

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Nolte Sheet Metal, Inc.**

Case No. 06-0160-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected subcontractor Nolte Sheet Metal, Inc. ("Nolte") submitted a timely request for review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("DLSE") with respect to work performed by Nolte on the Porterville Unified School District Educational Complex ("Project") in Tulare County. The Assessment determined that \$83,378.08 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits occurred on February 21, 2007, and April 25, 2007, in Fresno, California, before Hearing Officer Nathan D. Schmidt. Thomas M. Giovacchini appeared for Nolte, and Ramon Yuen-Garcia appeared for DLSE. For the reasons set forth below, the Director of Industrial Relations issues this decision modifying and affirming the Assessment.

**SUMMARY OF FACTS**

Oral E. Micham, Inc. ("Micham"), the general contractor for the Project, subcontracted with Nolte to perform sheet metal and heating, ventilation and air conditioning system ("HVAC") work on September 17, 2004. Nolte employees worked on the Project from approximately September 30, 2004, to October 13, 2005. Prevailing Wage Determination Number TUL-2004-1 ("PWD") prescribes the prevailing wages for the Sheet Metal Worker (HVAC) classification on the Project.

The Assessment found that Alfredo Rojas and his son, Mario Rojas, had been underpaid by Nolte for sheet metal work they had performed on the Project, including travel time to and

from the Project site. Nolte contends that the work that Alfredo and Mario Rojas did for Nolte during the course of the Project was performed at its shop in Fresno. Because the testimony varied widely, and the determination of whether Alfredo and Mario Rojas performed work on the Project requires weighing the credibility of numerous witnesses, the pertinent testimony of each witness is summarized below.

Both Alfredo and Mario Rojas testified at the hearing with the assistance of an interpreter, as neither spoke fluent English. Both testified that: they performed sheet metal work for Nolte on the Project site; they rode from Nolte's shop in Fresno to the job site in Porterville with other Nolte workers in a pickup truck driven by Kahira, whom they knew as "Snook;" their supervisor told them the job number or location to put on their timecards; and many of their timecards submitted into evidence were not filled out in their handwriting. Alfredo Rojas was listed by the general contractor as having been on the site on April 6 and 7, 2005.

Due to the departure of the interpreter after Mario Rojas's testimony on the second day of the hearing, neither Mario nor Alfredo Rojas could testify when called by DLSE as rebuttal witnesses. In lieu of their testimony, the parties stipulated that Mario and Alfredo Rojas would have testified that they had been told to record their travel time to and from the Project site on their timecards, resulting in longer hours being recorded than they could have worked at the Project site.

**Alfredo Rojas testified as follows:** He worked for Nolte from June 2004 to August 2005 as a sheet metal worker and worked full time installing air conditioning ducts on the Project from December 2004 until he was laid off in August 2005. His supervisor was Gerald Bane, whom he knew as "Jay" or "Jake." Bane gave him instructions via Kahira, who spoke Spanish. Kahira and Bane told him to always write "shop" on his timecards, even though he was working at the Project site in Porterville. Whenever he wrote in "585," Nolte's job number for the Project, he was told to cross it out and write "shop" instead. The only time he worked in Nolte's shop rather than at the Project site was some Saturdays, when he was doing fabrication work for the Project.<sup>1</sup>

---

<sup>1</sup> This decision does not address the issue of whether Alfredo Rojas was entitled to be paid prevailing wages for fab-

He knew and spoke to workers from other subcontractors in the course of his work on the Project, including Ricardo Figueroa and a man named Nacho whose last name he could not remember. He worked with other workers from Nolte on the Project, including Bane, Kahira, his son Mario, Torres and Jose Quintero. He worked on the Project every day, but Nolte frequently sent Mario to work on other projects. His rate of pay when he was first hired by Nolte was \$8.00 per hour and he received subsequent pay increases to \$8.75 and \$10.75. The drive from Nolte's shop to the jobsite took approximately one and one-half hours each way.

