

1 DIVISION OF LABOR STANDARDS ENFORCEMENT

2 Department of Industrial Relations

3 State of California

4 BY: DAVID CROSS, SBN 097203

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6 Sacramento, CA 95825

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9 Attorney for the Labor Commissioner

10 **BEFORE THE DIVISION OF LABOR STANDARDS ENFORCEMENT**

11 **DEPARTMENT OF INDUSTRIAL RELATIONS**

12 **STATE OF CALIFORNIA**

13 In the matter of the
14 Debarment Proceeding Against,

Case No.: SC 5198

15 ORDER OF THE LABOR
16 COMMISSIONER ON STIPULATION
17 TO DEBARMENT

18 FEI Enterprises, Inc.;
19 Gabriel Fedida, Individual,

20 Respondents.

21 Whereas, Respondent stipulated to debarment as follows:

- 22 1. Respondent FEI Enterprises, Inc. is the holder of California Contractor's
23 License No. 659252.
- 24 2. Respondent entered into the attached Stipulation for Debarment.
- 25 3. Based on the Stipulation for Debarment, Respondents shall be ineligible for a
26 period of three years, to do either of the following:
- 27 A) Bid on or be awarded a contract for a public works project; or
- 28 B) Perform work as a subcontractor on a public work as defined in Labor
Code sections 1720, 1720.2 and 1720.3.

1 4. Respondents shall be allowed to complete the following work; which is
2 estimated to be completed by December 1, 2012.

- 3 1. San Bernardino Unified School District-George Brown aka Wilson ES-
4 Electrical work (direct multi-prime)
- 5 2. City of Anaheim, Anaheim City Hall Fire Alarm (direct prime)
- 6 3. County of Orange. 320 N. Flower Building Fire Alarm Upgrade (direct
7 prime)
- 8 4. County of Orange, 909 N. Main Street Fire Alarm (direct prime)
- 9 5. Cal-Optima, Garden Grove Adult Day Care, Subcontractor to Professional
10 Electrical Contractors.

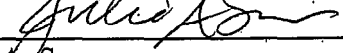
11 Substantially Complete Projects:

- 12 1. City of Malibu, Malibu City Hall (Subcontractor to SMC but being
13 completed by surety to SMC).
- 14 2. Bethune ES; LAUSD (Subcontractor to Western Group).
- 15 3. Bancroft ES and Bright ES, LAUSD (Subcontractor to JMS Air
16 Conditioning).
- 17 4. Torrance USD, Hull Middle School (Direct Multi-Prime).

18 This order is effective on the date it is signed.

19 IT IS HEREBY ORDERED.

20
21
22 Dated: *June 14, 2012*

By: 
23 Julie A. Su
24 Labor Commissioner and
25 Chief of The California Division of
26 Labor Standards Enforcement
27
28

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STIPULATION FOR DEBARMENT

15 FEI Enterprises, Inc.;
 16 Gabriel Fedida, individual,
 17 Respondents.

19 Respondents FEI Enterprises, Inc.; Gabriel Fedida, individual; stipulate as follows:

20 1. Respondent FEI Enterprises, Inc. is the holder of California Contractor's license No.
 21 659252.

22 2. Respondents were served with the attached STATEMENT OF ALLEGED
 23 VIOLATIONS in Debarment proceedings before the Labor Commissioner. The allegations in
 24 the STATEMENT OF ALLEGED VIOLATIONS are incorporated by reference.

25 3. Respondents stipulate to debarment pursuant to Labor Code section 1777.1(a) and
 26 (b) for a period of 3 years following the filing of the Determination and Order of the Labor
 27 Commissioner in this matter. During that 3 year period, Respondents and each of them, and any
 28 firm, corporation, partnership, or association in which Respondents have any interest as defined

1 Labor Code section 1777.1(f), or any substantial interest as defined in the California Code of
2 Regulations, Title 8, section 16800, shall be ineligible to do either of the following:

- 3 a. Bid on or be awarded a contract for a public works project; or
- 4 b. Perform work as subcontractor on a public works project.

5 4. Respondents shall be allowed to complete the following work; which is estimated to
6 be completed by December 1, 2012.

- 7 1. San Bernardino Unified School District – George Brown and Wilson ES – Electrical
- 8 work (direct multi-prime)
- 9 2. City of Anaheim, Anaheim City Hall Fire Alarm (direct prime)
- 10 3. County of Orange, 320 N. Flower Building Fire Alarm Upgrade (direct prime)
- 11 4. County of Orange, 909 N. Main Street Fire Alarm (direct prime)
- 12 5. Cal-Optima, Garden Grove Adult Day Care, Subcontractor of Professional Electrical

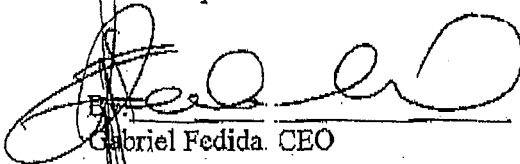
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- 17 2. Bethune ES; LAUSD (Subcontractor to Western Group)
- 18 3. Bancroft ES and Bright ES, LAUSD (Subcontractor to JMI Air Conditioning)
- 19 4. Torrance USD, Hull Middle School (Direct Multi-Prime)

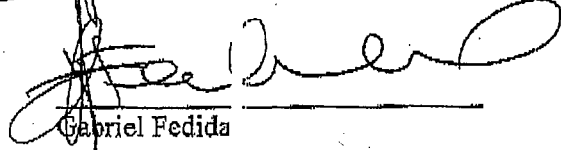
20 Dated: 6/7/2012

FBI Enterprises Inc.



