STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Kenner Construction and Explore General, Inc.	Case Nos.	09-0007-PWH; 09-0008-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

ORDER DENYING RECONSIDERATION

Affected contractor Explore General, Inc. (Explore) seeks reconsideration of the Decision of the Director issued on June 9, 2011 (Decision), on two grounds. Based on my review of Explore's and DLSE's arguments, and the relevant parts of the record, I deny reconsideration for the following reasons.

First, Explore requests that International Fidelity Insurance Company (IFIC) either be dismissed in this matter or that a finding be issued that IFIC has no responsibility for the payment of any of the wages or penalties found owing by the Decision. IFIC was never a party to this action and thus it cannot be dismissed from this proceeding.

Second, Explore contends that that the Assessment was untimely. Explore's contentions with regard to the timeliness of the Assessment were fully addressed in the Decision. Explore objects to Sidhu's testimony as hearsay for the first time in its Request for Reconsideration; the objection is overruled as untimely and waived. Therefore, Sidhu's hearsay testimony can be the basis for a finding. (Cal. Code Regs., tit. 8, § 17244, subd. (d).) Even if, Ms. Sidhu's testimony is deemed hearsay, however, the burden remains on Explore to establish the date on which the Project was "accepted" or that a valid notice of completion was filed. Explore has not carried that burden.

Accordingly, Explore's requests for reconsideration are denied.

Dated: June 24, 2011

Christine Baker
Acting Director of Industrial Relations

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DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Explore General, Inc. ("Explore") and affected subcontractor Danny Kenner, individually and doing business as Kenner Construction ("Kenner"), submitted timely requests 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 Kenner on the construction of the New Jerusalem Fire Station No. 93 ("Project") in San Joaquin County. The Assessment determined that $753,815.98 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits occurred on June 11, August 25, and August 26, 2009, in San Francisco, California, before Hearing Officer Nathan D. Schmidt. Monrae L. English appeared for Kenner, Myron Smith appeared for Explore and Ramon Yuen-Garcia appeared for DLSE.

The primary issues for decision are:

- Whether the Assessment was timely served.
- Whether the Assessment correctly found that Kenner had failed to report and pay the required prevailing wages for all of the work performed on the Project by the 19 affected workers.
- Whether the Assessment correctly found that 70 percent of the work performed on the Project by each of the affected workers was subject to the Iron Worker prevailing wage

rate and the remaining 30 percent was subject to the Cement Mason prevailing wage rate.

- Whether DLSE properly denied Kenner credit against unpaid prevailing wages for prior wage claim settlements made with some of the affected workers.
- Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775[1] at the rate of $25.00 per violation.
- Whether Explore is jointly and severally liable for penalties assessed under section 1775 for violations by Kenner.
- Whether Kenner and Explore are jointly and severally liable for penalties under section 1813 for Kenner's failure to pay the proper overtime rate of pay.
- Whether Kenner or Explore has demonstrated substantial grounds for believing the Assessment to be in error, justifying a waiver of liquidated damages.

In this Decision, the Acting Director finds that that Kenner and Explore have proven that the hours for which unpaid prevailing wages are assessed are excessive for all but five of the affected workers. Kenner and Explore have also proven that the determination that 70 percent of the work is subject to the Iron Worker prevailing wage rate is incorrect. Explore has not established that it is entitled to relief from penalties under section 1775, subdivision (b) and thus remains jointly and severally liable for the penalties assessed upon Kenner under section 1775. Neither Kenner nor Explore has proven the existence of grounds for a waiver of liquidated damages. Therefore, the Acting Director of Industrial Relations issues this decision affirming and modifying the Assessment.

FACTS

The Tracy Rural Fire Protection District ("District") published a Notice Inviting Bids for the Project on or about April 1, 2004, and awarded the contract to Explore in September 2004. Explore subcontracted with Kenner in early August 2005 to perform all of the concrete work on

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

the Project. Kenner's work on the Project included installation of the fire station building slab and footings, the driveway, the parking lot, the curbs, the sidewalks and a utility pad for a garbage enclosure. Kenner's employees worked on the Project from approximately August 10, 2005, through February or March 2006. Explore terminated Kenner's subcontract when approximately 70 percent of the concrete work for the Project had been completed. The remaining concrete work was completed by Explore workers.

The applicable prevailing wage determinations ("PWDs") in effect when the Project was bid are:

Cement Mason for Northern California (NC-23-203-1-2003-1): This is the rate used in the Assessment for all cement work. The Cement Mason PWD contains a predetermined pay rate increase that went into effect before the beginning of work on the Project.[2]

Iron Worker (C-03-X-1-2003-1): This is the rate used in the Assessment for work involving fabrication and installation of steel reinforcing bars or "rebar" ("rebar work").[3] The Iron Worker travel and subsistence provision requires payment of $40.00 per day in subsistence and $60.00 in travel reimbursement at the beginning and completion of the job for jobs located 100 miles or more from one of a list of city halls. The applicable city hall is the one from the list located nearest to the bona fide residence of the affected worker. It is undisputed that the applicable city hall for all the affected workers is in Fresno, which is located more than 100 miles from the Project site.

