STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Moutaz Alsayed, an Individual dba The Stone Collector Case No. 20-0304-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Moutaz Alsayed, an individual doing business as The Stone Collector (Alsayed), submitted a Request for Review of a Civil Wage and Penalty Assessment (Assessment) issued on August 28, 2020, by the Division of Labor Standards and Enforcement (DLSE) with respect to work Alsayed performed for the City of Anaheim Public Works Department (Awarding Body) in connection with the Edison Park Renovation project (Project) located in Orange County. The Assessment determined that Alsayed owed $79,429.92 in unpaid prevailing wages, training fund contributions, and statutory penalties.

A Hearing on the Merits occurred before Hearing Officer Steven A. McGinty on August 11, 2021. Charles M. Farano appeared as counsel for Alsayed and Lance A. Grucela appeared as counsel for DLSE.

The parties stipulated as follows:

- The work subject to the Assessment was performed on a public work and required the payment of prevailing wages and the employment of apprentices under the California Prevailing Wage Law, Labor Code sections 1720 through 1861.[1]
- The Request for Review was timely.
- The enforcement file was made available timely.
- No back wages have been paid nor deposit made with the Department of

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

Industrial Relations as a result of the Assessment.

The parties stipulated that issues for decision are:

- Whether DLSE served the Assessment timely.
- Whether Alsayed paid his employees the correct prevailing wage rates for all hours worked on the Project.
- Whether Alsayed paid the required training fund contributions for all hours worked on the Project.
- Whether Alsayed is liable for penalties assessed pursuant to section 1775.
- Whether the Labor Commissioner abused her discretion in assessing penalties pursuant to section 1775.
- Whether Alsayed is liable for liquidated damages on the wages found due and owing.
- Whether Alsayed provided the required contract award information to all applicable apprenticeship committees in a timely and factually sufficient manner.
- Whether Alsayed employed apprentices in the required minimum ratio of apprentices to journeypersons on the Project.
- Whether Alsayed is liable for penalties assessed pursuant to section 1777.7.
- Whether the Labor Commissioner abused her discretion in assessing penalties under section 1777.7.
- Whether Alsayed is liable for penalties assessed pursuant to section 1776.

For the reasons set forth below, the Director finds that the Assessment was untimely. Accordingly, the Director issues this Decision dismissing the Assessment. All other issues are moot.

FACTS

The Project.

The Project involved renovation of amenities at a city park. The work included extension of a lighted walking path around the perimeter of the park, installation of

additional outdoor exercise equipment, a hydration center, improved volleyball court, and additions to the playground. (DLSE Exhibit No. 9, p. 92.) On May 17, 2016, the Anaheim City Council awarded a contract to Alsayed to perform the work. (DLSE Exhibit No. 9.) The parties executed the contract on or about June 7, 2016. On July 18, 2016, the Awarding Body issued a Notice to Proceed stating in part: "All work, including final inspection, must be accomplished prior to October 11, 2016 in order to avoid assessment of liquidated damages …." (DSLE Exhibit No. 8, p. 82.) Alsayed's employees performed work on the Project from July 25, 2016 through October 28, 2016. (DLSE Exhibit No. 1, pp. 4, 6.)

On February 22, 2017, the Awarding Body's construction services manager sent a memorandum to its director of public works stating in part: "This work was substantially completed on November 4, 2016. Construction services manager recommends that the project be accepted and the Notice of Completion be filed." (DLSE Exhibit No. 9, p. 92.) That same day, the director of public works executed a Notice of Completion, but he did not sign the accompanying verification until two days later, February 24, 2017. (*Id*. at pp. 94, 95.) The Notice was recorded by the Orange County Clerk-Recorder on March 2, 2017. (*Id*. at p. 93.)

Order to Show Cause.