Gabriel Fedida, CEO

23 Dated: 6/7/2012



Gabriel Fedida

1 DIVISION OF LABOR STANDARDS ENFORCEMENT

2 Department of Industrial Relations

3 State of California

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9 **BEFORE THE DIVISION OF LABOR STANDARDS ENFORCEMENT**

10 **DEPARTMENT OF INDUSTRIAL RELATIONS**

11 **STATE OF CALIFORNIA**

12 In the matter of the
13 Debarment Proceeding Against,

14 FEI Enterprises, Inc.;
15 Gabriel Fedida, Individual,

16 Respondents.

Case No.: SC 5198

17 STATEMENT OF ALLEGED
18 VIOLATIONS

Hearing Date: May 8th, 2012

Time: 10:00 a.m.

Hearing Officer: Edna Garcia Earley

19 Complainant, as causes for Respondents' debarment pursuant to Labor Code section
20 1777.1, alleges:

21 1. Complainant, Julie A. Su, makes and files this statement of alleged violations
22 in her official capacity as the State Labor Commissioner and Chief of the Division of Labor
23 Standards Enforcement, Department of Industrial Relations, and not otherwise.

24 2. Respondent FEI Enterprises, Inc. ("FEI") has been, at all times relevant
25 herein, a contractor licensed by the Contractors State License Board under license number
26 659252.

27 3. Respondent Gabriel Fedida is and all relevant times mentioned was responsible
28 Managing Officer/CEO/President of FEI.

1 4. In performing work as the prime contractor on the Fire Station No. 3 project, P-
2 857 job in Los Angeles County, California from September 8, 2008 through April 29, 2009,
3 pursuant to a public works project awarded by the City of Culver City, Respondents willfully
4 violated Labor Code section 1774 by failing to pay the prevailing rates to employees, willfully
5 violated Labor Code section 1815 by failing to pay the correct overtime rate to employees, and
6 willfully violated Labor Code section 1776 by failing to maintain accurate certified payrolls.
7 The underpaid wages totaled approximately \$62,046.81. A Civil Wage and Penalty Assessment
8 was issued for this violation on June 9, 2010.

9 5. In performing work as the prime contractor on the Soledad Elementary and
10 Miraleste Intermediate School-Fire Alarm job in Los Angeles County, California from January
11 12, 2009 through April 19, 2009, pursuant to a public works project awarded by the Palos Verdes
12 Peninsula Unified School District, Respondents willfully violated Labor Code section 1815 by
13 failing to pay the correct overtime pay to employees, and willfully violated Labor Code section
14 1886 by failing to maintain accurate certified payrolls. The underpaid wages totaled
15 approximately \$11,058.34. A Civil Wage and Penalty Assessment was issued for this violation
16 on November 30, 2009. A Hearing on the Merits was held on the Civil Wage and Penalty
17 Assessment in case number 09-0253-PWH and a Decision of the Acting Director of the
18 Department of Industrial Relations was issued on June 7, 2011, modifying and affirming the
19 Civil Wage and Penalty Assessment and finding after an evidentiary hearing that FEI's violation
20 of the prevailing wage law in this case was willful. A copy of the Decision is attached as Exhibit
21 1.

22 6. In performing work as the prime contractor on the Peninsula High School
23 electrical upgrade job in Los Angeles County, California from April 8, 2008 through December
24 28, 2008 pursuant to a public works project awarded by the Palos Verdes failing to pay the
25 correct overtime pay to employees, and willfully violated Labor Code section 1886 by failing to
26 maintain accurate certified payrolls. The underpaid wages totaled approximately \$10,670-97. A
27 Civil Wage and Penalty Assessment was issued for this violation on November 23, 2009. A
28 Hearing on the Merits was held on the Civil Wage and Penalty Assessment in case number

1 09-0249-PWH and a Decision of the Acting Director of the Department of Industrial Relations
2 was issued on November 21, 2011, modifying and affirming the Civil Wage and Penalty
3 Assessment and finding after an evidentiary hearing that FEI's violation of the prevailing wage
4 law in this case was willful. A copy of the Decision is attached as Exhibit 2.

5 7. In performing work as the prime contractor on the Los Angeles Pierce College
6 South of Mall job in Los Angeles County, California, pursuant to public works project awarded
7 by the Los Angeles Community College District, Respondents willfully violated Labor Code
8 section 1776 by failing to provide a response to a request for certified payroll records issued by
9 the Division of Labor Standards Enforcement and received by Respondent FEI on June 7, 2010.
10 A Civil Wage and Penalty Assessment was issued for this violation on July 22, 2010. The
11 penalty assessed for violation of Labor Code section 1776 was \$94,350.00.

12 8. The violations listed above demonstrate a continued pattern and practice of
13 falsifying certified payroll records, defrauding employees by failing to pay the required
14 prevailing wage, failing to report all workers on the certified payroll records, failing to report all
15 hours worked on the certified payroll records, and paying workers in cash with no deduction
16 statements.

17 9. Respondent Gabriel Fedida knew that FEI submitted false certified payroll
18 records as set forth above.

19 10. Respondents committed each of the violations of Labor Codes section 1774; 1776
20 and 1815 with the intent to defraud the affected employees, the general contractors, the awarding
21 bodies, and enforcement agencies including the State Labor Commissioner.

22 11. By having committed the above-described violations, Respondents are subject to
23 debarment pursuant to labor Code section 1777.1(a) and (b).

24 WHEREFORE, Complaint prays that Respondents and each of them, and any firm,
25 corporation, partnership, or association in which Respondent have any interest as defined in the
26 California Code of Regulations, Title 8, section 16800, be debarred so as to be ineligible to bid

27 ////

28 ////

1 on or be awarded any public works contract, or perform work as a contractor of subcontractor on
2 a public works project, for a period of three years from the date of the Determination in this
3 proceeding.

4
5 Dated: 3/13/12

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California


7
8 By: 
9 DAVID D. CROSS
Attorney for the Labor Commissioner

EXHIBIT 1

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

FEI Enterprises, Inc.

