STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

RMR Construction Case No. **10-0233-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF ACTING DIRECTOR OF INDUSTRIAL RELATIONS AFTER RECONSIDERATION

The Decision of Director ("Decision") affirming the Civil Wage and Penalty Assessment ("Assessment") was issued on December 31, 2010. In summary, the Decision found that RMR's employees were paid at the Laborer prevailing wage rate while doing work properly paid for at the Plumber's wage rate. RMR filed a Motion for Reconsideration on January 13, 2011, on the following grounds:

1. Failure to consider Scope of Work for Laborer -- Building Construction in prevailing wage determination ("PWD") SD-23-102-4-2006-1.
2. Rejection of Daily Reports as evidence.
3. Lack of discussion regarding RMR's attempt to clarify classification with DLSE.
4. Timeliness of the Assessment.

The Director granted RMR's motion and reopened the matter for the limited issues of determining whether RMR had good cause to belatedly produce the scope of work for Laborer -- Building Construction (SD-23-102-4-2006-1) and, if so, whether consideration of this scope of work affects the outcome of the case. The Director rejected all other bases for reconsideration as not supported by the record.

This Decision After Reconsideration affirms the Decision because there was no good cause not to have presented the scope of work in a timely fashion at or before the hearing and

because the scope of work would not change the result. For these reasons, the Acting Director affirms the Decision and upholds the Assessment.[1]

A. No Good Cause Exists To Belatedly Admit The Scope Of Work - Laborer - Building Construction (SD-23-102-4-2006-1).

On October 1, 2010, the parties were ordered to submit exhibit lists to the Hearing Officer at least three weeks prior to the first day of the Hearing, October 29, 2010. The Order also stated that actual exhibits were to be submitted at the time of trial. RMR did not submit an exhibit list. Despite lack of an exhibit list, Craig Rogers, the owner of RMR, brought several documents to the Hearing. RMR sought to introduce two documents as exhibits, which were admitted as Exhibit A (scope of work provision for Laborer -- Engineering Construction for San Diego County (SD-23-102-3-2006-1) and Exhibit B (Fax from RMR to DLSE dated September 20, 2010, and its attachments). On November 15, 2010, RMR submitted a post trial brief. This brief was accompanied by several attachments, including Exhibit A, as well as Important Notice Regarding the San Diego Laborers' (Engineering Construction) General Prevailing Wage Determination, Notice Regarding Advisory Scope of Work for the Southern California Laborers' General Prevailing Wage Determination, Important Notice Regarding the San Diego Laborers' (Engineering Construction) General Prevailing Wage Determination 2004 through 2009, and Definition of Work Jurisdiction between U.A. Pipe tradesman and U.A. Plumber/Pipefitter, that had not been introduced at the hearing. At no time did RMR seek to introduce the scope of work for Laborer – Building Construction (SD-23-102-4-2006-1) ("Subject Scope of Work").

It was only in RMR's Motion for Reconsideration that it sought to have the Director consider the Subject Scope of Work to meet RMR's burden to show the Assessment was incorrect. RMR now argues that it did not know that it was required to present all relevant documents at the time of trial and that it did not know that it could not submit any additional documents after the trial.

The proper scope of work was the central question at the hearing. RMR was clearly informed that the exhibits were to be submitted at the time of trial. RMR in fact brought some

[1] For the sake of brevity, the underlying facts of the case set forth in the Decision will not be repeated here.

documents to the hearing that were relevant to the scope of work it claimed was the appropriate one on which to base a prevailing wage rate. None of RMR's proffered documents was excluded. RMR additionally attached documents to its post trial brief relevant to the appropriate scope of work, which were considered by the Director.

RMR admits that it was ignorant of the applicable procedural law and therefore it did not comply with them; RMR makes no showing of any attempt to ascertain what it needed to do to present its case. RMR seeks latitude because it was not represented by counsel but by a layperson. The record shows that it was afforded substantial latitude precisely because it was not represented by counsel. RMR does not claim that it did not know that the Subject Scope of Work was central to its defense or that it was ignorant of the existence or applicability of the one on which it now relies. It is well established ignorance of the law is not an excuse for not complying with it. (*See e.g. In re Karpf* (1970) 10 Cal.App.3d 355.)

RMR's showing for reopening the record is deficient as it is entirely based on inexcusable neglect; it is simply seeking a third "bite of the apple." There is no good cause to admit belatedly produced Subject Scope of Work.

