STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Division 8, Inc.

Case No. 13-0478-PWH
[DLSE Case No. 40-31965-578]

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor, Division 8, Inc. (Division 8), submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment). The Division of Labor Standards Enforcement (DLSE) issued the Assessment on August 15, 2013, with respect to glass work performed for awarding body San Diego Community College District on the Mesa College Student Services Center (Project) located in San Diego County. The Assessment determined that Division 8 owed $16,930.85 in unpaid prevailing wages and $6,980.00 in penalties under Labor Code sections 1775 and 1813.[1] Division 8 made a deposit on the Assessment with the Department of Industrial Relations, but since the deposit was not in the full amount of the Assessment, liquidated damages under section 1742.1 remain an issue.

The hearing on the merits took place in Oakland, California before Hearing Officer Nathan Schmidt on September 19, 2014, November 23, 2015, and December 14, 2015. The parties submitted hearing briefs on October 20 and 31, 2014. Ken Hoyt, counsel, appeared for Division 8 and Max D. Norris, counsel, appeared for DLSE.

The issues for decision are:

- Whether the Assessment correctly reclassified five of the affected workers from the Laborer Group 1 prevailing wage rate to the Glazier prevailing wage rate for their work on the Project.

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

- Whether DLSE abused its discretion in assessing penalties under section 1775 at the rate of $40.00 per violation for 172 violations.
- Whether Division 8 failed to pay the required prevailing wage rate for overtime work and is therefore liable for penalties under section 1813.
- Whether Division 8 demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver from liquidated damages under section 1742.1.

The Director finds that Division 8 has failed to carry its burden to prove the basis of the Assessment was incorrect. The workers employed by Division 8 were entitled to Glazier prevailing wage rates and Division 8 did not correctly compensate five of its workers for work on the Project. The Director also finds that DLSE did not abuse its discretion in assessing penalties under section 1775 at the rate of $40.00 per violation and that Division 8 failed to pay the required rate for overtime work and is liable for penalties under section 1813. Finally, the Director finds that Division 8 has not proven the existence of grounds for a waiver of liquidated damages for the unpaid wages due to workers. Pursuant to section 1742.1, subdivision (a), Division 8 is liable for liquidated damages in the amount of the unpaid wages. Therefore, the Director issues this Decision affirming the Assessment.

SUMMARY OF FACTS

On October 27, 2009, awarding body San Diego Community College District advertised for bids for the Project. The awarding body used an entity named PCL to manage the Project using prime contractors for various aspects. Division 8 was chosen to construct the glass wall and window portion of the Project. Division 8 used workers classified as Glaziers, with the exception of three workers it classified as Laborers. The following prevailing wage determination (PWD) and scope of work for the Glazier classification was in effect on the bid advertisement date:

Glazier PWD for San Diego County (SDI-2009-2) (Glazier PWD): The basic hourly rate for glazier is $34.55, the fringe benefits are $13.47, and the training fund contribution is $0.38, totaling $48.40 for straight-time work. Predetermined increases to the basic hourly rate contained in the Glazier PWD are $2.72 on October 1, 2009; $0.40 on January 1, 2010; and $2.88 on October 1, 2010.

The scope of work of the Glazier PWD states:

1.5. The following work of the Glaziers and Architectural Metal workers, to wit: General glazing shall include the setting, cutting, preparing, handling or removal of the following and incidental and supplemental to such work: art glass, prism glass, beveled glass, leaded glass, automobile glass, protection glass, plate glass, window glass, mirrors of all types, wire glass, ribbed glass, ground glass, colored glass, figured glass, vitrolite glass, carrara glass and all other types of opaque glass, glass chalk boards, structural glass, tempered and laminated glass, thiokol, neoprene and all other types of sealants when used in the glazing operations, all types of glass cements, all types of insulation glass units, solar heat collectors containing glass or glass substitutes, all plastics and all similar materials when used in the place of glass, to be set or glazed in its final resting place with or without putting, molding, rubber, vinyl, lead and all types of mastics in wood, iron, aluminum or sheet metal sash, skylights, doors, windows, frames, stones, wall cases, show cases, book cases, sideboards, partitions, and fixtures. The installation of the materials when in the shop or on the job site, either temporary or permanent, on or for any building in the course of repair, remodel alteration or construction.