Timeliness Of The Assessment: The building permit for the Project records a "final date" of June 6, 2007. Explore contends without documentary evidence that the fire station was occupied and put into service on or before June 30, 2007. After DLSE received complaints from three of the affected workers, Deputy Labor Commissioner Julia Sidhu commenced an investiga-

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[2] Throughout the relevant time period, the prevailing hourly wage due under the Cement Mason PWD was $37.46 comprised of a base rate of $23.88, fringe benefits totaling $13.30 and a training fund contribution of $0.28. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

[3] Throughout the relevant time period, the prevailing hourly wage due under the Iron Worker PWD was $44.15 comprised of a base rate of $27.31, fringe benefits totaling $16.32 and a training fund contribution of $0.52. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

tion in April 2008. Sidhu testified that she spoke to the District's Chief, Chris Bosch, on April 23, 2008. Bosch told Sidhu that the District was in litigation with Explore over problems with the Project and that Explore was still working on outstanding punch list items. As a result, the District had not yet accepted the Project and no notice of completion for the Project had been filed. Sidhu also first informed Explore of the complaints against Kenner by telephone on April 23, 2008. There is no evidence that a Notice of Completion had been filed by the District prior to issuance of the Assessment.

DLSE issued the Assessment on October 31, 2008. The Assessment found that Kenner failed to report all of his employees performing work on the Project on his CPRs, failed to pay the required prevailing wages, including failure to pay the required prevailing wage rate for overtime, misclassified employees and failed to make the required training fund contributions for any of the affected workers. The Assessment found a total of $687,240.98 in unpaid prevailing wages, including $7,712.71 in unpaid training fund contributions, for hours worked by Kenner workers on the Project between September 2005 and October 2006. Penalties under section 1775 were assessed at the mitigated rate of $25.00 per violation because Kenner had no record of prior violations.

Failure To Report All Hours Worked And Underpayment Of Required Prevailing Wages: Kenner testified that he did not prepare certified payroll records ("CPRs") for the Project contemporaneously with the work because he did not know that the Project was a public work. Kenner prepared and submitted CPRs for the Project to DLSE after the fact in June 2008, after Sidhu requested them in the course of her investigation. Kenner's CPRs report work on the Project by eight workers on 45 days from August 8, 2005, to February 24, 2006. The CPRs report the workers as concrete finishers and laborers at pay rates ranging from $10.00 to $22.00 per hour, well below the basic hourly prevailing wage rates required by the applicable PWDs. The CPRs report work in excess of eight hours per day on numerous occasions, but only rarely report the payment of any overtime differential for that work. Neither fringe benefit payments nor training fund contributions are reported for any of the workers.

Sidhu determined the unpaid prevailing wages after interviewing some of the affected workers by telephone and meeting with several others. Sidhu relied heavily on information provided by Angel Lopez who had been the foreman of Kenner's concrete crew for the Project.[4] Lopez gave Sidhu a handwritten notebook purporting to record the hours worked by the members of Kenner's concrete crew on all of the projects that Kenner was working on at the time of the Project. Sidhu believed that the notebook had been kept by Lopez himself. Lopez told Sidhu that the days annotated in the notebook with a "T," for Tracy, were the days that Kenner workers had performed work on the Project. According to the annotations, Kenner workers worked on the Project intermittently from September 15, 2005, to October 6, 2006. The notebook does not specify, however, which of the workers listed on each day marked "T" actually performed work on the Project that day. In a subsequent telephone conversation, Lopez told Sidhu which of the workers listed in the notebook had worked on the Project. Sidhu admits, however, that Lopez only provided her with a list of the affected workers' names; they did not go through the notebook day by day to identify which individuals, or how many total workers, had worked on the Project on any specific day.

Finding that the hours reported on Kenner's CPRs bore little resemblance to those in the notebook given to her by Lopez, Sidhu based DLSE's determination on the information in the notebook, the complaints and completed questionnaires submitted by some of the affected workers and the notes of the worker interviews that Sidhu had conducted. When Sidhu found a conflict between the information in Lopez's notebook and the information provided by the individual workers, she gave the greatest weight to the notebook, which she believed was more accurate. Because Sidhu could not identify the individual workers who worked on each day based on the information in the notebook, she included all of the hours listed on each of the specified days for every worker that Lopez told her had worked on the Project. Although Kenner failed to submit any documentation of the amounts that the affected workers had actually been paid, the workers who were interviewed or completed questionnaires uniformly stated that they had been paid for

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[4] Though listed as a witness by DLSE, and present on the first two days of hearing, Lopez was not called as a witness.

all hours worked, albeit at rates below the required prevailing wage rates. On that basis, Sidhu credited Kenner with payment for the assessed hours at the wage rates that the workers told her they were paid. For workers that had neither been interviewed nor completed questionnaires, Sidhu gave Kenner credit for payment at the rate of $10.00 per hour; the lowest wage rate reported on Kenner's CPRs.

