

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**F.O.R.D. Inc. Construction**

Case No. 10-0170-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected contractor, F.O.R.D. Inc. Construction ("F.O.R.D."), filed a timely request for review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("Division") with respect to work performed for the Compton Unified School District ("Compton USD") at Enterprise Middle School in Compton, California. A hearing on the merits was held Wednesday, September 22, 2010, before hearing officer, Christine Harwell. David D. Cross appeared for the Division and Alan Ross appeared with James Amos, president of F.O.R.D., on behalf of F.O.R.D. The hearing was completed and the matter was submitted September 22, 2010.

The issues for decision are:

- Whether the Assessment correctly reclassified Albert King to the classification of plumber and James Clark to the classifications of plumber and operating engineer for the work they performed on the Project;
- Whether the Assessment correctly found that F.O.R.D. had failed to report and pay the required prevailing wages for all hours worked on the Project by King and Clark;
- Whether the Assessment correctly found that F.O.R.D. had failed to pay the required training fund contributions to an approved plan or fund for all hours worked on the Project by King and Clark;

- Whether the Division abused its discretion in assessing penalties under Labor Code section 1775, subdivision (a)<sup>1</sup> at the maximum rate of \$50.00 per violation and whether the correct number of violations were assessed under sections 1775 and 1813;
- Whether F.O.R.D. has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver liquidated damages.

The Director finds that F.O.R.D. has failed to carry its burden of proving that the basis of the Assessment was incorrect. Therefore, the Director issues this Decision affirming and modifying the Assessment.

### FINDINGS OF FACT

On or about December 8, 2010, Compton USD requested a proposal from F.O.R.D. to perform emergency repairs on a leaking underground water pipe at Enterprise Elementary School ("Project"). Compton USD considered the job to be an emergency because water was emitting on the school grounds and dangerously undermining the foundation of a breezeway structure while children were attending school. F.O.R.D.'s proposal, dated December 8, 2009, submitted to Compton USD plumbing supervisor Craig Oliver, proposed to complete the job within 20 days for \$9,500.00.<sup>2</sup>

The witnesses disagree over when work on the Project commenced. King and Clark testified that they "walked the area" with Amos in the late afternoon on Wednesday, December 9, 2009, that fencing and digging work began on Thursday, December 10, 2009, and that they each worked for more than 8 hours that day. During the project there was

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<sup>1</sup> All further statutory references are to the California Labor Code, unless otherwise indicated.

<sup>2</sup> The proposal was for "Plumbing: As requested we are proposal [*sic*] to replace a 2 in. water line 20 ft. long. Saw cut concrete walk way (4" X 2" X 12'ft.) replace concrete 9" X 12" X 12'ft.) broom finish [*sic*]." F.O.R.D. proposed to do the following: "1 - cut concrete (4" X 12" X 20'ft.); 2 - Dig a (2'ft. X 3'ft.) trench; 3-Replace and install a (2" X 20'ft.); 4 - compact dirt 90% to cover the (2" X 20')ft.) trench; 5- concrete the (4" X 12" X 12'ft.) Broom finish. 6- Remove all construction debris from job area; 7-Secure working area for a total of 20 days." It contained the following qualifications: "Note: Total proposed work to be completed within a (20) day turn around [*sic*] time frame upon approval of proposal. Requesting construction site to be isolated time of construction (20 days). All proposed work include one (1) year warranty from date of completion. Proposed work sing [*sic*] off by supervisor upon completion." No written contract from Compton USD was introduced into evidence.

heavy rain and a gas line was ruptured which caused unforeseen problems and delay. Amos testified, to the contrary, that work first began Friday, December 11, 2009, and that King and Clark only worked 4 hours that day. Amos, King and Clark agree, however, that all day work occurred on Saturday, December 12, 2009, but Amos denies that King or Clark worked more than eight hours that day. Amos also denies that any work took place on Sunday, December 13, 2009. King did not work Monday, December 14, 2009; Clark testified that he did work all day on December 14.

