

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Micon Construction, Inc.

Case No. 16-0326-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Micon Construction, Inc. (Micon) submitted a timely Request for Review of a Civil Wage and Penalty Assessment (Assessment) issued on September 17, 2015, by the Division of Labor Standards and Enforcement (DLSE) with respect to work Micon performed for the City of Riverside (City or Awarding Body) in connection with the Sycamore Canyon Boulevard Median Improvements project (Project) located in Riverside County. The Assessment determined that Micon owed \$50,641.27 in unpaid prevailing wages, training fund contributions, and statutory penalties. A Hearing on the Merits was conducted in Santa Ana, California, before Hearing Officer Douglas P. Elliott on August 10, 2017. Kimberly Manning appeared as counsel for Micon, and David Cross appeared as counsel for DLSE. Deputy Labor Commissioner Fred De Leon and worker Miguel Rojas testified in support of the Assessment. Micon Vice President and General Manager Dan Napolitano and foreman Oscar Zazuetta testified on behalf of Micon.

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, et seq.¹

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

- The Request for Review was timely.
- No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment pursuant to section 1742.1.

The issues for decision are:

- Whether the correct prevailing wage classifications were used in the audit.
- Whether the hours worked as listed in the audit are correct.
- Whether the mathematical calculations as set forth in the Assessment are correct.
- Whether the wages paid to the workers were correctly recorded in the certified payroll records (CPRs).
- Whether all hours worked on the Project were recorded in the CPRs.
- Whether all workers were classified correctly in the CPRs.
- Whether all required employer fringe benefit contributions were paid to an approved plan or fund.
- Whether all required training fund contributions were paid to an approved plan or fund.
- Whether the required overtime rate was paid for all overtime hours worked.
- Whether Micon provided the required contract award information to the applicable apprenticeship committees within ten days of the date of execution of the prime contract.
- Whether Micon properly requested the dispatch of apprentices for all employed crafts.
- Whether Micon employed apprentices in the proper ratio on the Project.
- Whether the Labor Commissioner abused her discretion in assessing penalties under section 1775 at the rate of \$120.00 per violation.
- Whether Micon is liable for section 1813 penalties.
- Whether Micon has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages.
- Whether penalties are due under section 1777.7 for apprenticeship violations,

and if so, in what amounts.

For the reasons set forth below, the Director finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, but Micon thereafter carried its burden of proving that the basis of the Assessment was incorrect in part. (See Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, the Director issues this Decision affirming but modifying in part the Assessment.

FACTS

The Project.

The Awarding Body advertised the Project for bid on August 22, 2013. The Project involved the construction of a raised concrete median and installation of landscaping and irrigation along Sycamore Canyon Boulevard from Alessandro Boulevard to Cottonwood Avenue. Micon was awarded the Project and entered into a contract to perform the work on November 14, 2013 (the Contract). The Contract directs Micon to pay the applicable prevailing wage rates, cites the relevant Labor Code sections, advises that the Director's determinations of prevailing wage rates are open to inspection at the Awarding Body, and sets forth the requirements for submitting CPRs.

Micon employees worked on the Project from February 24, 2014, to July 31, 2014, in the City of Riverside. On August 22, 2014, a Notice of Completion was recorded with the County of Riverside Assessor, County Clerk & Recorder indicating that work on the Project was completed on August 14, 2014.

The Assessment.

The Assessment found that Micon misclassified and paid several workers at the Landscape/Irrigation Laborer (Landscape Laborer) or Laborer Group 1 (Laborer) rate for work that should have been classified and paid at the higher Cement Mason rate. The Assessment also found that Micon classified several workers as Landscape/Irrigation Tenders (Landscape Tenders) when the prevailing wage determination (PWD) required the classification of Landscape Laborer, and that it underpaid Landscape Tenders. Additionally, the Assessment found that Micon failed to fulfill its continuing obligation to request dispatch of apprentices for the crafts of Laborer and Cement Mason from all

applicable apprenticeship committees. Finally, the Assessment found that Micon failed to meet the required 1:5 ratio of apprentice to journey person hours for those crafts.

Altogether, the Assessment found that Micon underpaid required prevailing wages and training fund contributions in the amount of \$11,244.75. Penalties were assessed under section 1775 in the amount of \$120.00 per violation for 134 violations, in a total amount of \$16,080.00, and under section 1813 in the amount of \$25.00 per violation for 17 violations, totaling \$425.00. Penalties were assessed under section 1777.7 in the amount of \$150.00 per day for 160 days, totaling \$24,000.00.

Applicable Prevailing Wage Determinations (PWDs).

Set forth below are the three relevant PWDs and scopes of work that were in effect on the bid advertisement date.

1. Cement Mason for Southern California (SC-23-203-2-2012-2) (Cement Mason PWD).² The scope of work for the Cement Mason PWD provides, in relevant part:

It shall cover work on building, heavy highway, and engineering construction including the construction of, in whole or in part or in the improvement or modifications thereof, including any structure or operations which are incidental thereto, ... and including without limitation, the following types or classes of work.