Five of the affected workers testified: Tomas Gabriola, Vicente Eufracio, Ricardo Flores, Javier Flores and Joel Diaz (collectively "the workers"). The workers agreed on the following facts, with minor variations. At the time of the Project, Kenner had at least three other jobs that involved concrete work, none of which were public works. Lopez was the foreman of the concrete crew for all Kenner projects; he hired and fired workers and made their work assignments. The workers rotated among the various Kenner jobs based on the needs of each job, with some working on the Project more than others. The workers reported their hours on a daily basis to Lopez or Eufracio, who was Lopez's driver. The workers would either report their hours in person, if Lopez or Eufracio was at the job site where they had worked that day, or they would report their hours by telephone in the evening. The workers never prepared time cards. Due to the passage of time, none of the workers had an independent recollection of the specific days or hours they had worked on the Project; they had relied on Lopez or Eufracio for that information when filling out their worker questionnaires for DLSE.

Eufracio testified that he had prepared the notebook that Lopez had given to Sidhu and upon which her audit was based. Lopez told Eufracio which days Kenner workers had worked on the Project over the telephone and that Eufracio had marked those days with T's in his notebook. Eufracio wrote down the hours each of Kenner's concrete crew workers had worked on a daily basis, but he did not record which of Kenner's jobs the hours had been worked on. Eufracio testified that Lopez also kept a notebook of the hours worked, which included the identity of the job for each worker. However, this notebook had been lost or stolen in approximately August 2008. Eufracio had no independent recollection of which days he or any of the other workers had worked on the Project.

Eufracio, R. Flores and J. Flores testified that R. Flores and J. Flores, who are brothers, and Victor Pineda were consistently assigned to work on the Project on normal work days setting forms and placing rebar. Sometimes there was a fourth worker on those days. The entire Kenner concrete crew of up to 20 workers would work on the Project only on the days that concrete was poured. R. Flores and J. Flores testified that they normally worked 10 to 12 hour work days on the Project, from 6:00 or 7:00 a.m. to 5:00 or 6:00 p.m. Both Floreses testified that they had worked on the Project an average of three days per week, one to three weeks per month, for a total of about eight months. J. Flores testified that he was Kenner's foreman at the Project site when Lopez was not there. J. Flores further testified that it had taken two days to pour the concrete for the fire station slab.

Diaz testified that he worked on the Project from late November 2005 to March 15, 2006. Diaz remembered clearly that his last day of work on the Project was March 15, 2006, because he was injured on a different Kenner job the next day, March 16, and did not work for Kenner after that.

Gabriola, one of the three workers who filed a complaint with DLSE in December 2007, originally complained that he worked on the Project from March 1 through March 31, 2006. In the questionnaire that Gabriola later completed for Sidhu, however, he wrote that he had worked on the Project from August to September 2006. Gabriola testified at hearing that he had worked on the Project every day for the entire length of the Project but could not remember the beginning or ending dates.

Explore produced daily Contractor Production Reports ("production reports") for the Project from August 10, 2005, through February 24, 2006. This incomplete set of production reports was prepared by Ismael Salas, Explore's on-site superintendent for the Project. The production reports record work on the Project by Kenner workers on 19 days, including three days on which concrete was poured: November 21 and December 1, 2005, and February 13, 2006. The production reports record the number of workers, the trades present and the total number of hours worked for each subcontractor with workers on the Project that day.

Explore's general superintendent, Roger Halder, testified that he stopped at the Project site almost every afternoon while Salas was Explore's on-site superintendent. Halder normally arrived at the Project site between 4:15 and 4:30 and normally found the Project site closed. The only exceptions were on days concrete was poured, when workers were sometimes still present. Halder testified that it took two days to pour the slab for the building and an additional one to two days to pour the driveway and curbs. Halder testified that he had been present at the Project site on one of the two slab pour days and recalled that there had been between ten and 14 Kenner workers at the Project site that day.

Halder took over as the on-site superintendent for the Project in late February 2006, after Salas left. Halder was unable to produce the production reports for the period after he took over as on-site superintendent because Explore's job site binder for the Project had been in Halder's briefcase, which was stolen from Halder's home on August 4, 2008. Halder testified that Kenner workers worked on the Project for an intermittent two or three week period after he took over as on-site superintendent.

Jaime Gonzalez, Explore's president, testified that he had also been on the Project site on one of the slab pour days and had observed eight or nine Kenner workers on the job site that day. Pedro Nunez, Explore's project manager for the Project, testified that he reviewed Salas's production reports on a weekly basis. Reviewing the incomplete set of production reports in evidence, Nunez noted that there were days missing and expressed the opinion that there were probably more reports that would have shown Kenner workers on the job site. Nunez estimated that Kenner had completed approximately 70 percent of the work Kenner had contracted to do when the subcontract was terminated.

