

**STATE OF CALIFORNIA**  
**DEPARTMENT OF INDUSTRIAL RELATIONS**

In the Matter of the Request for Review of:

**Facility Solutions Group, Inc.**

Case No.: 11-0099-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected contractor Facility Solutions Group, Inc. (FSG)<sup>1</sup> submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued on April 13, 2011, by the Division of Labor Standards Enforcement (DLSE) with respect to work to be performed at the John Wayne Airport (Project) in the County of Orange. The awarding body for the contract is the John Wayne Airport, Orange County. The Assessment involved 45 employees of FSG.

A prehearing conference was scheduled for June 3, 2011, before then-assigned Hearing Officer Jessica Pirrone. DLSE was represented by David L. Bell, and FSG was represented by its owner, Jeff Johnson. At the prehearing conference, the parties stipulated that:

- The work subject to the Assessment was performed on a public work and required payment of prevailing wages under the California prevailing wage law, Labor Code sections 1720 through 1861;
- The Request for review was timely filed;
- The enforcement file was requested and produced in a timely fashion;
- No back wages have been paid as a result of the Civil Wage and Penalty Assessment.

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<sup>1</sup> EnerTech Systems, Inc. (EnerTech) is the entity that was awarded the prime contract on the Project in 2006. EnerTech was acquired by FSG during the life of the contract.

A Hearing on the Merits was first set for October 14, 2011.<sup>2</sup> The matter, however, was resolved by settlement on the date of the Hearing and the FSG withdrew its request to review. Hearing Officer Pirrone issued an Order Dismissing Request for Review on October 14, 2011. However, the settlement amount was not paid by the subcontractor, and DLSE obtained a Clerk's Judgment on January 17, 2012, pursuant to Labor Code section 1742, subsection (d).<sup>3</sup>

FSG then sought to set aside the Clerk's Judgment under Code of Civil Procedure section 473, subsection (b). On October 5, 2012, the judgment was set aside by the Orange County Superior Court. The Superior Court's ruling reinstated FSG's Request for Review and ordered that the Department of Industrial Relations (DIR) set a hearing on the merits. The Superior Court Order, however, was never served on the Director of Industrial Relations. The Director was made aware of the order in September 2019. The matter was set for a prehearing conference on November 15, 2019. That prehearing conference was continued to January 24, 2020. The case was then set for Hearing on April 15, 2020.

On February 25, 2020, FSG filed a motion to dismiss the Assessment. The Hearing was continued from April 15, 2020, to June 2, 2020, due to the COVID-19 pandemic.

On April 30, 2020, the then-assigned Hearing Officer, Mirna Solis, denied FSG's motion to dismiss. The Hearing was later continued to September 16, 2020, to be conducted by video conference.

On September 8, 2020, the matter was reassigned to hearing officer Michael Drayton. At the request of the parties, the Hearing was continued to December 3, 2020. Pursuant to written notice, the Hearing was held by video conference on December 3, 2020, before Hearing Officer Drayton. David Cross appeared as counsel for DLSE. Serafin H. Tagarao appeared as counsel for FSG. Deputy Labor Commissioner Monica

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<sup>2</sup> Only the more salient parts of the long procedural history, as necessary to explain the procedural status of the matter as of the date of the Hearing, are summarized here.

<sup>3</sup> All further section references are to the California Labor Code, unless otherwise specified.

Curi and former FSG employee Andy Swart testified in support of the Assessment. FSG employee Roberto Martin Alonzo and Christian Zuniga testified on adverse, called by DLSE. FSG Division Manager Jeff Johnson<sup>4</sup> testified on behalf of Requesting Party FSG.

By the time of the Hearing, all claims regarding prevailing wages had been resolved, other than those with respect to one worker, Swart. Therefore, at the Hearing DLSE filed a written Motion to Amend the Assessment and revise the Assessment downward to find \$56,163.04 in unpaid wages; \$308.00 in unpaid training fund contributions; \$2,640.00 in penalties under section 1775; and \$2,200.00 in penalties under section 1813. The total amount under the motion to amend Assessment is \$61,311.04. With the agreement of FSG and upon finding good cause, the Hearing Officer granted the motion.

