[Cite as *Sheet Metal Workers Internatl. Assn. Local Union No. 33 v. Courtad, Inc.*, 2015-Ohio-1439.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 33 Plaintiff-Appellee -vs- COURTAD, INC. Defendant-Appellant	: : : : : : : : : : :	JUDGES: Hon. W. Scott Gwin, P.J. Hon. Sheila G. Farmer, J. Hon. Craig R. Baldwin, J. Case No. 2014CA00143 O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2012CV00168

JUDGMENT: Affirmed

DATE OF JUDGMENT: April 13, 2015

APPEARANCES:

For Plaintiff-Appellee

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Farmer, J.

{¶1} On January 17, 2012, appellee, Sheet Metal Workers International Association Local Union No. 33, filed a complaint against appellant, Courtad, Inc., claiming appellant intentionally violated Ohio's prevailing wage laws by failing to properly classify and pay its employees the correct prevailing wage rate on a project, the construction of the Stark State College Business & Entrepreneur Center. A bench trial commenced on January 15, 2014. By judgment entry filed April 1, 2014, the trial court found appellant properly classified its employees, but intentionally violated Ohio's prevailing wage laws. The trial court levied payments and penalties regarding five employees against appellant, and determined appellant was statutorily responsible for attorney fees. A hearing on attorney fees was held on June 5, 2014. By judgment entry filed July 25, 2014, the trial court awarded appellee $38,732.84 for attorney fees.

{¶2} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶3} "THE TRIAL COURT ERRED WHEN IT FAILED TO DETERMINE WHICH CORRECT PREVAILING WAGE APPLIED BASED UPON THE RATE OF PAY AN EMPLOYEE SHALL BE PAID NOT LESS THAN."

II

{¶4} "THE TRIAL COURT ERRED WHEN IT DETERMINED AN EMPLOYER CANNOT TAKE CREDIT FOR VACATION DAYS."

III

{¶5} "THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE THE EMPLOYER CREDIT FOR ANNUAL BONUSES."

IV

{¶6} "THE TRIAL COURT ERRED WHEN IT EXCLUDED A LUMP SUM WAGE PAYMENT."

V

{¶7} "THE TRIAL COURT ERRED IN REFUSAL TO CONSIDER PERSONAL VEHICLE BENEFITS AND PERSONAL GASOLINE MADE BY THE EMPLOYER."

VI

{¶8} "THE TRIAL COURT ERRED BY FINDING DEFENDANT WAS AN INTENTIONAL VIOLATOR OF OHIO'S PREVAILING WAGE LAW."

VII

{¶9} "THE TRIAL COURT ERRED BY FINDING AN ATTORNEYS FEE AWARD WAS WARRANTED IN THE AMOUNT OF $38,732.84."

VIII

{¶10} "THE TRIAL COURT ERRED WHEN IT AWARDED PENALTIES AND OTHER RELIEF."

I

{¶11} Appellant claims the trial court erred when it did not identify a proper work classification that made up the "not less than" prevailing wage rate. We disagree.

{¶12} R.C. 4115.05 governs prevailing rate in locality to control contract wage and states the following in pertinent part:

> The prevailing rate of wages to be paid for a legal day's work, as prescribed in section 4115.04 of the Revised Code, to laborers, workers, or mechanics upon public works shall not be less at any time during the life of a contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining agreements or understandings, between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the trade or occupation, was made, and collective bargaining agreements or understandings successor thereto.

{¶13} In its judgment entry filed April 1, 2014, the trial court found there were various trades that fit the classification and characterization of the worked performed on the project by appellant's employees:

> Thus, the overwhelming evidence presented on this issue favored Defendant. The evidence indicated that there is more than one acceptable trade or occupation classification for the work Defendant performed. The *Kokosing* [*Pipefitters Union 392 v. Kokosing Construction Company,* 81 Ohio St.3d 214, 1998-Ohio-465] factors, including the skills involved, the industry practice, and the employer's preference, indicate that Defendant's classification is appropriate. Accordingly, the Court

> accepts Defendant's assignment of the trade Roofers to the Project and determines that the prevailing wage rate found in the bid book for Roofers is an acceptable and appropriate prevailing wage for this case. The prevailing wage rate for the Roofer classification on the Project was $35.64 per hour. The prevailing wage for overtime for the Roofer classification was $47.34 per hour.