Kenner testified that he and Lopez jointly decided to assign four primary workers to the work on the Project: R. Flores, J. Flores, Pineda and Raul Gabriola. Other workers were sent to assist as needed. Kenner believed that his workers had not worked on the Project more than 14 or 15 total days. Kenner recalled that Explore terminated his subcontract in February or March 2006. Kenner admitted that he did not have any contemporaneous time records for work on the Project. In lieu of such records, Kenner relied on Explore's production reports, a handwritten

pay journal he had kept, and his memory when he prepared CPRs for the Project after the fact.

Reclassification of Workers From Cement Mason To Iron Worker: Sidhu testified that Lopez told her in a telephone conversation that rebar work comprised 70 percent of the total work performed on the Project by Kenner workers because the rebar reinforcement for the slab of the fire station building and the steel reinforced parking lot and driveway had to be formed by hand. Based entirely on Lopez's estimate, DLSE determined that 70 percent of the hours assessed for each of the 19 affected workers required payment at the Iron Worker prevailing wage rate. The remaining 30 percent of the hours assessed for each worker were assessed at the Cement Mason prevailing wage rate.[5]

Many of the affected workers listed rebar work as one of the jobs they performed on the Project, but none of the workers who testified or supplied written statements indicated that rebar work constituted the majority of the work that they performed on the Project. R. Flores testified that only the driveway and the building slab had required rebar. R. Flores further testified that Pineda and another worker had helped him and his brother to prepare and install the rebar used in the footings for the slab at the beginning of the Project.

Halder testified that the rebar for the slab footings had to be formed into "cages." He believed that Kenner workers had fabricated the rebar cages off-site because he had seen completed rebar cages loaded on trucks when he visited the Project site before the slab was poured. Halder testified that the rebar work for the driveway was much simpler, consisting of rebar laid in a cross-hatch pattern on 12 inch centers. Kenner also testified that the rebar cages for the building slab footings had been constructed at one of his other job sites, where he had a rebar bending jig and cutter, and had been hauled to the Project site. Kenner estimated that it took his workers two to three days to make and install the rebar cages for the building slab.

Explore's production reports record iron work by three Kenner workers on February 8, 2006, and by four Kenner workers on February 14, February 17, February 20 and February 24,

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[5] Workers classified as laborers on Kenner's CPRs were reclassified as cement masons. This determination was not challenged. The sole classification issue in dispute is DLSE's determination that 70 percent of all work on the Project by Kenner workers was iron work.

2006. The production reports do not record the two to three days of iron work that Kenner testified were necessary to make and install the rebar cages for the building slab which, based on the production reports, appears to have been poured on November 21 and December 1, 2005.

Credit For Wage Claim Settlements: Kenner testified that he fired Lopez in December 2007 after finding out that Lopez was stealing materials from Kenner job sites and was using the materials and Kenner's workers to perform independent jobs. Kenner testified that most of the affected workers were either fired or quit at the same time. In mid-December 2007, 16 of the affected workers, including Lopez, filed wage claims with the Labor Commissioner in Fresno seeking compensation for overtime hours that had been paid at the straight-time rate and penalties under section 203. Ten of the 12 affected workers claimed unpaid overtime for time periods overlapping with Kenner's work on the Project. Kenner settled the wage complaints of 14 of the workers at hearing for amounts ranging from $700 to $7,500. The complaints filed by the other two workers, Lopez and Eustriberto Peralta, were dismissed by the Labor Commissioner for their failure to appear at their hearings. Kenner contends that he is entitled to credit for the amount of these settlements against his prevailing wage obligations to the affected workers. Kenner did not provide any documentation to establish the amounts of the settlements that are attributable to overtime hours worked on the Project rather than other projects or penalties under section 203.

Revised Audit: After service of the Assessment, DLSE determined that Kenner workers had not performed any work on the Project after March 24, 2006. Accordingly, DLSE prepared a revised audit prior to hearing reducing the assessed unpaid wages and penalties by more than 50 percent. The revised audit reduced the assessed unpaid prevailing wages to $320,989.36 and the assessed unpaid training funds to $3,687.55. Penalties continued to be assessed under section 1775 at the mitigated rate of $25.00 per violation. The revised audit calculated 704 violations of the obligation to pay prevailing wages, which resulted in $17,600.00 in section 1775 penalties. In addition, penalties were assessed under section 1813 for 665 overtime violations; at the statutory rate of $25.00 per violation, this totaled $16,625.00. DLSE did not formally move to amend the Assessment downward, but because the facts clearly warrant the reduction the amounts in the revised audit are accepted as the assessed unpaid wages and penalties under the Assessment.

Kenner's General Defenses: Kenner admits that he failed to pay his workers prevailing wages, the required overtime rate for overtime work, or any training fund contributions. Kenner's defenses are that he did not know that the Project was a public work, that the total hours assessed were excessive, and the percentage of work assessed at the Iron Worker prevailing wage rate was excessive. Kenner denies Explore gave him a written subcontract or asked him to submit CPRs before terminating his subcontract.