On January 22, 2021, pursuant to Rule 27,[2] the Hearing Officer issued an Order to Show Cause Why the Assessment Should Not be Dismissed as Untimely. On February 25, 2021, DLSE submitted its Opposition, supported by the Declaration of Jessica Santiesteban, the Deputy Labor Commissioner who investigated the case. The Opposition stated in part:

> Prior to the expiration of the 18-month limitations period, on August 14, 2017, DLSE properly served a written request for certified payroll records on Moutaz Alsayed dba The Stone Collector's [sic] ("Alsayed"). Alsayed ignored this request, as well as a subsequent notice of impending debarment, and continues to refuse to provide DLSE with the requested certified payroll records to this day. As a result, the … Assessment issued by DLSE against Alsayed was timely as the applicable limitations period was tolled pursuant to … section 1741.1 as a result of Alsayed's failure to

[2] California Code of Regulations, title 8, section 17227.

provide certified payroll records in a timely manner pursuant to DLSE's written requests under section 1776.

At a Prehearing Conference on March 29, 2021, the Hearing Officer informed the parties that he was reserving the issue of timeliness for further consideration and determination in connection with the Hearing on the Merits, citing Rule 27, subdivision (c). He set the Hearing on the Merits for August 11, 2021.

Hearing on the Merits.

On July 15, 2021, Alsayed filed a motion to bifurcate the hearing so that evidence would initially be presented on the timeliness issue, with all other issues reserved. At the beginning of the Hearing on the Merits on August 11, 2021, the Hearing Officer denied that motion and proceeded to receive evidence on all issues. By stipulation, DLSE Exhibit Numbers 1 through 27 were admitted into evidence. Each party presented one witness: Jessica Santiesteban testified for DLSE, and Moutaz Alsayed testified on his own behalf.

Santiesteban testified that she was employed by DLSE as a Deputy Labor Commissioner I. She investigated complaints and enforced California prevailing wage laws and regulations, as well as apprenticeship requirements.

Santiesteban testified that she was assigned to investigate a complaint from the Center for Contract Compliance against Moutaz Alsayed doing business as The Stone Collector. According to DLSE's 900 Notes, the complaint, dated March 8, 2017, was received in DLSE's Long Beach office on March 10, 2017. It was forwarded to the San Diego office, where it was docketed on May 24, 2017. (DLSE Exhibit No. 27, p. 214.) The complaint, submitted on a DLSE form, identified The Stone Collector as the prime contractor, and Moutaz Alsayed as the sole owner. It listed the contractor's address as 2220 Skyline Drive, Fullerton, CA 92831, and listed the contractor's telephone number and contractor's license number. (DLSE Exhibit No. 4, p. 32.) It alleged underpayment of prevailing wages, failure to make training fund contributions, and violation of apprenticeship requirements. (*Id.* at pp. 32-33.)

Santiesteban began her investigation by sending an initial request for documents ("initial packet") to both the Awarding Body and the contractor. Among the documents

requested were certified payroll records (CPRs). According to Santiesteban: "Normal business practice is for our clerical staff to support us in investigations by serving these documents." Accordingly, Lea Lopez, a member of the DLSE support staff, mailed the requests certified and regular first-class mail on June 8, 2017. The requests to the contractor were addressed to "The Stone Collector, Inc.," at 1201 E. Ball Road, Unit C, Anaheim, CA 92805.[3] (DLSE Exhibit No. 5, pp. 40, 41.)

Alsayed never received either copy of the request, as both were returned to DLSE by the United States Postal Service. The returned certified mail was received by DLSE on June 20, 2017. (DLSE Exhibit No. 11, p. 124.) The returned first-class mail was received by DLSE on June 27, 2017, with a label affixed reading "Return to sender, not deliverable as addressed, unable to forward." (*Id*. at p. 123.)

Meanwhile, on June 15, 2017, the Awarding Body responded to Santiesteban's request to it. Among other things, it submitted copies of Alsayed's payroll records. Santiesteban determined, however, that these records were not certified and appeared to be incomplete, as certain required information was omitted and records for several weeks were not provided.