{¶14} Appellant's argument on this issue is disingenuous. Appellant has consistently maintained that the "prevailing wage" it chose was the proper wage as defined by R.C. 4115.05 cited above and Ohio Adm.Code 4101:9-4-10(H) set forth in *Kokosing* at 219, fn.1:

> In the event that it is unclear which occupation to catagorize [*sic*] an employee because the work to be performed on a public improvement by said employee fits the description of more than one occupation, the proper occupation shall be determined by looking to past industry practices in the locality concerning which occupation has traditionally done said work.

{¶15} This is evidenced by appellant's closing argument filed January 27, 2014 at 3-4:

> Because Plaintiff was <u>unable</u> to establish by a greater weight of the evidence that the work performed on the public improvement should be

classified as work exclusive and appropriate to one single particular trade or occupation for prevailing wage purposes, Plaintiff failed to meet its burden and carry the day in court. Courtad submits that Plaintiff woefully missed the target by a longshot.

The Supreme Court of Ohio stated that a court may consider several factors in determining which particular trade sets the prevailing wage rate for the work performed at issue. Such factors encompass more than the past assignment of similar work in the county where the public works project was located. In fact, the Court can consider many factors including the factors set out by the NLRB known as the so-called *Jones* factors.

In resolving work jurisdiction disputes, the court can look at "the skills and work involved, certification by the Board, company and industry practice, agreements between employers and unions, awards of arbitrators, joint boards, and the AFL-CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. In examining these factors the court should exercise its "common sense" with a "decided preference in the usual case for the employer's preferences in making work assignments."

{¶16} In a June 25, 2013 response to a partial summary judgment motion filed by appellee, appellant argued the appropriate prevailing wage rate was the rate it chose:

> There was no secret that the roofer rates were being applied by Courtad. Each week the certified payroll reports show "Work Classification" as "ROOFER COMP PNLS." (Plaintiff's Motion at Ex. E to Ex. 2; see also Defendant's Ex. 5). On each report the rate of total sum prevailing wage rate was $35.64 regular time and $53.46 overtime. (Id.) The Prevailing Wage coordinator, Mr. Jivens received these and never took issue with the classification or rate, despite Plaintiff's administrative protest.

{¶17} Also, the testimony of appellant's president, Dennis Courtad, established the classification. T. at 269, 273-274.

{¶18} In our reading of former Chief Justice Moyer's opinion in *Kokosing, supra,* we do not find the requirement that in order to determine compliance with R.C. 4115.05, a trial court must discuss or enumerate the lowest trade applicable to the work performed.

{¶19} Appellant's whole defense was that the rate chosen was correct and conformed with the definition of "prevailing wage" under R.C. 4115.03(E) which is discussed in the following assignments of error.

{¶20} Upon review, we find the trial court did not err in not identifying a proper work classification that made up the "not less than" prevailing wage rate.

{¶21} Assignment of Error I is denied.

II, III, IV, V

{¶22} Under these assignments, appellant claims the trial court erred in finding appellant could not take credit for vacation days, bonuses, lump sum wage payments, and personal vehicle and gasoline benefits as part of its payment of the prevailing wage rate ($35.64 per hour). We disagree.

{¶23} R.C. 4115.03(E) defines "prevailing wage" as follows:

> (E) "Prevailing wages" means the sum of the following:
>
> (1) The basic hourly rate of pay;
>
> (2) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program;
>
> (3) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing the following fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected:
>
> (a) Medical or hospital care or insurance to provide such;
>
> (b) Pensions on retirement or death or insurance to provide such;
>
> (c) Compensation for injuries or illnesses resulting from occupational activities if it is in addition to that coverage required by Chapters 4121. and 4123. of the Revised Code;

(d) Supplemental unemployment benefits that are in addition to those required by Chapter 4141. of the Revised Code;

(e) Life insurance;

(f) Disability and sickness insurance;

(g) Accident insurance;

(h) Vacation and holiday pay;

(i) Defraying of costs for apprenticeship or other similar training programs which are beneficial only to the laborers and mechanics affected;

(j) Other bona fide fringe benefits.