The installation of all extruded, rolled or fabricated metals or any materials that replace the same, such as plastics, metal tubes and all types of metal panels, mullions, metal facing materials, muntins, fascia, trim moldings, porcelain panels, architectural porcelain, spandrel glass, plastic panels, skylights, show case doors and relative materials, including those in any or all types of building related to store front, window wall, curtain wall, solarium, slope glazing and window construction.

Glazing and installation of door and window frames such as patio sliding or fixed doors, vented or fixed windows, shower doors, bathtub enclosures, screens, storm sash where the glass becomes an integral part of the finished product, the tinting and coating of glass for reflecting heat.

The selections, cutting, preparing, designing, art painting, fused glass, thick facet glass in concrete and cementing of art glass, assembly and installing or removal of all art glass, engraving, drafting, etching, embossing, designing, sand blasting, chipping, glass bending, glass mosaic workers, cutters of all flat and bent glass, glass shade workers and glaziers in lead of other glass materials.

(DLSE Exhibit 6.)

Division 8 did not submit into evidence the PWD and scope of work for Laborer Group 1, Laborer Building Construction in effect for San Diego County on the bid advertisement date. In its brief, however, DLSE quoted a portion the scope of work for the Laborer classification (SD-23-102-4) where it states:

(12) All work in connection with concrete work, including all concrete tilt-up, including chipping and grinding, patching, sandblasting, water blasting, mixing, handling, shoveling, rough strike-off of concrete, conveying, pouring, handling of the chute from

readymix trucks, walls, slabs, decks, floors, foundations, footings, curbs, gutters and sidewalks, concrete pumps and similar type of machines, grout pumps, nozzlemen, (including gunmen and potmen), vibrating, guniting and otherwise applying concrete whether done by hand or any other process; and wrecking, stripping, dismantling and handling concrete forms and false work, cutting of concrete piles and filling of cracks by any method on any surface.

Lance Grucela, Deputy Labor Commissioner, prepared the audit and Assessment in this matter. Grucela testified at the Hearing on the Merits that he spoke with Garth Altringer and Juan Miranda, two of the workers Division 8 classified as Laborer. Grucela learned that Division 8 had hired Altringer and two other workers from Apex, a subcontractor previously used by Division 8. At hiring, Altringer expected to be paid as a Glazier and when he was not, he thought the balance would be paid him as fringe benefits at the end of the Project. Grucela learned from Altringer the nature of the work that the three hired from Apex performed, consisting of mostly caulking glass, and that other Division 8 workers also performed some of the caulking but were paid the Glazier rate. The caulking duties were associated with a variety of glass and aluminum elements of the building, including work involved with the installation of butt joints, interior horizontals, storefront frames, panels, bays, elevations, perimeters, head and sills, column wrap and punch openings, flashing, curtain walls, and other elements. Other duties associated with Glazier work was installing zone plugs, fillers, water bridges, and 1, 2, 3 tape; and preparing steel panels to be caulked.

Grucela reviewed Division 8's certified payroll records (CPRs) and daily production records (DPRs) and confirmed that workers classified by Division 8 as Glazier at times performed the same work tasks as five workers classified by Division 8 as Laborer. While most of the overlapping work tasks involved "caulking," other tasks for which Division 8 paid both Glazier rates and Laborer rates, depending on the worker, included installing zone plugs, water bridges, and filler caps and cleanup work. Grucela concluded that the caulking, cleanup work, and installation work clearly fell within the Glazier classification either directly or as work "incidental and supplemental" to the setting of glass, as described in the Glazier PWD's scope of work. Grucela reclassified the workers who were paid at the Laborer rate to the Glazier classification. To calculate the amount of underpayment, Grucela took the hours as reported on Division 8's CPRs, evaluated which hours were spent on caulking, cleanup, and other duties

associated with Glazier work but paid by Division 8 at Laborer rates, and calculated the difference in pay that would be owing them if paid at Glazier rates.

