

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

**Lewis C. Nelson & Sons, Inc. and
Nolte Sheet Metal, Inc.**

Cases Nos. 08-0168-PWH
and 08-0169-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

In the Matter of the Request for Review of:

Nolte Sheet Metal, Inc.

Cases Nos. 08-0173-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

The above cases were consolidated for hearing and decision because they involve the same issues, witnesses, and fact patterns. In Cases Nos. 08-0168-PWH and 08-0169-PWH, Lewis C. Nelson & Sons, Inc. (“Nelson”) and Nolte Sheet Metal, Inc. (“Nolte”) filed timely requests for review from a civil wage and penalty assessment (“Assessment”) issued by the Division of Labor Standards Enforcement (“Division”) with respect to Nolte’s work on the Heaton and Lowell Elementary Schools Modernization (“Heaton and Lowell”) project in Fresno, California. In Case No. 08-0173-PWH, Nolte filed a timely request for review from a separate Assessment issued by the Division with respect to the HVAC Equipment Addition and Replacement project, also referred to as the Year-Around Air Conditioning or “YRAC” project, at the Norseman, Turner, Wilson, and Winchell schools in Fresno. A hearing on the merits was held on March 4 and 5, 2009, in Fresno, California before hearing officer John Cumming. Nelson appeared through its controller Charles Fletcher and on brief through attorney Brian Crone. Ja-

son S. Epperson appeared for Nolte, and Ramon Yuen-Garcia appeared for the Division.

Both Assessments arose out of the Division's determination that Nolte had underpaid or completely failed to pay some of its employees for work performed on the two projects. Nolte's time and payroll records showed that these same employees were being paid prevailing rates but working only a limited number of hours, or in some cases not at all, during the time periods covered by the claims. After reviewing the evidence in the record, I find the claims in these cases to be contrived and lacking in credibility. Accordingly, for the reasons discussed below, I am dismissing the Assessments.

SUMMARY OF FACTS AND RELEVANT EVIDENCE

Heaton and Lowell Project: On June 4, 2007, the Fresno Unified School District entered into a contract with Nelson for the Modernization of Heaton and Lowell Elementary Schools. On June 8, 2007, Nelson entered into a separate subcontract agreement with Nolte which required Nolte to furnish and install Heating, Ventilation and Air Conditioning equipment and perform related work on the project. Nelson commenced work on the job site on June 20, 2007. According to Nelson's daily job journals and Nolte's certified payroll records ("CPRs"), Nolte concluded its work on this project on August 29, 2007, with most of the work performed between July 5 and August 15, 2007, using from two to four workers on a given day. Nelson's daily journals also reflect that it usually had from four to eight subcontractors on site on a given day, using in the range of 15 to 30 but occasionally as many as 40 workers in aggregate on a given day.

Nolte employees Francisco Acosta, Antonio Dorado, and Pedro Mejia signed nearly identical declarations under penalty of perjury, which asserted, among other things, that they worked 40 or more hours per week on the Heaton and Lowell project and were working with each other and six other Nolte employees (a total of nine Nolte employees). Dorado asserted in his declaration that he began working on this project in July 2007 and worked there until August 2007. Acosta's and Mejia's declarations asserted that they worked on the project from July until November 2007. All said that they would write down the applicable job number for this project on their time cards, but were told by Nolte to write down different job numbers for locations they had not worked.

Dorado and Mejia submitted personal copies of time cards, which were on the same forms as Nolte's time cards, and that showed them working eight hour days (without overtime) for three weeks on the Heaton and Lowell project. By contrast, Nolte's time and pay records showed fewer days of work and fewer hours per day for each of these workers. Acosta also claimed that he worked on this project, although he did not submit any time records or other estimates for this work; and he could not say when the work began or ended. The Division's Assessment determined that Dorado and Mejia had worked 120 and 112 hours respectively on the project and that Nolte still owed a total of \$7,663.20 for back wages and training fund contributions for that work.¹ The Division did not find that any wages were due to Acosta.