The Awarding Body's response also included a copy of its contract with Alsayed and related documents. The contract identified The Stone Collector as the contractor and was signed by Alsayed as its principal. (DLSE Exhibit No. 8, at p. 73.) Accompanying the contract was a Notice of Award addressed to:

Moutaz Alsayed
President
The Stone Collector
2220 Skyline Drive
Fullerton, CA 92831

[3] In her declaration in opposition to the Order to Show Cause, Santiesteban stated that the request was sent "to an address registered with the California Secretary of State by The Stone Collector Inc." (Declaration of Jessica Santiesteban, at p. 2.) Attached as Exhibit H to a Request for Judicial Notice accompanying Alsayed's Motion to Bifurcate is a copy of a DLSE's record of Business Entity Search detail from the Secretary of State's website. It shows the status of The Stone Collector, Inc. as dissolved. Although it lists the Ball Road address in Anaheim as the corporation's address, it lists Moutaz Alsayed as the agent for service of process, and lists his address as 2088 N. Santiago Boulevard, Orange CA 92887.

(*Id.* at p. 80.)

Santiesteban testified that after the packets addressed to The Stone Collector, Inc. on Ball Road came back to her, she did research on why they were returned:

> I did look at the contract provided by the Awarding Body and its material, so I did confirm that the contract stated that it was between the City of Anaheim and The Stone Collector, or Mr. Alsayed dba The Stone Collector. I also [found] through the contract materials the contractor's state license number, and so I went on the Contractors State License Board website to look up the contractor's mailing address as well as looked into the DIR Contractor Registration because the public works contractor is required to register with DIR. So I went ahead and also verified the contractor's mailing address through the DIR's Contractor Registration system. Once I gathered that information, I was able to confirm that the contractor's mailing address is 2220 Skyline Drive, Fullerton, California 92831.

On cross-examination, Santiesteban stated that she had access to the Contractors State License Board (CSLB) website on June 8, 2017, and that she did not recall it having the Ball Road address at that time. The CSLB website provided Alsayed's Skyline Drive business address and license number, and identified The Stone Collector as a sole proprietorship owned by Alsayed and provided his telephone number. (DLSE Exhibit No. 24, pp. 197-198.) The DIR Contractor Registration search provided much the same information. It did not list Alsayed's telephone number but did provide his email address. (DLSE Exhibit No. 25, p. 211.)

Santiesteban testified that she provided the Skyline Drive address to support staff "so that she could send out a request for payroll records to the contractor at the correct mailing address on Skyline Drive in Fullerton." On August 14, 2017, Lopez again mailed the initial packet dated June 8, 2017. She again addressed the envelopes to "The Stone Collector, Inc.," but used Alsayed's current address in Fullerton. The request was again sent by certified and first-class mail. The certified envelope was again returned to DLSE by the Postal Service, but the first-class envelope was not. (DLSE Exhibit No. 12, at pp. 125-132.) Alsayed did not respond to the request. Santiesteban assumed that he received the request because, "the ordinary first-class mail was never returned by the United States Postal Service."

When asked by DLSE counsel what she did next, Santiesteban testified:

> Because the ordinary first-class mail was not returned by the United States Postal Service, it was then determined that the contractor was to provide the records within ten days of the request for payroll records. The records were not provided by the contractor, and a Notice of Impending Debarment was sent to the Skyline Drive address in Fullerton, California.

Thus, on April 27, 2020, DLSE employee Gloria Ayala served the Notice of Impending Debarment on Alsayed at the Skyline Drive address (again addressed to "The Stone Collector, Inc.") via ordinary first-class and certified mail.[4] The certified mail receipt was returned to DLSE, apparently signed by Alsayed on April 29, 2020. (DLSE Exhibit No. 13, pp. 133-142.)

On May 12, 2020, Alsayed sent a letter to Saniesteban, stating: "The Stone Collector furnished all certified payroll records to the city upon project completion and unfortunately we do not retain any information for more than three years after any project completion. We do apologize for not beign [*sic*] able to assist in this matter." (DLSE Exhibit No. 14, p. 143.)