Most of the violations that DLSE found involved three workers hired from Apex and classified and paid by Division 8 at the Laborer Group 1 rate: Altringer, Gabriel Gomez-Casteneda, and Miranda. DLSE's audit worksheet reflects that Altringer worked 1,014 hours, Gomez-Casteneda 104 hours, and Miranda 183 hours.[2] DLSE also identified Troy Dailey and Ryan Rodrigues as two other workers on Division 8's payroll who were underpaid at the Laborer rate for four hours apiece during the term of the Project.

Grucela also discovered in Division 8's CPRs four instances of overtime pay violations, whereby worker Altringer and Miranda, classified as Laborer Group 1, worked 25 overtime hours on four occasions without being paid the time and one-half rate under either the Glazier PWD or the Laborer PWD. Based on the audit, the Assessment found $16,930.85 in underpaid straight time and overtime wages.

For the statutory penalties, DLSE assessed penalties under section 1813 for failure to pay the required prevailing overtime rate in the amount of $100.00 for four instances at the statutory rate of $25.00 per violation. DLSE assessed penalties under section 1775 for failure to pay the required straight time wage rates based on a count of 172 days for the five workers.[3]

Altringer testified that he has worked in the field 15 years. He worked on and off with Apex for at least five years, during which Apex classified him as a caulker and paid him as a Glazier. Altringer worked on the Project for nine months, having been hired by Division 8 from Apex, along with Apex co-workers, Miranda and Gomez-Casteneda. The three comprised a

[2] According to Division 8's records (Exhibit A), Altringer worked approximately 1,059 hours over the course of the Project in mostly caulking duties, paid at the Laborer hourly rate of $25.88; Gomez-Casteneda worked 120 hours in mostly caulking duties, and Miranda worked 188 hours also performing mostly caulking duties. Division 8 made no fringe benefits contributions for any of these three workers. Exhibit A also discloses that during the first week when Altringer, Gomez-Casteneda and Miranda began on the Project, they were listed as Laborer Group 1 and were each paid for 32 hours the rate of $41.63, with no fringe benefits. Their hourly wage, however, thereafter dropped down to $25.88 for the rest of their work on the Project. The CPRs show the hourly rate Division 8 paid its Glazier journeymen on the Project was $38.85, with fringe benefits being paid, including contributions for health and welfare, pension, vacation and training fund, as required by the Glazier PWD.

[3] Division 8's Exhibit A discloses 178 days of such violations.

crew performing the same work. Altringer helped install a couple of glass pieces but the majority of his work was caulking. The glazier work on the Project was on a new structure, with glass curtain walls that functioned as structural walls. The caulking work allowed movement in the glass as needed and held it together. Altringer also spent some time installing zone plugs and vinyl around frames, though other Division 8 workers normally installed the vinyl.

Division 8 conceded that Altringer, Gomez-Casteneda and Miranda spent 23 hours during the Project performing Glazier duties beyond caulking and that those hours were payable at the Glazier rate. Division 8 also conceded that caulking is one of the tasks the other Glaziers performed. It maintained, however, that other than the 23 hours mentioned, the caulking work done by the named three workers and the small amount of cleanup work were payable at the Laborer rate, not the Glazier rate.

Testifying for Division 8, Robert Hoyt said Division 8 is a glazing contractor and its work on the Project took place under a glazing contract. The contract required sealant to be applied on the inside of the building in order to mechanically retain the glass and on the outside to act as a weather sealant. Of the five workers mentioned in the Assessment, two were existing employees of Division 8, working as Glaziers at the Glazier rate. Three were hired from Apex as "caulkers" or "sealant installers," paid at the Laborer Group 1 rate. Hoyt testified Division 9 uses "waterproofing companies" because it can get better prices than if Glaziers were used. He admitted that the three caulkers from Apex, however, were used for Glazier work for 23 hours, during a period of time when caulking work was slow.

