STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Bannaoun Engineers Constructors Corp Case No. 12-0062-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Bannaoun Engineers Constructors Corp (Bannaoun) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the Del Aire Pavement Preservation, Phase 1(Project) in Los Angeles County. The Assessment determined that $26,350.27 in unpaid prevailing wages and statutory penalties was due. At the time of Hearing on the Merits, DLSE amended the Assessment downwards, removing Charles Stagner and Enrique Santos who were supervisors from the audit. DLSE also removed all training funds previously found to be due as Bannaoun has presented sufficient proof of payments. After the amendment, unpaid prevailing wages due are said to be $12,901.44 and statutory penalties $8,100.00.

A Hearing on the Merits was conducted on June 25, 2012, in Los Angeles, California, before Hearing Officer Makiko I. Meyers. Omar G. Maloof appeared for Bannaoun and David Cross appeared for DLSE. The matter was submitted for decision on July 27, 2012, after admission of additional exhibits.

The issues for decision are:

- Whether the Assessment correctly found that Bannaoun had failed to report and pay the required prevailing wages for all hours worked on the Project by William Cron.
- Whether the Assessment correctly reclassified Alvaro Ledezma and Cron to

Operating Engineer Group 8.

- Whether Timothy L. Bitner was correctly reclassified as a Teamster Group 2.
- Whether the Assessment correctly found that Bannaoun had failed to apply pre-determined increases for Laborer classification resulting in payment of wages less than required by the prevailing wage determinations.
- Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775[1] at the maximum rate of $50.00 per violation.
- Whether Bannaoun has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages.

The Director finds that Bannaoun has disproved the basis of the Assessment as to the issue of unreported hours claimed by Cron. However, the Director finds that Bannaoun improperly classified Ledezma, Cron and Bitner and failed to apply predetermined increases for Laborers. Therefore, the Director issues this Decision affirming and modifying the Assessment and remanding the matter to DLSE for further calculation and determination consistent with the Decision.

FACTS

The County of Los Angeles (County) advertised the Project for bid on May 11, 2010, and awarded the contract to Bannaoun on August 16, 2010. The Project called for Bannaoun to "perform and complete ... the chip seal and slurry seal existing roadway pavement; reconstruct curb, gutter, and sidewalk."

Applicable Prevailing Wage Determinations (PWDs): The following applicable PWDs and scopes of work were in effect on the bid advertisement date:

Laborer and Related Classification (SC-23-102-2-2010-1): This PWD provides for the following prevailing wage rates for regular time: $40.78 per hour, excluding training funds, for Group 1, and $41.88 per hour, excluding training funds, for Group 3. The predetermined increase provides "effective July 1, 2010, there will be an increase of

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

$1.00 to Health and Welfare and $0.25 to Pension." Another predetermined increase took effect on July 1, 2011. The applicable Scope of Work provides that the Laborer classification covers work relating to "street and highway work, grading and paving, excavation of earth and rock ..." Group 1 includes "concrete curb and gutter laborer" and "laborer, concrete." Group 3 covers "bushing hammer, guardrail erector/guardrail builder, shot blast equipment operate (8 to 48 inches), and small skid steer loader."

Operating Engineer (SC-23-63-2-2009-1): The applicable Scope of Work states that an Operating Engineer does "handling, cleaning, erection, installation, and dismantling of machinery, equipment and all work on robotics" in connection with street and highway work and operates "forklift, loed, pettibone or mobile equipment" in connection with concrete work. An Operating Engineer also performs "all repair and service work on equipment, including the washing of all boilers and/or scrubbers." Group 8 covers "asphalt or concrete spreading operator," "asphalt paving machine operator," "backhoe operator," "concrete mixer operator – paving," etc.

The prevailing wage for Group 8 is $56.46 per hour, excluding training funds. There were no predetermined increases during the relevant time period.