Prior to the Hearing, the parties submitted a joint statement of issues to be determined, which were read into the record:

- Were the correct prevailing wage classifications used in the audit?
- Were the hours worked as listed in the audit correct?
- Were the mathematical calculations set forth in the amended Assessment correct?
- Were the wages paid to the worker listed correctly in the certified payroll records (CPRs)?
- Were all hours worked on the Project listed on the CPRs?
- Was all work classified correctly on the CPRs?
- Was the worker on the Project listed on CPRs?
- Were all required training fund contributions paid to an approved plan or fund?
- What is the correct overtime rate paid for all overtime hours worked?
- Is FSG liable for penalties under section 1775?
- Is FSG liable for penalties under section 1813?

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<sup>4</sup> Johnson had served as President of FSG's predecessor entity, EnerTech. His title changed to that of Division Manager after the company was acquired by FSG.

- Is FSG liable for liquidated damages?

The parties stipulated to admission into evidence of DLSE Exhibit Numbers 1 through 22, sequentially marked pages 00001 through 00471. With no objection from DLSE, FSG Exhibits A1 through F1 were admitted into evidence, except that DLSE objected to FSG Exhibit B7, containing statements from two workers.<sup>5</sup> The objection was noted and those exhibits otherwise admitted into evidence.

After post-trial briefing, the matter was deemed submitted for decision on January 15, 2020.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for some of the Assessment, but FSG thereafter carried its burden of proving the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a) and (b).) Accordingly, the Director issues this decision dismissing the Assessment.

## **FACTS**

### The Public Works Contract.

The invitation for bids by the John Wayne Airport, Orange County was published on August 1, 2006. The bid was for interior and exterior lighting maintenance services at the airport. The company FSG acquired had been the contractor performing similar services under a previous contract at the airport. The period of work under the Project ran from October 17, 2006, through October 16, 2010.

### The Complaint.

A complaint of underpayment of prevailing wages was initiated by Swart approximately one month after he was terminated from FGS for undisclosed reasons.

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<sup>5</sup> DLSE's objection was based on FSG's nonconformance with the procedures under Rule 34 providing for prehearing submission of declarations to allow for cross-examination. (Cal. Code Regs., tit. 8, § 17234.) DLSE agreed that the declarations were admissible, but only as hearsay. (Cal. Code Regs., tit. 8, §§ 17234, subd. (a), (c) & 17244, subd. (d).)

Swart contended that he performed work on the Project for which he was not paid the required prevailing wages, including wages for substantial overtime hours. FGS's position is that Swart was first a Service Manager (for the predecessor company) and then a Dispatcher, he was paid a salary as such, and that his role and responsibilities were to accept work orders from customers, schedule the work to be done with customers, schedule service technicians to perform the work, assemble quotes for work to be done, order material needed for his service technicians, and see that the customer invoices were done correctly. FSG contends that his role was strictly managerial and that at no time did he perform craft work payable at prevailing wage rates.

#### Work Classification and Prevailing Wage Determination.

DLSE utilized the prevailing wage determination (PWD) rates for the Electrician: Inside Wireman (Third Shift) Job classification for Orange County, ORA-2006-1 (Inside Wireperson) in the calculation of prevailing wages for work allegedly performed by Swart.<sup>6</sup> The scope of work for the Inside Wireperson PWD describes the craft work as including a broad range of tasks. As regards the work DLSE contends Swart performed on the Project, the scope of work includes routine maintenance, repair, and replacement of existing electrical and electronic systems, equipment and appliances, lighting fixtures and lamps; installing new light bulbs and lamps; and handling and moving all electrical and electronic material, equipment and apparatus. (DLSE Exhibit No. 17.)

#### The Assessment.

On April 13, 2011, DLSE issued the Assessment against FSG for unpaid wages and penalties involving 45 employees of FSG. As a result of resolution of all claims other

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<sup>6</sup> The Inside Wireperson PWD provides the following rates: basic hourly rate of \$57.11; overtime rate of \$80.10 per hour; total fringe benefits of \$11.13 per hour; and training fund contributions of \$0.35 per hour. Pre-determined rate increases under the PWD raised the wage rates on designated dates during the Project.

than those pertaining to Swart, DLSE revised the Assessment downward as indicated above.

