

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Ornelas Enterprise Inc. dba Ornelas Electric  
Construction**

Case No. 15-0010-PWH

From Civil Wage and Penalty Assessments issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected subcontractor, Ornelas Enterprise, Inc. dba Ornelas Electric Construction (Ornelas Enterprise), submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on December 23, 2014, with respect to electrical work performed for awarding body Bakersfield City School District (District) as part of the Compton Junior High School Modernization project (Project) located in Kern County. The Assessment determined that Ornelas Enterprise owed \$25,120.30 in unpaid prevailing wages and \$235,625.00 in penalties under Labor Code section 1775, subdivision (a).<sup>1</sup>

The hearing on the merits took place in Los Angeles, California before Hearing Officer Ed Kunnes on August 7, 2015. At the hearing on the merits, DLSE moved to amend the Assessment (Amended Assessment) downward to \$8,903.84 in unpaid prevailing wages, \$5,498.23 in unpaid training fund contributions, \$100.00 in penalties under section 1813, and \$108,800.00 in penalties under section 1775. The Hearing Officer granted the motion over the objection of Ornelas Enterprise because there was no prejudice to Ornelas Enterprise.

Carlos Ornelas appeared for Ornelas Enterprise and Max Norris appeared for DLSE. The affected contractor, Klassen Corporation (Klassen), did not request review of the

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

Assessment, but paid \$58,022.08 to DLSE in full settlement of its joint and several liability prior to the hearing.<sup>2</sup>

At trial, the parties stipulated to the issues for decision as follows:

- Was the correct prevailing wage classification used in the audit?
- Were the correct fringe benefit contributions paid to the workers?
- Were the hours worked as listed in the audit correct?
- Were the wages credited to Ornelas Enterprise as paid in DLSE's revised audit correct?
- Were all overtime hours paid at the correct prevailing wage overtime rate?
- Were the correct training fund contributions paid on behalf of all workers?
- Can the party requesting review establish that the Labor Commissioner abused her discretion in assessing penalties under Labor Code section 1775?
- Is Ornelas Enterprise liable for Labor Code section 1813 Penalties?
- Is Ornelas Enterprise liable for liquidated damages?
- What is the correct calculation of interest on unpaid wages?<sup>3</sup>

The Director finds that Ornelas Enterprise has failed to carry its burden of proving that the basis of the Amended Assessment was incorrect. Therefore, the Director issues this Decision affirming the Amended Assessment in full. Ornelas Enterprise has not proven the existence of grounds for a waiver of liquidated damages.

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<sup>2</sup> In part, DIR used Klassen's payment to pay the workers' unpaid prevailing wages as assessed in the aggregate amount of \$8,903.84.

<sup>3</sup> Although the parties stipulated to this as an issue, insufficient evidence was presented regarding Klassen's payment for which Ornelas is entitled to an offset against the amounts remaining due. Because the timing of this payment has a direct impact on the calculation of prejudgment interest due on the unpaid prevailing wages the record is incomplete on this issue and it will not be addressed in this decision.

## SUMMARY OF FACTS

On April 8, 2013 and April 15, 2013, the District, published a notice for bids for the Project. On June 2, 2013, the District entered into a contract with Klassen for the construction of the Project.

Klassen entered into a subcontract for the amount of \$1,921,000.00 with Ornelas Enterprise to perform "Electrical" construction work on the Project on June 6, 2013. The subcontract contains a list of work, including among other items: site fire alarm, site underground conduits, demo lighting, panel removal, fire alarm pathways, panel board, fire alarm demo, site communication demo, camera pathway, bore underground conduits, fire alarm pathways, install panels building, underground power boxes, demo feeders, demo lighting sheet, install wire mold, panel removal, install light fixtures, fire alarm wiring, demo feeders/removal, low voltage pathways, low voltage wire, underground low voltage, install terminal cabinets, and rough power and lighting. Ornelas Enterprise employed a total of fourteen workers on the Project from June 25, 2013, to December 21, 2014.