Teamster (SC-23-216-2-209-1): The applicable Scope of Work for Teamster covers "assembly, operation, maintenance, and repair of all equipment, vehicles, and other facilities." Group 2 covers "drivers of vehicle or combination of vehicles – 2 axles." The prevailing wage rate for Teamster Group 2 is $45.20 per hour excluding training funds, and there were no predetermined increases during the relevant time period.

The Assessment: DLSE served the Assessment on December 12, 2011. The Assessment found that Bannaoun misclassified some workers, failed to report all hours worked by William Cron, and failed to apply predetermined increases for Laborers. The Assessment found a total of $14,000.27 in underpaid prevailing wages. Penalties were assessed under section 1775 in the amount of $50.00 per violation for 247 violations, totaling $12,350.00. DLSE determined that the maximum penalty was warranted by its finding that "it is apparent that Bannaoun ... did not pay the correct prevailing wages."

DLSE found that Bannaoun had several previous prevailing wage violations which were also considered in setting the penalty rate.

Hours Worked by Cron on the Project: Cron was the only worker who complained that some of the hours he worked on the Project were not reported on Bannaoun's Certified Payroll Records (CPRs) and that he did not get paid for those hours. Cron testified that he spoke to the Deputy Labor Commissioner Jeffery Pich regarding unpaid work hours he had performed on various public works for Bannaoun, including this Project. Cron was informed at that time that the hours he claimed to have worked on each project must be separated as DLSE's assessments are issued on a project to project basis. After meeting with Pich, Cron created and submitted a calendar stating that he had worked eight hours per day every weekday from October 11, 2010, through December 7, 2010, excluding November 11, 2010 (holiday), November 15, 2010, and November 25 and 26, 2010 (holidays). Cron's calendar also shows that he worked six hours each on two Saturdays, November 13, 2010, and November 20, 2010.

On the day of trial, Cron first produced his notes on "Truck Fuel." Cron testified that he voluntarily kept notes of the dates, odometer readings, and amount of fuel he purchased and loaded to the fueling truck for Bannaoun for various projects[2]. Next to the dates are notations such as "LAX" or "West Covina." Cron stated that these notations indicated the specific project for which the fuel truck was loaded with fuel and that the Project at issue was known as the "LAX" job. Another document Cron produced on the day of trial was his notes on "Equipment Fuel." Cron testified that he kept these notes to keep a record of which equipment was fueled when and with how much fuel. Like his "Truck Fuel" notes, the specific projects the equipment was fueled for were noted. In both sets of notes, Cron indicated that he started to work on the Project, identified in the notes as LAX, on October 4, 2010. Based on these notes, Cron testified that the calendar he had submitted to DLSE earlier was erroneous and that he had actually commenced work on the Project on October 4, 2010, rather than October 11, 2010. Cron also testified that his notes did not record the hours he had worked each day. He admitted that he had estimated the hours that he had worked on the Project when he created the

[2] Cron purchased fuel at local gas stations using a Bannaoun company credit card.

calendar he submitted to DLSE.

Bannaoun's weekly reports on the Project to the County contradict Cron's notes and calendar, showing that Bannaoun's workers did not commence work on the Project until the week ending October 30, 2012, and continued work through May 7, 2011. These reports show the names of the workers, their classifications, and hours worked by each worker for each day that Bannaoun worked on the Project. Bannaoun's CPRs were created based on these weekly reports and Bannaoun's workers were paid based on the reported hours and classifications.

Reclassification of Workers: DLSE reclassified both Ledezma, who was classified as an "Operator" in Bannaoun's CPRs, and Cron, who was classified as a "Laborer Group 1" in the CPRs, to Operating Engineers Group 8 based on photographs of the equipment they used and Cron's statements to DLSE. The photographs were provided to DLSE by Bannaoun and there is no dispute as to the types of the machines used in the course of Bannaoun's work on the Project. Bannaoun does not dispute DLSE's reclassification of Ledezma. Bannaoun argues, however, that Cron was not an Operating Engineer because all he did was transport those machines from Bannaoun's premises to the job site. DLSE contends that Cron drove or otherwise operated the equipment.