DLSE's investigation as to Swart commenced after Swart filed a DLSE Public Works – Initial Report complaint form certifying that he worked on the Project from October 26, 2006, through August 26, 2009, as a "Dispatcher/ Manager/ Electrician/ Estimator" with varying daily job functions. As Swart wrote in his complaint, "I was an electrician and scheduled dispatch, data input, estimator, order parts, deliver parts, pick up parts and permits, troubleshoot over the phone customer service (*sic*)." (DLSE Exhibit No. 18.) He asserted he used tools described as "computer, phone, small hand tools, car, truck."

Deputy Labor Commissioner Curi performed the investigation and devised an audit that resulted in the amended Assessment. Curi testified that she reviewed the payroll records and interviewed Swart. She testified about the manner of the investigation and the basis for the Assessment. The CPRs did not list Swart as an employee. (DLSE Exhibit No. 22.) While Swart worked for FSG as a salaried manager during the term of the Project, DLSE audit did not recognize his salary as a credit against prevailing wages. Instead, for the amount of unpaid wages found in her audit, she relied on the number of hours and days of work on a night shift as represented by Swart according to his memory, which was aided by no corroborating or contemporaneous documentation. Curi's audit assumed all that time was spent on craft work payable by prevailing wages. She spoke to Swart approximately twice, for 30 minutes to an hour each time.

Curi testified that her file notes (DLSE Exhibit No. 19) and a calendar she prepared after her calls with Swart reflect that Swart told her that he worked a few days each month at the office and on the Project. Based upon what he told her, Curi testified Swart worked the evening shift at the airport, ended his shift at 7:30 a.m, but also arrived at his job at the FSG offices at 6:30 a.m. She was unable to explain this seeming discrepancy other than to say this is what Swart told her. She explained that her focus with the audit was to use the hours he claimed to have worked at the Project

site, not in the office.

For when Swart was at the Project site, Curi apportioned no time to his supervisory duties. Curi's audit assumes all hours he claimed to be on the night shift at the Project site were spent on compensable craft work. Curi testified that she asked Swart for no confirmation or corroboration of his claim from any other person. She never asked coworkers if they worked alongside him, and she asked Swart for no documents to prove his hours of craft work. Nor did she see any documents confirming his claimed hours, either the total amount or the dispersal of hours throughout the daily and weekly schedule that comprises Curi's audit. After settlement of the claims on behalf of the 45 workers other than Swart, the Assessment found Swart was not paid any wages for his work and he worked over 704 straight time hours and 176 overtime hours on the Project, for a total of 880 hours of work. The audit displays hours of Inside Wireperson work attributed to Swart starting in January 2006 and continuing to October 2009, at the rate of ten hours per day for the third, midnight shift on Tuesdays and Wednesdays of each month.

Although Swart told her that he worked on high voltage equipment or electricity and changed lamps and ballasts, Curi did not specify what the high voltage or electricity work consisted of. Curi did not question his veracity with respect to his ability to perform what appeared to be an extraordinary day and night work schedule that he represented to her. She also did not verify through any other source that he did any electrical work. Curi also did not obtain records from the airport or statements from anyone at the airport who may have observed Swart or any craft duties he claimed to have done. She did not attempt to obtain key card entry data and did not know where they exist. She stated that if he only changed the lamps and ballasts, the correct classification would be that of Light Fixture Maintenance Technician, not an Inside Wireperson.

On cross-examination, Curi was unable to explain the inconsistency between the date that her Assessment found that Swart began work (the week ending January 6, 2006), and the date identified on Swart's Public Works – Initial Report form (showing a

start date in October 2006). Also, the dates Swart was found to have worked as reflected on the audit worksheets do not match those on the calendar she prepared following her discussion with Swart. (DLSE Exhibit No. 20.)

At the Hearing, Swart testified that he was the supervisor on the Project. He was paid a salary in his position as Service Manager and, later, as Dispatcher for FSG.<sup>7</sup> He was involved in hiring employees for FSG (and EnerTech, before it was acquired by FSG). He testified that when Johnson would tell him an employee was to be terminated, Swart would carry out the termination. He supervised approximately four to seven employees, depending on the time period.