None of the benefits enumerated in division (E)(3) of this section may be considered in the determination of prevailing wages if federal, state, or local law requires contractors or subcontractors to provide any of such benefits.

{¶24} Attached to appellant's January 27, 2014 closing argument is a summary of the hours worked and the benefits received per hour for the five employees. The benefits included medical coverage, vacation, holiday, company vehicle, and bonuses. The benefit amounts per hour were added to the base pay per hour to make up the claimed prevailing wage rate of $35.64 per hour.

{¶25} It is not disputed by appellant that the hourly rate paid throughout the project to the five employees without consideration of the hourly benefits ranged from $12.00 to $30.00 per hour and the prevailing wage rate was $35.64 per hour. T. at 276-

281; Joint Exhibit 9. The gravamen of these assignments of error is whether under Ohio law, appellant is permitted to credit the enumerated benefits when determining the amount due under the prevailing wage law.

{¶26} Pursuant to R.C. 4115.03(E)(3)(h), vacation pay may be included in the prevailing wage if it is an "enforceable commitment" that is a "legally binding contractual obligation of an employer." Ohio Adm.Code 4101:9-4-02(M). Appellant argues the employee handbook included a vacation policy to establish an enforceable commitment. Defendant's Exhibit L.

{¶27} In its judgment entry filed April 1, 2014, the trial court addressed the issue of vacation pay and found it to be unenforceable:

> In this case, Defendant claimed a credit for vacation pay. There was no evidence that Defendant took a credit if and only if an employee took a vacation during the time of the prevailing wage contract. Rather, the Court finds that Defendant claimed the credit based on an actuarial pay calculation that has broken down the annual value of vacation pay as a per-hour cost. However, Defendant's policies required vacation days to be taken within a particular year or the vacation days and the actuarial amount of money set aside would be forfeited. Because the right to vacation pay is subject to forfeiture, it is not an "enforceable commitment" and thus not a proper credit under the statute. This practice is unacceptable in the prevailing wage context because of the potential that employers could take a "credit" against prevailing wage obligations for

> vacation pay days that employees actually end up forfeiting at the end of the year - something that would result in employees not receiving the required prevailing wage.

{¶28} We concur with the trial court's analysis that the vacation policy was not an enforceable commitment. The testimony established that appellant had a flexible discretionary vacation policy (long-term employees were treated differently than new employees). T. at 579-580. Some employees could carry their days over and some could not, depending on the circumstances. T. at 579. Employees generally were not permitted to "cash out" their unused vacation time, but again, it was discretionary "on a personal basis based on each employee and what their needs are." T. at 580. The lack of uniformity coupled with the lack of ability to "cash out" unused vacation time negates appellant's argument that its vacation policy was an enforceable commitment.

{¶29} We find this interpretation to be consistent with this court's finding in *Straughn v. Dillard Department Store,* 5th Dist. Stark No. 95CA0294, 1996 WL 132228, *2 (March 4, 1996), that "vacation pay is not a gift or gratuity, but rather a deferred payment of an earned benefit."

{¶30} In its April 1, 2014 judgment entry, the trial court also found claimed bonus payments were not enforceable commitments:

> Defendant also claims credit for bonus payments. However, there was no evidence of any enforceable commitment to pay bonuses. In fact, a typical definition of "bonus" indicates gratitude – not commitment – as

> the motivation for the payment. Dennis Courtad testified that the bonus payments were entirely discretionary. The Court therefore finds that the "bonus" payment is not an enforceable commitment and Defendant is not entitled to claim the bonus payment as a credit against its prevailing wage obligation.

{¶31} We concur with the trial court's analysis that bonus payments did not constitute enforceable commitments. Mr. Courtad testified bonuses were at "my discretion, and I look at performance of our employees every year and we give out bonuses every year." T. at 581. There was no set schedule for the award of bonuses, it was "strictly something that I do for them as a Christmas present to them and their families." *Id.* Bonuses are not mentioned in the employee handbook. *Id.*

{¶32} Appellant counted the use of a company vehicle and gasoline as a fringe benefit in calculating the prevailing wage. We find R.C. 4115.07 in pertinent part to be determinative:

> All contractors and subcontractors required by sections 4115.03 to 4115.16 of the Revised Code, and the action of any public authority to pay not less than the prevailing rate of wages shall make full payment of such wages in legal tender, without any deduction for food, sleeping accommodations, transportation, use of small tools, or any other thing of any kind or description. This section does not apply where the employer and employee enter into an agreement in writing at the beginning of any

> term of employment covering deductions for food, sleeping accommodations, or other similar item, provided such agreement is submitted by the employer to the public authority fixing the rate of wages and is approved by such public authority as fair and reasonable.