From December 11 through December 13, 2009, King and Clark performed work on the Project in heavy rain that required a tent to be installed to allow them to keep working. Using heavy machinery provided by Clark, they dug a hole through cement and asphalt to reach the broken pipe. Because of flooding from rain and the water that had leaked from the broken pipe, they required a pump to eliminate water from the work area. As described by F.O.R.D.'s proposal and the testimony of the witnesses, the work performed required the crafts of plumber and operating engineer for which the applicable prevailing wage determinations ("PWDs") in Los Angeles County were LOS-2009-2 for plumber and General PWD SC-23-63-2-2009-1 for operating engineer. The applicable prevailing rates are as follows:

- Plumber, Industrial and General Pipefitter (LOS-2009-2): Straight-time prevailing wage rate is \$54.39, the regular overtime and Saturday prevailing wage rate is \$72.64, and the Sunday and holiday rate is \$89.41;
- Operating Engineer, Group 4 (Backhoe Operators) (SC-23-63-2009-1): Straight-time prevailing wage rate is \$56.78, the regular overtime prevailing wage rate is \$76.475, and the Sunday and holiday rate is \$96.17.

F.O.R.D.'s CPR lists King and Clark as F.O.R.D.'s employees for the job; King at \$25.00 per hour, and Clarke at \$66.66 per hour. At hearing, Amos asserted that he had given Clark \$300.00 for diesel fuel on the day he first appeared for work.

The Division served F.O.R.D. with the Assessment on June 7, 2010. Based on F.O.R.D.'s CPR, and the workers' own records and description of their work, the Assessment calculated that King worked four days (Thursday through Sunday, December 10 through 13,

2009): 16 hours at straight time, 24 hours of overtime and 7.5 hours of Sunday overtime as a plumber; and Clark worked five days (Thursday through Monday, December 10 through 14, 2009), part as a plumber and part as an operating engineer: 35 hours at straight time, 17 hours of overtime rate, and 5.5 hours of Sunday overtime. The Assessment found that King was underpaid \$3,232.87, and Clark was underpaid \$3,653.78. The Division assessed penalties under section 1775, subdivision (a) at the maximum rate of \$50.00 per day for 14 violations totaling \$700.00.<sup>3</sup> Penalties under Labor Code section 1813 were also assessed for F.O.R.D.'s failure to pay King overtime for his work in excess of eight hours per day on 4 days, totaling \$100.00. Though the Assessment found that Clark was owed wages at the overtime rate, no penalties for failure to pay him overtime were assessed.<sup>4</sup> Unpaid training fund contributions were assessed in the amount of \$102.90. Because none of the back wages were paid within sixty days following service of the Assessment, F.O.R.D.'s potential liability includes an additional \$ 6,989.55 in liquidated damages.

At hearing the Division produced Deputy Labor Commissioner Elsa Jenabi, King and Clark as witnesses. F.O.R.D. produced Oliver and Amos.

Jenabi, the Division's investigator, commenced her investigation when she received complaints from King and Clark. Her audit applied the applicable prevailing wages rates for plumber and operating engineer to the hours supplied by the workers to determine the underpayments for straight time, overtime and Sunday/holiday hours. Jenabi met with Amos at the Division office on February 26, 2010. Amos completed F.O.R.D.'s one-page CPR for the Project in Jenabi's presence and she observed that he did not know how to prepare a CPR. F.O.R.D.'s CPR reported 12 hours of work by King on December 11 and 12, 2009, at \$25.00 per hour with no overtime reported, and six hours of work by Clark, as Clark Trucking Equipment, on December 12, 2009, at a rate of \$66.66 per hour. At the same time, Amos also produced an unsigned, un-cancelled F.O.R.D. check dated December 15, 2009,

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<sup>3</sup> The Division assessed \$500.00 for ten violations for Clark, presumably \$50.00 for each day he worked, however, at most he worked 5 days, not 10 ( December 10, 11, 12, 13 and 14). For King the assessment of \$200 was presumably for the four days of December 10, 11, 12 and 13, 2009.