Swart testified that his job duties included scheduling field service technicians, ordering all parts, doing job quotes, training employees, making sure employees were on time and operating safely, and taking care of all customer services. He testified that he told the employees "what to do, what not to do, what not to hit, watch this, watch that." He referred to himself "the guy handing in the parts, making sure they have their gloves on and everything make sure they drive around to check everything" on the Project. He checked the employees' quality of work and reviewed safety protocols.

As for his work schedule, Swart testified that he went into the FSG office in Anaheim at approximately 6:30 a.m. He worked from 6:30 a.m. to 4:30 or 5:00 p.m. and then returned home. Then he left home around 9:30 or 10:00 p.m. to get to the Project site at the airport. Depending on the work that had to be done, he arrived there anytime between 10:30 p.m. and midnight. He then worked the third (night) shift until around 7:00 or 8:00 a.m., depending on what needed to be done. He then headed back to the FSG office in Anaheim, performed some dispatching work and left work between 11:00 a.m. and 1:00 p.m. He testified he worked this extraordinary schedule for 2 to 4 nights per month, depending on what had to be done at the Project. Sometimes he worked back-to-back nights.

Swart admitted that he could not reliably testify as to the precise days or hours

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<sup>7</sup> Swart testified that his job title prior to the FSG acquisition was Service Manager. That title was changed to Dispatcher after the acquisition, but his job duties remained the same.



that he worked at the Project site. On his DLSE claim, where the form asked if he had an accurate record of hours, he answered that he did not. He had no journals and no calendar entries, no emails, nothing to indicate the dates and times when he performed identifiable craft work on the Project. He admitted that his testimony about the times he worked there was based entirely on memory.

Nonetheless, Swart testified that he "knows" he worked between 1,000 and 2,000 hours over five to six years of the contracts.<sup>8</sup> However, as he testified, "If you want me to put down actual days, no, I can't do it...Nobody knows." Figuring it out for DLSE, was done "by memory, it was hard...it was years later."

Swart testified to performing a wide range of work on the Project. Sometimes he got on a lift to have a "look." He performed "just maintenance work, replacing lamps and ballast. Making sure everything was done. You had to walk the entire airport each night ... I would walk John Wayne probably ... a mile and a half 2 miles, at least." He testified he would help the technicians with whatever was needed. He testified that he made sure they did their work safely. He testified to numerous physical activities that he allegedly performed in the course of his work for FSG, such as putting cones on roads, receiving lifts that had been delivered, assisting technicians, and troubleshooting. Sometimes he took parts out of boxes and handed them to technicians. He put away the trash. He swept up. He testified he "did everything." Swart also testified that he worked "almost all the time" with Zuniga and he worked with Alonzo, too. He helped them replace lamps and ballasts, trouble shot ballasts with Alonzo if a problem arose with a ballast, and he made sure the workers did their jobs safely.

With respect to any potential craft work, Swart testified that he did not change the lights much himself. If not many fixtures were non-functioning, he would just point them out to the workers for them to fix. He testified that the Project was to maintain 21,000 functioning light fixtures. "Much" of his time he spent looking for outages, and

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<sup>8</sup> By "contracts" Swart meant the two contracts, the first with the awarding body and EnerTech, and the second with the awarding body and EnerTech, as taken over by FSG after its acquisition of EnerTech. Only the work performed in the course of the second contract from 2006 to 2009 is at issue.

typically he was not the person replacing the lamps or ballasts in order to return the fixtures to functioning status. Still, he stated he changed at least 750 lamps over an undefined time period. He also testified that he could not specify the amount of time he spent actually changing lamps or performing associated wirework. Swart testified that for him to quantify the time he spent on that work "would be a guesstimate at best."

Appearing at the request of DLSE, Zuniga testified his job included retrofitting (replacing) lamp bulbs, but mainly he performed the maintenance task of replacing non-functioning ballasts. When he saw Swart on the site, Swart handed him lamps, but did not actually replace a lamp. Zuniga testified that Swart tried once to replace a lamp and started a fire that Zuniga had to put out. Thereafter, Swart did not try to do that work.