DLSE also reclassified Bitner, who was classified as a "Truck Driver" in the CPRs, to Teamster Group 2 because "Truck Driver" is not a valid classification under the applicable PWDs. Bannaoun does not dispute this reclassification.

Failure to Apply Predetermined Increases: The Assessment found that Bannaoun underpaid its Laborers because Bannaoun did not apply the required predetermined increases for its workers in Laborer classifications. The record establishes that Bannaoun's workers worked on the Project from the week ending October 30, 2010, through May 7, 2011. The prevailing wage rates applicable to Laborer Groups 1 and 3 during this period, with applicable predetermined increases are $42.03 and $43.13, respectively, excluding training funds. However, Bannaoun paid the affected workers at the rates of $41.42 for Laborer Group 1 and $42.81 for Laborer Group 2 throughout its work on the Project, resulting in underpayment to the workers.

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

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 to 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 under section 1741.

When DLSE 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 the Assessment 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 civil wage and penalty Assessment is incorrect."

Bannaoun Properly Kept and Reported All Hours Worked by William Cron.

Employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers 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 maker to determine the amount by a just and reasonable 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.]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727 [applying same rule to state overtime wage claims]; and *In re Gooden Construction Corp.* (USDOL Wage Appeals Board 1986) 28 WH Cases 45 [applying same rule to prevailing wage claims under the federal Davis-Bacon Act, 40 U.S.C. §§3141 et seq.].) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

In the current case, the Assessment for additional hours claimed by Cron is based on Cron's recollection and his estimate of the hours that he worked on the Project. Thus, the credibility and accuracy of Cron's testimony and recollection are the central issue in this case.

Evidence Code section 780 provides in pertinent part:

> Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:
>
> (a) His demeanor while testifying and the manner in which he testifies.
>
> (b) The character of his testimony.

* * *

(f) The existence or nonexistence of a bias, interest, or other motive.

(g) A statement previously made by him that is consistent with his testimony at hearing.

(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

First, Cron's statements regarding the hours that he claims to have worked on the Project are self-contradictory. When Cron initially submitted a calendar to DLSE, he stated that he started to work on the Project on October 11, 2010, a full two weeks earlier than the evidentiary record shows Bannaoun workers to have commenced work on the Project. On the day of hearing, however, Cron claimed for the first time to have discovered additional documents, namely his "Truck Fuel" and "Equipment Fuel" notes and claimed that the date he had actually commenced working at the Project was October 4, 2010; a week earlier than he had previously claimed and three weeks earlier than the evidentiary record shows other Bannaoun workers to have commenced work on the Project. Cron never explained why he would have commenced work on the Project three weeks earlier than any other Bannaoun worker.

The credibility of Cron's "Truck Fuel" and "Equipment Fuel" notes are doubtful. It is undisputed that Cron used Bannaoun's company credit card to purchase fuel. It is unclear, however, why Cron allegedly kept these meticulous records when Bannaoun did not require him to do so and when the circumstances indicate that there would not have been any issue of reimbursement for the fuel charges. Further, Cron didn't explain why he would have kept meticulous records on fuel but no record of the hours he worked. Furthermore, it is hard to believe that the notations of the project names besides the dates are accurate. When Cron initially brought his complaint to DLSE, Cron admittedly was not aware that each project needed to be addressed separately. Thus, it seems unnatural for someone who had bundled all of the projects he worked on for Bannaoun together for

one purpose would make detailed notations of specific project when recording fuel costs and usage.

Finally, Cron admitted that he did not keep any contemporaneous record of the hours that he worked and that the hours he reported later to DLSE when he lodged complaints are estimates. The fact that Cron's admittedly non-contemporaneous calendar doesn't match up with his "Truck Fuel" and "Equipment Fuel" notes, which he claims were contemporaneously created, casts significant doubt on the credibility and claimed contemporaneity of the latter documents. Bannaoun, however, has established that it kept contemporaneous records of Cron's work hours by way of the weekly reports it submitted to the County reporting the days and hours worked by all of its workers on the Project. The record does not establish that Bannaoun failed to maintain accurate time records and it has therefore met its burden of disproving the basis of the Assessment as to the alleged unreported hours Cron claimed to have worked on the Project.