On June 25, 2020, Santiesteban sent Alsayed an email stating that she had completed her audit, and was sending a demand letter giving him an opportunity to settle the case for "a significantly mitigated amount." She then stated that if payment was not received by July 9, 2020, a CWPA would be issued. (DLSE Exhibit No. 15, p. 146.). On July 19, 2020, Alsayed responded by email, requesting "more time to go over stored files." He also stated that he had "found some checks paid to employees directly besides regular payroll checks," and provided copies of fourteen checks. (*Id*. at pp. 146, 147-160.) On August 3, 2020, Santiesteban responded by email, stating that she was unable to provide credit for the checks, and requesting that he submit any additional documentation immediately. (DLSE Exhibit No. 16, pp. 161-162.)

On August 4, 2020, Alsayed sent an email to Santiesteban stating: "I have consulted my attorney, and he advised me to let you know that the statute of limitation

[4] DLSE's 900 Notes show that this was the first action taken by DLSE since the August 14, 2017, request for payroll records. (DLSE Exhibit No. 27, p. 214.). Thus, according to both Santiesteban's testimony on direct examination and the documentary evidence, DLSE took no investigative action in the case for a period of 32 months.

has passed and unfortunately I have no other information to provide you." (DLSE Exhibit No. 16, p. 161.) Santiesteban responded on August 5, 2020, stating that if no further information was to be provided, she would move forward with issuing the Assessment. (*Ibid.*)

Testifying on his own behalf, Alsayed stated that the Ball Road address had been the mailing address for a corporation he operated, the Stone Collector, Inc., but that the corporation had been dissolved around 2005. He had not been at the Ball Road address since 2008. At the time he signed the contract for the Project, he had a contractor's license in his own name.

Alsayed testified that the first communication he received from DLSE regarding the Project was the Notice of Impending Debarment in 2020. Asked if he remembered receiving any letters at the Skyline Drive address prior to 2020, he responded: "No. I didn't get anything, no."

On cross-examination, Alsayed testified that the Skyline Drive address was his residence and his current address, where he received both business and personal mail. Asked by DLSE if he had ever had issues with receiving his mail, Alsayed responded: "Yes, I did actually. Yes. … It's on a regular basis if the regular driver is not available, they send somebody else, and he puts the mail, my mail in somebody else's box, or he puts the neighbor's in my box. So it happens. I do have some missing credit card bills and so forth, but it's normal." He further testified that he had just received a check that was mailed to him in June: "I just received it today. … I don't know where it has been." Asked if he would have paid attention to something that was addressed to The Stone Collector, Inc., Alsayed responded: "Yeah, anything that comes in the mail, I check it. Whether it's regular or junk, I check all of it." Asked if something addressed to The Stone Collector, Inc. with his name on it would be junk mail, he answered: "No, it wouldn't be junk. No."

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth in 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 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.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and also 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 unpaid prevailing wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741.

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 may appeal that assessment by filing a request for review. (§ 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 producing

evidence that "provides prima facie support for the Assessment …." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that 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." (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

Section 1741, Subdivision (a) Sets Forth the Limitation Period.

Section 1741, subdivision (a) is the statute of limitations for service of civil wage and penalty assessments:

> The assessment shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor, subcontractor, and awarding body. The assessment shall advise the contractor and subcontractor of the procedure for obtaining review of the assessment.

The Statute of Limitations Began to Run on February 22, 2017.

Here the Awarding Body executed a Notice of Completion for the Project on February 22, 2017, which was recorded by the Orange County Clerk-Recorder on March 2, 2017. The Notice of Completion stated that the date of completion was November 4, 2016.

Under Civil Code section 9204, "[a] public entity may record a notice of completion on or within 15 days after the date of completion of a work of improvement," and the notice of completion "shall... include the date of completion." There are two ways this statute makes clear that a notice of completion recorded more than 15 days after the date of completion is invalid. First, as quoted above, the statute expressly does not permit recordation of a notice of completion more than 15 days after the date of completion. Second, the statute states that if the notice of completion states an erroneous date of completion, the notice is still effective only if "the true date of completion is 15 days or less before the date of recordation of the notice." (*Ibid.*)

Here, the Notice of Completion stated that the Project was completed on November 4, 2016, and there was no evidence disputing this completion date. The Notice of Completion was filed nearly four months later, on March 2, 2017. Accordingly, the Notice of Completion was invalid and did not commence the running of the limitations period under section 1741, subdivision (a).