Zuniga estimated Swart worked approximately six years on the Project, from 2003 to 2009. Swart was his "boss" and the boss of the service technicians. Zuniga's testimony was inconsistent, as when he stated Swart worked with him twenty times over a period of time—three to four months, only to later state that Swart worked probably 43-45 days in the three to four month period over four to five years, and then later to say Swart worked 43-45 days in each year for a period of six years. Zuniga stated that Swart had no regular hours, and that his presence at Project varied. Zuniga's own involvement in the Project ended when he was terminated for falsification of documentation on the Project. Personnel at John Wayne airport showed that he had not actually performed work that he had claimed he performed for FSG. His termination was at the end of 2009 or early 2010. Alonzo, another worker called by DLSE, testified that he worked for EnerTech and FSG on the Project during two public work contracts. He described Swart as his service manager. Alonzo performed the maintenance work of replacing ballasts and he conducted electrical troubleshooting for FSG at the John Wayne airport and other FSG work locations away from the Project. Like Zuniga, Alonzo testified to Swart's role as supervisor. He stated Swart "had to be there" because work took place in "critical areas" of the airport. Alonzo testified that "If somebody broke a lamp" or something of that nature, "Somebody had to be responsible." He testified that

Swart was present on site to "give us a hand," physically handing the technicians materials such as lamps, wire, tools, or ballasts, or "to make sure that the job was getting done the right way." Alonzo testified that on two or three occasions he observed Swart replacing a lamp. Alonzo stated that Swart was present at the Project overseeing the work, and most the time Swart was there to be sure the job was done safely. Alonzo testified that he himself did not work overtime nor did he ever hear of anyone working overtime on the Project.

For FSG, Johnson testified that Swart did no craft work at the Project. Because he was a manager, Swart was not required to complete time sheets, like the service technicians did. Johnson said Swart was in charge of the time records for his crew of service technicians, and he did not submit a time sheet showing work he did on the night shift. Johnson stated that had Swart filled out and turned in a time sheet showing he performed "physical" work at the Project, Johnson would have asked him why he was performing that work. Johnson stated that it was unlikely that Swart did the work schedule he claims he performed on the Project because Swart would let Johnson know about any work he did which he felt was extraordinary.

Johnson also testified that nobody was scheduled to work on the Project as an Inside Wireperson, including Swart. Swart was a manager and the only prevailing wage classification FSG used on the Project was Light Fixture Maintenance Technician, because the work was essentially changing lamps and ballasts. The contract called for work on existing fixtures, for which FSG in a first phase replaced lamps in all airport fixtures. In a second phase, FSG maintained the fixtures by replacing lamps and ballasts as needed. FSG employees did not change out the entire lighting fixtures themselves. Everything they did was inside the existing fixture. No new junctions or new electrical work was performed under the contract. Further, Swart was only scheduled to be on site for management meetings, though there was an expectation that he be on site from time to time to oversee the work and make sure that it was being done correctly and safely. Swart was never expected or known by FSG to do any physical work at the

Project.<sup>9</sup> The first Johnson heard that Swart believed he was underpaid prevailing wages was after Swart's termination from FSG, when he filed his complaint with DLSE.

## DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

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); see also *Lusardi*, at p. 985.)

Moreover, "[a] contractor or subcontractor who pays less than the established prevailing rate may be assessed civil penalties (§§ 1741, 1775, and 1777.7), may be suspended from bidding or working on public works projects for up to three years (§§ 1777.1 and 1777.7), and is also subject to criminal prosecution for failing to maintain payroll records demonstrating compliance. (§§ 1776 and 1777; *State Bldg. and Const. Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 296.)

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<sup>9</sup> In addition, FSG introduced two statements (FSG Exhibit B7) that stated, in effect, that Swart did not perform electrical work. In part because the statements are unsworn, they are not persuasive even as hearsay.

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who received less than the prevailing wage rate, and also prescribes penalties for failing to pay the prevailing wage rate. The prevailing rate of per diem wage includes amounts for fringe benefits and training fund contributions pursuant to section 1773.1.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if unpaid prevailing wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the assessment, the contractor deposits into escrow with Department of Industrial Relations the full amount of the assessment, including the statutory penalties.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal that assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of presenting evidence that "provides prima facie support for the Assessment ...." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that initial burden is met, "the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment ... is incorrect." (§ 1742, subd. (b); Cal. Code Regs., tit. 8, § 17250, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

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DLSE Made a Prima Facie Showing That FSG Failed to Pay Required Prevailing Wages.