Case No. **09-0253-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

**DECISION OF ACTING DIRECTOR OF INDUSTRIAL
RELATIONS**

Affected contractor, FEI Enterprises, Inc. ("FEI") requested review from a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("DLSE") on November 23, 2009, regarding upgrading of fire alarm systems at Miraleste Intermediate School ("Miraleste Project").¹ The Assessment assessed FEI for unpaid prevailing wages in the amount of \$11,058.34 and penalties under Labor Code sections 1775 and 1813 in the amount of \$2,175.00.² The Hearing on the Merits was conducted on July 22, 2010, July 29, 2010, August 23, 2010, September 13, 2010, and December 2, 2010, in Los Angeles before Hearing Officer Makiko I. Meyers. FEI was represented by Robert G. Klein and DLSE was represented by David L. Bell. The parties submitted closing briefs on January 14, 2011. Additional evidence was later admitted, and the matter was submitted for decision on April 4, 2011.

The issues submitted at the hearing were

1. Whether DLSE correctly recalculated the rate of pay for Jony Caminos from \$20 per hour as a "supervisor" to Inside Wireman.

¹ The Assessment identifies the project as "Soleado Elementary and Miraleste Intermediate School – Fire Alarm." The upgrading of fire alarm systems at Soleado Elementary School and Miraleste Intermediate School were performed under one contract. The wages assessed in this Notice only involves work performed at Miraleste Intermediate School.

² All references to sections are to the Labor Code, unless otherwise specified.

2. Whether FEI failed to pay Caminos prevailing wages.
3. Whether DLSE abused its discretion by assessing penalties under Section 1775 at the maximum rate of \$50 per violation.
4. Whether DLSE properly assessed penalties under Section 1775.
5. Whether DLSE properly assessed penalties under Section 1813.
6. Whether liquidated damages should be waived.

For the reasons stated below, I find that FEI improperly paid Caminos as a supervisor but that DLSE assessed unpaid wages for work Caminos performed on another project. I therefore modify the Assessment and, as modified, affirm the Assessment.

FACTS

FEI was the general contractor for the Miraleste Project, which was located in the Los Angeles County and whose bid advertisement date was December 20, 2007. The Miraleste Project involved upgrading of the fire alarm system from "manual activation system" to "fully automatic system."³ Thus, the wage determination applicable to the Project is LOS 2007-2. The prevailing wage rates for Inside Wireman, Second Shift were \$58.41 for regular time and \$79.10 for overtime. The prevailing wage rates for Sound and Communication Installer, Second Shift were \$37.18 for regular time and \$51.94 for overtime.

Inside Wireman "performs all electrical work on de-energized and energized electrical conductors ... and [i]n connection to an electrical system in its entirety." The Scope of Work for Inside Wireman in LOS 2007-2 also covers "[p]lacement, installation, erection or connection of any electrical wires, fixtures, lighting, appliances, instrumentation apparatus, raceway systems, conduit systems, pipe systems, underground systems, photovoltaic systems, solar systems, railroad, signalman, maintainer, and railroad communication, communication

³ In "manual activation system," someone has to pull a pull station in order to activate the system. In "fully automatic system," the system is activated when it detects smoke, fire, and/or heat.

systems, TV, communication transmission, notification, warning systems, fire alarm systems, security systems and appurtenance thereto." It further provides that Inside Wireman "[p]erforms high voltage cable splicing and terminations, breaker testing, commission and decommission of electrical control systems" and "[c]leans, services, repairs, operates, and adjust high and low voltage switchgear, transformers, conductors, connectors, fuses, and buses."

The Scope of Work for Communication and System Installer involves

installation testing [sic], service and maintenance, of the following systems which utilize the transmission and/or transference of voice, sound, vision, and digital for commercial education, security and entertainment purposes for the following: TV monitoring and surveillance, background-foreground music, intercom and telephone interconnect, inventory control systems, microwave transmission, multi-media, multiplex, nurse call system, radio page, school intercom and sound, burglar alarms and low voltage master clock systems.

This Scope of Work also include "[i]nstallation, wire pulling, and testing" of fire alarms systems;

Fire alarm systems, when installed in race way (including wire and cable pulling) shall be performed at the equivalent current Inside wage and fringe rate in those areas where the work is historically performed by Inside Journeyman Wiremen with either of the following two (2) conditions apply: 1. The project involves new or major remodeling Building construction. 2. The Conductors for the fire alarm systems are installed in conduit. ... In those areas where fire alarm systems have historically not been performed by Inside Journeyman Wireman, such work may be performed [by Communication and System Installer].

The Scope of Work continues that the areas where fire alarms have been performed by Inside Wireman are Riverside, San Bernardino, Inyo, Mono, Ventura, Kern, Santa Barbara, and San Luis Obispo. Thus, Los Angeles County is in an area where fire alarm work historically has not been performed by Inside Wiremen.

Claimed Hours: It is undisputed that Caminos worked on the Project. FEI claims Caminos was properly paid \$20 per hour as a supervisor. FEI's employment record shows that

Caminos was hired as a supervisor, and Caminos submitted time sheets to FEI stating that he did supervision. Caminos testified that he actually worked as an "electrician" with tools and did not supervise anyone. Caminos states that he installed pipes, pulled wires, and changed location of devices such as smoke and heat detectors. He was instructed by FEI to submit falsified time sheets stating that he was a supervisor rather than an electrician. In addition to the false time sheets claiming to be a supervisor, Caminos produced additional "time sheets" to DLSE claiming that FEI failed to pay for an additional 27 hours he worked as an electrician.