Explore's General Defenses: Explore's main defense addresses whether it is excused from section 1775 penalties. Gonzalez testified that he informed Kenner that the Project was a public work subject to prevailing wages at the time he requested Kenner's bid and sent Kenner a written subcontract which included the requirement to pay prevailing wages and submit CPRs. An unsigned copy of the subcontract between Explore and Kenner was submitted into evidence. The only reference to prevailing wages in the subcontract is an attachment instructing the subcontractor to submit certified payroll reports which includes blank certified payroll and statement of non-performance forms and an instruction sheet explaining how to prepare them under the federal Davis-Bacon Act (40 U.S.C. §§276, et seq.) The subcontract does not refer to or include copies of sections 1771, 1775, 1776, 1777.5, 1813 or 1815. Gonzalez admitted that Explore never received a signed subcontract from Kenner. Gonzalez testified that his office manager repeatedly requested CPRs from Kenner but never received them. Gonzalez did not testify that Explore took any action when the CPRs were not forthcoming. Gonzalez also admits that Explore paid Kenner approximately $140,000.00 for his work on the Project, despite Kenner's failure to submit CPRs.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

> The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to

> permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [*citations omitted*] (*"Lusardi"*).) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and *Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect."

The Assessment Was Timely.

Explore erroneously argues that the statute of limitations for issuing the Assessment must run from the District's occupation of the newly-constructed fire station, on approximately June 30, 2007, which Explore equates the completion of the Project. Since the fire station was occupied more than a year before the Assessment was served on October 31, 2008, Explore contends that the Assessment is not timely. The applicable statute of limitations is found in section 1741, subdivision (a) which states in relevant part:

> . . . The assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever occurs last. However, if the assessment is served after the expiration of this 180 day period, but before the expiration of an additional 180 days, and the awarding body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained. . . .

The operative date from which the 180 days begins under section 1741 is either "Notice of Completion" or "acceptance." In *Department of Industrial Relations v. Fidelity Roof Company* (1997) 60 Cal.App.4th 411, 418 , the court held that a "valid" notice of completion meant one filed within ten days of acceptance of a public works project; otherwise, the statute of limitations runs from the awarding body's acceptance of the project. "Formal acceptance has been defined as that date at which someone with authority to accept does accept unconditionally and completely." (*Madonna v. State of California* (1957) 151 Cal.App.2d 836, 840; see also *In re El Dorado Improvement Corporation* (9th, Cir. 2003) 335 F.3d 835, 840 ["acceptance" occurs when public officials consent to dedication of improvement to the public "typically . . . by determining that the improvement was satisfactorily built."].)

Neither Kenner nor Explore introduced evidence as to acceptance of the Project. This leaves Sidhu's unrebutted testimony that the Project had not been accepted by the District at the time the Assessment was issued because of ongoing litigation over problems with the Project. The Assessment was therefore timely under section 1741.

In the alternative, Explore argues that DLSE's failure to give Explore notice of the complaints filed by Kenner's workers within 15 days as required by section 1775, subdivision (c) should have barred DLSE from subsequently serving the Assessment on Explore. Explore's argument has no legal basis. Section 1775, subdivision (c) is a notice provision contained in the section of the law establishing penalties for failure to pay prevailing wages. Subdivision (c) has no relationship to the timeliness requirements contained in section 1741, nor does it specify any penalty for failure to provide the required notice. DLSE's failure to provide timely notice of the complaints does not provide a basis for finding that the Assessment was not timely served upon Explore.

The Affected Workers Are Entitled To Receive Prevailing Wages For Their Documented Work On The Project.

There is no way to precisely calculate the prevailing wages due to the affected workers for their work on the Project because Kenner did not keep contemporaneous time records; the CPRs he prepared are only an estimate that was created after the fact. Kenner has not produced any reliable record of what the affected workers were actually paid. As a result, it is necessary to look to the record as a whole to derive the most accurate estimate possible of the hours the affected workers actually worked on the Project and the amounts that they were paid for that work.

Employers on public works also must keep accurate records of the classifications for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) When an employer fails to maintain accurate time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount by a just and reasonable from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the reasonable estimate. (*Anderson v. Mt. Clemens Pottery Co.*(1945) 328 U.S. 680, 687-688 [rule for estimate-based overtime claims under the federal Fair Labor Standards Act, 29 U.S.C. §§201 et seq.]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727 [applying same rule to state overtime wage claims]; and *In re Gooden Construction Corp.* (USDOL Wage Appeals Board 1986) 28 WH Cases 45 [applying same rule to prevailing wage claims under the federal Davis-Bacon Act, 40 U.S.C. §§3141 et seq.].) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

In the absence of any contemporaneous time records from Kenner, and in light of the workers' admissions that they had no independent recollection of the specific days that they had worked on the Project, the only credible documentary evidence from which to estimate the hours worked and wages paid come from Explore's daily production reports and Eufracio's notebook. Each has limitations. The production reports are incomplete; many days are missing completely and there are no records for the final month of Kenner's work on the Project. Moreover, the pro-

duction reports list only numbers of workers without identifying those workers by name. Eufracio's notebook is a contemporaneous record of the hours worked by the affected workers, but its evidentiary value is limited because it only lists the total daily hours worked by each worker. The notebook does not identify either the nature of the work performed or the project on which the work was performed. Even if weight is given to Eufracio's subsequent annotation of the notebook at Lopez's instruction to indicate days worked on the Project, the annotations only indicate that some of Kenner's workers performed work on the Project on those days without identifying specific workers.