{¶33} There was no proof of a written agreement between appellant and the employees for the use of a company vehicle and gasoline to be included in the prevailing wage.

{¶34} Appellant counted a paid vacation cruise ($5,000) as a fringe benefit in calculating the prevailing wage for two employees. A supplier, ABC Supply Company, sponsored a cruise for up to six people. T. at 582, 584. Appellant took eight people, two of whom were the subject employees to reward then for their "exemplarily year." T. at 495, 584. Appellant paid their expenses for the trip. T. at 503. As a result of the trip, the two employees were given an extra week of vacation. T. at 583. The trial court was correct in finding this reward cruise was not a fringe benefit under R.C. 4511.03(E), but a gratuity to only two of the five employees as a result of their performance for the year. The project sub judice lasted for six months.

{¶35} Appellant justified paying a less than prevailing wage hourly rate on the fact that prior to commence of work, the employees agreed appellant could make up the difference with a differential lump sum payment. Appellant made the lump sum payment on December 4, 2011, after the work on the project was completed in November. T. at 478-479. At the beginning of the year, appellant asked its employees "how they want their prevailing wage distributed; do they want it weekly, do they want it

per month, or do they want it at the end of the job." T. at 296. Appellant argues the prevailing wage waiver was not mandatory, but discretionary for each employee.

{¶36} This plan devised by appellant flies in the face of the statutory language of R.C. 4115.05, 4115.10, and Ohio Adm.Code 4101:9-4-20(C). The statutes and administrative code mandate that an employee's daily wage "shall not be less at any time during the life of a contract." These statutes and the administrative code section speak specifically to "each day worked."

{¶37} Ohio Adm.Code 4101:9-4-20(F) specifically addresses waiver: "No agreement by an employee to waive his right to prevailing wages is valid or will be recognized by the director."

{¶38} In *International Brotherhood of Electrical Workers, Local Union No. 575 v. Settle-Muter, Electric,* 12th Dist. Fayette No. CA2012-02-003, 2012-Ohio-4524, ¶ 14, the overwhelming philosophy of Ohio's prevailing wage law was explained as follows:

> Ohio's prevailing wage law is set forth in R.C. Chapter 4115. In general, these provisions require contractors and subcontractors for public works projects to pay laborers and mechanics the "prevailing wage" in the locality where the project is to be performed. *State ex rel. Associated Builders & Contrs. of Central Ohio v. Franklin Cty. Bd. of Commrs.,* 125 Ohio St.3d 112, 926 N.E.2d 600, 2010-Ohio-1199, ¶ 10. "[T]he primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector." *Id.* To achieve this end, R.C.

> Chapter 4115 provides to employees who have been denied the prevailing wage a comprehensive statutory procedure of administrative and civil proceedings to ensure an employer's compliance with the prevailing wage laws. *State ex rel. Harris v. Williams,* 18 Ohio St.3d 198, 200, 480 N.E.2d 471 (1985).

{¶39} Appellant argues the reason it used the waiver and differential lump sum payment plan was to protect unsophisticated employees from overspending. T. at 297. Appellee argues contra to this position that there was no guarantee that appellant would be solvent at the conclusion of the project, still on the project, or even in existence. We find appellant's claimed altruism to be disingenuous.

{¶40} Apart from the clear meaning of R.C. Chapter 4115, that employees under a collective bargaining process in the private construction sector are guaranteed a daily hourly prevailing wage, we find *Pruneau v. Department of Commerce, Bureau of Wage and Hour,* 191 Ohio App.3d 588, 2010-Ohio-6043 (10th Dist.), to be enlightening on the issue of whether an employee can waive full payment of the guaranteed prevailing wage.