Describing the process of installing glass for the Project, Hoyt testified that the Glaziers classification installed aluminum framing, glass panels, and joint plugs which allow water to shed. Glaziers secured the glass panels in place then Laborers installed caulking with a pneumatic caulking gun. Caulkers also installed foam cylindrical backing rod, which provides space for the sealant, which structurally is a necessary element. The caulking material consists of a silicone substance that were placed in a vertical joint between glass panels. Mechanical retainers were placed and then removed after the caulking cured. At that point, the caulkers returned to apply more caulking. The caulkers used different sealants for exterior water proofing.

William Hunyadi, owner of Apex, also testified for Division 8. He did not consider Apex a glazing company. It does caulking and waterproofing on buildings. On prevailing wage jobs,

Apex was guided by an unidentified "labor board" to pay Laborer Group 1 rates for waterproofing work. Hunyadi has worked twice with Division 8, once through a subcontract and once on the Project when its employees Altringer, Gomez-Casteneda and Miranda were hired by Division 8. Hunyadi was unaware that Altringer worked as a Glazier, though he had worked for Apex for a period doing caulking and left, but he never paid Altringer at the Glazier rate. Hunyadi said that some of his workers are members of the Glaziers union.

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,* at p. 985.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received 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 unpaid wages, if those wages are not paid within sixty days following the service of a civil wage and penalty assessment.

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 may appeal that assessment by filing a request for review under section 1742. At the

hearing, the contractor "shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§ 1742, subd. (b).) As to section 1775 penalties, DLSE's determination "as to the amount of the penalty shall be reviewable only for abuse of discretion." (§ 1775, subd. (a)(2)(D).) Further, if the contractor "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." (§ 1742.1, subd. (a).)

1. Division 8 Underpaid Five Workers Not Paid the Glaziers PWD Rate.

The 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. It is the rate paid to the majority of workers; if there is no single rate payable to the majority of workers, it is the single rate paid to most workers (the modal rate). On occasion, the modal rate may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. (§§ 1773, 1773.9, and *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.) The Director determines these rates and publishes general wage determinations, such as the Glazier PWD, to inform all interested parties and the public of the applicable wage rates for the "craft, classification and type of work" that might be employed in public works. (§ 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 (*Ericsson*).)

The applicable prevailing wage rate is the one in effect on the date the public works contract is advertised for bid. (§ 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 § 1773.4].) In the absence of a timely petition under section 1773.4, Division 8 was bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1084-1085.)]

As the parties agreed, the main issue in this case is whether the caulking duties performed on the Project constitute Glazier work or Laborer Group 1 work. The decision is guided in the main by the wording of the scope of work contained in the PWDs for each classification as compared to the actual work duties performed. As part of DLSE's case, the Glazier PWD was admitted into evidence, but Division 8 neither submitted the Laborer PWD for admission into evidence nor requested the Hearing Officer to take official notice of it.

While the Laborer PWD is not in evidence, DLSE's hearing brief quoted what appears to be the material scope of work of the Laborer PWD relied upon by Division 8. The preface, "All work in connection with concrete work," signals that the work functions to be described pertains to work with concrete, not glass. The scope of work does not include the term "glass," "glass work," or work with any material except concrete. The Laborer scope of work continues in a way that shows concrete work is the only subject matter: "All work in connection with concrete work, including all concrete tilt-up, including chipping and grinding, patching .... vibrating, guniting and otherwise applying concrete...." It continues to include "wrecking, stripping, dismantling and handling concrete forms and false work, cutting of concrete piles and filling of cracks by any method on any surface." It is the last phrase of the scope of work that Division 8 relies on, the "filling of cracks by any method on any surface." Yet, to read that phrase as encompassing the filling of glass cracks would disregard the scope of work as a whole and read the phrase in isolation. The immediate context for the "filling of cracks" twice mentions the word "concrete," leaving the inference that the "cracks" to be filled are concrete cracks. A work process or types that is described immediately after a reference to a particular feature to be built gives the inference that the process or type applies only when done on those features, in this case, concrete. The larger context for the "filling of crack" as presents itself in the scope of work lists work functions that apply to concrete, not glass. Further, to extend the function of "filling of cracks" to include the filling of gaps in glass walls would equate the gaps common during

glass wall installation with concrete cracks that appear on concrete surfaces being repaired or maintained. To interpret the Laborer PWD to include application of caulking and sealant on a glazier job stretches the Laborer scope of work too far. Similarly, the Laborer scope of work makes no mention of cleanup work associated with the installation of glass or any other material.