The testimony of both the workers and Kenner establishes that three or four Kenner workers worked on the Project on most days; additional workers were called to assist on the days when concrete was poured. The testimony of the workers, corroborated by Kenner, establishes that R. Flores, J. Flores and Pineda worked on the Project for Kenner on a full time basis. In addition, Kenner himself identified R. Gabriola as a fourth regular Kenner worker on the Project. Diaz, the only worker who could remember at least one specific day on which he worked on the Project, worked a limited number of hours, as demonstrated by his testimony. The audit is in accord with this unrebutted testimony.

T. Gabriola's testimony was not credible, in light of his conflicting written statements regarding the time period he worked on the Project. Especially troublesome is T. Gabriola's unsupported testimony that he worked on the Project every day.

The record as a whole supports a finding that concrete was poured on four days. Explore's production reports document three concrete pour days while Salas was Explore's superintendent on the Project. In addition, the testimony and the four days of reported iron work that took place after the last recorded concrete pour on February 13, 2006, support an inference that at least one day on which concrete was poured occurred after Halder took over as Explore's onsite superintendent in late February 2006; a time period for which production reports are unavailable.

The record supports a finding that the remaining workers in the revised audit only performed work on the Project on one or more of these four days. On days when concrete was

poured, there were between eight and 14 additional workers who worked approximately ten hours each on the Project. Neither Kenner nor Explore has produced evidence to establish which affected workers, or even how many of the affected workers, performed work on the concrete pour days. The best inference that can be drawn is that the remaining 14 workers are entitled to receive prevailing wages at the applicable Cement Mason rate for four ten-hour work days on the Project, constituting 56 violations each of sections 1775 and 1813. The Assessment is modified accordingly.

Similarly, Kenner produced no evidence of the amounts each of these 14 workers were paid. The best source for an inference of the evidence is the worker statements, which form the basis of crediting Kenner for wage payments. Kenner is entitled to credit against the assessed unpaid prevailing wages for these workers as modified for either the hourly wage rate each affected worker stated that he was paid by Kenner or $10.00 per hour, whichever is greater.

Finally, Kenner has provided insufficient evidence to establish that he is entitled to any credit against the assessed unpaid prevailing wages for independent wage claim settlements for unpaid overtime that he negotiated with some of the workers. The issues of unpaid prevailing wages and training funds for these 14 workers are remanded to DLSE for recalculation in accordance with these Findings. The remainder of the Assessment is dismissed as to these workers.

Kenner And Explore Have Proven That DLSE's Reclassification Of Workers From Cement Mason To Iron Worker Was Excessive.

The parties do not dispute that the Iron Worker prevailing wage rate is applicable to the rebar work performed by Kenner workers on the Project. The sole issue as to reclassification is how much rebar work was actually performed by the affected workers. Consideration of the record as a whole does not support DLSE's blanket reclassification of 70 percent of Kenner's work on Project as iron work. Sidhu admitted that the sole basis for the reclassification was an estimate provided over the telephone by Lopez, who did not testify at the hearing and whose estimate is not corroborated by the workers who did testify. The evidence establishes that rebar was required for the building slab and the steel reinforced driveway and parking lot. The rebar for the slab footings was formed into cages and the rebar for the driveway and parking lot was

laid in a cross-hatch pattern. Explore's production reports record five days of iron work by Kenner workers in February 2006. Because the building slab had already been poured by that time, it can be inferred that the work reported involved laying rebar for the driveway and parking lot. Explore's production reports do not record the two to three days of iron work that Kenner testified were necessary to make and install the rebar cages for the building slab. Based on the testimony of Kenner and Halder, it can be inferred that this work does not appear on Explore's production reports because the majority of that work was performed for the Project at one of Kenner's other job sites. Because 14 of the affected workers have been found only to have performed cement mason work on the four concrete pour days, Kenner and Explore have disproved the basis of the Assessment's reclassification of those workers. Consequently, it must be found that all of the rebar work on the Project was performed by Kenner's four regular workers, R. Flores, J. Flores, Pineda and R. Gabriola, with possible assistance from Diaz, who has been found to have been a frequent worker on the Project after November 2005.

For these reasons, the record supports a finding that, prior to November 21, 2005, three days of rebar work were performed by R. Flores, J. Flores, Pineda and R. Gabriola to make and install the rebar cages for the building slab. In addition, Explore's production reports establish that rebar work for the driveway and parking lot were performed by at least three Kenner workers on February 8, 2006, and by at least four Kenner workers on February 14, February 17, February 20 and February 24, 2006. Because neither Kenner nor Explore has produced evidence to establish which, or precisely how many, of the regular workers performed this work on those days, the reclassification of R. Flores, J. Flores, Pineda and R. Gabriola from cement mason to iron worker is modified and affirmed for eight days of work on the Project and the reclassification of Diaz from cement mason to iron worker is modified and affirmed for five days of work on the Project. The remaining hours of work assessed for these five workers are payable at the applicable Cement Mason prevailing wage rate.