<sup>4</sup> The Assessment worksheet that lists overtime penalties applies four violations to King's overtime for the four days he worked, and none for Clark for the five days he worked. Nevertheless, the assessment registers overtime wage rate payment to Clark for 22.5 hours on four days. The Division provided no explanation for not assessing overtime penalties for the unpaid overtime hours worked by Clark.

made out to Albert King in the amount of \$273.75, and submitted a document identifying "Health and Welfare, Pension, Vacation/Holiday and Training fees" as "NA" (not applicable). Amos admitted to Jenabi that King had not been paid. He asserted that Clark was a subcontractor, but nonetheless, F.O.R.D.'s CPR lists Clark as an employee. Jenabi also sought records from Compton USD regarding the Project but received no response.

King testified that he put up the retaining fence, dug during the rain, put up a tarp and commenced locating the leaking pipe. He cut and prepared the replacement pipe and "sweat" it to attach to the existing pipe. King used a blow-torch, grinder, chisel, pick and shovel to complete the job. King testified that, on Saturday, December 12, 2009, when Amos was also using a blow-torch in the hole with him, Amos burned King's eyes and leg. King continued to work the entire day, more than 8 hours, and worked again on Sunday. He did not work on Monday, December 14, 2009, because his injuries required medical treatment. Because King needed medical care, he could not complete the job. King testified that Amos had fired him, refused to pay him at all and objected to King's request to be paid for overtime. King stated that Amos threatened him with a pistol on December 15, 2009, when he went to Amos's home to collect his pay and retrieve his tools. King submitted an affidavit to the Division stating that he worked on the Project on Thursday, December 10, from 6:30 a.m. to 7:00 p.m.; Friday, December 11, from 6:30 a.m. to 6:40 p.m.; Saturday, December 12,<sup>5</sup> from 6:30 a.m. to 9:00 p.m.; and Sunday, December 13, 2009, from 7:00 a.m. to 5:00 p.m., for a total of 47 hours. He said that Amos had told him he would earn \$175.00 per day but that he was not paid anything.

Clark testified that he had worked for F.O.R.D. in the past doing backhoe, concrete and electrical work and was usually paid a set rate of \$160 to \$170 per day for his time and backhoe rental. He denied that Amos had advanced him \$300.00 for diesel fuel. Clark stated that he visited the site and met with Amos on December 9, 2009, which took about 3 hours. Clark kept a log of his work on Project which listed his work as follows: Thursday,

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<sup>5</sup> In King's affidavit of April 7, 2010, he stated that he worked December "14" before he worked Sunday, December 13. It appears that this is a typographical error, as King's testimony at hearing was that he worked Thursday through Sunday, and did not work Monday, December 14, 2009, because of his burned eye and leg injury.

December 10, from 6:30 a.m. to 7:00 p.m., Friday, December 11, from 6:30 a.m. to 6:40 p.m., Sunday, December 13, from 6:30 a.m. to 8:00 p.m., and Monday, December 14, 2009, from 7:00 a.m. to 5:00 p.m. Clark's log did not list any work on Saturday, December 12, 2009, but he testified at hearing that the log was in error and that he knew he had worked on that Saturday. Clark testified that he worked equal amounts of time on the Project as an operating engineer and a plumber. The jobs Clark performed were breaking concrete, putting up the fence and a tent, and pumping water; he used a breaker bar, backhoe, shovel and pick. He did not work to the end of the job because, in his words, things got "ugly." Clark explained that Amos had asked for a breakdown of his hours and that Amos had refused to pay the amount due, which Clark estimated was approximately \$8,000.00. Clark also stated that Amos refused to pay overtime. He testified that Amos raised his voice, got a pistol and told Clark and King to leave when they went to collect their pay. Clark testified that he was never paid any wages.