The Division also assessed \$1,450.00 in penalties under Labor Code section 1775.² These penalties were assessed at the maximum rate of \$50 per violation in both cases based on the egregiousness of the violations, which involved the alleged deliberate falsification of time records to avoid paying the correct rate and the fact that Nolte had been the subject of a prior Assessment for very similar violations.

YRAC Project: On September 13, 2007, the Fresno Unified School District entered into a prime contract with Nolte for the YRAC project at the Norseman, Turner, Wilson, and Winchell schools. According to Nolte's pay records, work on this project commenced on September 17, 2007, and concluded on January 8, 2008. According to these same records, Nolte usually used from four to six workers in a given week, with not every worker working every day, and daily hours per worker fluctuated from three to eight. Nolte also used several subcontractors for other types of work on this project, including electric, plumbing, framing, and roofing.

Dorado submitted a written declaration, similar to the one for Heaton and Lowell, asserting that he had begun working on the YRAC project, on "days and nights and weekends" in October 2007. However, in another declaration prepared in the course of an interview with the Division's investigator, Dorado said that his work on this project began and ended in September.

¹ Because Nolte's records showed that the workers were being paid the correct prevailing rate, the premise of the claims and of the Assessment was that Nolte was "shaving" the reported number of work hours, as described further below, in order to match the total compensation paid for the actual hours (*i.e.* 40 per week) and actual compensation rates of \$12.00 to \$16.00 per hour.

² All statutory references hereinafter are to the Labor Code unless otherwise indicated.

Acosta's and Mejia's declarations for this project asserted that they began working on this project in October and November respectively. Acosta said he started work in "Sept/October" and ended in November in a declaration based on his interview with the Division's investigator. The declaration from Mejia's interview with the Division did not have starting or ending dates for this project, but stated that he stopped working for Nolte altogether in November 2007.

Dorado, Acosta, and Mejia also submitted personal copies of time cards for this project, although Mejia's turned out to be numerous duplicates covering the same few days of work. In addition, the Division obtained daily photographs from the school district's project manager which purportedly showed Nolte workers performing installation work on the project sites on days that were not included in the CPRs. The Division's Assessment in this case assumed that the workers were working 40 hour weeks and being paid at the true hourly rates of \$16.00 (Dorado), \$15.00 (Acosta), or \$12.00 (Mejia). This Assessment also covered two other workers identified in Nolte's records, and found that Nolte owed a total of \$21,498.23 in back wages and training fund contributions, and \$4,100.00 in penalties under section 1775.³

Evidence Pertaining to both Cases: The three workers submitted eight nearly identical sworn declarations that were signed from late January to mid-February, 2008, and covered these two projects as well as a third unrelated project. They also signed additional declarations based on interviews with the Division's investigator in early May. Notwithstanding the fact that Acosta and Mejia neither speak nor read English, all of their declarations as well as the Division's interview notes were in English only. Acosta's and Mejia's declarations were prepared and translated for them by David Peña, who was described as a former Nolte employee. Peña assisted the workers in preparing and presenting these claims and previously had assisted two other workers in making claims against Nolte. Peña also served as the interpreter when the Division's investigator interviewed these two workers. Peña was present during the hearing on the merits as an observer but did not testify.

As previously noted, all of the initial declarations were nearly identical in content and wording. Each starts by identifying the declarant as an employee of Nolte since a starting month

³ It is unclear what information the Division used to determine the wages due to the two other workers.

and year and then as being currently employed or laid off by Nolte. The declarations identify the work of Nolte and then state that the declarant was employed as an installer of a sheet metal air duct system, noting that parts of the system were fabricated in Nolte's shop but that most of the declarant's time was spent "on the construction sites on [name of project to which the declaration pertained] installing duct work."

The fourth paragraph of each declaration states the month and year when the declarant began working on the relevant project. In Acosta's and Dorado's declarations for Heaton and Lowell only, this statement is followed by assertions that the declarant worked until November, "working 40 or more hours with overtime," that the overtime went on the check as straight time, and that when not on this project, the declarant was on other Nolte projects like YRAC that was going on at the same time.