The reclassification to the iron worker pay rate also affects the Assessment's application of travel and subsistence payments. Because the Project site is located over 100 miles from Fresno's city hall, these workers are also entitled to receive travel and subsistence payments for

the days that they performed iron work on the Project. As with the other 14 affected workers discussed above, Kenner has provided insufficient evidence to establish that he is entitled to any credit against the assessed unpaid prevailing wages for independent wage claim settlements for unpaid overtime that he negotiated with these workers. The precise amounts of unpaid prevailing wages, travel and subsistence and training funds for these five workers as a result of the reclassification are remanded to DLSE for recalculation in accordance with these Findings.

DLSE Did Not Abuse Its Discretion In Assessing Penalties Under Section 1775 At The Rate of $25.00 Per Violation.

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 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.[6]

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 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)].)

Here, Kenner's primary defense is ignorance that the Project was a public work and subject to the obligation to pay prevailing wages. While Kenner and Explore have proven that the total hours for which prevailing wages were assessed were excessive and have partially disproved the basis of DLSE's reclassification of 70 percent of the work performed by Kenner workers on the Project as iron work, Kenner freely admits that he failed to pay the required prevailing wages to his workers.

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 when deciding to assess penalties at the mitigated rate of $25.00 per violation. The Acting Director is not free to substitute her own judgment. The record does not establish an abuse of discretion and, accordingly, the assessment of penalties as modified under section 1775 is affirmed for 267 vi-

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[6] 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."

olations.

Kenner and Explore Are Jointly And Severally Liable For The Penalties Assessed Under Section 1775.

Explore seeks to avoid joint and several liability for section 1775 penalties imposed as a result of Kenner's prevailing wage violations. A contractor is jointly and severally liable with a subcontractor for penalties assessed under section 1775 unless the contractor proves the elements enumerated in section 1775, subdivision (b). A contractor may avoid liability for section 1775 penalties assessed against its subcontractor if it proves that it had no knowledge that underpayments were occurring and fully complied with four specified requirements:

> (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.
>
> (2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.
>
> (3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.
>
> (4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

The language, "unless the prime contractor fails to comply with all of the following requirements," means that the burden is on the contractor to show that it did in fact satisfy all four requirements. The failure to satisfy any one of the enumerated requirements will deny the contractor relief under this section.

While there is no direct evidence that Explore was aware of Kenner's violations before it was first contacted by Sidhu in the course of DLSE's investigation, the record exhibits a serious

failure on the part of Explore to adequately monitor Kenner's compliance, or lack thereof, with his prevailing wage obligations on the Project. The record shows that Explore failed to comply with any of the four requirements of section 1775, subdivision (b): (1) Explore failed to obtain a signed subcontract from Kenner, but even if it had done so, the unsigned subcontract in evidence does not contain the required statutory language required by subdivision (b)(1); (2) Explore failed to review Kenner's CPRs as required because it never obtained CPRs from Kenner and apparently took no corrective action, such as withholding payment, to compel Kenner to submit CPRs when Kenner failed to do so; (3) Explore has not shown that it took any action once it was aware that there was a problem to ensure that the affected workers received the prevailing wages to which they were entitled; and (4) Explore did not obtain the required affidavit from Kenner before making the final disbursement to him.

Explore failed in its statutory duty as a contractor to monitor the compliance of its sub-contractor, Kenner, as required by section 1775, subdivision (b). Therefore, Explore remains jointly and severally liable for the full penalties assessed against Kenner under section 1775, subdivision (a).

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

Section 1813 states as follows:

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

Section 1815 states in full as follows:

> Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1½ times the basic rate of pay.

The record establishes that Kenner violated section 1815 by paying less than the required prevailing overtime wage rate on 260 occasions. Halder's general testimony that the Project site was closed by 4:15 or 4:30 p.m., without regard to specific days, is insufficient to overcome Eufracio's contemporaneous record of the hours worked by Kenner workers which records overtime being worked on most days. Unlike section 1775 above, section 1813 does not give the enforcing agency any discretion to reduce the amount of the penalty, nor does it give the Acting Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813 as modified is affirmed.

Kenner And Explore Are Liable For Liquidated Damages.

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

> After 60 days following the service of a civil wage and penalty assessment under 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, subdivision (b) [Cal.Code Regs. tit. 8, § 17251, subd. (b)] states as follows:

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

Absent waiver by the Acting Director, Kenner and Explore are liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages is closely tied to their positions on the merits and specifically whether they had an "objective basis in law and fact" for believing the Assessment to be in error.