In contrast, the caulking and sealing tasks performed on the Project easily fit into the Glazier PWD. The Glazier scope of work provides that "General glazing shall include the setting, cutting, preparing, handling or removal of the following and incidental and supplemental to such work...." Caulking and sealing are incidental to Glazier work and directly relate to the function and purpose of the glass installed. Cleanup after work associated with Glaziers likewise can be seen as work incidental to glass installation, notably the structural nature of the glass walls. The material that the Glazier scope of work describes to be set, prepared and handled includes the building elements used on the Project: "window glass,... structural glass,..." and the substances used on the Project to secure the glass walls: "neoprene and all other types of sealants when used in the glazing operations, [and] all types of glass cements...." The balance of the Glazier scope of work adds support to application of the Glazier PWD to the caulking work, where it lists the handling of glass "... to be set or glazed in its final resting place with or without putting, molding, rubber, vinyl, lead and all types of mastics in wood, iron, aluminum or sheet metal sash, skylights, doors, windows, frames, stones, wall cases, ...[and] all types of metal panels, mullions, metal facing materials, muntins, fascia.... window wall, curtain wall, solarium, slope glazing and window construction."

The record evidence and the Glazier and Laborer scopes of work admit to no shared work processes between the two. Caulking and sealant work done at the Project clearly falls within the Glazier PWD and does not even indirectly fall within the Laborer scope of work. Consequently, because Division 8 did not pay the prevailing wages specified for the Glazier classification, and the scope of work provisions for that classification encompassed caulking, sealing, and cleanup; installation of fillers, bridges, and 1, 2, 3 tape; and preparing steel panels to be caulked, it violated its statutory obligation to pay prevailing wages.

2. DLSE Did Not Abuse Its Discretion by Assessing Penalties Under Section 1775 at the Minimum Rate.

Section 1775, subdivision (a) as it existed on the date bids were advertised for the Project 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.[4]

Abuse of discretion by DLSE is established if the "agency's nonadjudicatory action ... is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the 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

[4] The correct reference for the definition of "willful" is to section 1777.1, subdivision (e), where a willful violation is defined 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."

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, subd. (c) [Cal. Code Reg., tit. 8 §17250, subd. (c)].)

Hence, the burden is on Division 8 to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of $40.00 per violation. Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it neither mandates mitigation in all cases nor requires mitigation in a specific amount when the Labor Commissioner determines that mitigation is appropriate.

DLSE assessed section 1775 penalties at the rate of $40.00 instead of the maximum $50.00 because Division 8 did not have a significant history of prior violations. Division 8 posed no argument that the Labor Commissioner abused her discretion in setting the penalty rate at $40.00 or in its tally of the number of violations found in the DLSE audit. Indeed, Division 8's own records show more violations in terms of days of payment of the Laborer rates than that counted by the Assessment. Hence, Division 8 has not shown an abuse of discretion and, accordingly, the Assessment's finding of 172 violations at the rate of $40.00 is affirmed as is the assessment of penalties for $6,880.00 under section 1775.

3. Overtime Penalty Is Due for Three Occasions Where Overtime Was Not Paid.

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.

The record establishes that Division 8 violated sections 1813 and 1815 by paying less than the required prevailing overtime wage rate to two workers on four occasions. No testimony refuted DLSE's contention of unpaid overtime. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of the penalty under section 1813 is affirmed for $100.00.

4. There Are No Grounds for a Waiver of 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. 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. . . . .

Absent waiver by the Director, Division 8 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 requires evaluation of Division 8's position on the merits and specifically whether, within the 60-day period after service of the Assessment, it had "substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment."