**Mario Rojas testified as follows:** He worked for Nolte from July 2004 to August 2005, installing insulation, flex and sealer to ductwork for a number of projects. He never worked in Nolte's shop, and the few timecards for the days that he claimed to have worked on the Project, which listed "shop" rather than job number "585," were not in his handwriting. He worked on the Project, under the supervision of Kahira, for several weeks, and he recalled working with his father, Bane and Kahira. He knew and spoke to workers from other subcontractors on the Project during breaks, including Ricardo Figueroa and Nacho Ramirez whom he spoke to about his wages. His rate of pay when he was first hired by Nolte was \$7.75 per hour and he received subsequent pay increases to \$8.50 and \$9.50.

Three workers from other subcontractors on the Project, Brian Wells, David Alvarez, Jr., and Ricardo Figueroa, and Dave Yancey, a representative of the Plumbers & Pipefitters Union, all identified Alfredo and Mario Rojas in the courtroom and testified that they had seen and interacted with them at the jobsite in the course of their work on the Project. DLSE also submitted a declaration from Nacho Ramirez, who worked for Lane Electric on the Project, stating that he had worked alongside Alfredo and Mario Rojas at the jobsite.<sup>2</sup>

**Brian Wells testified as follows:** He worked full time on the Project for Salegh Painting from March through November 2005, and in January and February 2006. While he did not know Alfredo or Mario Rojas personally, he saw them often at the Project site, though Wells could not

---

rication work done at Nolte's shop on Saturdays, because the Assessment does not claim any unpaid prevailing wages for weekend work.

<sup>2</sup> Ramirez's declaration was admitted into evidence without objection from Nolte.

specify the days. Wells distinctly recalled getting upset with Alfredo and Mario Rojas for scratching some window casings that he had painted and needing to get someone who could translate Spanish so that he could speak to them. He also remembered seeing Alfredo Rojas working at the job site in early 2006 helping to clean up after a plumbing explosion that had occurred in late 2005.

**David Alvarez, Jr. testified as follows:** He also worked full time on the Project for Salegh Painting from April through November 2005, spoke to Mario and Alfredo Rojas during breaks, and worked alongside them from time to time. Alvarez saw Alfredo and Mario Rojas frequently at the beginning of the Project and less frequently as the Project was being completed. When he saw Alfredo Rojas working, Alfredo was generally picking up and hauling things and going up ladders with vents and ducting.

**Ricardo Figueroa testified as follows:** He worked full time on the Project for Lane Electric from April 2005 through its conclusion. He saw Alfredo and Mario Rojas installing duct work on the Project and had often coordinated work with them. Figueroa saw Alfredo Rojas at the Project site quite often and saw Mario Rojas there occasionally. He spoke to Alfredo and Mario Rojas about their wages and arranged for them to meet with a union representative a few months before they were laid off.

**Dave Yancey testified as follows:** He was a representative of the Plumbers & Pipefitters Union and visited the Project site during the summer of 2005 to make sure that plumbers were being paid properly. He saw Alfredo and Mario Rojas and spoke to them twice at the Project site during the lunch break.

**Sukhvir Kahira testified as follows:** He had been employed by Nolte for approximately 12 to 13 years and worked on the Project three to five days per week from approximately 8:30 a.m. to 2:00 p.m. He either rode to the Project site with Bane or one of the Noltes, or drove his own truck. Generally, he, Bane, and the Noltes rode together. Kahira never drove Alfredo or Mario Rojas and denied that either Alfredo or Mario did any work on the Project. The only times he saw Alfredo Rojas at the jobsite were when Alfredo and another Nolte worker delivered ductwork to the Project site. Sometimes he saw Alfredo or Mario Rojas at the shop on Friday

afternoon when he picked up his paycheck. Kahira also denied ever telling either Alfredo or Mario Rojas what to write on their timecards.

**Gerald Bane testified as follows:** He had worked for Nolte for approximately 26 to 27 years, prior to his retirement in December 2006. He worked on the Project as a supervisor, three to five days per week for four to six hours per day, with the exception of two to three months when he was off sick. Bane generally drove his pickup truck to the Project site and gave rides to Kahira and Ed Nolte, if they were at the shop when he left. He denied ever driving Alfredo or Mario Rojas. He never saw either Rojas working on the Project site. Bane denied telling either Alfredo or Mario Rojas what to write on their timecards. He occasionally saw Alfredo or Mario Rojas at the shop but could not recognize them in the courtroom. Bane could not explain why both he and Alfredo Rojas were listed as having worked on the Project for Nolte on the general contractor's daily reports for April 6 and April 7, 2005.