The following applicable prevailing wage determinations (PWDs) and scopes of work were in effect on the bid advertisement date:

Laborer and Related Classifications for Southern California (NC-23-102-1-2010-2): This PWD was issued August 22, 2012, and includes the Laborer rate that was paid by Ornelas Enterprise for the work in issue. The Laborer PWD contains two predetermined pay rate increases that went into effect on July 1, 2013, and July 1, 2014, respectively, both during the course of Ornelas Enterprise's work on the Project.<sup>4</sup> The advisory scope of work for Laborers includes, among other things, all work necessary to tend all building trades and craftsmen as well as excavation for building, including digging trenches.<sup>5</sup>

General Prevailing Wage Determination for Kern County (KER-2013-1): This PWD contains the rate of Inside Wireman, Technician (Inside Wireman), issued February 22, 2013,

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<sup>4</sup> The Assessment found that Ornelas Enterprise failed to pay one of the required predetermined increases to three workers classified as Laborers: Vincente Barragan, Arnulfo Cordero and Richard Vasquez. At the hearing on the merits, Ornelas Enterprise acknowledged this underpayment.

which is the rate used in the Assessment for all work in issue that was reclassified by DLSE. The applicable Inside Wireman wage rate contains a predetermined pay rate increase that went into effect on December 1, 2013, during the course of Ornelas Enterprise's work on the Project. The advisory scope of work for Electrician provides in pertinent part as follows:

- (a) The replacing, extending, modification of existing facilities, and the installation of new facilities is the work of the Construction Electrician.
- (b) Workers employed under the terms of this Agreement shall do all electrical construction, all installation of electrical and electronic work and all electrical maintenance thereon, on all electrical work under the jurisdiction of Local#428, I.B.E.W., as determine by the International President of I.B.E.W. This shall include the setting, processing, welding, cutting, burning, brazing, handling and moving of all electrical materials, electrical equipment, electrical apparatus and the making of the final running test and the installation of all underground raceways. This shall also include the installation and maintenance of all temporary power and light wiring. It shall furthermore include the radiation monitoring, the installation of all public address equipment, communication equipment other than for public utilities, electronic equipment, telemetering equipment, or any other electrical instrumental equipment, with the installation of all related wiring, control wiring, fixtures, instruments and devices. It shall include the installation of all external raceways or wiring of fixtures or electrical equipment and chasing and channeling necessary to complete the electrical installation work. . . .

The only witness that DLSE produced at the Hearing on the Merits was Lori Rivera, the Deputy Labor Commissioner who investigated Ornelas Enterprise's work on the Project and prepared the Assessment and Amended Assessment. Rivera testified that, after reviewing Ornelas Enterprise's certified payroll records (CPRs) and Daily Reports for the Project and the responses to DLSE questionnaires submitted by the some of the affected workers, she determined that five workers reported and paid as Laborers had performed electrical work on the Project that fell within the scope of work of an Inside Wireman. Accordingly, DLSE reclassified five of the workers (Mario Carrillo, Daniel Cobos, Justin Valerio, Luis Resendiz, and Daniel LuPian) from Laborer to Inside Wireman. DLSE reclassified these workers based in part on the description of the work contained in Ornelas Enterprise's Daily Reports (Daily Reports). For example, Carrillo, Cobos, Valerio and LuPian worked on pull boxes at the

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<sup>5</sup> The Director takes administrative notice of the applicable Scope of Work Provisions for Laborer and Related Classifications in Imperial, Inyo, Kern, Los Angeles, Mono, Orange, Riverside, San Bernardino, San Luis

beginning of the Project and Resendiz worked on installing ground wire later in the Project. Also, DLSE relied in part upon the response to questionnaires in which Carrillo and Cobos identified themselves as electricians on the Project and described the electrical work they performed, including working with live power, pulling wire and installing underground conduit.

Ornelas testified at the Hearing on the Merits that Ornelas Enterprise classified the removing of concrete, trenching and setting down gravel as laborer work. Ornelas further testified that the workers performing these tasks did not perform electrical work on the Project. The answers to the questionnaires Carrillo and Cobos submitted to DLSE, however, directly contradict Ornelas's testimony with statements that they performed electrical work.

Because DLSE did not produce any witness other than Rivera, the Hearing Officer was not able to compare the credibility of Ornelas's testimony vis-à-vis the answers in the questionnaires. However, Ornelas Enterprise's Daily Reports indicate that the workers reclassified by DLSE were performing electrical work, such as work on pull boxes, work with a boring crew, and work on various conduits. Furthermore, DLSE showed that the Division of Apprenticeship Standards had certified Aniceto Jimenez, LuPian, Valerio, Carrillo, and Raymond Paniagua as currently registered apprentices in the trade of Electrician. While the certification in and of itself does not indicate the work they performed on anyone particular project, it does beg the question why would Ornelas Enterprise hire apprentices registered in the trade of electrician to perform only as laborers on a contract for electrical construction.