Alvaro Ledezma and William Cron Were Properly Reclassified as Operating Engineer Group 8

The prevailing rate of pay for a given craft, classification, or type of work is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. It is the rate paid to the majority of workers; if there is no single rate payable to the majority of workers, it is the single rate paid to most workers (the modal rate). On occasion, the modal rate may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. (§§ 1773, 1773.9, and *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.) The Director determines these rates and publishes general wage determinations to inform all interested parties and the public of the applicable wage rates for the "craft, classification and type of work" that might be employed in public works. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125 (*Ericsson*).)

The applicable prevailing wage rate is the one in effect on the date the public

works contract is advertised for bid. (§ 1773.2 and *Ericsson, supra.*) Section 1773.2 requires the body that awards the contract to specify the prevailing wage rates in the call for bids or alternatively to inform prospective bidders that the rates are on file in the body's principal office and to post the determinations at each job site.

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (*See Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by section 1773.4].) In the absence of a timely petition under section 1773.4, Bannaoun was bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1084-1085.)]

Bannaoun's CPRs classified Ledezma as an "Operator" and Cron as a Laborer Group 1. It is undisputed that the types of equipment used for the Project were subject to the Scope of Work for Operating Engineer Group 8. It is also undisputed that Ledezma operated these machines. Thus, the prevailing wage rate of $56.46 per hour excluding training fund applies, but Ledezma was only paid $55.71 per hour. Ledezma is therefore entitled to receive the difference.

As to Cron, Bannaoun argues that Cron did not operate the machines but only transported them on a trailer to and from the job site. It is undisputed, however, that Cron was in charge of fueling these machines, which is considered maintenance of machines under the applicable Scope of Work and therefore subject to the prevailing wage rate for Operating Engineer Group 8. Cron was only paid $41.42 per hour and is entitled to the difference between the two rates. While the Assessment correctly found that Cron is entitled to be paid at the Operating Engineer Group 8 rate for his work on the Project, the Assessment included hours that Bannaoun has proven to be inaccurate.

Accordingly, the matter is remanded to DLSE with instructions to prepare a new audit of the hours worked on the Project by Cron in accord with this decision. DLSE shall present this new audit to Bannaoun within 30 days of the date of service of this

decision. Bannaoun shall have 30 days from service of the new audit in which to request a hearing before the Hearing Officer, who shall retain jurisdiction for that purpose. Any such further hearing shall be limited to the recalculation of prevailing wages assessed for Cron's work on the Project.

Timothy L. Bitner Was Correctly Reclassified as a Teamster Group 2.

Bannaoun's CPRs classified Bitner as a "Truck Driver," which is not a valid classification under the applicable PWDs. The applicable Scope of Work for Teamster covers "assembly, operation, maintenance, and repair of all equipment, vehicles, and other facilities." Group 2 covers "drivers of vehicle or combination of vehicles – 2 axles." It is undisputed that the Bannaoun utilized 2 axled trucks, thus, Bitner was correctly reclassified as a Teamster Group 2.

Bitner was paid $44.95 per hour whereas the prevailing wages applicable to Teamster Group 2 was $45.20 per hour. Therefore, the Assessment correctly reclassified Bitner and assessed unpaid prevailing wages on his behalf.

Bannaoun Failed to Apply Required Predetermined Increases, And Thus Failed to Pay Correct The Prevailing Wages to Workers Classified As Laborer Groups 1 And 3 After The Effective Date Of The Increases.