Caminos received two "blue checks" from FEI totaling \$1,125.10. Under a normal procedure, FEI issues "blue checks" to reimburse its employees for advances of employment related expenses. FEI issued two checks to Caminos as reimbursement for materials purchased from Home Depot and gas. Caminos testified that he never advanced money to purchase materials from Home Depot, nor did he purchase any materials from Home Depot, and that these two blue check payments were actually for payment of overtime wages for Peninsula High School project.⁴

Otgonbayer "Otgo" Batmunh ("Batmunh"), who worked alongside Caminos, testified for FEI. He testified that he worked with Caminos at the Miraleste Project. Batmunh admitted that Caminos helped and worked with him.⁵ Batmunh further testified that he worked with tools and was paid prevailing wages.⁶

FEI Defenses: Besides FEI's contention that that Caminos worked as a supervisor, FEI contended that even if Caminos performed physical labor, the work was subject to the

⁴ The Awarding Body Palos Verdes Peninsula Unified School District awarded two separate contracts to FEI during 2008 and 2009. One was at Soleado Elementary and Milareste Intermediate School, the Project at issue here, and the other was for Electrical Upgrade at Peninsula High School, which is subject of another assessment and hearing before the Director (09-0249-PWH).

⁵ It was FEI's contention that Caminos supervised Batmunh while Caminos insisted that Batmunh was his supervisor. It is unnecessary to resolve this dispute to determine whether Caminos was paid the proper wage.

⁶ The records are not clear whether Batmunh was paid at the Inside Wireman rate or Systems and Communication Installer rate.

Communication and System Installer wage rate and not the Inside Wiremen wage rate. In attempt to support these contentions, FEI presented various witnesses who are FEI's current or former employees.

Gabriel Fedida testified that Caminos was instructed not to use tools. Caminos was sent to "close out" the Miraleste Project because FEI had difficulties completing the Miraleste Project, which was faced with a number of testing and corrections required by the Inspector.

Gian Madrigal, a project manager and system design engineer for FEI, testified that Caminos was in charge of inspection and testing. Madrigal never observed Caminos working with tools, although Madrigal was not often on site. Madrigal instructed Caminos to supervise the crew doing labor and to communicate with the Inspector. Madrigal also testified that a list of the items for which corrections were required after inspection ("punch list") showed very little physical work needed during the time Caminos worked on the Project. During the direct examination, Madrigal pointed to only a few items on the punch list requiring the work of an inside wireman. During the cross examination, however, Madrigal admitted that he omitted to identify a number of other items on the punch list that signified inside wireman work, such as installation of heat and smoke detectors. Madrigal ignored the fact that the punch list showed that conduits needed to be removed while Caminos worked on the Miraleste Project. Madrigal's testimony was contradicted by the inspector, Gary Voizberger, who testified that the punch list used during Madrigal's testimony was not complete. Voizberger said the list relied on by Madrigal during his direct testimony was one of the last versions, and there were earlier versions which listed more items for correction. The list Madrigal used failed to include all the buildings where work was performed. Voizberger also testified that he observed Caminos at the Miraleste Project almost every day doing physical work with tools.

Juan Ponce, an FEI supervisory employee, testified that he and his crew worked on the punch list and that Caminos was not a member of Ponce's crew. Although Ponce saw Caminos working at the Miraleste Project, he did not know what Caminos was doing.

Assessment: Deputy Commissioner Lorna Espiritu determined that Caminos should have received the prevailing wage rate for Inside Wireman. Espiritu used the overtime pay rate for second shift work because Caminos worked at other projects during the day and worked at the Project after an initial eight hours. Espiritu also added a total of 27 hours (for January 13, 2009, January 30, 2009, and February 4, 2009) as "per time records submitted by worker but not reported on CPR." and another 55 hours (during the weeks ending April 12, 2009 and April 19, 2009) as "per copy of blue check [sic] paid to worker for OT." Espiritu added one hour of travel time for each day that Caminos worked at the Miraleste Project.⁷ As to wage rate, Espiritu testified that she used the Inside Wireman classification because Caminos "installed all devices for fire alarm system, fan ENT pipe to pull the wire, and installed wire molding for the fire alarm wiring." She also testified that she used the Inside Wireman wage rate rather than Communication and System Installer wage rate because other workers performed the same work at the Inside Wireman wage rate⁸ and the Inspector confirmed that the FEI workers were doing work described in the Inside Wireman scope of work.

As part of Espiritu's penalty review, she discovered that there were 15 prior cases including instances where FEI was assessed unpaid wages and penalties for misclassification of its workers and for underreporting of hours. Therefore, the DLSE determined that FEI's violation in the current case was willful and assessed Section 1775 penalty at the maximum rate of \$50 per violation.

⁷ Travel and Subsistence Provision for Electrician (LOS-2007-2-61-11-1) provides "[t]he Employer shall pay traveling time and furnish transportation from shop to job, job to job, and job to shop." The Travel and Subsistence Provision is silent as to whether and when overtime rate should be applied. The Deputy used the regular time rate in the Assessment.

⁸ The records are not clear as to whom Espiritu refers as "other workers." Neither party submitted the CPR's as evidence.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers 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 non public 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 of 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 standard.” (§ 90.5, subdivision (a); 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 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 notice of withholding under section 1741.

Upon determining that a contractor or subcontractor has violated prevailing wage requirements, DLSE issues a civil wage and penalty assessment, which an affected contractor or subcontractor may appeal by filing a request for review under section 1742. In such an appeal, “[t]he contractor or subcontractor shall have the burden of proving that the basis of the [notice of withhold] is incorrect.” (§ 1742, subdivision (b).)

Camino Performed Physical Labor and Was Not a Supervisor

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.)

It is undisputed that Caminos worked on the Project. The issue here is whether he worked as a supervisor or as a worker who performed labor. FEI's witnesses that Caminos never worked with tools and only provided supervision were not credible. Although Madrigal attempted to minimize the amount of correction work required on the Miraleste Project, it became apparent during the course of the cross examination that Madrigal's direct testimony to that effect was not complete. At the same time, Madrigal confirmed that the correction items on the "punch list" called for work by an Inside Wireman, not Communication System Installer. Batmunh, FEI's witness, testified that he worked with Caminos, he worked with tools although he was a "supervisor", and he was paid prevailing wages. If Batmunh was paid prevailing wages for his work on the Miraleste Project, Caminos who worked with Batmunh and performed the same type of work would have performed work entitling him to prevailing wages.