The reclassifications resulted in an underpayment of prevailing wages to these workers, including underpayment of fringe benefits. Additionally, DLSE assessed amounts due for unpaid training fund contributions. Ornelas testified that Ornelas Enterprise paid part of the training fund contributions directly to the workers rather than to the California Apprenticeship Council.

DLSE assessed penalties under Labor Code section 1775 at the maximum rate of \$200.00 per violation for 544 violations. In assessing the penalties under Labor Code section 1775, DLSE had considered (1) whether the failure of the contractor or subcontractor to pay

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Obispo, Santa Barbara, and Ventura Counties.

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; and (2) whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations. Prior to the issuance of the Civil Wage and Penalty Assessment, DLSE advised Ornelas Enterprise of the violations of the prevailing wage law on December 11, 15, 16, 17, 18 and 19, 2014. Additionally, a Labor Compliance Program (LCP) previously brought a claim against Ornelas Enterprise for public work violations. Ornelas testified that the prior violation was settled with the LCP for a much lower amount than that stated on the assessment. DLSE also found four instances of failure to properly pay overtime on the Project and assessed penalties for four violations of section 1813 at the statutory rate of \$25.00 per violation. Ornelas Enterprise had paid none of the wages assessed by DLSE under either the Assessment or the Amended Assessment at the time of the Hearing on the Merits.

#### 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].) 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 *see 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 rate, and

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 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.”

Ornelas Enterprise Is Required To Pay The Prevailing Rate For Electricians For The Disputed Work.

The single 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. (*Sheet Metal Workers Intern. Ass’n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1082.) The Director determines these rates and publishes general wage determinations to inform all interested parties and the public of the applicable wage rates for each type of worker that might be employed in public works. (Section 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.) In the unusual circumstance when the advisory scopes of work for two prevailing rates overlap, a conflict is created because no single prevailing rate clearly applies to the work in issue. In this limited situation, a contractor may pay either of the applicable prevailing wage rates for the work.

In this case, the disputed work falls clearly within the Electrician scope of work. The question is whether the disputed work also falls clearly within the Laborer scope of work entitling the affected subcontractors to pay the lower Laborer rate for the work. The Director finds that it does not and therefore she affirms the Amended Assessment’s reclassification of the affected workers from Laborer to Electrician.

The applicable prevailing wage rates are the ones in effect on the date the public

works contract is advertised for bid. (See § 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].) No such petition was submitted for this Project. In the absence of a timely petition under section 1773.4, the contractor and subcontractors are bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers, supra*, at pp. 1084-1085.)

While it is the Director's responsibility to define advisory scopes of work and set prevailing wages for "crafts, classifications and types of work" that might be employed in public works, the awarding body is "responsible in the call for bids [to determine] what 'category of worker' is required." (*Pipe Trades District Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1473.) The bid notice states that the awarding body ascertained the general prevailing rate of per diem wages in the locality and posted those rates at the job site.<sup>6</sup>

The contract documents submitted into evidence do not specify the applicable crafts or classifications required for the Project, but the subcontract did specify "Electrical" as the required work under the subcontract. While a laborer may tend to the trade or craft of another, Ornelas Enterprise had the onus to explain in detail the use of workers outside the trade or craft associated with the job for which it was hired.

In the instant case, Ornelas Enterprise had failed to adequately distinguish between work within the scope of Laborer and the work within the scope of Inside Wireman on its Daily Reports. The work descriptions are abbreviated without detail as to the tasks performed and the work descriptions that appear for workers classified as Laborer are the same as those

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<sup>6</sup> The awarding body's posting was not placed into evidence by either party.

for workers classified as Inside Wireman. Accordingly, Rivera could neither readily distinguish between the work functions reported for laborers and electricians in the Daily Reports, nor could she identify which workers performed which tasks.