Since there was no filing of a valid Notice of Completion, a determination must be made under section 1741, subdivision (a) as to the date of the acceptance of the Project. "Formal acceptance has been defined as that date at which someone with authority to accept does accept unconditionally and completely. (*Graybar Elec. Co. v. Manufacturers Cas. Co*. (1956) 21 N.J. 517 [122 A.2d 624].) "It is not necessary that the acceptance be embodied in a formal resolution." (*Madonna v. State of California* (1957) 151 Cal.App.2nd 836, 840 (hereafter *Madonna*).)

> In the instant case we are satisfied that there was a formal acceptance of the work on May 3, 1955 . . .. Prior thereto all of the work under the contract had been completed in accordance with the plans and specifications, and the State Highway Engineer had recommended that the contract be accepted. The formal written acceptance took place on May 3, 1955, when the Director of Public Works approved the State Highway Engineer's recommendation by endorsement on the interdepartmental communication.

(*Id*. at p. 839.)

The facts of this case are similar to those in *Madonna*. On February 22, 2017, the Awarding Body's Construction Services Manager sent a memorandum to its Director of Public Works with the following recommendation: "That the Director of Public Works accepts the construction of the improvements, approve and sign the Notice of Completion, and authorize the Construction Administration Section to file the Notice of Completion for the Edison Park Renovation." (DLSE Exhibit No. 9, p. 92.) The memorandum went on to say that the "work was substantially completed on November 4, 2016" and the Project "was completed within budget." (*Ibid*.) The same day, the Director of Public Works signed the Notice of Completion, stating therein that the date of completion was November 4, 2016. (*Id*. at p. 94.) He subsequently executed a verification declaring under penalty of perjury that he was authorized to execute the

notice. (*Id*. at p. 95.)

While the recordation of the Notice of Completion was untimely, the administrative process preceding it demonstrates complete and unconditional acceptance by the Director of Public Works within the meaning of *Madonna*. The Construction Services Manager's recommendation here is analogous to the State Highway Engineer's recommendation in *Madonna*. By following those recommendations, the Awarding Body's Director of Public Works manifested acceptance of the work, just as the State Director of Public works manifested acceptance by endorsing the interdepartmental communication in *Madonna*. Thus, the public work was accepted on February 22, 2017, and section 1741, subdivision (a)'s 18-month limitations period began to run on that date.

The Statute of Limitations Was Not Tolled.

Section 1741.1, subdivision (a) provides in part: "The period for service of assessments shall … be tolled for the period of time that a contractor or subcontractor fails to provide in a timely manner certified payroll records pursuant to a request from the Labor Commissioner." At issue is whether this tolling provision applies to the facts of this case.

Employers on public works must keep accurate payroll records, recording, among other information, the work classification, straight time and overtime hours worked, and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.)

Section 1776, subdivision (d) requires a contractor to file a certified copy of payroll records with DLSE "within 10 days after receipt of a written request." Thus, by the express statutory language, the contactor must receive the request for the limitations period to be tolled under section 1741.1.

On June 8, 2017, DLSE had in its file the correct identity and address of the contractor for the Project. Yet for reasons that remain unexplained, DLSE sent, by

certified and first-class mail, a request for certified payroll records to a corporation that had been dissolved twelve years previously, at an address Alsayed had not used since 2008. It is undisputed that Alsayed never received either copy of the request, as both were returned by the Postal Service. (DLSE Exhibit No. 11.)

The one and only attempt DLSE made to serve the request on Alsayed at his correct address came more than two months later, on August 14, 2017. The dispositive question in this case is whether or not Alsayed received that request.

California Evidence Code section 641 provides: "A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." This presumption is not conclusive, but rather a presumption affecting the burden of producing evidence. (Evid. Code, § 630.) Evidence Code section 604 provides:

> The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.