The fifth paragraph states that while on the project in question, "I worked along side of other employees of Nolte Sheet" followed by a list of names. The following paragraph then asserts that the declarant "became gradually aware" that he was not being paid properly by Nolte, and that on this specific project he had been approached by an employee of another subcontractor who asked if he was getting prevailing wage. The next paragraph starts with the sentence, "We new [sic] what the prevailing wage was \$47.10 dollars an hour but we were afraid to tell our foreman what the correct wage was and of being fired." This is followed by a limited recitation of the declarant's wage history at Nolte.

In the next paragraph each declarant denies working as an apprentice on the project in the question or having registered as or been told he was an apprentice. Then, in either the same or a separate paragraph, the declarations state that the workers drove their own vehicles every day and that they would write the job number for the project in question on their time cards but be told to write a different number for a location they had not worked when they returned to the shop on Friday.

All three of these workers testified at the hearing on the merits. Each affirmed the accuracy of statements made in the declarations in the Division's file. On cross-examination, however, each had difficulty recalling dates or details, including where any of the schools were located, and acknowledged that they could not tell one of these schools apart from another or from

others where Nolte had performed similar work. Dorado knew that the YRAC project work was being performed during evening hours because the schools were in session but also contradicted himself and other evidence by testifying that he worked on this project in July.

The three workers provided similar testimony on the handling of their time sheets. Blank time cards were available in the shop, which was also where the office was located. The workers said they would fill out their own weekly time cards, writing down the date, the project number for where they worked that day, and the total number of hours that day. They then turned this time card in to the office on Fridays when picking up their paycheck for the previous week. The workers said that when they submitted the time cards they had prepared showing the correct hours and locations, Natalie Nolte would give them a yellow piece of paper showing the hour totals and job numbers that she wanted them to put on their time cards. The workers then would prepare and submit a second time card with the information supplied by Nolte, and Natalie Nolte would shred the original cards.

Dorado testified that this was the practice since the beginning of his employment in 2000. At one point he stopped submitting time cards with the correct information but then resumed doing so in 2005. He described Nolte family members as being secretive about pay practices and not wanting workers to talk with anyone else about their pay. The workers testified that the employees discussed the situation among themselves but did not complain to management or anyone else because they believed it would cost them their jobs.

All of the workers said that they started keeping copies of the original time cards, knowing that there might be an issue someday. Copies of these cards were provided to the Division during its investigation and were submitted into the record. Mejia testified that he had provided all of his cards covering work on the two projects and that all were included in the record. However, following the observation that his cards were largely duplicative of each other and showed only a handful of days of work on the YRAC project, Mejia testified that most of his cards had been lost or destroyed by a roommate in December 2008, which was well after the Division had completed its investigations and issued its Assessments.

The workers also identified themselves and other co-workers on some of the YRAC project photographs that the Division introduced into record. The workers could not say when or

where any of the pictures were taken or specifically what they were doing on a project at the time. None of the photographs for which this testimony was offered provided a recognizable image of one of these worker's faces. However, the workers identified themselves or others in darkened or obscure images or based on articles of clothing.

Nelson's controller Charles Fletcher testified that he oversaw the review of CPRs for Nelson, that CPRs were cross-checked against daily logs to identify potential compliance issues. Fletcher said that Nolte's CPRs for Heaton and Lowell were consistent with Nelson's logs, and that Nelson had worked with Nolte on at least ten public works projects in the past fifteen years with no history of problems. Fletcher asserted that Nelson had no knowledge of the issues raised in this case until after Nolte had completed and been paid for its work.

Natalie Nolte affirmatively denied the time card scenario described by the three workers. She and Jeff Nolte, who worked as a foreman on these jobs, testified that the time records they provided to the Division were the accurate ones and that the workers were paid for all their hours, including shop time, at the prevailing rate. Included among these records were copies of cancelled checks and pay stubs showing that Acosta, Dorado, and Mejia were receiving prevailing wage rates all through calendar year 2007, albeit for less than full time hours.