During the time Bannaoun's workers worked on the Project, i.e. the week ending October 30, 2010 through May 7, 2011, the prevailing wage rates applicable to Laborer Groups 1 and 3 during this period, with applicable predetermined increases are $42.03 and $43.13, respectively, excluding training funds. However, Bannaoun paid at the rates of $41.42 for Laborer Group 1 and $42.81 for Laborer Group 2 throughout its work on the Project, resulting in underpayment to the workers. Accordingly, the Assessment correctly assessed the difference between the actually prevailing wage rate applicable and actual wages paid to Laborers.

DLSE's Penalty Assessment Under Section 1775 Is Appropriate.

Section 1775, subdivision (a) states in relevant part:

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each

calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B)(i) The penalty may not be less than ten dollars ($10) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.

(ii) The penalty may not be less than twenty dollars ($20) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than thirty dollars ($30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[3]

The Director's review of the Labor Commissioner'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.)

[3] Section 1777.1, subdivision (c) defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

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)].)

DLSE found that the maximum penalty amount of $50.00 per violation was appropriate because "based on Mr. Cron's testimony and the wages on the certified payroll records, it is apparently that Bannaoun ... did not pay the correct prevailing wages" resulting in underpayment to its workers. While this decision finds Cron's testimony to be not credible and that the assessment of wages for alleged unreported hours worked by him was not warranted, the Assessment is upheld in all other respects. Bannaoun's own CPRs showed that Bannaoun failed to apply the correct prevailing wage rates for various classifications and Bannaoun provided no explanation or excuse why it failed to pay at the correct rates and classifications. Furthermore, there are several past violations, and in some cases, the maximum penalty rate was also applied. Consequently, the imposition of the maximum penalty rate in this case was not abuse of discretion.

Bannaoun 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.
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> 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.

Absent waiver by the Director, Bannaoun is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the

Assessment. Bannaoun has presented no evidence or argument as to why liquidated damages should be waived. Bannaoun has therefore failed to demonstrate grounds for wavier of liquidated damages.

FINDINGS

1. Affected contractor Bannaoun Engineers Constructors Corp filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the Project.

2. Bannaoun kept accurate records of the hours worked by William Cron.

3. Bannaoun incorrectly classified Alvaro Ledezma and William Cron for their work on the Project. The correct classification for those workers is Operating Engineer Group 8.

4. Bannaoun incorrectly classified Timothy L. Bitner as a Truck Driver, where the correct classification for his work on the Project is Teamster Group 2.

5. Bannaoun failed to apply required predetermined increases to wages it paid to its workers in the Laborer classification.

6. In light of Findings 3 through 5, above, Bannaoun underpaid its employees on the Project. Determination of the exact amount of the underpayments owing to the affected workers is remanded to DLSE for recalculation in accordance with these Findings.

7. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of $50.00 per violation. However, the exact number of the violations is remanded to DLSE for recalculation in accordance with these Findings.

8. Bannaoun failed to demonstrate substantial grounds for appealing the Assessment and is therefore liable for liquidated damages.

ORDER

The Civil Wage and Penalty Assessment is affirmed in part and vacated and remanded in part as set forth in the above findings.

Remand Order: The matter is remanded to DLSE to recalculate the unpaid prevailing waged owed to the affected workers and number of violations for penalties under section 1775 as follows:

a. DLSE shall present its new audit to Bannaoun within 30 days of the date of service of the Notice of Findings. Bannaoun shall have 30 days from service of that audit in which to request a hearing before the Hearing Officer, who shall retain jurisdiction for that purpose. All other issues are final. The burden to show error shall remain on Bannaoun. If no hearing is requested within 30 days, the revised audit and penalty assessment shall become final.

b. In complying with this remand order, DLSE shall only rely on those documents admitted into evidence. If DLSE requires the use of other documents for its audit, it shall provide them to Bannaoun at the time it presents the audit. Bannaoun shall be provided an opportunity to supplement the record as well should it request a hearing.

The Hearing Officer shall issue a notice of Findings which shall be served with this Decision on the parties.

Dated: 10/8/2012

Christine Baker
Director of Industrial Relations