{¶41} *Pruneau* involved the certification of payroll records indicating fringe benefits paid, including pension fund payments, by the contractor when in fact the pension payments were made more than a year after certification. The *Pruneau* court found an intentional violation not only in the untimeliness of the pension payments, but in the false certification of the prevailing wage report. *See, Pruneau* at ¶ 13 and 17-20.

{¶42} In the case sub judice, appellant certified the prevailing wage was paid less the fringe benefits. It is undisputed that appellant, even after crediting the fringe benefits, owed each employee additional money. Appellant's January 27, 2014 Closing Argument at Appendix D.

{¶43} If the philosophy of Ohio's prevailing wage law is to support the integrity of the collective bargaining process and to protect against the undercutting of employee wages in the private construction sector, then appellant's argument falls short.

{¶44} In our view, appellant's decision to pay a differential lump sum payment benefits the company and not the wage earner who is entitled to a daily hourly prevailing wage on a public works project.

{¶45} Upon review, we find the trial court did not err in excluding the fringe benefits of vacation pay, bonus pay, a vacation cruise, and the use of a company vehicle and gasoline in the calculation of the prevailing wage rate under R.C. 4115.03, and was correct in finding appellant's differential lump sum payment plan was contrary to law, public policy, and R.C. 4115.05.

{¶46} Assignment of Errors II, III, IV, and V are denied.

VI

{¶47} Appellant claims the trial court erred in finding it was an intentional violator as any violations were not intentional. We disagree.

{¶48} R.C. 4115.13(H) defines an "intentional violation" as follows:

> As used in this section, "intentional violation" means a willful, knowing, or deliberate failure to comply with any provision of sections

4115.03 to 4115.16 of the Revised Code, and includes, but is not limited to, the following actions when conducted in the manner described in this division:

(1) An intentional failure to submit reports as required under division (C) of section 4115.071 of the Revised Code or knowingly submitting false or erroneous reports;

(2) An intentional misclassification of employees for the purpose of reducing wages;

(3) An intentional misclassification of employees as independent contractors or as apprentices;

(4) An intentional failure to pay the prevailing wage;

(5) An intentional failure to comply with the allowable ratio of apprentices to skilled workers as required under section 4115.05 of the Revised Code and by rules adopted by the director pursuant to section 4115.12 of the Revised Code;

(6) Intentionally allowing an officer of a contractor or subcontractor who is known to be prohibited from contracting directly or indirectly with a public authority for the construction of a public improvement or from performing any work on the same pursuant to section 4115.133 of the Revised Code to perform work on a public improvement.

{¶49} It is accepted that de minimis errors and admissions in complying with the prevailing wage laws are not intentional. R.C. 4115.13(C); *State ex rel. Associated*

Builders & Contractors of Central Ohio v. Franklin County Board of Commissioners, 125 Ohio Std.3d 112, 2010-Ohio-1199; *Ohio Valley Associated Builders & Contractors v. Rapier Electric, Inc.,* 12th Dist. Butler Nos. CA2013-07-110 and CA2013-07-121, 2014-Ohio-1477. However, we find the actions of appellant sub judice are not de minimis or the result of clerical errors. Appellant engaged in purposeful subterfuge in characterizing vacation pay, bonus pay, a vacation cruise, and the use of a company vehicle and gasoline as fringe benefits. As the trial court noted, appellant's reasons for violating R.C. 4115.05 are skeptical at best. In addition, appellant's certified payroll reports were false and misleading.

{¶50} Upon review, we find sufficient substantive proof of appellant's intentional acts.

{¶51} Assignment of Error VI is denied.

VII

{¶52} Appellant claims the trial court erred in awarding attorney fees of $38,732.84. We disagree.

{¶53} R.C. 4115.16(D) provides the following:

> Where, pursuant to this section, a court finds a violation of sections 4115.03 to 4115.16 of the Revised Code, the court shall award attorney fees and court costs to the prevailing party. In the event the court finds that no violation has occurred, the court may award court costs and fees to the prevailing party, other than to the director or the public authority,

> where the court finds the action brought was unreasonable or without foundation, even though not brought in subjective bad faith.