B. Even If The Subject Scope Of Work Were Considered, The Outcome Does Not Change.

The issue at the hearing was whether the work performed was subject to the prevailing wage rate for Plumbers or Laborers. The Assessment determined the proper rate was that for Plumbers, and RMR had the burden to prove this was incorrect. (Lab. Code, § 1742, subd. (b), 2d par.) The Subject Scope of Work does not change this outcome.

The Subject Scope of Work under Section B states that it "shall cover all works ..., including all work involved in laying and installation of pipe." Section B then continues to list a number of different specific work covered such as;

> (1) ... work on building, heavy highway, and engineering construction ...
>
> * * *
>
> (4) All work involved in laying and installation of pipe outside of a building, structure or other work ...

> (5) All work involving in laying and installation of pipe both outside and within sewage filtration and water treatment ...

(Section 4B of the Subject Scope of Work.) RMR argues that this scope of work applies because Section B uses the phrase "all work ... including all work involved in laying and installation of pipe." It is undisputed that the Project did not call for laying or installation of pipes outside a building or for sewage filtration or water treatment pipes.

> As a rule, the language of an instrument must govern its interpretation if the language is clear and explicit. [Citations.] A court must view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach' [citation]. If possible, the court should give effect to every provision. [Citations.] An interpretation [that] renders part of the instrument to be surplusage should be avoided. [Citations.]

(*Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730.) If the Subject Scope of Work is read to cover any and all laying and installation of pipe under Section 4B or in connection with "work on building, heavy highway, and engineering construction" under Section B(1), the language of subsections (4) and (5) would be surplusage. Giving effect to all of the words in Section B leads to the conclusion that "all work" is modified by "**on**" buildings (not necessarily **in** buildings), outside of buildings, and inside and outside of water filtration plants. Thus, the Subject Scope of Work covers pipe fitting work only when the pipes are on, outside of, or for sewage filtration or water treatment pipe.

RMR attempts to find further support in Section H which provides "[w]ork involved in *laying and installation of pipe which is covered by this Agreement* shall include, but shall not be limited to: (1) All work *incidental to the laying of pipe* ... (2) Industrial pipe fitting *in connection with Laborer's work.* ... (4) Welding, certified or otherwise *in connection with Laborer's work.*" (emphasis added.) This argument fails because Section H only provides that specific tasks are covered if the underlying work is covered by the Subject Scope of Work. It does not provide independent basis to find that the Subject Scope of Work applies. Thus, pipe fitting work done by RMR employees do not fall within the Subject Scope of Work.

C. Issues Improperly Raised Outside The Scope Of The Limited Reopening Are Rejected.

In spite of the limited scope of reconsideration, RMR submitted additional arguments and documents not permitted by the Director's Order. These arguments and documents were not considered as either waived because they were not raised timely or were already decided.

- Whether the Assessment was timely. [waived]
- Whether the Enforcing Agency properly investigated the complaint. [waived]
- Whether the Enforcing Agency met the burden of proving prima facie case. [waived]
- Whether RMR was entitled to use Laborer classification because such classification was permitted in the work RMR performed previously. [decided]
- The nature of work performed by RMR employees. [decided]
- Credibility of the inspector, Mr. Johnson's statements (electronic mails). [waived]
- Whether RMR's employees were apprentices as recognized under the prevailing wage law. [decided]
- Whether the Scope of Work Engineering Construction (SD-23-102-3-2006-1) is applicable. [decided]
- Whether RMR's error in classifying its employee had objective basis in law or facts. [decided]
- Objections to testimony taken and exhibits admitted at the hearing. [waived]

Furthermore, RMR improperly submitted additional documents and evidence contrary to the Director's Order regarding limited reopening of the case. The following exhibits were improperly submitted and are excluded:

- Exhibit A (Declaration of Craig Rogers) to the extent it discusses the issues outside of the limited reopening.
- Exhibit B (actual exhibit not supplied).
- Exhibit C (Advertisement for Bids)
- Exhibit E (Statement from Jim Gillie of University of California, San Diego).

DECISION AND ORDER

The Decision issued on December 31, 2010 is reinstated in its entirety. The Hearing Officer shall issue a Notice of Findings which shall be served together with this Decision after Reconsideration and the original Decision. No further reconsideration will be allowed. RMR shall have its statutory period in which to seek further relief from the date of service of the Notice of Findings, Decision After Reconsideration, and Decision.