As the Court of Appeal for the Second Appellate District explained in *Bonzer v. City of Huntington Park* (1993) 20 Cal.App.4th 1474, 1481:

> Upon presentation of appellant's detailed, credible, and unimpeached evidence of no actual notice — the *presumption* of such notice (Evid. Code, § 641) ceased to exist. (Evid. Code, § 604.) The only remaining effect of the "Proof of Service" declaration was to enable the trial court to draw "any inference that may be *appropriate.*" (*Ibid.*)
>
> Any inference, in the face of appellants' declarations, that the subject notices were actually received is, as a matter of law, *inappropriate.*

Similarly, a trial court found that a notice had not been received where the defendants introduced evidence that they had mailed a letter and it was never returned to them, where plaintiff's office manager, Fred Carpenter, testified that the letter had never been received in his office. The Court of Appeal affirmed the trial court decision, holding that: "Mr. Carpenter's testimony constituted substantial evidence to sustain the above

finding." (*Tremayne v. American SMW Corporation* (1954) 125 Cal.App.2d 852, 854, *citing Grade v. County of Mariposa* (1901) 132 Cal. 75, 76.)

On August 14, 2017, DLSE again attempted to serve the original request dated June 8, 2017. DLSE again addressed the envelopes to "The Stone Collector, Inc.," but used Alsayed's current address in Fullerton. The request was again sent by certified and first-class mail. The certified envelope was again returned to DLSE by the Postal Service, but the first-class envelope was not. (DLSE Exhibit No. 12.) Alsayed did not respond to the request. Santiesteban assumed that he must have received the request because "the ordinary first-class mail was never returned by the United States Postal Service."

Alsayed, however, testified that he never received the request, and in fact received no communication from DLSE regarding the Project until he received the Notice of Impending Debarment in April 2020.[5] On cross-examination, he testified that it was his practice to check all mail, whether business or personal, he received at his Skyline Drive address. He further testified that he had had recurring problems with substitute carriers delivering mail to the wrong address. The Hearing Officer found his testimony to be credible, particularly in light of these latter points.

Alsayed's credible testimony that he never received the August 14, 2017, Request for Certified Payroll Records overcame the presumption in Evidence Code section 641. Thus, Evidence Code section 604 requires the trier of fact to determine the question from the evidence, without regard to the presumption. Alsayed's testimony is unrebutted. Therefore, the Director finds that he never received the Request for Certified Payroll Records prior to the April 2020 Notice of Impending Debarment.

The Assessment Was Not Served Timely.

The assertion that the Assessment was served untimely constitutes a statute of limitations defense. "[T]he statute of limitations is an affirmative defense and its elements must be proved by the party asserting it." (*Ladd v. Warner Bros.*

[5] It is undisputed that after August 14, 2017, DLSE made no further attempt to contact Alsayed until April 27, 2020.

Entertainment, Inc. (2010) 184 Cal.App.4th 1298, 1310, quoting *Western Recreational Vehicles v. Swift Adhesives* (9th Cir. 1994) 23 F.3d 1547, 1553.) Thus, Alsayed had the burden of proving that he did not fail "to provide in a timely manner certified payroll records pursuant to a request from the Labor Commissioner" within the meaning of section 1741.1, subdivision (a). Alsayed met that burden by proving that he received no request for certified payroll records prior to April 2020. Accordingly, the statute of limitations set forth in section 1741, subdivision (a) was not tolled.

As stated above, the 18-month statute of limitations set forth in section 1741, subdivision (a) began to run on February 22, 2017. Because it was not tolled, the 18-month period ran out in August 2018. DLSE did not serve the Assessment until 24 months later, August 28, 2020. Therefore, the Assessment was not served timely and must be dismissed.

All Other Issues are Moot.

In view of the finding that DLSE failed to serve the Assessment timely, all other issues are moot.

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

FINDINGS AND ORDER

1. The Assessment was served untimely under Labor Code section 1741, subdivision (a).
2. All other issues are moot.

The Civil Wage and Penalty Assessment is dismissed as untimely. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 03-28-2023

Katrina S. Hagen, Director
California Department of Industrial Relations