established that on certain days MMC employed unidentified John Doe workers on the Project, the evidence supports a finding that there were up to a maximum of three Does on any given day, rather than the four Does as determined by City. Therefore, the Director issues this Decision affirming the Notice of Withholding except as to the alleged unpaid wages and penalties derived from the employment of Hugo Velasco and John Doe 1. MMC also has failed to establish that City abused its discretion in assessing penalties under section 1775, subdivision (a) at the rate of \$50.00 per violation. Finally, MMC has not demonstrated substantial grounds for a waiver of liquidated damages.

FACTS

City's prime contractor on the Project was FTR International, Inc. (FTR). FTR subcontracted the necessary paving work to MMC. MMC had its workers on the Project starting August 24, 2009, and ending November 6, 2010. There is no dispute that the applicable prevailing wage determination in effect for the Project was: Labor and Related Classifications (SC-23-102-2-2007-1). This determination was effective September 1, 2007, and provides the rates used in the Notice of Withholding for all

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

named workers and all John Does. There was also a pre-determined rate increase effective July 1, 2008.²

City's Labor Compliance Analyst, Yono Hong, testified that her investigation of the payment of MMC's workers on the Project was triggered by a referral from the Labor Commissioner's office, where several MMC workers had gone to complain of underpayment, including Jose Isabel Menjivar, Douglas Arnulfo Chicas, Elio A. Mejia, and Jose Paulino Velasquez, all of whom identified Hugo Velasco as their manager. Hong, or another City analyst, interviewed MMC employees Wilber Velasquez, Elio A. Mejia, Jose Mejia Sanchez, and Hugo Velasco. Hong also gathered and analyzed documentary evidence, including MMC's CPRs (CPRs), time cards kept by MMC, FTR's sign-in sheets for subcontractors, and the daily reports compiled by City's construction inspector, Gianfranco Grimaldi. Hong also visited the jobsite and spoke with MMC's workers. From this information, Hong concluded that there were significant discrepancies between the hours reported as having been worked on MMC's CPRs and the actual hours worked on the Project. She also concluded that the MMC was underreporting the number of workers MMC had on the Project and failing to identify or include those workers on the CPRs.

Hong concluded that MMC's workers were on the Project for eight-hour days as opposed to the four- to seven-hour days being reported on the CPRs. Based chiefly on the inspector reports, she concluded that MMC was frequently underreporting the number of MMC workers on the Project by anywhere from one to four unidentified workers on any given day. Accordingly, Hong included from one to four "John Doe" workers on the audit sheets underlying the Notice of Withholding. She testified that City had no issue with the classification of the workers; she prepared the Notice of Withhold based on the assumption that all MMC workers were to be paid the prevailing wage rate of \$39.77 per hour, excluding training fund contributions, for Laborer Group 1.

After the Notice of Withhold was prepared and served, Hong obtained surveillance video from the Port of Los Angeles for some of the dates that MMC had

² Throughout the relevant time period, the prevailing hourly wage rate for Laborer was comprised of a base rate that ranged from \$26.33 for Group 1 to \$29.33 for Group 5, fringe benefit contributions totaling \$13.44, and a training fund contribution of \$0.64.

workers on the Project. Based on images on the surveillance video and information obtained from Grimaldi, Hong could identify workers engaged in paving work at particular times on particular dates. She could count the number of MMC workers on the Project because most of them were given black shirts to wear most of the time they were on the Project site. From this evidence, Hong was able to corroborate her deduction that MMC had failed to account for anywhere from one to four John Doe workers on any given workday. From the times recorded on the surveillance video, Hong was able to corroborate that MMC did in fact have workers on the jobsite well into the afternoon hours, thus affirming what the individual MMC workers had told her.

Grimaldi credibly testified that it was his custom and practice to daily count the number of workers each subcontractor, including MMC, had on the Project. He credibly testified that he recorded these figures on the same day or the next day, and that he always had an unobstructed view of the jobsite from his vantage point. He also made note of what type of work the subcontractors were performing. Grimaldi viewed images taken from the surveillance video and identified workers doing paving work. He also identified those workers engaged in paving work and wearing black shirts as being employees of MMC. From his observations, Grimaldi held the view that MMC always had its workers on the Project site for a standard 8-hour day.

City called three workers to testify: Jose Menjivar, Paulino Velasquez, and Elio Mejia. All offered essentially the same testimony: they were given black shirts to wear on the job, Hugo Velasco was their supervisor, they worked from 7:00 a.m. to 3:30 or 4:00 p.m., and were paid a flat rate of \$120 to \$130 per day.

Although MMC had documentary evidence admitted to the record, and representatives of MMC cross-examined some of City's witnesses, MMC did not call any witnesses to testify on its behalf.

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 non-union contractors; to benefits the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

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

Awarding bodies have been encouraged to adopt and enforce a labor compliance program approved by the Department of Industrial Relations as a method of meeting their obligation of assuring compliance with payment of the prevailing wage on their public works projects. A labor compliance program is required to enforce the payment of prevailing wages as would the Labor Commissioner. (Cal.Code Regs., tit. 8, § 16434, subd. (c)(2).)