Dated: May 10, 2011

Christine Baker

Christine L. Baker, Acting Director of Industrial Relations

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

RMR Construction Case No. **10-0233-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF DIRECTOR

INTRODUCTION

Affected contractor, RMR Construction ("RMR") requested review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("DLSE") on June 3, 2010, regarding the Central Utility Plan – Chiller Addition at the University of California San Diego ("Project"). The Assessment assessed RMR for unpaid prevailing wages in the amount of $48,395.95, training fund contribution of $2,372.68, and penalties under Labor Code sections 1775 and 1813 in the amount of $6,305.00.[1] A Hearing on the Merits was held on October 29, 2010, in Los Angeles before Hearing Officer Makiko I. Meyers. RMR was represented by its owner, Craig Rogers, and DLSE was represented by David Cross. Closing briefs were submitted by both parties on November 15, 2010, at which time the matter was submitted.

The issues for decision are:

- Whether the Assessment was served timely under Section 1741.
- Whether the Assessment correctly re-classified Morgan Holbrook, Frank Lujano, David Osorio, and Devon Cohen as Plumber.[2]

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

[2] The Assessment also lists some hours worked by these workers under the classification of Roofer. This classification is not disputed.

- Whether DLSE abused its discretion by assessing penalties under section 1775 at the rate of $30.00 per violation.
- Whether RMR is liable for penalties under section 1813.
- Whether RMR has demonstrated substantial grounds for believing the Assessment to be in error, entitling it to a waiver of liquidated damages.

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

FACTS

RMR was the general contractor for the Project, which was located in San Diego County and advertised for bid on July 15, 2007. The Assessment covers the period of November 18, 2007 through July 13, 2008, during which time RMR's Certified Payroll Records ("CPR's") listed five (5) workers: Rogers, Holbrook, Lujano, Osorio, and Cohen. No wages are listed for Rogers who was reported as "salaried owner operator paid by draw." The other four workers were reported and paid under the following classifications on RMR's CPRs: Holbrook as Pipe Tradesman or Laborer Group 1, Lujano as Laborer Group 3, Osorio as Landscape/Irrigation Laborer or Laborer Group 1, and Cohen as Roofer or Pipe Tradesman.

The following Prevailing Wage Determinations ("PWDs") and scopes of work were in effect on the bid advertisement date:

General Prevailing Wage Determination for San Diego County (SDI-2007-1) ("Plumber PWD"): This PWD includes the classification of Plumber and is the rate used in the Assessment to reclassify Holbrook, Lujano, Cohen, and Osorio. The scope of work for the Plumber classification covers "all piping for plumbing, water, waste drains, floor drains, drain grates, supply downspout piping, soil pipe, grease traps, sewage and vent line," and "setting, electing and piping of all cooling units, pumps, reclaiming systems, and appurte-

nances, in connection with transformers and piping to switches of every description." The Scope of Work also provides: "Sewer and Storm Drain work shall include all Sewer and Storm Drain work inside property lines, outside of buildings. No other type of piping installation (i.e. water, gas, sanitary plumbing, etc.) shall be performed under this section outside, inside or under buildings."

Laborer (Construction-Fence Erector-Gunite-Housemover-Tunnel) (SD-23-102-3-2006-1) ("Engineering Construction PWD"): This is the PWD relied on by RMR. The projects covered by this PWD are limited to: "work on heavy highway and engineering construction ... or improvement or modification thereof, including any structure or operations which are incidental thereto, the assembly, operation, maintenance and repair of all equipment, vehicles, and other facilities ..." For such projects, the Laborer classification could be the basis of a prevailing wage for "[w]ork involved in laying and installation of pipe which is covered by this Agreement ...." (Engineering Construction PWD Scope of Work.)

RMR also relied on the "Definition of Work Jurisdiction between U.A. Pipe Tradesman and U.A. Plumber/Pipefitter," to justify its payment of workers at the Pipe Tradesman rate. This agreement provides that the work of Pipe Tradesman includes "the unloading, handling, and distribution to point of installation of [water mains including the rigging, lowering into a ditch, aligning, leveling and making of joints]." There is no evidence that this agreement has been published by the Director as a prevailing wage or classification.

There is no dispute as to the nature of the work required and performed by the workers. The workers fabricated and installed pipes. They cut pipes with a cutting torch, assembled them, and positioned them for installation. This work was done under the direction of Rogers. None of the pipes installed were drain or sewer pipes. The pipes were not installed outside. The workers also performed some excavation, insulation, demolition and roofing work.