Oliver recalled that he learned of a broken pipeline at the school on Wednesday, December 9, 2009. Using a backhoe, he dug up the area and discovered a break in a three inch water-main located in the footing of a post that supported the roof of a breezeway. Observing the scope of the problem, Oliver determined that a contractor should perform the job, called F.O.R.D., and arranged to meet Amos on December 10, 2009. Oliver stated that he met only with Amos on December 10, and contracted with F.O.R.D. to repair the broken pipe that day. Since Oliver had other duties to attend to during the time work on the Project was being performed he would intermittently come by the location to see how the work was proceeding. He saw Clark on the job on December 11 breaking concrete and digging using a bobcat with a backhoe. Oliver understood that Clark's job was to operate equipment, load dirt and use the backhoe and dump truck. Oliver did not know how long Clark worked on December 11. He observed both King and Clark working on Friday, December 11 and Saturday December 12, 2009, and he observed that the work was complicated by the heavy rain and the broken gas line. Oliver testified that the workers were present past dark on December 12 and it was raining. He stated that the workers had dug a four foot to five foot deep hole that continually filled with water, they were digging in mud and it was very difficult to "sweat" the pipe due to the moisture. Oliver testified that he did not see any

workers on Sunday, December 13 when he briefly visited the job site in the morning and again at about noon. Oliver stated that it took five or six days to complete the job and that for the last four or five days Amos hired someone else.

Amos testified that he first called King to assist him with the Project on Thursday, December 10, 2009. He thought that the December 8 date on the bid proposal was a mistake and that it should have been dated December 10, 2009. On December 11, Amos met with King and advised him that he would be paid a straight rate of \$25.00 per hour as a "helper," primarily to put up a fence. Amos testified that King finished putting up the fence by about 1:00 p.m. on December 11, 2009. The next day, December 12, Clark arrived to crack the concrete and dig the hole. Amos testified that Clark told him that he needed \$300.00 for fuel and that Amos had given it to him. Amos stated that Clark had worked for him as a self-employed backhoe operator in the past at a flat rate of \$400.00 per day. Amos denied promising Clark an hourly rate of \$85.00. Amos testified that he had not asked Clark to do any plumbing work but, because a gas main broke during digging, much time was lost and Clark was required to assist with pumping water from the hole and locating and repairing the broken pipe.

Amos acknowledged that King worked on repairing the pipe, using a blow-torch and attempting to "sweat" the pipe which was very difficult in the wet conditions. King worked with Amos in the hole that King and Clark had dug to gain access to the broken pipe. A shut-off valve was soldered and installed by King and Amos. Amos denied that either King or Clark had worked in excess of eight hours on December 12, stating that they had worked until dark, which was early in mid-winter. Amos denied that any work was performed by either worker on Sunday, December 13 or by Clark on Monday, December 14. Amos testified that King did not show up for work on Monday, December 14, so he hired another worker, Charles Sims, to complete the job. According to Amos, King came to his home accompanied by Clark on December 16, 2009, and told Amos he had been sick. Amos denied threatening King with a gun, but admitted that he had not paid either King or Clark. Amos said that he told Clark he would pay him if Clark provided a receipt with an itemization. Amos produced an undated handwritten statement at hearing stating that King had worked 12 hours with no overtime on December 11 and 12, 2009, at the rate of \$25.00

per hour, and that Clark had rented his bobcat services for \$400.00 December 12, 2009, and had been paid \$300.00 for diesel fuel, leaving a balance due of \$100.00.

## 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, as noted earlier, 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 the statutory 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); see *Lusardi, supra*, 1 Cal. 4th at 985.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate, and section 1775, subdivision (a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of unpaid wages, if those wages are not paid within sixty days following the service of the civil wage and penalty assessment.