At the hearing on the merits, Ornelas Enterprise did not provide clarification for the distinction between these workers. Ornelas provided no detailed testimony regarding the work performed by each worker DLSE had reclassified. Nor did Ornelas provide an adequate explanation for Ornelas Enterprise's classifications of laborer where the work description implied electrical work (e.g. pull boxes and conduits). To be clear, Ornelas Enterprise's careless paperwork alone does not justify affirming the Amended Assessment. The fact, however, that Ornelas Enterprise could not meet its burden of proof resulted in a failure to rebut DLSE's contentions.

Ornelas Enterprise employed workers who were from electrician apprenticeship programs and who had reached the level of journeymen electrician. The work itself necessarily defines the category of work as opposed to the worker's vocational education and experience defining the category of work. Nonetheless, the hire by Ornelas Enterprise of these workers lends credibility to the workers' claims that they were performing electrical work. It defies credibility that a contractor would hire workers who identified as journeymen electricians or who came from electrician apprenticeship programs to perform only laborer work on a job specifically requesting electrical work.

Furthermore, the Daily Reports indicated that only two days consumed trenching while the remainder of the Project for the disputed work concerned pull boxes, conduits and other electrical work. This implies that the trenching was merely incidental to the electrical work. Despite Ornelas testifying that the pull boxes primarily involved laborer work, as stated above, there was no distinction made between those whom Ornelas Enterprise designated as inside wiremen working on pull boxes and those whom Ornelas Enterprise designated as laborers working on pull boxes in its Daily Reports.

Therefore, the Director finds that there is no overlap between the Laborer and Electrician classifications with regard to this Project and that the single prevailing rate applicable to the disputed work is the Inside Wireman rate. The misclassification by Ornelas

Enterprise resulted in a failure to properly compensate these workers for straight time and for fringe benefits on the Project.

DLSE Did Not Abuse Its Discretion By Assessing Penalties Under Section 1775 At The Maximum Rate.

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

(a)(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 two hundred dollars (\$200) 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 forty dollars (\$40) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, unless 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) The penalty may not be less than eighty dollars (\$80) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the contractor or 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 one hundred twenty dollars (\$120) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.<sup>[7]</sup>

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<sup>7</sup> Section 1777.1, subdivision (e) 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

(C) If the amount due under this section is collected from the contractor or subcontractor, any outstanding wage claim under Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 against that contractor or subcontractor shall be satisfied before applying that amount to the penalty imposed on that contractor or subcontractor pursuant to this section.

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

(E) The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. 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)].)

The Director's review of DLSE'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.)

The facts show that DLSE considered the prescribed factors for mitigation and determined that the maximum penalty of \$200.00 per violation was warranted in this case. The two statutory factors for mitigation of penalties are 1) a contractor's good faith error and prompt correction and 2) no history of prior violations. Rivera testified, and the Penalty Review paperwork approved by her supervisor documents, that DLSE considered both of these factors and gave Ornelas Enterprise notice of its findings and an opportunity to make

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fails or deliberately refuses to comply with its provisions."

corrections before issuing the Assessment. Additionally, Rivera testified, and Ornelas admits, that there was a prior violation by Ornelas Enterprise. At most Ornelas Enterprise has shown there was a disagreement over which wage rate applied but had not established that this was a good faith mistake. Ornelas Enterprise has offered no evidence or argument to show that DLSE abused its discretion in assessing penalties at the maximum rate.

The record does not establish that DLSE abused its discretion and, accordingly, the assessment of penalties under section 1775 is affirmed against Ornelas Enterprise in the amount of \$108,800.00 for 544 violations.

Training Fund Contributions Are Due For Subcontractor's Omission to Make Payments to the Proper Entity.

Moreover, the issue of willfulness arises in this situation due to Ornelas Enterprise's failure to properly submit the training fund contribution. Ornelas Enterprise readily admitted that it gave the training fund contribution to the workers. While there is no perceived advantage obtained by Ornelas Enterprise favoring the workers over the training fund, such a failure to pay the training fund is inexcusable given the plain language of the statute. Section 1777.5, subdivision (m) (1) states that the contractor "shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site." Willfulness includes those matters in which the contractor "reasonably should have known of his or her obligations under the public works law." (§ 1777.1, subd. (e).)

Therefore, Ornelas Enterprise is liable for unpaid training fund contributions in the amount of \$5,498.23. The omission to pay the required training funds to the correct entity supports a finding of willfulness as regards DLSE's setting of the penalty under Section 1775.