RMR argued that the classifications of Pipe Tradesman and Laborer were the appropriate pay classifications because the workers were unskilled and assisted "the only journey-

man pipe fitter" Rogers. Rogers testified that he used these classifications in connection with another, unspecified, public work 10 years earlier. There was no evidence whether the Director approved the use of these classifications for pay rate at the time.

DLSE calculated all the wages at the Plumber rate because RMR did not maintain any contemporaneous breakdown of the hours spent on tasks that might have been paid at lower rates. It is not disputed that on some days work payable at rates lower than Plumber was performed by the workers. However, RMR failed to keep contemporaneous records of the hours worked and did not submit any time sheets, documentation, or testimony at the hearing showing hours spent on each different task.

RMR completed the work as it contracted with the University of San Diego ("University") on October 8, 2008, at which time the Inspector indicated on his daily report "entire project and all change order work is now 100% complete." The Notice of Completion was recorded on December 10, 2009; there is no evidence when the Project was accepted by University officials. The Assessment was served on June 3, 2010.

DISCUSSION

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

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

(Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 9877 [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 standard." (Section 90.5, subdivision (a); and see *Lusardi, supra.*)

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

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

The Assessment Was Served Timely.

Section 1741, subdivision (a) provides:

> The assessment shall be served no 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 no later than 180 days after acceptance of the public work, whichever occurs last.

Acceptance occurs when "someone with authority to accept does accept unconditionally and completely." (*Madonna v. State* (1957) 151 Cal.App.2d 836, 840, also see *In re El Dorado Imp. Corp.* (9th Cir. 2003) 335 F.3d 835.)

RMR argues that the 180 day deadline ran from October 8, 2008, when the inspector stated "entire project and all change order work [was] 100% complete." RMR's argument is without merit. The October 8, 2008, notation on the inspector's daily report that the project was complete is not acceptance of the work absent evidence that the University empowered the inspector to formally accept the Project. There is also no evidence to indicate that the

December 10, 2009, Notice of Completion was invalid for any reason. Accordingly, the Assessment, which was served on the 176th day after recording of the Notice of Completion, was timely.

The Affected Workers Were Properly Reclassified To Plumber.

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 such as SDI-2007-1 and SD-23-102-3-2006-1 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.)

The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (*See* section 1773.2 and *Ericsson, supra.*) Section 1773.2 requires the body that awards the contract to specify the prevailing wage rates in the call for bids or alternatively to inform prospective bidders that the rates are on file in the body's principal office and to post the determinations at each job site.

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (*See Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by section 1773.4].) No such petition was submitted for this Project. In the absence of a timely petition under section 1773.4, the contractor and subcontractors are bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers, supra,* at pp. 1084-1085.)

The nature of the work performed by the workers on this Project is undisputed; the only dispute is whether the work clearly fell within the scope of work relied on by RMR. The Engineering Construction PWD's scope of work only covers certain types of projects: "heavy highway and engineering construction, . . . street and highway work, . . . [and] construction ... of any incidental building structures." Use of the job classifications contained within the Engineering Construction PWD is limited to projects of the enumerated types and there is no independent basis for using those classifications on other types of projects. The record shows that the Project did not fall within any of the enumerated categories of work, thus the Engineering Construction PWD is inapplicable to the Project on its face. Moreover, the Pipe Tradesman agreement submitted by RMR is not part of any published PWD and thus cannot be the basis for justifying payment of the Pipe Tradesman wage rate in this case. Therefore, RMR has not demonstrated that it had a valid basis for relying on the classifications contained in the Engineering Construction PWD as the applicable pay rates for the disputed work. (See *Pipe Trades Council, District 51 v. Aubry* (1996) 41 Cal.App.4th 1457; *Independent Roofing Contractors Association v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345.)

RMR's second basis for arguing that the Assessment is incorrect is that the workers were not trained plumbers. This argument is equally unavailing. The only times that a worker may be paid less than a published journeyperson rate are if there is a lower published prevailing rate for trainee or if the worker is a registered apprentice. (§ 1775.5, subd. (b).) Whether the workers lacked experience or whether they worked under direction of an experienced pipe fitter is irrelevant to the proper pay rate. As there is no evidence that any of these workers were properly registered as apprentices, and no trainee classification exists in the Plumber PWD, RMR's argument is rejected. RMR relied on the incorrect scope of work when it paid the affected workers at the Laborer and Pipe Tradesman rates. DLSE, therefore, correctly recalculated the pay rate for the workers as Plumbers.