**Steven McCarter testified as follows:** He was Lane Electric's general foreman on the Project, worked full time on the Project every day and had one of the two keys to the access gate at the jobsite. The normal work hours on the Project were 7:00 a.m. to 3:30 p.m. and he locked the gate every day at 3:30 p.m. McCarter observed that the Nolte workers on the Project normally arrived between 8:00 and 8:30 a.m. and left between 2:00 and 3:00 p.m.<sup>3</sup>

**Gerry Riggins testified as follows:** He was Micham's project superintendent, oversaw the various subcontractors on the site and normally prepared the general contractor's daily reports. He was on the Project site approximately 80 per cent of the time; when he was not present, the daily reports were prepared by two other Micham superintendents. The normal Project hours were 7:00 a.m. to 3:30 p.m. (at which point the gate was locked). In the summer, work on the Project sometimes commenced at 6:00 a.m. and ended at 2:30 p.m. 20 to 80 workers from two to ten subcontractors worked on the Project on any given day. The names of the workers listed on the daily reports were normally provided by the foremen for each subcontractor, although Riggins might have the workers list their own names. Riggins said he did not know Al-

---

<sup>3</sup> McCarter was not asked if he knew Alfredo or Mario Rojas or if he had ever seen them at the Project site.

fredo or Mario Rojas, but he was not asked if he recognized them in the courtroom as workers he had seen at the Project site. The only Nolte workers that he knew by name were Ernie Nolte, Kahira and Bane. He did not prepare the daily reports for April 6 or April 7, 2005, when Alfredo Rojas appeared as working on the Project.

**Ernie Nolte testified as follows:** He and his brother Ed Nolte own the company. Ernie Nolte scheduled the labor for the various projects that Nolte had; he denied ever scheduling Alfredo or Mario Rojas to work on the Project. Neither Alfredo nor Mario Rojas were assigned to work on any prevailing wage jobs for Nolte; they worked only in the shop, with the exception of occasional clean-up work at jobsites for 15 to 20 minutes at the end of the day. Neither Alfredo nor Mario Rojas delivered ductwork and other material on a regular basis; he did not believe that either Alfredo or Mario Rojas had ever set foot on the Project site. He saw both Alfredo and Mario Rojas working in the shop every day that Nolte was working on the Project.

The boiler explosion described by Wells occurred in approximately October 2005, and Nolte did their repairs between February and March 2006, several months after Alfredo Rojas stopped working for Nolte. Each worker was responsible for filling out his own timecard and listing the appropriate job number for the jobsite that he was working on. Nolte's foremen are supposed to check the workers' timecards, and Ernie Nolte reviews the timecards himself on a weekly basis. When asked if the fact that Nolte's job number for the Project appeared on many of Mario Rojas' timecards meant that he had worked at the jobsite on those days, Ernie Nolte said the notation could mean that Mario Rojas had been doing fabrication work for the Project in the shop. He explained that the ductwork is built specifically for each Project to the specifications for that job.

**Natalie Nolte testified as follows:** She is Ernie Nolte's daughter, and serves as Nolte's bookkeeper, office manager and controller. She worked in Nolte's office, located in the same building as their shop, and would occasionally see Alfredo and Mario Rojas working in the shop, driving forklifts or weeding around the property. She did not see them frequently, however, as she rarely had any reason to go into the shop. Her review of the timecards, payroll records and general contractor's daily reports indicated that no one from Nolte had worked on the Project on

many of the days for which underpayments were assessed for Alfredo Rojas and for one of the days assessed for Mario Rojas. She asserted that it would have been impossible for Alfredo or Mario Rojas to have worked the long hours reported on their timecards, generally nine and one-half hours, on the Project because the jobsite was not open long enough to work those hours. She stated that it was not unusual, however, to work ten hours in the shop. She added that Nolte's employees typically reported directly to the jobsite for work, but that she was aware of informal ride sharing from the shop among some of the workers.