As Fedida and Voigtsberger agreed, FEI had difficulty "closing out" the Miraleste Project due to various testing and correction items. It is undisputed that the testing and inspection phase of the Miraleste Project took longer than expected because of the amount of corrections required by the Inspector. The evidence as a whole shows that a great deal of physical labor took place during "the testing and inspection phase" during which time Caminos worked at the Miraleste Project. Voigtsberger, who has no interest in the outcome of this case, testified that he observed Caminos performing this work.

DLSE Properly Reclassified All Hours Worked by Caminos As An Inside Wireman

The next issue is whether Caminos performed Inside Wireman or Communication System Installer work. FEI argues that the work Caminos performed was covered by the Communication and System Installer scope of work and not Inside Wireman. However, the testimonies of Madirgal, Voigtsberger, and Espiritu show that Caminos performed work within the Inside Wireman scope of work. While Caminos may have performed work covered by the Communication and System Installer scope of work, i.e. work relating to fire alarm systems in the Los Angeles County, FEI failed to keep accurate records of how much time Caminos spent in each task, partly because it ordered Caminos to submit untruthful timesheets stating that he did supervision.

“Each contractor and subcontractor shall keep accurate payroll records, showing the name ... work classification, straight time and overtime hours worked each day and week ...” (Section 1776, subdivision (a).) When there is sufficient evidence to show the amount and extent of work, just and reasonable inference may be made even if the result is only approximate. (*Hernandez v. Mendoza* (1998) 199 Cal.app.3d 721, 727.) The burden then shifts to the employer to produce evidence to specifically negate the inference. (*Ibid.*)

FEI failed to meet its burden to prove which hours should have been classified as subject to the Communication and System Installer wage rate. DLSE correctly reclassified all hours worked by Caminos on the Miraleste Project as an Inside Wireman.

FEI Underreported Hours Worked By Jony Caminos On Its CPR's

It is undisputed that Caminos reported to FEI that he worked 103.5 hours on the Miraleste Project for which he was paid as a supervisor. These hours were worked on days Caminos worked at other projects earlier in the day, which were about one hour away. Thus, the Assessment for overtime wages for second shift work for 103.5 hours and as well as one hour on each day for travel time for a total of 17 hours at regular time wage were appropriate.

The Assessment assessed an additional 27 hours as hours worked on January 12, 2009, January 29, 2009, February 3, 2009, March 26, 2009, March 27, 2009 and April 1, 2009 (five

days) as "per time record submitted by worker but not reported on CPR." It is unclear why Caminos failed to report these hours (even as a supervisor) to FEI. However, FEI failed to present any evidence to specifically show that the newly reported 27 hours were incorrect. Thus, FEI has failed to meet its burden of proof to prove the Assessment was incorrect on this point. The Assessment for 27 hours and 5 hours at regular rate⁹ for travel time for these days was correct.

The Assessment also assessed 55 hours of work time and 7 hours of travel time during the weeks ending April 12, 2009 and April 19, 2009. DLSE assessed these hours believing that FEI paid Caminos overtime wages by issuing two blue checks rather than properly reporting those overtime hours on the CPR's. Caminos however testified that the two checks were payments for wages on the Peninsula Project, not for the Miraleste Project. The Assessment for these days for the Miraleste Project was incorrect.

The correct amount of the assessment is \$11,607.57 (\$10,322.55 for 130.50 hours at overtime rate of \$79.10 per hour and \$1,285.02 for 22 hours at regular rate of \$58.41 per hour at Inside Wireman Second Shift). FEI has already paid Caminos a total of \$2,070.00 for these hours worked. This means that the unpaid prevailing wages remain due are \$9,537.57.

DLSE Did Not Abuse Its Discretion By Assessing The Maximum Of \$50 Per Violation For Section 1775 Penalty

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.

⁹ DLSE did not assess the travel time for February 3, 2009.

(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 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 twenty dollars (\$20) . . . 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 thirty dollars (\$30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^[10]

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 Civ. Proc., § 1094.5, subd. (b).) In reviewing for abuse of discretion, however, 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* (1998) 67 Cal.App.4th 95, 107.)

The evidence shows that FEI instructed Caminos to submit time sheets as a supervisor although it knew that Caminos was performing the job of an electrician. Caminos testified

¹⁰ Section 777.1, 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."

that he initially reported his hours as "an electrician" but FEI refused to accept the time sheets and had him re-write them as "a supervisor." This demonstrates that FEI's violation of the prevailing wage law in this case was willful. Further, FEI has prior violations of which DLSE could take notice. FEI has not met its burden to prove that DLSE abused its discretion in setting the penalty at the maximum rate of \$50 per violation.

The Assessment imposed \$1,450 in Section 1775 penalty for 29 violations. After reducing the assessment for the 7 violations that were incorrectly assessed, penalties of \$1,100.00 for 22 violations are affirmed.

FEI Is Liable For Penalty Under Section 1813

Section 1813 provides:

The contractor or 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) 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 to be permitted to work more than 8 hours in any one calendar day and 40 hours in an one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the division of Labor Standards Enforcement.

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."

Unlike penalties under section 1775, there is no discretion as to the amount due for each violation. The Assessment imposed \$750 as Section 1813 penalty for 30 violations.

However, 7 violations were incorrectly assessed. Therefore, \$575 for 23 violations is the appropriate amount of Section 1813 penalty.