After investigation, if the Labor Commissioner determines that a violation of the prevailing rate has occurred, the Division will issue a Civil Wage and Penalty Assessment pursuant to section 1741. An affected contractor or subcontractor may appeal the assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that “the contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.”

F.O.R.D. Was Obligated To Pay King And Clark Prevailing Wages For The Work They Performed On The Project.

Prior to hearing, F.O.R.D.'s counsel stipulated that the Project was a prevailing wage job. Nevertheless, Amos contended at hearing that no prevailing wage requirements existed because the total cost of the Project was less than \$10,000.00. Amos further contends that, even if prevailing wages were applicable to the Project, he was not required to pay prevailing wages to Clark who was a subcontractor. Neither of Amos's arguments are supported by the applicable law.

First, Amos is mistaken about the contract dollar limit that exempts public works projects from prevailing wage requirements. Contractors for public works projects that exceed \$1,000 are required to pay local prevailing wages to construction workers on those projects. Section 1771 states in part:

*Except for public works projects of one thousand dollars (\$1,000.00) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.*

(Emphasis added).

The California Prevailing Wage Law (CPWL) (§§1720 et seq.) is a "comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds." *Road Springer Fitters, Local Union 669 v. G.&G. Fire Sprinklers, Inc.* (2002) 102 Cal. App. 4th 765, 776. In addition to state agencies, the CPWL applies to "political subdivisions," which include any county, city, district, public housing authority, or public agency of the state, and assessment of improvement districts. (§1721). Thus the CPWL applies to school districts like Compton USD.<sup>6</sup> Consequently,

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<sup>6</sup> The Public Contract Code establishes contracting requirements for school districts and community college districts. (Public Contract Code sections 20110 et seq., and 20650 et seq.) Depending upon the purpose of the project and estimated dollar amount, the district may be required to contract out to the lowest responsible bidder to accomplish the project. There are numerous sections that address the total dollar limits as to when a district must call for bids and let to the lowest bidder. (i.e. Public Contract Code sections 20111, subdivision (b), and 20651, subdivision (b)), however, in the case of an emergency when any repairs, alterations, work or improvement is necessary to any facility of a college or public school to permit the continuance of classes, or to avoid danger to life or property, the governing board of a school district or community college district may, by

because the Project entailed work for a contract above \$1,000.00, F.O.R.D. was required to pay its workers prevailing wages.<sup>7</sup>

With regard to F.O.R.D.'s argument that it was not required to pay prevailing wages to Clark, because Clark was a subcontractor, the prevailing wage law does not distinguish who is eligible for prevailing wages based on their status in a business that has contracted to do public work. The Labor Code states that a "Worker" includes laborer, worker or mechanic." (§1723.) A person who performs work may not be deemed a "subcontractor" rather than an employee to avoid payment of prevailing wages. All workers employed by a contractor in the execution of a public works contract are employed on the public work; a contractor or subcontractor may not subcontract work to another to avoid the requirements of paying prevailing wages under the appropriate prevailing wage determination. (§1774.) A contractor and subcontractor are jointly and severally liable for all amounts found owing. (§1743.)

Thus, King and Clark are entitled to prevailing wages for the hours they worked on the Project. Based on King and Clark's description of the work they performed, corroborated by the testimony of Amos and Oliver, they are entitled to be paid at the applicable rates for plumber and operating engineer. The Assessment's reclassification of King and Clark to the plumber and operating engineer classifications for their work on the Project is therefore affirmed. There remains, however, the issue of the number of hours that each worker worked on the Project in the respective classifications.

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unanimous vote, with the approval of the county superintendent of schools, either: 1) make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing materials or supplies without advertising for or inviting bids; or 2) without regard to the number of hours needed for the job, authorize the use of day labor or force account to carry out the project. (Public Contract Code sections 20113 and 20654.) These statutes do not relieve a school district project from being subject to prevailing wage requirements; they merely release the school district from engaging in the delayed bid and contract process.