The Assessment also found that three Nolte workers, who were reported on the Certified Payroll Records ("CPRs"), had been underpaid on the Project as follows:

- Sukhvir Kahira had received no wages for his work on the Project during the week ending November 7, 2004, and had received straight time rather than holiday pay for the four hours he worked on Admission Day, September 9, 2005.<sup>4</sup> The evidence shows that Kahira was properly compensated for the week ending November 7, 2004, but he was not paid for the work on Admission Day.
- Jose Torres had been underpaid for the week ending April 3, 2005. The evidence shows that Torres was incorrectly listed on the CPRs as working on the Project when in fact he worked on another project for which he was properly paid.
- Edmund Nolte, Jr. ("Ed Nolte") had been underpaid for all of his work on the Project from September 30, 2004, to October 16, 2005. The evidence shows that Ed Nolte was paid over \$400,000 during the period involved, far in excess of the prevailing wage.

## DISCUSSION

Labor Code 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.<sup>5</sup>

---

<sup>4</sup> Pursuant to the PWD, September 9, 2005 (Admission Day) was a holiday for the Sheet Metal Worker (HVAC) classification in Tulare County.

<sup>5</sup> All further statutory references are to the California Labor Code, unless otherwise indicated.

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(a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and section 1775(a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1(a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not 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.”

Alfredo and Mario Rojas Are Entitled To Unpaid Prevailing Wages For The Work They Performed On The Project, But They Are Not Entitled To Be Paid For Their Travel Time.

Consideration of all the testimony shows that Nolte has failed to carry its burden of prov-

ing the Assessment was incorrect on the issue of whether Alfredo and Mario Rojas worked on the Project. Nolte has carried its burden, however, of showing the Assessment incorrectly found Alfredo and Mario Rojas were entitled to be paid for their travel to and from the Project site.

The credible testimony of Alfredo and Mario Rojas undercuts the surface regularity of the timecards produced by Nolte that otherwise identify the majority of Alfredo's work as having been in Nolte's shop rather than at the Project jobsite. Supporting the Rojas' testimony is the testimony of four non-party witnesses who worked for other subcontractors on the Project and who could identify both Alfredo and Mario Rojas and testified that they saw and worked with Alfredo and Mario Rojas at the Project site. These witnesses were credible and were not weakened on cross examination. Further, the significant variation between the Rojas' claims, with Mario claiming to have worked on the Projects for a period of weeks, while Alfredo claimed to have worked on the Project for months, adds to the believability of their claims. Moreover, Micham's daily reports document Alfredo Rojas's presence at the Project site on at least two days in April 2005.

The bare denials of Nolte's witnesses, who, like Alfredo and Mario Rojas, have a strong interest in the outcome of the case, are insufficient to negate the reasonable inference resulting from the testimony of Alfredo and Mario Rojas, and the non-party witnesses. Wells's testimony that he saw Alfredo Rojas on the job site in early 2006, months after Alfredo had stopped working for Nolte, brings the reliability of Wells's testimony into question. While a concern, this does not completely undercut Wells's credibility in light of his unhesitating identification of both Alfredo and Mario Rojas in the courtroom and his clear recollection of an incident when he interacted with both of them during the course of the Project.

Nolte's proffered timecards do not support their position that Mario did not work on the Project, as they list Nolte's job number for the Project on all but a few of the timecards for the days Mario claims to have worked on the Project. Ernie Nolte's explanation for the presence of Nolte's job number for the Project on Mario's timecards, and his absence from Nolte's CPRs, that Mario might have been doing fabrication work for the Project in the shop on those days, does not undercut the testimony of non-party witnesses who saw Mario working at the Project

site.<sup>6</sup> Moreover, the testimony of Nolte's witnesses was inconsistent, with Kahira testifying that Alfredo Rojas had delivered material to the jobsite and Ernie Nolte testifying that he was certain that neither Alfredo nor Mario Rojas had ever set foot on the Project jobsite. The non-party witnesses called by Nolte, Riggins and McCarter, testified credibly about the hours the Project site was open (relevant to hours worked). Because neither was asked if they recognized Mario or Alfredo Rojas in the courtroom as workers they had seen at the Project site, their testimony does not change the result that Alfredo and Mario Rojas worked on the Project.