FEI Is Liable For Liquidated Damages

Section 1742.1 provides:

“(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice 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 or notice with respect to a portion of the unpaid wages covered by the assessment or notice, the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

FEI requests that the Acting Director waive liquidated damages because “there was ample evidence that Caminos’ claim was fraudulent and FEI was justified in requesting a review of the wage and penalty assessment.” FEI’s argument is contrary to the findings set above. The evidence shows that FEI knew that Caminos was performing work entitling him prevailing wages but still paid Caminos \$20 per hour. FEI’s own witnesses testified that Caminos performed physical labor. Caminos testified credibly that he attempted to submit time sheet to FEI indicating that he worked as an “electrician.” FEI rejected such time sheets and had Caminos revise the time sheets to state “supervision.” FEI had numerous prior violations including misclassification and unreported hours. Thus, there were no substantial grounds for appealing the assessment and there is no basis for exercising discretion to waive liquidated damages.

FINDINGS

1. The affected contractor, FEI Enterprises, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standard Enforcement.
2. The Civil Wage and Penalty Assessment was served timely.
3. FEI improperly classified Caminos as a supervisor. The correct classification for Caminos was an Inside Wireman.
4. FEI failed to pay Caminos prevailing wages in the amount of \$9,537.57.
5. DLSE did not abuse its discretion setting section 1775, subdivision (a) penalties at the rate of \$50.00 per violation, and the resulting total penalty is \$1,100.00.
6. FEI is liable for penalties under section 1813 for a total of \$575.00.
7. The unpaid wages found due in Finding No. 4 remained due and owing more than 60 days following issuance of the Assessment. FEI is therefore liable for liquidated damages under section 1742.1 in the amount of \$9,537.57 as there are insufficient grounds to waive payment of these damages.
8. The amounts found remaining due in the Assessment as affirmed by this Decision are as follows:

Wages Due:	\$9,537.57
Penalties under section 1775, subdivision (a):	\$1,100.00
Penalties under section 1813:	\$575.00
Liquidated Damages:	\$9,537.57
TOTAL:	\$20,750.14

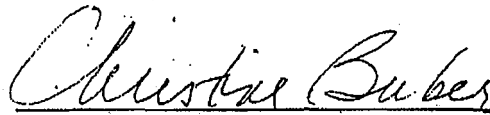
In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

ORDER

The Civil Wage and Penalty Assessment is affirmed as modified above. The Hearing Officer shall issue a Notice of Findings which shall be served together with this Decision.

SO ORDERED

Dated: June 7, 2011



Christine Baker, Acting Director of Industrial Relations

EXHIBIT 2

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

FEI Enterprises, Inc.

Case No. 09-0249-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

**DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL
RELATIONS**

INTRODUCTION

Affected contractor FEI Enterprises, Inc. (FEI) 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 electric upgrade at the Peninsula High School (Project) in Los Angeles County. The Assessment determined that \$14,295.97 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits was conducted on July 22, 2010, July 29, 2010, August 23, 2010, September 13, 2010, and December 2010 in Los Angeles, California, before Hearing Officer Makiko I. Meyers. Robert G. Klein appeared for FEI, and David L. Bell appeared for DLSE. The parties submitted closing briefs on January 14, 2011. However, FEI failed to lodge all its exhibits during the hearing and, therefore, submission was stayed. The matter was initially submitted for decision on July 29, 2011. Submission was vacated on August 3, 2011 in order to allow parties to submit additional exhibits. Additional exhibits were admitted and the matter was re-submitted for decision on September 22, 2011.

The issues for decision are:

- Whether DLSE made prima facie showing as to 22 workers other than Tony Caminos (Caminos).

- Whether DLSE correctly assessed FEI 23 hours of regular time and 173 hours of overtime for Caminos at the Inside Wireman Second Shift rate.
- Whether DLSE abused its discretion by assessing penalties under Section 1775 at the maximum rate of \$50 per violation.
- Whether DLSE properly assessed penalties under Labor Code Section 1775.¹
- Whether DLSE properly assessed penalties under Section 1813.
- Whether liquidated damages should be waived.

The Acting Director finds that DLSE failed to meet its prima facie showing as to 22 workers other than Caminos and that FEI has disproven the basis of the Assessment as to Caminos except for 16 hours of regular time at the Inside Wireman rate as well as nine hours of regular time and 65.5 hours of overtime at the Inside Wireman Second Shift rate. Therefore, the Acting Director issues this Decision affirming and modifying the Assessment. FEI has not proven the existence of grounds for a waiver of liquidated damages.

FACTS

The Palos Verdes Peninsula Unified School District (PVPUSD) advertised the Project (electrical upgrading such as installing conduit, pulling electrical wiring, and changing panels and circuit breakers) for bid on January 29, 2008, and awarded the contract to FEI. Thus, the Prevailing Wage Determination (PDW) applicable to the Project is LOS 2007-2. The prevailing wage rates for Inside Wireman were \$51.47 for regular time and \$69.94 for over time. The prevailing wage rates for Inside Wireman, Second Shift were \$58.41 for regular time and \$79.10 for overtime.

The Shift Provision for Electrician in Los Angeles County (LOS 2007-2-61-11-1) provides that the Second Shift rate applies to work performed between 4:30 p.m. and 12:30 a.m. and the Third Shift rate applies to work performed between 12:30 a.m. and

¹ All references to sections are to the Labor Code, unless otherwise specified.

8:00 a.m.

The Travel and Subsistence Provision for Electrician (LOS-2007-2-61-11-1) provides "[t]he Employer shall pay traveling time and furnish transportation from shop to job, job to job, and job to shop." The Travel and Subsistence Provision is silent as to whether and when overtime rate should be applied. DLSE used the regular time rate in the Assessment.

DLSE's audit sheet shows 23 workers, including Caminos. The classification DLSE used for each worker varies, such as Communication and Systems Installer, Inside Wireman, and Carpenter depending on the worker. Caminos was classified as Inside Wireman Second Shift. DLSE never sought to amend the Assessment to exclude the 22 workers in the Assessment other than Caminos, but DLSE did not describe how or why the Assessment for the 22 workers was made, nor did DLSE submit any part of its enforcement file regarding these 22 workers. As to Caminos, the Assessment determined that Caminos worked 23 hours of straight time and 173 hours of overtime at the Inside Wireman Second Shift rate for which he was not paid.