<sup>7</sup> This Decision does not analyze whether Compton USD properly contracted with F.O.R.D. for the emergency water pipe repair at Enterprise Middle School according to the Public Contract Code; an issue which is beyond the scope of this review.

King and Clark's Records Of The Days And Hours They Worked Constitute Substantial Evidence In The Absence Of Credible Evidence To The Contrary.

The Labor Code requires an employer on a public work for which prevailing wages are required to be paid to prepare and maintain contemporaneous records of the hours an employee works. (§1776, subd. (a); see, also, Cal. Code Regs., tit. 8, §11160, subd. (6)(a)(1).) Where, as here, the employer did not keep a record, or otherwise report every employee's hours, the employee may demonstrate his hours by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. (*Hernandez v. Mendoza*, (1988) 199 Cal App.3d 721, 727 (citing with approval *Anderson v. Mt. Clemens Pottery Co* (1945) 328 U.S. 680 [L.Ed. 1515, 1523, 66 S. Ct. 1187]).) This shifts the burden to the employer to produce either evidence of the precise number of hours worked or evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. (*Hernandez, ibid.*) If the employer fails to produce such evidence, a court may then award wages to the employee, even though the result may be imprecise. F.O.R.D. did not maintain time cards, and, except for a handwritten statement of total hours, F.O.R.D. did not produce any time records during the hearing proceedings. For this reason, the burden shifting is appropriate and King and Clark's estimates of their work hours may be considered in determining their hours. Each worker reported and testified to the hours and tasks he performed each day on the Project. Through Oliver's testimony, F.O.R.D. attempted to refute King and Clark's estimated hours based solely on Oliver's intermittent visits to the site. However, Oliver's testimony that he discovered the pipe leak on December 9 and first contacted Amos on December 10, 2009, is not credible because the bid that Amos provided was dated December 8, 2009.

King and Clark's calendars and their affidavits of the hours they worked have some discrepancies, but both agree that work was performed from Thursday, December 10 through Saturday, December 12, 2009, when King testified that he was injured but kept working, and also for some amount of time on Sunday, December 13, 2009. Oliver and Amos agreed that the job was an emergency; therefore it is logical to believe that work was immediately performed on Thursday, December 10, 2009, as claimed by King and Clark, as well as on Sunday, December 13, 2009 – a non-school day. The work King and Clark reported on

Friday, December 11, 2009 and Saturday, December 12, 2009, was corroborated by Amos and Oliver. Amos disputes that either worked more than four hours on Friday, December 11, but Oliver acknowledged that he had no idea how long the workers were present that day. Oliver confirmed that both King and Clark worked past dark on Saturday December 12, 2009, and Amos agreed that he was present on Saturday, as well. The work claimed for Sunday, December 13, 2009, is somewhat problematic in light of Oliver's testimony that he visited the site twice and saw no workers. Nevertheless, King and Clark both testified that the weather had cleared and the work continued. Oliver admits that he was not present for the entire day and he may have coincidentally arrived at the site during the workers' break times. The consistencies in the statements of the workers for Thursday through Sunday lead to the reasonable inference that King and Clark have correctly estimated the hours they worked. King testified that his injuries required that he get medical treatment on Monday, December 14, 2009, and Clark stated that he worked on the Project without King on that day but that Sims showed up instead. Oliver and Amos assert that no work occurred on Monday, except that when King did not show up for work Amos hired Sims to finish the Project. Sims was not called to testify and Amos produced no records regarding Sims's work.

F.O.R.D. was required to keep specific records of hours worked by any employees subject to federal and state overtime laws (29 U.S.C. § 211, subd. (c), and §1174, subd. (d)), irrespective of whether those employees were engaged in prevailing wage work. Since F.O.R.D. did not produce any records of who actually worked on the job or when, the rule of *Anderson v. Mr. Clemens Pottery* applies, particularly in light of F.O.R.D.'s burden of proof under section 1742 to show that the basis for the Assessment was incorrect.