The only evidence supporting a reduction in the claimed unpaid wages is the consistent testimony that the Project site was only open from 7:00 a.m. to 3:30 p.m., and that the Nolte crew typically arrived between 8:00 and 8:30 a.m. and left between 2:00 and 3:00 p.m. As a result, neither Alfredo nor Mario Rojas could have worked the nine and one-half hours, or more, that was typically reported on their timecards for the days that they claimed to have worked on the Project, because the jobsite was only open for eight and one-half hours per day and Nolte workers were typically observed at the jobsite for a maximum of seven hours per day. This discrepancy is resolved however, by reference to the parties' stipulation that Alfredo and Mario Rojas would have testified that they were instructed to report their travel time to and from the jobsite, which Alfredo estimated as one and one-half hours each way. Deducting three hours of travel time from the nine and one-half hours typically reported on Alfredo and Mario Rojas' timecards leaves six and one-half hours of work at the job site, a number consistent both with the observed arrival and departure of the Nolte crew and the hours reported for other Nolte workers on the Project.

With regard to the travel time claim, DLSE has not pointed to any travel or subsistence provision applicable to Nolte's work on the Project. Rather, Nolte has simply been assessed for Alfredo and Mario Rojas' travel time to and from the Project jobsite, an estimated total of three hours per day, including one and one-half hours of overtime on most days. The weight of the

---

<sup>6</sup> Because substantial evidence establishes that both Alfredo and Mario Rojas worked on the Project jobsite doing sheet metal work as they claimed, there is no need to address the issue of whether sheet metal fabrication work done to the Project's specifications in the shop would have entitled them to prevailing wages for that work whether they ever set foot on the jobsite or not.

evidence supports a finding that there was an optional ride-sharing arrangement among Nolte workers traveling to and from Nolte's shop in Fresno and the Project jobsite in Porterville. While Alfredo and Mario Rojas may have participated in this ride sharing arrangement, neither of them testified that they were required to report for work at the shop rather than the Project site and there is no other evidence that their participation was mandatory. Consequently, neither Alfredo nor Mario Rojas are entitled to be paid either prevailing wages or overtime for their daily travel to and from the Project jobsite. [*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 594 ("employers may provide optional free transportation to employees without having to pay them for their travel time, as long as employers do not require employees to use this transportation.")]

For the above reasons, Nolte has failed to carry its burden of proving that Alfredo and Marion Rojas did not perform sheet metal work on the Project on the days that they claimed; Alfredo and Mario Rojas are therefore entitled to prevailing wages for that work. The Assessment is affirmed to that extent. The Assessment is modified, however, by deducting the three hours of travel time per day claimed by Alfredo and Mario Rojas for time that they were traveling to and from the jobsite with other Nolte workers. The total hours assessed, as modified, are 1,166.5 hours, on 181 days, for Alfredo Rojas and 114.5 hours, on 18 days, for Mario Rojas.

The other elements of the Assessment have been discussed above and need no further discussion here.

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

Section 1775(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.<sup>[7]</sup>

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

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))

---

<sup>7</sup> Labor Code §1777.1, subd. (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."

[Cal.Code Reg. tit. 8 §17250(c).]

Nolte's sole defense to Alfredo and Mario Rojas' claims of underpayment is the argument that neither of them ever worked on the Project. Nolte did not carry its burden of proof in disproving these claims, however. While this was a hard fought evidentiary case on this issue, once the determination that Alfredo and Mario Rojas did work for Nolte on the Project is made, the only possible conclusion is that Nolte knew about it. Nolte admits its liability to Kahira for unpaid holiday pay, but asks to be excused from penalties because the violation was inadvertent.

Even though the number of hours assessed each day is reduced, this does not reduce the number of penalties as both Alfredo and Mario Rojas were not paid the prevailing wage for the hours they did work. Therefore, the Assessment is affirmed on the number of penalties assessed for days worked by Alfredo and Mario Rojas. With the exception of the one day of admitted underpayment to Kahira, for which the penalty is affirmed, prevailing wages were paid to all of the other workers named in the Assessment and the balance of the penalties assessed are dismissed.

