

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

FEI Enterprises, Inc.

Case No. 09-0249-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

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

INTRODUCTION

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

The issues for decision are:

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

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

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

FACTS

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

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

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

8:00 a.m.

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

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

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

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

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

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

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

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

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

DISCUSSION

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

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

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

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1,

subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

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

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

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

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

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

Caminos Performed Physical Labor And Was Not A Supervisor

The single prevailing rate of pay for a given “craft, classification, or type of work” is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. (*Sheet Metal Workers Intern. Ass’n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1082.) The Director determines these rates and publishes general wage determinations to inform all interested parties and the public of

the applicable wage rates for each type of worker that might be employed in public works. (Section 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.)

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

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

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

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

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

² Neither party submitted CPR's as an exhibit.

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

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

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

DLSE's Penalty Assessment Under Section 1775 Is Modified.

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

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars (\$50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

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

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

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

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

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

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

Abuse of discretion is established if the Labor Commissioner "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc. § 1094.5, subd. (b).) In reviewing for abuse of discretion, however, the Acting Director is not free to substitute [her] own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

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

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

or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty.” (Rule 50(c) [Cal. Code Regs., tit. 8, §17250, subd. (c)].)

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

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

Overtime Penalties Are Due For Caminos’s Overtime Hours.

Section 1813 states, in pertinent part, as follows:

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

Section 1815 states in full as follows:

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

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

FEI Is Liable For Liquidated Damages.

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

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

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

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

FINDINGS

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

affirmed by this Decision are as follows:

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

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

ORDER

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

Dated: 11/21/2011 Christine Baker

Christine Baker
Acting Director of Industrial Relations