F.O.R.D. has not proven that the days and hours that the Division assessed, based on the workers' journals, were incorrect, and has therefore failed to carry its burden of disproving the basis of the Assessment. Except for December 12, when Amos was present (the day Clark contends he was burned by Amos's blow-torch), there is no evidence that Amos had personal knowledge of which workers were or were not present when work was performed. Amos has produced no evidence that refutes Clark or King's claim of performing plumbing work and excavation work on the Project. Moreover, Amos admitted knowing that both King and Clark could have performed plumbing work. Neither F.O.R.D.'s CPR, which

was prepared after the fact in February 2010, and which reports hours far below those claimed by the workers, nor the undated log Amos produced for the first time at hearing constitute substantial evidence that work was not performed as claimed by King and Clark.

For these reasons, F.O.R.D. has failed to meet its burden of proving that King and Clark did not perform all the work on the Project they have claimed. The unpaid prevailing wages assessed are therefore affirmed in full.

Training Fund Payments Have Not Been Made.

The record establishes that F.O.R.D. failed to pay any wages to either King or Clark for their work on the Project and F.O.R.D. has provided no evidence that it made any training fund contributions on their behalf as required by section 1773.1. On the contrary, a document submitted to the Division by F.O.R.D. expresses the mistaken belief that no fringe benefit payments were required for the work on the Project. Consequently, F.O.R.D. has not met its burden of proving that it paid the required fringe benefits on the wages found due to King and Clark. The assessed training fund obligations in the amounts of \$50.83 for King and \$52.06 for Clark totaling \$102.90 are therefore affirmed.

The Division Did Not Abuse Its Discretion In Assessing Penalties Under Labor Code Section 1775 At The Maximum Rate.

Section 1775, subdivision (a), provides in relevant part as follows:

(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.

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(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.”

Abuse of discretion is established if the Labor Commissioner “has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence.” (Code of Civil Procedure section 1094.5, subdivision (b).)

In reviewing for abuse of discretion, 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*, 67 Cal.App.4<sup>th</sup> 95 at 107 (1998). Here, F.O.R.D. not only did not pay prevailing wages, F.O.R.D. did not pay the workers for their work at all. For this reason, F.O.R.D. has failed to carry its burden of proving an abuse of discretion. The assessment of penalties under section 1775, subdivision (a) at the maximum rate of \$50.00 is therefore affirmed, however, the number of days to which the penalties applies is reduced from 14 to nine, because (as described in footnote 3, page 5), Clark worked five days, not ten, and King worked four.

F.O.R.D. Is Liable For Penalties Under Section 1813.

Section 1813 states as follows:

“The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25.00) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article.”

Section 1815 states in full as follows:

“Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week,

shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1½ times the basic rate of pay.”

The Assessment assessed section 1813 penalties in the amount of \$100.00, representing four overtime violations for work performed by King. F.O.R.D. denies that any overtime violations occurred. By Amos’s own testimony, when King and Clark requested to be paid their agreed upon earnings, that included overtime, Amos refused to pay them anything.

The record thus establishes that F.O.R.D. violated section 1815 by paying less than the required prevailing overtime rate to King on a total of four occasions for a total of \$100.00 in penalties under section 1813. The record shows that Clark also worked overtime for which he was not paid on four days, but the Division did not assess penalties for those violations. The Division erred in failing to assess \$100.00 for the four additional violations. Unlike section 1775 above, section 1813 does not give the Division any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties as to King under section 1813 is affirmed. Additional penalties for the four days on which Clark worked unpaid overtime hours are also added to the Assessment based on the record provided at hearing.

F.O.R.D. Is Liable For Liquidated Damages.

Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, upon the failure to pay the back wages due within sixty days following service of a civil wage and penalty assessment under section 1741. 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 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.

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 payment of the liquidated damages with respect to that portion of the unpaid wages.

Rule 51, subdivision (b) [Cal.Code Reg. tit. 8, section 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 ...