Every employer in the on-site construction industry, whether the project is a public work or not, must keep accurate information with respect to each employee. Industrial Welfare Commission (IWC) Wage Order No. 16-2001, which applies to on-site occupations in the construction industry, provides as follows:

Every employer who has control over wages, hours, or working conditions, must keep accurate information with respect to each employee including...name, home address, occupation, and social security number...[,] [t]ime records showing when the employee begins and ends each work period...[,] [t]otal wages paid each payroll period...[and] [t]otal hours worked during the payroll period and applicable rates of pay....

(Cal. Code Regs., tit. 8, § 11160, subd. (6)(A).) Also, the employer must furnish each employee with an itemized statement in writing showing all deductions from wages at the time of each payment of wages. (Cal. Code Regs., tit. 8, § 11160, subd. (6)(B); see also Lab. Code, § 226.) Employers on public works have the additional requirement to keep accurate certified payroll records. (§ 1776; Cal. Code Regs., tit. 8, § 11160, subd. (6)(D).) Those records must reflect, among other information, "the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journey[person], apprentice, worker, or other employee employed by him or her in connection with the public work." (§ 1776, subd. (a).)

In this case, the record shows DLSE presented prima facie support for the Assessment. (Cal. Code Regs., tit. 8, § 17250, subd. (a).) Swart testified that he changed hundreds of lamps and performed other labor such as high voltage electrical work, sweeping, and cleaning up after workers. Alonzo and Zuniga supported that assertion, in part, by testifying that Swart handed them tools, materials and lamps and ballasts for them to install. The Inside Wireperson scope of work includes routine maintenance, repair, and "handling" of existing and new electrical and lighting

equipment, including lamps. DLSE's evidence shows on some occasions Swart handed lamps to two workers, a task similar to the "handling" task mentioned in the craft scope of work. Combined with Swart's testimony that he also performed cleaning and unspecified electrical work two to four nights a month from 2006 to 2009, the evidence is sufficient for DLSE to have carried its prima facie burden.

FSG Met Its Burden To Show That The Assessment Was Incorrect.

While DLSE met its prima facie case, the record shows that FSG in turn carried its burden to prove the Assessment, as amended, was incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

As to whether DLSE showed Swart in fact performed Inside Wireperson duties, Curi testified that she reviewed the payroll records and interviewed Swart in order to devise the audit. But Curi did not explain how, if at all, any payroll records as to other workers performing full time work on the Project confirm the claims Swart made in her interviews. Presumably, they did not, for the CPRs would only show the days and hours of full time work of other workers that do not correspond to the Tuesday to Wednesday dates the audit shows for Swart.

Curi stated she created a calendar to illustrate the work done by Swart based on telephone calls with Swart. But she conceded that the calendar does not match the distribution of days and hours she lists in the audit. The audit shows Swart working ten hours a day, every Tuesday and Wednesday from 2006 to 2009. However, Swart testified while he worked back-to-back nights, he did not do that often. Curi did not explain why her audit consistently shows back-to-back work days on Tuesdays and Wednesdays. These circumstances undermine the creditability of the audit.

Evidence provided by Swart similarly fails to inform the days and hours of work the audit finds. Swart testified he worked two to four nights a month, ten hours a day over five to six years, spending 1,000 to 2,000 hours on the Project. He claimed to have done limited duties with respect to craft workers on the Project, mainly changing lamps, sweeping, and cleaning up after them. He also testified he also reviewed sign-in sheets, dealt with airport personnel about what was needed for FSG workers to do, and

scheduled the workers. If his testimony is accepted at face value, then, at best it shows Swart performed a mixture of supervisory duties and craft work during his time at the Project. But his testimony is so rife with vagueness and generalities that it cannot be discerned which duties were performed on which days and hours, or in what proportion. Along with his testimony about the supervisory duties he performed for FSG (hiring and terminating workers, ordering parts, writing job quotes, providing customer service, and ensuring safe work practices), the record presents no reasoned basis on which to conclude the amount of time on the Project he spent performing craft work and what time was devoted to supervisory duties not compensable by prevailing wages.