It is undisputed that Caminos was an employee of FEI and worked on the Project but was not listed on the Certified Payroll Records (CPR's). FEI admits that it dispatched Caminos to work at the Project but claims that Caminos was working as a "supervisor." FEI also states that Caminos did not submit time sheets to FEI regarding this Project but must have submitted time sheets including hours he worked on this Project for other projects FEI was working on concurrently. In other words, according to FEI, Caminos reported hours worked at the Project as though he worked at another project and was paid the supervisor rate of \$20.00 per hour.

Caminos first presented his time records for this Project when he brought his complaint to DLSE. On those time records, Caminos claimed that he worked 81.5 hours as an "electrician" at the Project. FEI argued that Caminos was sent to the Project site in order to meet with the inspector and performed work as a supervisor. However, the inspector, Gary Voiztsberger (Voiztsberger) testified that he observed Caminos

performing work with tools, rather than performing supervisory duties; and Caminos usually worked after 3:00 p.m. Caminos's time records show the following hours worked at the Project; December 1, 2008 (seven hours starting 3:30 p.m.), December 2, 2008 (seven hours starting 3:30 p.m.), December 9, 2008 (seven hours starting 3:30 p.m.), December 10, 2008 (seven hours starting 3:30 p.m.), December 11, 2008 (eight hours starting 3:30 p.m.), December 12, 2008 (six and one-half hours starting 3:00 p.m.), December 19, 2008 (seven hours starting noon), December 16, 2008 (eight hours starting 6:00 a.m.), December 15, 2008 (eight hours starting 2:30 p.m.), December 22, 2008 (eight hours starting 8:00 a.m.), January 15, 2009 (eight hours from 3:30 p.m.). Caminos testified that he worked as an electrician on the Project after he finished eight hours of work at another FEI project. Caminos' testimony is corroborated by Voitzsberger's testimony.

FEI attempted to refute the testimony of Caminos and Voitzsberger by calling Reymond Agajanian (Agajanian) as a witness. Agajanian was an electric subcontractor on the Project. Agajanian recalled that the Project commenced in mid-2008, probably May, and that he and his crew did most of the work on the Project. Agajanian testified that he never saw Caminos and does not know who he is. However, Agajanian's crew stopped work on the Project when it was approximately 70 percent completed, which was towards the end of 2008. Caminos worked on the Project in December 2008. These facts taken together show that Caminos worked at the Project after Agajanian and his crew finished work on and left this Project. Thus, Agajanian's testimony does not contradict either Caminos' or Voitzsberger's testimony.

DLSE served the Assessment on November 23, 2009. The Assessment found that FEI did not properly report the hours worked by its employees and, therefore, failed to pay proper prevailing wages. The Assessment found a total of \$10,570.97 in underpaid prevailing wages. As to Caminos' work hours, DLSE assessed 23 hours at the regular Inside Wireman rate and 173 hours at the Inside Wireman Second Shift overtime rate. The 23 regular time hours were assessed for travel between the Project and other projects that Caminos worked on those days. As to the 173 overtime hours, DLSE explained that

those hours were a combination of the 81.5 hours claimed by Caminos and additional hours "based on IOR daily log/diary; CPR no hours." The inspector's log only shows the number of workers without the number of hours worked or name(s) of worker(s). DLSE never explained why and how it determined that one of the workers counted by the inspector was Caminos and how many hours of work were performed on those days.

Penalties were assessed under section 1775 in the amount of \$50.00 per violation for 67 violations, totaling \$3,350.00. DLSE determined that the maximum penalty was warranted because it found FEI's violations were willful and FEI had several prior violations. In addition, penalties were assessed under section 1813 for 16 overtime violations at the statutory rate of \$25.00 per violation, totaling \$400.00.

DISCUSSION

Section 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.”

DLSE Failed to Establish Prima Facie Support For The Assessment As To The Other Workers

California Code of Regulations title 8, section 17250, subdivision (a) provides:

The Enforcing Agency has the burden of coming forward with evidence that the Affected Contractor or Subcontractor (1) was served with an Assessment ... in accordance with Rule 20 [Section 17220]; (2) was provided a reasonable opportunity to review evidence to be utilized at the hearing in accordance with Rule 24 [Section 17224]; and (3) that such evidence provides prima facie support for the Assessment....

DLSE provided no evidence to support the Assessment as to the 22 workers other than Caminos. Nor did it submit any documents from its enforcement file in connection with these 22 workers. DLSE did not present any testimony to explain how the assessment was made as to those 22 workers. DLSE failed to meet its prima facie showing as to these workers, and the Assessment is dismissed as to them.

Caminos Performed Physical Labor And Was Not A Supervisor

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.)

Caminos testified that he worked on the Project as an electrician with tools. Voitzberger observed Caminos working with tools. FEI argues that Caminos, who was hired as a supervisor, only did supervisory work. Agajanian's testimony did not present any facts which contradict Caminos and Voitzberger. FEI failed to meet its burden of proof. Thus, DLSE was correct finding Caminos worked as an Inside Wireman on the Project.

In Light Of FEI's Failure To Keep Records Of The Hours Worked By Caminos, Caminos's Later Estimate May Be Accepted As Accurate.

"Each contractor and subcontractor shall keep accurate payroll records, showing the name ... work classification, straight time and overtime hours worked each day and week ..." (Section 1776, subdivision (a).) When there is sufficient evidence to show the amount and extent of work, just and reasonable inference may be made even if the result is only approximate. (*Hernandez v. Mendoza* (1998) 199 Cal.App.3d 721, 727.) The burden then shifts to the employer to produce evidence to specifically negate the inference. (*Ibid.*)

It is undisputed that Caminos was not listed on the CPR's² for this Project and there are no records of him being paid prevailing wages. The time sheets Caminos presented to DLSE showed that he worked a total of 81.5 hours. FEI presented no basis not to rely on this reconstruction as the basis for a just and reasonable inference of the hours worked.