F.O.R.D. is liable for liquidated damages only on any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is closely tied to F.O.R.D.’s position on the merits and specifically whether there was an “objective basis in law and fact” for appealing the Assessment.

First, F.O.R.D. contends that this work was not subject to prevailing wages because its contract was for less than \$10,000.00. As discussed above, this assertion is legally incorrect, as section 1771 requires the payment of prevailing wages on all public works projects over \$1,000.00. Further, F.O.R.D. generally defended on the ground that the hourly claims of the affected workers were inflated, but F.O.R.D. presented no objective credible time cards or other records to establish when the affected workers actually worked. Nor did the testimony of Oliver establish that he knew the workers’ hours. Neither of F.O.R.D.’s assertions are supported by the facts or applicable law and therefore cannot constitute an “objective basis in law and fact” for appealing the Assessment. F.O.R.D. did not pay the assessed back wages and they remained due more than sixty days after service of the Notice.<sup>8</sup> F.O.R.D. has not demonstrated grounds for waiver, hence, F.O.R.D. is liable for liquidated damages in an amount equal to the unpaid wages by operation of law.

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<sup>8</sup> The unsigned check made out to King, dated December 15, 2009, is a nullity. The evidence establishes that it had not been tendered to Albert King and had not been negotiated. Nothing was tendered to the workers or the Division after the Assessment was served in June, 2010

## FINDINGS

1. Affected contractor, F.O.R.D., filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. King is entitled to be paid the applicable prevailing wage rate for plumber for: 16 hours of straight time; 24 hours of overtime, and 7.5 hours of Sunday/holiday time for his work on the Project in the total amount of \$3,232.87.
3. Clark is entitled to be paid the applicable prevailing wage rate for plumber for: 23 hours of straight time; 8 hours of overtime, and 3 hours of Sunday/holiday time and at the applicable prevailing wage rate for operating engineer, group 4 for: 12 hours of straight time; 8 hours of overtime, and 2.5 hours of Sunday/holiday time for his work on the Project in the total amount of \$3,653.78.
4. F.O.R.D. failed to pay required training fund contributions for King and Clark in the total amount of \$102.90.
5. In light of Findings 2 through 4, above, the net amount of wages including training funds due under the Assessment is \$6,989.55.
6. The unpaid wages found due in Finding No. 5 remained due and owing more than sixty days following issuance of the Assessment. F.O.R.D. is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of \$ 6,886.65, and there are insufficient grounds to waive payment of these damages.
7. The record establishes 9 violations under section 1775. The Division did not abuse its discretion in setting section 1775, subdivision (a) penalties at the maximum rate of \$50.00 per violation, and consequently F.O.R.D. is liable for penalties in the amount of \$ 450.00.
8. F.O.R.D. is liable for penalties pursuant to section 1813 at the rate of \$25.00 per violation for not paying King overtime at the correct prevailing rate on four separate days, for a total amount of \$ 100.00. F.O.R.D. is also assessed an additional \$100.00 in penalties pursuant to section 1813 for the four separate days that Clark worked overtime, for a total penalties under section 1813 in the amount of \$200.00.

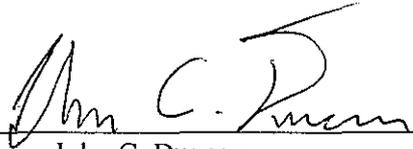
9. The amount found due in the Assessment and affirmed by this Decision, including the imposition of liquidated damages by operation of law, is as follows:

Wages Due:	\$6,886.65
Training Funds Due:	\$102.90
Penalties under Labor Code section 1775 (a)	\$450.00
Penalties under Labor Code section 1813	\$200.00
Liquidated Damages	<u>\$6,989.55</u>
<b>TOTAL:</b>	<b>\$14,629.10</b>

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

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

Dated: 11/5/10

  
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John C. Duncan  
Director of Industrial Relations