When an awarding body’s labor compliance program determines that a violation of the prevailing wage laws has occurred, a written Notice of Withholding is issued pursuant to section 1771.6. An affected contractor or subcontractor may appeal the Notice of Withholding by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the [Notice of Withholding] is incorrect.” The Notice of Withholding is reviewable at a hearing under section 1742 in the same manner as if the Notice of Withholding was a civil wage and penalty assessment issued by the Division of Labor Standards Enforcement. (§ 1771.6, subd. (b).)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing pay the prevailing wage 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 (or, in the case of labor compliance programs, a notice of withholding) under section 1741.

Employers on public works must keep accurate payroll records that reflect, among other things, the work classification, hours worked, and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction workers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal.Code Regs., tit. 8, §11160, subd. 6.) When an employer fails to maintain accurate time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision makers to determine the amount by a just and reasonable inference from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the reasonable estimate. (*Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S.680, 687-688 [rule for estimate-based overtime claims under the Federal Fair Labor Standards Act, 29 U.S.C. §§ 201 et. seq.]; and *Hernandez v. Mendoza* (1988) 1999 Cal.App.3d 721, 726-727 [applying the same rule to state overtime wage claims].) This burden is consistent with an affected contractor or subcontractor's burden under section 1742 to prove that the basis for a Notice of Withholding is incorrect.

As to the practice of extrapolating from the evidence to conclude that unidentified Doe workers were employed on a public works project, the failure to identify specific workers does not bar City's enforcement and collection of prevailing wages on their behalf. The contractor's liability is to the enforcing agency, not to the individual workers. (See *Violante v. Communities Southwest Development and Construction Co.* (2006) 138 Cal.App.4th 972.) The enforcing agency may collect unpaid wages and then locate the aggrieved workers. (See §§ 96.7, 1743, and *Division of Labor Standards Enforcement v. Fidelity Roof Company* (1997) 60 Cal.App.4th 411.)

MMC Underreported The Number Of Workers Employed On The Project, As Well As The Hours Worked.

In essence, the resolution of this case rests on the question of whether MMC's CPRs are accurate and complete, or whether they were falsified to understate the number of workers employed on the Project as well as the number of hours worked. City has marshaled considerable evidence, to challenge the validity of the figures used on MMC's CPRs. There is the documentary evidence compiled by City in the course of its investigation, most notably the daily log kept by inspector Grimaldi. There is consistent, forthright, and credible oral testimony from Hong, Grimaldi, and the individual workers called to testify by City. Most tellingly, there is the photographic evidence taken from the surveillance film which largely corroborates the observations of Grimaldi and bolsters the calculations of Hong. With a couple of exceptions to be discussed below, the weight of this evidence substantiates City's contention that MMC underreported the number of workers and hours worked and underpaid wages due to MMC's employees.

MMC disputes the Notice of Withholding and insists on the accuracy of its CPRs, but chose not to produce live testimony from percipient witnesses who might have been in a position to rebut the testimony of City's witnesses. As a result, MMC's defense consists of little more than implausible assertions,³ naysaying, unsubstantiated contentions, and post-trial argument resting on facts and documents that are not part of the administrative record. Even when MMC's representatives cross-examined City's witnesses, the focus was on peripheral and extraneous issues, such as whether the complaining workers could be believed because they may or may not have been using legitimate social security numbers, and may or may not have filed unmeritorious workers' compensation claims. In short, MMC has failed to meet its burden of showing that the bulk of the Notice of Withholding is incorrect.

³ For instance, in the jointly signed statement of the issues submitted before the Hearing, MMC contended that "Workers only worked a 4 to 7 hour day because they would get tired after lunch and were not as efficient, due to the large size of the pavers." Ultimately, there was no testimony produced by MMC to support this empty assertion.

The Notice Of Withholding Must Be Modified To Dismiss The Reclassification Of Hugo Velasco And The Unpaid Prevailing Wages Assessed For John Doe 1.

The status of Hugo Velasco merits separate consideration. Mr. Velasco was listed primarily as a superintendent on MMC's CPRs. He was recorded as a laborer for a few days early in the Project, during a period of time that is not encompassed in the Notice of Withholding. He was one of the complainants interviewed by or Hong during her investigation, and he claimed to be a construction laborer. Jose Menjivar testified that Velasco was his supervisor. Paulino Velasquez testified that he was told what to do by Velasco. *On direct examination*, Hong testified that City did not take issue with the classification of MMC's workers. Despite this position, City had in fact reclassified Velasco from superintendant to laborer for the purpose of calculating the amount of wages due Velasco. Hong's concession that City was not disputing MMC's classification of the workers employed on the Project will be treated as a withdrawal of the claim for unpaid wages and penalties due from MMC in connection with Velasco's alleged employment as a Laborer Group 1, and the Notice of Withholding will be modified accordingly.