Overtime Penalties Are Due For The Workers Who Were Underpaid For Overtime Hours Worked On The Project.

Section 1813 states, in pertinent part, 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 ... contractor ... 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 record establishes that Ornelas Enterprise violated section 1815 by paying less than the required prevailing overtime wage rate to its workers on four occasions. Unlike section 1775 above, section 1813 does not give DLSE 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 under section 1813 is affirmed in the amount of \$100.00 for four violations.

There Are No Grounds For A Waiver Of Liquidated Damages.

At all times relevant to this Decision, section 1742.1, subdivision (a) provided in pertinent part as follows:

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

Rule 51, subdivision (b) [Cal. Code Regs., tit. 8, §17251, subd. (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 . . .

Absent waiver by the Director, Ornelas Enterprise is liable for liquidated damages in an amount equal to 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 Ornelas Enterprise's position on the merits and specifically whether there was an "objective basis in law and fact" for contending that the Amended Assessment was in error.

Ornelas Enterprise failed to provide satisfactory evidence to make a determination with regard to the daily tasks performed during the Project. Without such information, the Director cannot make a determination that Ornelas Enterprise had substantial grounds for believing the Amended Assessment to be in error. Moreover, there was no evidence to indicate that DLSE in any way erred with regard to the assessment of the training fund contribution set forth on the Amended Assessment. The remainder of the Amended Assessments was undisputed. Ornelas Enterprise has therefore not shown an objective basis for contending that the Amend Assessment was in error. Because the assessed back wages remained due more than sixty days after service of the Assessment, and Ornelas Enterprise has not demonstrated grounds for waiver, it is also liable for liquidated damages in an amount equal to the unpaid wages.

### **FINDINGS AND ORDER**

1. Affected subcontractor, Ornelas Enterprise, Inc., timely requested review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the Compton Junior High School Modernization project located in Kern County.

2. The Assessment was issued timely.

3. Ornelas Enterprise, Inc. failed to pay all their workers the required prevailing wages for the disputed work, as it paid some employees the Laborer rate rather than the applicable Inside Wireman rate. The portions of the Amended Assessment reclassifying workers from laborer to inside wireman for that work, and the associated penalties assessed under sections 1775 are therefore affirmed. The balance of the wage determination is undisputed and is therefore also affirmed in full. Ornelas Enterprise, Inc. underpaid its

workers for their work on the Project in the aggregate amount of \$8,903.84.

4. DLSE did not abuse its discretion by setting the penalty for these violations under section 1775, subdivision (a) at the maximum rate of \$200.00 per violation for 544 violations on the Project by Ornelas Enterprise, Inc., totaling \$108,800.00.

5. Penalties under section 1813 at the rate of \$25.00 per violation are due for four violations on the Project by Ornelas Enterprise, Inc., totaling \$100.00 in penalties.

6. Ornelas Enterprise, Inc. failed to pay training fund contributions to the California Apprenticeship Council in the amount of \$5,498.23.

7. In light of Finding 3, above, the potential liquidated damages due under the Amended Assessment are \$8,903.84. Ornelas Enterprise, Inc. is therefore liable for liquidated damages on the Project under Labor Code section 1742.1, subdivision (a) in the amounts of \$8,903.84.

8. The amounts found due in the Amended Assessment against Ornelas Enterprise, Inc. and as affirmed by this Decision are as follows:

Wages Due:	\$8,903.84 <sup>8</sup>
Training Fund Contributions:	\$5,498.23
Penalties under section 1775, subdivision (a):	\$108,800.00
Penalties under section 1813:	\$100.00
Liquidated Damages:	\$8,903.84
<b>TOTAL:</b>	<b>\$132,205.91</b>

In addition, interest<sup>9</sup> is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

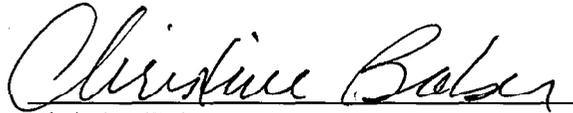
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<sup>8</sup> Ornelas Enterprise is entitled to credit against any amounts owed under the Amended Assessment for payments made by the contractor Klassen, including wages and penalties.

<sup>9</sup> See footnote 3, above.

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

Dated: 11/19/2015



Christine Baker  
Director of Industrial Relations