{¶54} Appellant challenges the award of attorney fees as not timely requested. In its complaint filed January 17, 2012, appellee requested attorney fees in its prayer for relief. During trial, evidence of attorney fees was not presented. Appellant made a motion for a directed verdict on the issue. T. at 316. Appellee argued the statute authorized attorney fees to the "prevailing party," thereby implying it is was a post-judgment issue. *Id.* The trial court reserved ruling on the motion and at the close of the case, took the issue under advisement. T. at 640.

{¶55} In its judgment entry filed April 1, 2014, the trial court addressed the motion indirectly: "Having determined that Defendant did violate the prevailing wage law, that makes Plaintiff the prevailing party entitled to attorneys' fees and costs of this action. The Court will conduct a hearing to determine the appropriate amount of fees and costs." The trial court held a hearing on attorney fees on June 18, 2014, and by judgment entry filed July 25, 2014, awarded attorney fees to appellee in the amount of $38,732.84.

{¶56} In *International Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Industries,* 116 Ohio St.3d 335, 2007-Ohio-6439, paragraph one of the syllabus, the Supreme Court of Ohio held: "When attorney fees are requested in the original pleadings, a party may wait until after the entry of a judgment on the other claims in the case to file its motion for attorney fees." The court noted at ¶ 12: "Second, International Brotherhood misstates this court's precedent in support of both of its

arguments - first, that a party implicitly abandons his attorney-fee claim if he does not raise the issue subsequent to the original claim, and second, that a trial court implicitly denies any request for attorney fees if it does not address such a request in its order." We find this case to be dispositive of the issue.

{¶57} As we noted, the complaint requested attorney fees. Further, the issue was not ripe for litigation until after the trial court found a violation of R.C. 4115.03, et seq.

{¶58} Appellant also argues the amount awarded to appellee was not appropriate, challenging the amount of work done on the issues appellee actually prevailed upon.

{¶59} As explained by our brethren from the Twelfth District in *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.,* 23 Ohio App.3d 85, 91 (12th Dist.1985):

> It is well-settled that where a court is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the trial court. Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere. The trial judge which participated not only in the trial but also in many of the preliminary proceedings leading up to trial has an infinitely better opportunity to determine the value of services rendered by lawyers who have tried a case before him than does an appellate court.

{¶60} In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217 (1983).

{¶61} Appellee did not prevail on the classification issue addressed in Assignment of Error I, but prevailed on the prevailing wage issue. The center of the controversy was appellant's creative use of fringe benefits and the differential lump sum payment plan in violation of R.C. Chapter 4115.

{¶62} In reviewing the arguments herein, we find the trial court's decision factored in appellee's win/loss ratio. During the June 5, 2014 hearing, appellee presented attorney fees in the amount of $64,272.21. Plaintiff's Exhibit 1. The trial court awarded appellee $38,732.84. We find the lower amount addressed the issues that appellee actually prevailed upon.

{¶63} Upon review, we find the trial court did not abuse its discretion in the amount of the attorney fees award.

{¶64} Assignment of Error VII is denied.

VIII

{¶65} Appellant claims the trial court erred in assessing penalties. We disagree.

{¶66} R.C. 4115.10(A) states the following in pertinent part:

> Any employee upon any public improvement, except an employee to whom or on behalf of whom restitution is made pursuant to division (C) of section 4115.13 of the Revised Code, who is paid less than the fixed rate of wages applicable thereto may recover from such person, firm,

> corporation, or public authority that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to the employee and in addition thereto a sum equal to twenty-five per cent of that difference. The person, firm, corporation, or public authority who fails to pay the rate of wages so fixed also shall pay a penalty to the director of seventy-five per cent of the difference between the fixed rate of wages and the amount paid to the employees on the public improvement.

{¶67} In its April 1, 2014 judgment entry, the trial court found appellant failed to pay the prevailing wage, discrediting the differential lump sum payment, but specifically stated "the differential payment is properly considerable in the overall damages calculation." The trial court then methodically went through each of the five employees and assessed penalties, taking into consideration the amounts of the underpayments and the differential payments made. We find no error by the trial court.

{¶68} Based upon the foregoing opinion, R.C. 4115.13(C) as argued by appellant does not apply sub judice.

{¶69} Upon review, we find the trial court did not err in assessing penalties under R.C. 4115.10(A).

{¶70} Assignment of Error VIII is denied.

{¶71} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Baldwin, J. concur.

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