Jeff Nolte testified that the company was not working eight hour days on Heaton and Lowell due to having to work around other trades but that probably most days on YRAC were full days. There was also testimony that Nolte tried to spread work among the workers as construction work dropped but that many workers ended up being laid off during the YRAC project.⁴

The Division's notes indicate that its investigator spoke with Adrian Garcia of Kitchell CEM, who was identified as the school district's project manager for the YRAC project.⁵ Garcia

⁴ Nolte's version of the events was also corroborated by another worker Sukhvir Kahira, although he spent only a very limited amount of time on either project. Kahira also testified that Acosta called in November 2007, to discuss the other workers' plan to make wage claims against Nolte, and then a second time to ask if Kahira's father would be rehiring the workers at his farm. In lieu of recalling Acosta as a witness at the end of the hearing, the parties stipulated that Acosta would deny that either conversation occurred.

⁵ Kitchell was also identified in the Division's notes as the labor compliance program for the Debra E. Williams Elementary School project.

reportedly took the photographs and prepared the accompanying Daily Construction Reports. According to the investigator's notes, Garcia also offered information suggesting that Nolte may have been underreporting the numbers of hours and number of Hispanic employees it was using on this project. Garcia also reportedly told the investigator how the number of Nolte workers could be extrapolated from the daily reports. However, the reports themselves provided no specific information about Nolte's use of its own manpower on the project, and in fact incongruously reported on each day that Nolte had "No Crew Assigned." Garcia was not called as a witness to explain the reports or provide other testimony, and no other witnesses or evidence from Kitchell were presented.⁶

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

⁶ Additional declarations and documents that were attached to the parties post-hearing briefs but not part of the record presented at the hearing on the merits have been disregarded.

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).)

Nolte Is Not Liable For Unpaid Prevailing Wages Because It Has Met Its Burden To Prove The Assessment Is Incorrect.

The premise underlying the Assessment in each case is that Nolte falsified its records to hide the fact that it was paying low wages for full-time work rather than prevailing wages for part-time work. The Division had reason to suspect that this was the case based on its past experience with Nolte, what it purportedly heard from Kitchell’s project manager Garcia, and the three workers’ claims. However, this suspicion was not born out by the evidence. Aside from Nolte’s expedited denials, the claims themselves do not bear up under close scrutiny.

To begin with, the workers’ initial declarations clearly were based on a formula of information that the author believed would best support a prevailing wage claim, rather than on what may have been true of each individual’s knowledge and situation. For example, Acosta affirmatively declared that he had worked on Heaton and Lowell from July through November of 2007, notwithstanding the fact that the project had ended in August, and Acosta had no time cards of his own or other documentation showing any work on that project. Similarly, Dorado’s claim of working overtime on this project was not supported by his own time records. Since the declarations were signed only a few months later, the errors cannot be ascribed to faulty memories.

The assertion about being approached by an employee of another subcontractor and asked about prevailing wage lacks credibility when repeated verbatim as something that happened to each of the employees individually on each of the projects. Furthermore, the implication that the employees were unaware of the prevailing wage rate and that Nolte was keeping this information from them is refuted by the information that was printed plainly on their pay stubs, which no one denied receiving.

Especially implausible was the workers' testimony concerning the handling of their time cards. All three said that they would present time cards with their true hours of work to Natalie Nolte, who would give them a yellow slip of paper with the hours and projects that the company wanted to have reported, and ask them to fill out a new card while she shredded the original in front of them. Left unexplained by this scenario, however is why the workers would continue preparing and tendering originals, for several years according to Dorado, if they knew those cards would be shredded by Natalie Nolte. Why would Natalie Nolte in turn would make a point of shredding the original cards in the worker's presence if the company otherwise was intentionally secretive about its pay practices or trying to conceal a fraud? Why was no one able to procure and produce a single one of these yellow slips?

Other factors that undercut the credibility of these claims include the decision of all three workers to keep track of their time only on duplicate copies of Nolte's time cards rather than on some kind of personal journal or calendar, and Mejia's clearly implausible explanation for the limited number of time cards reflecting his work on the YRAC project, to wit, that a roommate had destroyed the others last December, which happened to be several months *after* Mejia claimed to have provided all of his time cards to the Division.