Swart testified he changed at least 750 lamps over the life of the Project. However, testimony from Zuniga and Alonzo flatly contradicts that assertion, for they state that at he changed no lamps (Zuniga) or just two to three (Alonzo). Further, insofar as he testified he did other work potentially considered craft work, Swart did not explain the work processes he allegedly used, the classification applicable to the craft work he performed, the time it took him to accomplish any particular task, or the days on which he undertook those tasks. Curi testified that Swart told her that he had worked on high voltage equipment or electricity. Yet, no witness including Swart either explained what that work consisted of or described the context or extent of the work. Given the lack of specificity provided by Swart and the countervailing testimony, Swart's claims, including that he replaced 750 lamps and worked on high voltage equipment, are not accepted as credible.

DLSE's audit was based on the assumption that all of Swart's hours were spent on Inside Wireperson duties. But nothing in the record supports that assumption. Curi testified that if Swart only changed the lamps and ballasts, the correct classification would be that of Light Fixture Maintenance Technician, a lesser paid subtrade of Inside Wireperson, not the higher-paid Inside Wireperson title per se. As to other alleged craft work done by Swart, Zuniga and Alonzo did testify that Swart handed them lamps and small items to enable them to complete the work of changing lamps and ballasts. The



scopes of work of Inside Wireperson and Light Fixture Maintenance Technician arguably embody those steps. (See DLSE Exhibit Nos. 16, 17, scopes of work that include the "Handling and moving of all electrical material, equipment, and apparatus.") Yet, the record suggests that it was only in a handful of unspecified times over the years that he handed items to technicians, cleaned up after a crew that was replacing lamps and ballasts, and once climbed on a lift to evaluate a malfunction. Apart from the "handling" function, no basis in the record appears upon which to associate most of that work with a specific craft.

From both Swart's and Johnson's testimony, FSG service managers train workers and assure they are performing safely. While supervisors performing craft work are indeed subject to prevailing wages at the craft rates if the evidence supports that finding, in this case what Swart's alleged electrical work consisted of and whether that work took place in a context of conducting supervisory quality control or a craft function remains unclear. Further, while Zuniga stated Swart was on the Project for years, his testimony gave inconsistent answers as to the more precise lengths of time Swart worked on the Project. Zuniga provided no evidentiary basis for concluding that, during the time Swart was "on" the Project, he performed the Inside Wireperson work of any particular type. While Alonzo testified that on two or three occasions he observed Swart replacing a lamp, no dates or length of time for those steps was described. Further, Alonzo also stated that Swart was present at the Project overseeing the work and most the time Swart was there to be sure the job was done safely. As the record shows, overseeing work and ensuring safe work practices are tasks performed by a manager, not an Inside Wireperson. Similarly, Swart's testimony that he performed unspecified trouble-shooting work went unsupported by the workers, and it remains unclear if the tasks consisted of supervisorial or craft work.

Apart from a curt reference in his DLSE complaint that he worked as an electrician, the list of tasks Swart provided in his initial complaint ("scheduled dispatch, data input, estimator, order parts, deliver parts, pick up parts and permits, troubleshoot over the phone customer service") logically pertain to a management position, not a

craft position. Further, insofar as the Inside Wireperson scope of work describes routine maintenance and repair of existing electrical and lighting equipment, little if any evidence presented – and most of the evidence of emanates from Swart alone – verifies that he engaged in those Inside Wireperson duties.

Swart admitted that he supervised approximately four to seven employees, depending on the time period. He was involved in hiring and terminating employees, scheduling field service technician, ordering all parts checking employees' quality of work, reviewing safety protocols and the like -- all things a supervisor would normally do as a service manager. Based on the testimony of Zuniga and Alonzo, and based on Swart's own testimony about his activities at the airport, a fair reading of the record is that, consistent with what Zuniga and Alonzo said, Swart by and large worked on the Project as a supervisor, not a craftsperson.

DLSE based on the audit solely on Swart's memory, given long after the fact. Reliance on workers' memories may be justified in some instances, such as where corroboration exists from a writing of some sort such as a contemporaneous diary, journal or calendar prepared by a worker, inspector's reports or work site logs that represent a neutral source of information, or CPRs or time cards that are available to corroborate the memories. The list is not exhaustive, but in this case DLSE presents virtually no corroborative documentation from any record contemporaneous with the work, must less a record that can justify the dates, times and hours listed in the audit. Along with the facts that the audit conflicts with the calendar Curi prepared after calls with Swart and Swart's own testimony fails to support the schedule of ten hours on each Tuesday and Wednesday for four years, the audit appears too arbitrary to be credited.