However, the Assessment assessed 23 hours at the regular Inside Wireman rate for travel between the Project and other projects that Caminos worked over 23 days and 173 hours at the Inside Wireman Second Shift overtime rate for work on the Project. The

² Neither party submitted CPR's as an exhibit.

23 regular time hours were assessed for travel between the Project and other projects that Caminos worked on those days. As to the 173 hours of overtime, DLSE explained that those hours were a combination of the 81.5 hours claimed by Caminos and additional hours "based on IOR daily log/diary; CPR no hours." It is unclear why DLSE reached the conclusion that the hours "based on IOR daily log/diary; CPR no hours" should be allocated as Caminos' work hours. Therefore, DLSE failed to make its prima facie showing as to the hours beyond the claimed 81.5 hours.

Thus, the correct assessment for unreported hours worked by Caminos on the Project is 81.5 hours based on Caminos' own time records. Out of these hours, 16 hours (on December 16, 2008 and December 22, 2008) were worked during the regular shift (starting at 6:00 a.m. and 8:00 a.m. respectively) and the regular Inside Wireman rate of \$51.47 per hour is applicable; a total of \$823.52 in wages is due for those hours. On the nine other days, Caminos worked at another project in the morning and later worked at this Project. Thus the second shift overtime rate of \$79.10 should be applied, yielding \$5,101.95 wages due. On nine days, Caminos traveled to work on the Project from another project and therefore is entitled to travel pay for nine hours, amounting to \$525.69.

Accordingly, the total wages due to Caminos are \$6,451.16, less the \$20.00 per hour Caminos actually received from FBI for that work. Therefore, the total unpaid wages due to Caminos are \$4,821.16.

DLSE's Penalty Assessment Under Section 1775 Is Modified.

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]}

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 Civ. Proc. § 1094.5, subd. (b).) In reviewing for abuse of discretion, however, the Acting Director is not free to substitute [her] own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor

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."

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)].)

FEI failed to present evidence to show the amount of each penalty was an abuse of discretion. Caminos's underpayment was the result of FEI's failure to keep appropriate and accurate time records. FEI admitted that it dispatched Caminos to work at the Project but permitted Caminos to report those hours on time sheets of other projects. Therefore, DLSE's determination that FEI's violations were willful is not abuse of discretion. Further, FEI has prior violations of which DLSE could take notice. FEI has not met its burden to prove that DLSE abused its discretion in setting the penalty at the maximum rate of \$50 per violation.

Although the Assessment imposed penalties for 67 violations, the actual number of violations substantiated by evidence is 11. Thus, the appropriate section 1775 penalty amount is \$550.00.

Overtime Penalties Are Due For Caminos's Overtime Hours.

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."

Unlike penalties under section 1775, there is no discretion as to the amount due for each violation. The Assessment imposed \$400.00 as Section 1813 penalty for 16 violations. However, Caminos worked 11 days on the Project out of which only nine days were in the afternoon after working a full day at another project, and the overtime rate was applicable to the hours worked only on those nine days. Thus, \$225.00 is the appropriate amount of section 1813 penalties for nine violations.

FEI Is Liable For Liquidated Damages.

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

After 60 days following the service of a civil wage and penalty assessment under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

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

FEI appears to request that the Acting Director waive liquidated damages arguing that the Camino's claim for unpaid wages was fraudulent and thus tied to the merits of its claim, which has been rejected. Furthermore, FEI admitted that it sent Caminos to work on the Project but failed to keep accurate records of his work hours. FEI has had numerous prior violations, including unreported hours. There were no substantial grounds for appealing the Assessment as to Caminos, and there is no basis for waiver of liquidated damages. As FEI underpaid Caminos in the amount of \$4,821.16, liquidated damages in the amount of \$4,821.16 is appropriate.

FINDINGS

1. Affected contractor FEI Enterprises, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
2. DLSE failed to meet its prima facie showing as to 22 workers listed on its audit, other than Caminos.
3. Caminos worked at the Project as an Inside Wireman and for 81.5 hours over 11 days. Out of those 81.5 hours, the Inside Wireman regular rate of \$51.47 per hour applies to 65.5 hours and the Inside Wireman Second Shift overtime rate of \$79.10 per hour applies to 16 hours. FEI paid Caminos \$20.00 per hour for the 81.5 hours he worked on the Project.
4. Caminos is entitled to receive one hour of travel time for each of the nine days he reported to the Project site from another FEI project, at the Inside Wireman Second Shift regular time rate of \$58.41 per hour.
5. In light of Findings 2 and 4, above, FEI underpaid Caminos on the Project in the aggregate amount of \$4,821.16.
6. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of \$50.00 per violation, and the resulting total penalty of \$550.00, as modified, for 11 violations is affirmed.
7. Penalties under section 1813 at the rate of \$25.00 per violation are due for 9 violations on the Project, for a total of \$255.00 in penalties.
8. The unpaid wages found due in Finding No. 5 remained due and owing more than sixty days following issuance of the Assessment. FEI is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of \$4,821.16; and there are insufficient grounds to waive payment of these damages.
9. The amounts found remaining due in the Assessment as modified and

affirmed by this Decision are as follows:

Wages Due:	\$4,821.16
Penalties under section 1775, subdivision (a):	\$550.00
Penalties under section 1813:	\$255.00
Liquidated Damages:	\$4,821.16
TOTAL:	\$10,447.32

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

ORDER

The Civil Wage and Penalty Assessment is affirmed and modified 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:

11/21/2011

Christine Baker

Christine Baker
Acting Director of Industrial Relations