Nelson's daily job journals essentially corroborated Nolte's claims and refuted the workers claims about the number of Nolte employees used on the Heaton and Lowell project; and there is no evidence that Nelson had any reason or motive to falsify these reports at the time they were prepared.⁷ Moreover, while the Division apparently believed at one time that the daily reports for YRAC project would tell a different story, the reports themselves say nothing about Nolte's manpower usage, the Division presented no witnesses to authenticate or explain the contents of the reports or accompanying photographs or to provide a disinterested objective view of how Nolte's CPRs matched up with observable work activities. In this regard, two evidentiary rules work against the Division's determinations. First, Nolte may not simply be presumed guilty of wrongdoing (*see* Evid. Code, §520), and second, the Division's unexplained decision

⁷ In most instances, the number of workers reported on Nolte's CPRs was equal to or exceeded by one the number of Nolte employees listed on Nelson's reports. The number of subcontractors and overall number of workers on site on a given day was not so great as to pose any substantial difficulties for the project manager in making a reasonably accurate estimate of who was there.

not to present Garcia or another witness from Kitchell strongly suggests that such testimony would not have corroborated the Division investigator's notes or otherwise been helpful to the Division's case. (*See* Evid Code, §§412, 413.)

The Division's evidence and arguments include references to my decision upholding an earlier Assessment against Nolte in Case No. 06-0160-PWH. Nolte has objected to those references, but I am overruling those objections and taking official notice of my decision in Case No. 06-0160-PWH, in order to explain why this decision reaches a different conclusion. The principal issue in the earlier case was whether two workers had performed work at a project site in Porterville rather than at Nolte's shop in Fresno. Nolte did not dispute that those two workers had performed a substantial amount of work related to the project, as reflected on Nolte's own time cards. However, Nolte contended that the work had been performed in its shop and was not compensable at prevailing rates.⁸ In that case I found the two workers' testimony and claims to be credible and bolstered by the testimony of four non-party witnesses who saw and worked with the two workers at the project site, including one who had a very specific recollection of becoming upset with the workers over scratching a window casing that the witness had painted.

In this case the workers' claims were not credible, but rather were riddled with inconsistencies, assertions of fact that demonstrably were untrue, inability to remember specific information about the projects, and the repetition of odd details that undoubtedly were intended to elicit sympathy but instead made the claims seem contrived and the testimony rehearsed. (*See* Evid. Code, §780.) Finally, unlike the earlier case, here there were no non-party witnesses or credible competent evidence from any source to corroborate any aspect of these claims.

In summary, the workers here presented no reasonable, credible, or reliable evidence that performed any work on these projects for which they were not fully compensated, and there is no other competent evidence in the record to sustain the Division's determinations. Accordingly, in these cases I find that Nolte has carried its burden of proving that the basis for the Assessments was incorrect and that the Assessments must be dismissed in their entirety. In light of this finding, there is no reason to address the issues of penalties and liquidated damages.

FINDINGS

1. In Cases Nos. 08-0168-PWH and 08-0169-PWH, affected contractor Lewis C. Nelson & Sons, Inc. and affected subcontractor Nolte Sheet Metal, Inc. filed timely requests for review from a civil wage and penalty assessment issued by the Division of Labor Standards Enforcement ("Division") with respect to the Heaton and Lowell Elementary Schools Modernization project in Fresno, California.

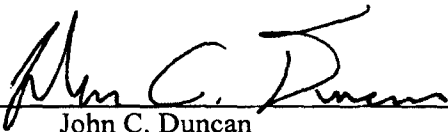
2. In Case No. 08-0173-PWH, affected contractor Nolte Sheet Metal, Inc. filed a timely request for review from a separate Assessment issued by the Division with respect to the HVAC Equipment Addition and Replacement project at the Norseman, Turner, Wilson, and Winchell schools in Fresno.

3. The record fails to establish any violation of prevailing wage requirements by Nelson & Sons, Inc. or by Nolte Sheet Metal, Inc. in either case. Accordingly, the Assessments must be dismissed.

ORDER

The Civil Wage and Penalty Assessment in Cases Nos. 08-0168-PWH and 08-0169-PWH, and the Civil Wage and Penalty Assessment in Case No. 08-0173-PWH are dismissed. 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

⁸ Nolte's testimony and pay stub evidence in this case indicate that it subsequently discontinued the practice of paying a lower rate for shop work, at least with respect to Acosta, Dorado, and Mejia.