Curi testified she reviewed the CPRs before preparing the audit. But those CPRs listed the other 45 workers, not Swart. As such, the CPRs provide inadequate guidance for identifying the days of regular and overtime hours to attribute to Swart's alleged Inside Wireperson duties. Swart testified the estimates of his craft work time were a "guestimate at best." That characterization undermines DLSE ability to show that the

hours listed in the audit should be endorsed. The vagueness and inconsistencies in Zuniga's testimony as to how often Swart worked with him over a period of time further inhibits a conclusion as to the hours Swart allegedly worked.

Alonzo's testimony also undermines Swart's claim for overtime pay as presented in the Assessment. Alonzo testified that he never heard of anyone working overtime, and there was "no overtime" by anyone on the Project. This evidence contradicts the Assessment finding of 176 hours of overtime by Swart based on his claim he worked ten hours a day, two days a month. Both Zuniga and Alonzo recognized Swart as a service manager and that appears to be the job function Swart fulfilled. Though licensed as a general journeyman electrician, and even crediting the limited evidence from Alonzo that Swart handed him lamps, small tools and other parts as he performed his own craft work, no evidence offers a reasonable basis on which to conclude Swart spent 706 hours, or any other specific amount of time, on those duties.

The contemporaneous Orange County Contractor Sign In/Out Log Sheets maintained at the airport are equally unavailing for Swart, because they showed that he signed in and out just four times. (FSG Exhibit B6.). FSG examined the witnesses regarding procedures for entry onto the Project by FSG employees. Johnson testified that at a management meeting with FSG and John Wayne Airport management the requirement for signing in and out was discussed. Zuniga testified that FSG employees who were issued a badge were required to sign in and out and could allow three others on site. Swart acknowledged signing in by himself on February 8, 2007; March 7, 2007; June 12, 2007; and March 12, 2009. In his testimony Swart refused to acknowledge the authenticity of the sign in/out log sheets. He questioned the completeness of the records, stating that there were three different sign-in sheets for three different areas at the airport. Nonetheless, these sign-in sheets fail to verify he worked the third, night shift as often as he claimed, nor do they show overtime work on his part.

In summary, while it appears that Swart may have occasionally performed minor tasks to assist those performing craft work of some type, the evidence does not support that those tasks were undertaken other than to fulfill his supervisory function on the

Project. Adding to that conclusion, Swart presented no time cards showing craft work and admitted that his memory is insufficient to establish days and hours that he performed alleged craft work, as opposed to supervisory duties.

Based on the totality of the record, the Director finds that the work Swart performed on the Project was done as a supervisor, for which he was paid a salary, not as an Inside Wireperson, as found in the Assessment. As such, he is not entitled to prevailing wages. The finding of no wages due renders moot all other issues.

Accordingly, the Director issues this decision dismissing the amended Assessment.

Based on the foregoing, the Director makes the following findings:

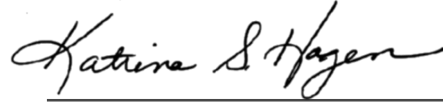
### **FINDINGS**

1. The amended Assessment did not correctly find that Facility Solutions Group, Inc. failed to pay the required prevailing wage rate for the craft of Inside Wireperson for all hours worked on the Project by Andy Swart.
2. Facility Solutions Group, Inc. is not liable for statutory penalties under section 1775.
3. Facility Solutions Group, Inc. is not liable for liquidated damages under section 1742.1.
4. Facility Solutions Group, Inc. did not fail to pay the required fringe benefits for work on the Project by Andy Swart.
5. Facility Solutions Group, Inc. did not fail to pay the required training fund contributions.
6. Facility Solutions Group, Inc. did not fail to pay the require overtime rates for hours worked by Andy Swart, and is not liable for penalties under section 1813.
7. The amended Civil Wage and Penalty Assessment is dismissed as set forth in the above Findings.

**ORDER**

The Civil Wage and Penalty Assessment, as amended, is dismissed 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: 12-30-21

A handwritten signature in black ink, reading "Katrina S. Hagen", written over a horizontal line.

Katrina S. Hagen, Director  
Department of Industrial Relations