Division 8 did not demonstrate that it had substantial grounds for appealing the Assessment as to either the misclassification or overtime wage issues. It made virtually no argument about the overtime issue. As to misclassification, Division 8 did not submit the Laborer PWD for admission in evidence and, while it quoted the one phrase DLSE culled from the Laborer PWD's scope of work that mentioned "the filling of cracks ... on any surface," it did

not attempt to explain how that language could conceivably apply to glass work when the context for the phrase strongly suggests "any surface" applied to concrete surfaces. Nor did it attempt to explain how the areas on glass walls being filled by caulking and sealant could arguably constitute the "cracks" mentioned in the PWD. Division 8 as well failed to argue why the few hours spent by workers in cleanup work fell under the Laborer scope of work, which by its own terms makes no mention of cleanup or any analogous activity. This lack of argument unmasks a claim that Division 8 had substantial grounds to appeal.

Division 8 did analogize to the taking of vital signs by both nurses and doctors as a reason that laborers may do caulking. It indicated it used "waterproofing companies," presumably paying Laborer rates, because it can get better prices than if Glaziers were used. It also expressed a concern for excluding laborers from an opportunity to do caulking. All points fall way wide of the mark. That lower rates can be obtained in some fashion does not relate to the issue of what is the proper classification and rate to apply given the competing PWDs and work functions involved. Further, public works projects differ by nature from private works of improvement. Bidders on public works are deemed to have constructive notice of the applicable prevailing wage rates. (*Ericsson, supra,* 221 Cal.App.3d at p. 125.) This regulatory scheme does not apply to the private sector, so that analogies to unregulated fields are inapt. Moreover, the misclassification issue does not turn on equality of opportunity. Had Division 8 believed the Laborer PWD should be the one to apply, within 20 days after the advertisement for bids it should have petitioned the Director under section 1773.4 to review the applicable prevailing wage rates for a project. No evidence shows Division 8 did so. That Division 8 did not pay fringe benefit contributions or overtime rates for the workers it classified as Laborer suggests it had no intent to follow any particular PWD as it employed the workers it hired from Apex. Under the facts, Division 8 has shown no substantial grounds to appeal on the theory that the Laborer PWD instead of Glazier PWD applied.

Representations made during the prehearing stages of this case indicate that Division 8 deposited with the Department of Industrial Relations a portion of the amounts due under the Assessment. As provided in section 1742.1, subdivision (b), in order to be entitled to protection against liquidated damages under section 1742.1, subdivision (a), the full amount of the Assessment, including penalties, must be deposited with the Department within sixty days after service of the Assessment. Since Division 8 did not deposit the full amount of the Assessment, it

remains liable for liquidated damages. Division 8, of course, may be entitled to credit for any amount deposited with the Department, which would release the funds to DLSE for enforcement proceedings in connection with this Decision.

As Division 8 has not demonstrated grounds for waiver, it is liable for liquidated damages in an amount equal to the unpaid wages of $16,930.85.

FINDINGS AND ORDER

1. Affected contractor, Division 8, Inc. timely requested review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Affected contractor Division 8, Inc. failed to pay all its workers the required prevailing wages at the Glazier PWD rate. Division 9 underpaid its workers $16,930.85.

3. DLSE did not abuse its discretion by setting penalties under section 1775, subdivision (a) at the rate of $40.00 per violation for 172 violations, totaling $6,880.00.

4. Penalties under section 1813 at the rate of $25.00 per violation are due for four overtime rate violations, totaling $100.00.

5. Division 8 Inc. is liable for liquidated damages on the Project under Labor Code section 1742.1, subdivision (a) in the amount of $16,930.85.

6. The amounts found due against Division 8, Inc. and as affirmed by this Decision are as follows:

Wages Due:	$16,930.85
Penalties under section 1775, subdivision (a):	$6,880.00
Penalties under section 1813:	$100.00

Liquidated Damages:	$16,930.85
TOTAL:	**$40,841.70**

The Civil Wage and Penalty Assessment is affirmed in whole 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: 5/8/2017

Christine Baker
Director of Industrial Relations