As discussed above, Kenner's justification for his failure to pay prevailing wages to his workers on the Project is ignorance that the Project was a public work and subject to the obligation to pay prevailing wages. This does not establish an objective basis for his failure to pay prevailing wages to his workers for their work on the Project. Explore insists that Kenner was aware that the Project was a public work subject to payment of prevailing wages, but Explore failed in its own statutory duty to monitor Kenner's compliance. As discussed above, Explore failed to take any concrete action to force Kenner to submit CPRs when he failed to do so but nonetheless paid Kenner for all of his work without any review of Kenner's payroll for the Project. Even after Kenner prepared belated CPRs that showed he failed to pay prevailing wages on the Project, Explore failed to take any action within 60 days after service of the Assessment to ensure that the affected workers received the prevailing wages to which they were entitled for the undisputed portion of their work on the Project. While Kenner and Explore have achieved a significant reduction in the unpaid prevailing wages that were originally assessed, neither has established that they had any objective legal basis for believing the Assessment to be in error with regard to the remainder of the assessed unpaid wages. There is thus no basis for the Acting Director to exercise her discretion to waive liquidated damages.

Because the unpaid wages remained due more than sixty days after service of the Assessment, and neither Kenner nor Explore has demonstrated grounds for waiver, they are jointly and severally liable for liquidated damages in an amount equal to the assessed unpaid wages as modified.

FINDINGS

1. Affected contractor Explore General, Inc. and affected subcontractor Danny Kenner, individually and doing business as Kenner Construction, filed timely Requests for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project. The Assessment was timely served.

2. Kenner underpaid 14 workers for four ten hour days of work on the Project payable at the Cement Mason prevailing wage rate, comprising 56 violations. Kenner is also liable for unpaid training fund contributions for that work. Kenner has provided insufficient evidence

to establish that he is entitled to any credit against the unpaid prevailing wages for independent wage claim settlements for unpaid overtime that he negotiated with some of these workers. The issues of unpaid prevailing wages and training funds for these 14 workers are remanded to DLSE for recalculation in accordance with these Findings.

3. Kenner underpaid the prevailing wages owed R. Flores, J. Flores, Pineda, R. Gabriola and Diaz for their work on the Project, as discussed above, comprising 211 violations. The reclassification of R. Flores, J. Flores, Pineda and R. Gabriola from cement mason to iron worker is modified and affirmed for eight days of work on the Project and the reclassification of Diaz from cement mason to iron worker is modified and affirmed for five days of work on the Project. Because the Project site is located over 100 miles from Fresno's city hall, these workers are also entitled to receive travel and subsistence payments for the days that they performed iron work on the Project. The remaining hours of work on the Project assessed for these five workers are payable at the applicable Cement Mason prevailing wage rate. Kenner is also liable for unpaid training fund contributions for that work. Kenner has provided insufficient evidence to establish that he is entitled to any credit against the unpaid prevailing wages for independent wage claim settlements for unpaid overtime that he negotiated with some of these workers. The issues of unpaid prevailing wages, training funds and travel and subsistence for these five workers are remanded to DLSE for recalculation in accordance with these Findings.

4. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of $25.00 per violation, and the resulting total penalty of $6,675.00, as modified, for 267 violations is affirmed. Explore has not demonstrated that it is entitled to relief from penalties under section 1775, subdivision (b) and remains jointly and severally liable for the penalties assessed upon Kenner under section 1775.

5. Penalties under section 1813 at the rate of $25.00 per violation are due for 260 violations on the Project, for a total of $6,500.00 in penalties.

6. The unpaid prevailing wages found owing in Findings 2 and 3 remained due and owing more than sixty days following issuance of the Assessment. Kenner and Explore are therefore liable for an additional award of liquidated damages under section 1742.1 and there are

insufficient grounds to waive payment of these damages.

7. This decision is final as to all issues not specifically subject to the Remand Order. (§ 1742, subd. (c).)

ORDER

The Civil Wage and Penalty Assessment is affirmed in part, modified in part and remanded in part as set forth in the above Findings.

Remand Order: The matter is remanded to DLSE to recalculate the unpaid prevailing wages due as follows:

a. All recalculations shall be based on the operable PWDs, enumerated above.

b. The classifications and hours used in the revised shall be used in the new audit, except as dismissed or modified by the above Findings.

c. DLSE shall present its new audit to Kenner and Explore within 30 days of the date of service of the Notice of Findings. Kenner or Explore shall have 30 days from service in which to request a hearing before the Hearing Officer, who shall retain jurisdiction for that purpose, providing with specificity why DLSE's calculations are erroneous. If such a hearing is requested, the scope shall be limited solely to the numerical accuracy of DLSE's revised audit; that is, the only issue shall be whether DLSE did its math correctly. All other issues are final. The burden to show error shall remain on Kenner and Explore. If no hearing is requested within 30 days, the revised audit shall become final and liquidated damages in the amount of the unpaid prevailing wages shall issue.

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

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

Dated: 6/09/11

Christine Baker

Christine Baker
Acting Director of Industrial Relations