Finally, as to division of hours between plumbing and other activities, such as excavation, RMR failed to show with specificity how many of the hours that DLSE reclassified as Plumber should have been classified under another work category. "Each contractor and

subcontractor shall keep accurate payroll records, showing the name ... work classification, straight time and over time hours worked each day and week ..." (§ 1776, subd. (a).) Here, RMR did not present any evidence to show which worker performed non-plumbing work on which day and for how many hours. RMR has therefore failed to disprove the basis of the Assessment's reclassification of the affected workers from Laborer and Pipe Tradesman to Plumber and is required to pay the applicable Plumber rate for the disputed work.

Accordingly, I affirm the Assessment in full.

DLSE Did Not Abuse Its Discretion By Assessing Penalties Under Section 1775 At The Rate Of $30.00 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.[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 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.)

RMR has not presented any evidence to challenge the penalties assessed under Section 1775 or to show DLSE abused its discretion. The record does not establish that DLSE abused its discretion by assessing penalties under section 1775 at the rate of $30.00 per violation, which is a reduction from the statutory maximum of $50.00 per violation. Thus, RMR has not met its burden. (Rule 50(c) [Cal. Code Regs., tit. 8, §17250, subd. (c)].) Accordingly, the assessment of penalties under section 1775 is affirmed in the amount of $5,580.00 for 186 violations.

RMR Is Liable For Penalties Under Section 1813.

Section 1813 provides:

> The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contact is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required to permitted to work more than 8 hours in any one calendar

[3] Section 777.1, subdivision (c) defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

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

Section 1815 states in full as follows:

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

The hours worked are not disputed, including the overtime the workers worked. DLSE found 29 violations, and there is no evidence that this was erroneous. Unlike penalties under section 1775, there is no discretion as to the amount due for each violation. Accordingly, the assessment of penalties under section 1813 is affirmed in the amount of $725.00 for 29 violations.

RMR Is Liable For Liquidated Damages.

Section 1742.1 provides:

> "(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.
>
> Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment or notice with respect to a portion of the unpaid wages covered by the assessment or notice, the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages. Any liquidated damages shall be distributed to the employee along with

the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) Notwithstanding subdivision (a), there shall be no liability for liquidated damages if the full amount of the assessment or notice, including penalties, has been deposited with the Department of Industrial Relations, within 60 days following service of the assessment or notice, for the department to hold in escrow pending administrative and judicial review. The department shall release such funds, plus any interest earned, at the conclusion of all administrative and judicial review to the persons and entities who are found to be entitled to such funds."

Rule 51(b) (Cal. Code Regs., tit. 8, §17251, subd. (b)) states:

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

Absent waiver by the Director, RMR is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is closely tied to RMR'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 shown above, RMR has presented no evidence on which it could objectively rely that the classifications on which it based its payments were correct. Either the PWD did not apply on its face or the agreement was not published. Because the assessed unpaid wages remained due more than sixty days after service of the Assessment, and RMR has not demonstrated grounds for waiver, it is also liable for liquidated damages in an amount equal to the unpaid wages and training fund contributions.

FINDINGS

1. The affected contractor RMR Construction filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standard Enforcement.

2. The Civil Wage and Penalty Assessment was served timely.

3. RMR Construction misclassified Morgan Holbrook, Frank Lujano, Devon Cohen and David Osorio on its Certified Payroll Records, which resulted in underpayment of prevailing wages and training funds.

4. In light of Finding No. 3 above, RMR Construction underpaid its workers on the Project in the aggregate amount of $48,395.95 in unpaid prevailing wages and $2,372.68 in unpaid training fund contributions.

5. DLSE did not abuse its discretion setting section 1775, subdivision (a) penalties at the rate of $30.00 per violation, and the resulting total penalty of $5,580.00 is affirmed.

6. Penalties under section 1813 at the rate of $25.00 per violation, for a total of $725.00, are affirmed.

7. The unpaid wages found due in Finding No. 4 remained due and owing more than sixty days following issuance of the Assessment. RMR Construction is therefore liable for liquidated damages under section 1742.1 in the amount of $50,768.63 as there are insufficient grounds to waive payment of these damages.

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

Wages Due:	$48,395.95
Unpaid Training Fund Contributions:	$2,372.68
Penalties under section 1775, subdivision (a):	$5,580.00

Penalties under section 1813:	$725.00
Liquidated Damages:	$50,768.63
TOTAL:	**$107,842.26**

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

SO ORDERED

Dated: December 29 2010

John C. Duncan, Director of Industrial Relations