City relies on the discrepancy between Grimaldi's daily inspector log and MMC's CPRs to figure that anywhere from one to four John Doe workers were employed by MMC on various dates during the duration of the Project, and that these Does were omitted from the CPRs. The data recorded in the daily log is organized, thorough, and based on first-hand observation. The individual log entries always noted the number of workers each subcontractor (not just MMC) had on the jobsite. Grimaldi's enumeration of MMC workers matched the number of workers who can be seen doing paving work and wearing black shirts on City's photographic evidence. However, Grimaldi did not always note whether MMC had a foreman or superintendant among its workers on the jobsite. Additionally, there was no evidence as to whether Velasco, the Project superintendent, might have customarily worn a black shirt like the laborers did. Nor was there testimony as to whether Velasco ever engaged in hands-on paving work. The photographs of MMC workers on the jobsite were not sufficiently distinct to identify any particular MMC employee by name. Under these circumstances, City's evidence is not

strong enough to support an inference that John Doe 1 was an unidentified laborer. It is more probable than not that John Doe 1 was actually Velasco or some other MMC employee working in a supervisory capacity. Consequently, the Notice of Withholding will be modified to eliminate the unpaid wages and penalties allegedly owed to John Doe 1.

MMC is Required to Pay Additional Training Fund Contributions.

City presented prima facie evidence that MMC paid some, but not all, the training fund contributions due for work done on the Project. MMC presented no evidence to the contrary. Therefore, MMC has failed to meet its burden of showing that this basis for the Notice of Withholding is incorrect.

City's Penalty Assessment Under Section 1775 is Appropriate.

City assessed MMC a penalty of \$50.00 per day for each worker that was underpaid on the Project, pursuant to section 1775. The Director's review of City's determination is limited to an inquiry into whether the action was "arbitrary, capricious, or entirely lacking in evidentiary support . . ." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the Director is not free to substitute her own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

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

In this case, City assessed penalties at the maximum rate of \$50.00 per violation.⁴ Given that MMC's underreporting of hours and workers could only have been done

⁴ Section 1775, subdivision (a)(2)(B)(iii) provides that the penalty for each calendar day, for each worker paid less than the prevailing wage rates, may be up to \$50.00 per day but not less than \$30.00 if the violation was willful as defined in subdivision (c) of section 1777.1. Section 1777.1, subdivision (c) defines a willful violation as one in which "the contractor or subcontractor knew or

intentionally, MMC's conduct can fairly be characterized as a willful violation of the prevailing wage laws warranting a penalty of \$50.00 per violation in this case. The Director is not free to substitute her own judgment. MMC has not shown an abuse of discretion, and the assessment of penalties at the rate of \$50.00 per violation is affirmed.⁵

MMC is Liable for Liquidated Damages.

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

After 60 days following the service of a civil wage 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.

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

Absent waiver by the Director, MMC is liable for liquidated damages in an amount equal to any wages that remained unpaid 60 days following service of the Notice of Withholding. MMC's claim of entitlement to a waiver of liquidated damages in this case is partially tied to MMC's position on the merits and specifically whether, within the 60 day period after service of the Notice of Withholding, it had "substantial grounds for appealing the [Notice] . . . with respect to a portion of the unpaid wages covered by the [Notice]." MMC has presented no evidence or cogent argument as to why liquidated damages should be waived as to the difference between the applicable prevailing wage rate and the actual wages paid to the MMC's workers. Because the assessed back wages remained due more than 60 days after service of the Notice of Withholding, MMC is also liable for liquidated damages.

reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

FINDINGS

1. Affected subcontractor Michael Moore Construction, Inc. dba MMC Pavers filed a timely request for review of the Notice of Withholding issued by the City of Los Angeles with respect to the Project.

2. MMC did not maintain accurate payroll records and underreported both the daily number of workers and the daily number of hours worked on its CPRs. MMC underpaid its workers by paying them a daily lump sum amount below the required prevailing hourly wage rate, comprising 199 violations of section 1775 and resulting in underpayment of prevailing wages in the aggregate amount of \$32,461.68.

3. MMC failed to make all required training fund contributions for its workers on the Project, resulting in underpayment of \$513.28.

4. The Notice of Withholding is dismissed as to Velasco and John Doe 1.

5. City did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of \$50.00 per violation and the resulting total penalty of \$9,950.00, as assessed, for 199 violations on the Project is affirmed in light of appropriate factors and the other findings in this Decision.

6. The unpaid wages found due in Finding No. 2 remained due and owing more than sixty days following the issuance of the Notice of Withholding and there are insufficient grounds to waive payment of liquidated damages on those unpaid wages. MMC is therefore liable for liquidated damages under section 1742.1 in the amount of \$32,461.68.

7. The amounts found remaining due in the Notice of Withholding as affirmed and modified by the Decision are as follows:

Wages Due:	\$32,461.68
Training Fund Contributions Due:	\$513.28

⁵ Except as to the alleged violations attributable to the employment of Hugo Velasco and John Doe 1.

Penalties under section 1775, subdivision (a):	\$9,950.00
Liquidated Damages under section 1742.1, subdivision (a):	\$32,461.68
TOTAL:	\$75,386.64

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 as modified herein. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: October 29, 2013


Christine Baker
Director of Industrial Relations