Section 1775, subdivision (a)(2) grants DLSE the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The record shows that DLSE considered the prescribed factors for mitigation and determined that the maximum penalty of \$50 per violation was warranted in this case. The Director is not free to substitute his own judgment. The record does not establish an abuse of discretion and, accordingly, the assessment of penalties as modified is affirmed.

Nolte Is Not Liable For Penalties Under Section 1813.

Section 1813 prescribes an additional penalty of \$25 "for each calendar day during which [a] worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week" without receiving the prescribed overtime rates. Because of the modification of the hours subject to the payment of prevailing wages, there are no penalties due for overtime violations.

Nolte Is Liable For Liquidated Damages.

Labor Code section 1742.1(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. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the Assessment . . . to be in error, the director shall waive payment of the liquidated damages.

Rule 51(b) [Cal.Code Reg. *tit. 8* §17251(b)] states as follows:

To demonstrate “substantial grounds for believing the Assessment . . . to be in error,” the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment . . . was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment . . .

In accordance with the statute, Nolte would be liable for liquidated damages only on any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is closely tied to Nolte’s position on the merits and specifically whether there was an “objective basis in law and fact” for contending that the assessment was in error.

As discussed above, Nolte’s sole defense to Alfredo and Mario Rojas’ claims of underpayment is the argument that neither of them ever worked on the Project. Nolte did not carry its burden of proof in disproving these claims, however. While it was a close case on this issue, once the determination that Alfredo and Mario Rojas did work for Nolte on the Project is made, and the inevitable conclusion reached that Nolte knew about it, it is impossible to find that Nolte had an objective belief that Alfredo and Mario Rojas were not due prevailing wages for their work on the Project. Nolte admits its liability to Kahira for unpaid holiday pay, but asks to be excused from penalties because the violation was inadvertent. While Nolte may have been honestly ignorant of the fact that Admission Day was a holiday, ignorance does not constitute an “objective basis in law and fact” for contending that the Assessment on the Project was in error. Because the assessed back wages remained due more than sixty days after service of the As-

assessment, and Nolte has not demonstrated grounds for waiver, Nolte is also liable for liquidated damages in an amount equal to the unpaid wages.

### FINDINGS

1. Affected subcontractor Nolte Sheet Metal, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Alfredo and Mario Rojas performed work on the Project subject to the Sheet Metal Worker (HVAC) classification and are therefore entitled to unpaid prevailing wages in the amounts of \$29,767.57 and \$3,289.31, respectively. Nolte is also liable for training fund contributions in the amount of \$0.76 per hour for 1,281 hours worked by Alfredo and Mario Rojas on the Project in the amount of \$973.56.

3. Nolte underpaid Sukhvir Kahira by \$114.08, the difference between straight time and holiday double time, for the four hours that he worked on the Admission Day holiday, September 9, 2005.

4. Nolte fully paid the applicable prevailing wages to all other workers on the Project.

5. In light of Findings 2 and 3, above, Nolte underpaid its employees on the Porterville Unified School District Educational Complex in Tulare County in the aggregate amount of \$34,144.52, including unpaid training fund contributions.

6. DLSE did not abuse its discretion in setting section 1775(a) penalties at the rate of \$50 per violation, and the resulting total penalty of \$10,000.00, as modified, for 200 violations is affirmed.

7. The unpaid wages found due in Finding No. 5 remained due and owing more than sixty days following issuance of the Assessment. Nolte is liable for an additional award of liquidated damages under section 1742.1 in the amount of \$34,144.52, and there are insufficient grounds to waive payment of these damages.

8. The amounts found remaining due in the Assessment as modified and affirmed by this Decision are as follows:

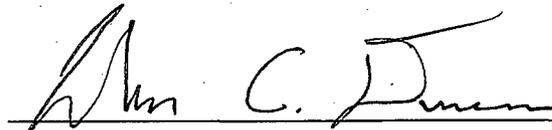
Wages Due:	\$33,170.96
Training Fund Contributions Due:	\$973.56
Penalties under section 1775, subdivision (a):	\$10,000.00
Penalties under section 1813:	\$0.00
Liquidated Damages:	\$34,144.52
<b>TOTAL:</b>	<b>\$78,289.04</b>

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 modified and affirmed 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: 3/21/08



John C. Duncan  
Director of Industrial Relations