...
Street and highway work, grading and paving, excavation of earth and rock, grade separations, elevated highways, viaducts, bridges, abutments, retaining walls, subways, airport grading, surfacing and drainage

2. Landscape/Irrigation Laborer/Tender for Riverside County (SC-102-X-14-2013-1) (Landscape Laborer PWD and Landscape Tender PWD).³

² The basic hourly rate provided in the Cement Mason PWD is \$30.00, the combined fringe benefits are \$20.55 per hour, and the training fund contribution rate was \$0.45 per hour, for a total of \$51.00 for each straight-time hour.

³ The Landscape Laborer PWD and Landscape Tender PWD appear under one PWD, but different rates of pay and scopes of work apply. Landscape Tenders assist Landscape Laborers in a manner and ratio specified in the scope of work for Landscape Tenders. The basic hourly rate for Landscape Laborers (with a predetermined increase effective August 1, 2013) is \$27.13, the combined fringe benefits are \$17.52 per hour, and the training fund contribution rate is \$0.64 per hour, for a total of \$45.29 for each straight-time

The scope of work for the Landscape Laborer portion of the PWD provides, in relevant part:

Work covered by this Agreement includes all work in the landscape industry, is defined as follows: Decorative landscaping, such as decorative walls, pools, ponds, reflecting units, lighting displays low voltage, handgrade landscaped areas, tractor grade landscaped areas, finish rake landscape areas, spread top soil, build mounds, trench for irrigation manual or power, layout for irrigation, backfill trenches, asphalt, plant shrubs, trees (including removal, relocation and trimming of trees on construction projects), vines, set boulders, seed lawns, lay sod; hydro seed; use ground covers such as flatted plant materials; rock rip rap, colored rock, crushed rock, pea gravel, and any other landscapable ground covers; installation of header boards and cement mowing edges; soil preparation such as wood shavings, fertilizers, organic, chemical or synthetic; top dress ground cover areas with bark or any wood residual or other specified dressing, operation of any equipment, as directed by the Contractor, for the installation of landscaping and irrigation work. In addition to the above paragraph, the work covered by this Agreement shall include, but not be limited to:

. . . .
All plant establishment work
All work in connection with traffic control, including but not limited to flagging, signaling, assisting in the moving and installation of barriers and barricades, safety borders and all equipment[.]

The scope of work for the Landscape Tender portion of the PWD provides, in relevant part:

Tenders may only perform the following work on landscape/irrigation projects:
Assisting the Landscape Laborer with the wire installation, unloading of materials, distribution of pipe, stacking of sprinkler heads and risers, the setting of valve boxes and thrust block, both precast and poured in place, cleaning and backfilling trenches with a shovel, cleanup and watering during construction and all other

hour. The basic hourly rate for Landscape Tender is \$11.04, the combined fringe benefits are \$5.42 per hour, and there is no training fund contribution, for a total of \$16.46 for each straight-time hour.

landscaping, planting and all work involved in laying and installation of landscape irrigation systems.

* * *

3. Laborer and Related Classifications for Riverside County (SC-23-102-2-2012-1) (Laborer Group 1 PWD).⁴ The Assessment reclassified certain workers from Laborer Group 1 to Cement Mason. The scope of work for Laborer Group 1 is seven pages long and covers a broad range of work involving the construction, erection, alteration, repair, modification, demolition, salvage, addition or improvement of any building structure. It provides on page 4 that the following work is covered:

Street and highway work, grading and paving, excavation of earth and rock ... grade separations, elevated highways, viaducts, bridges, abutments, retaining walls. . .

Also relevant here in the Laborer Group 1 PWD are section F(1) on page 5, section F(3) beginning on page 5, and section F(5) and F(7), both on page 6. Section F(1), in relevant part, states the following is covered:

All work necessary to tend all other building trades craftsmen including stripping of concrete forms, handling and raising up of slip forms . . . gardening . . . landscaping . . . clean up of debris, grounds and buildings, the unloading of trucks and moving of equipment, material . . .

Section F(3) of the Laborer Group 1 PWD provides, in relevant part, that the following work is covered:

All work in connection with concrete work, including all concrete tilt-up, including chipping and grinding, patching, sandblasting, water blasting, mixing, handling, shoveling, rough-strike off of concrete ... conveying, pouring, handling of the chute from readymix trucks, walls, slabs, decks, floors, foundations, footings, curbs, gutters and sidewalks, concrete pumps and similar type machines, grout pumps, nozzle men ... vibrating,

⁴ The basic hourly rate for Laborer Group 1 (with a predetermined increase effective July 1, 2013) is \$28.99, the combined fringe benefits are \$17.55 per hour, and the training fund contribution rate is \$0.64 per hour, for a total of \$47.18 for each straight-time hour. A second predetermined increase, effective July 1, 2014, increased the basic hourly rate by \$1.20, and combined fringe benefits by \$0.55 per hour.

guniting, and otherwise applying concrete whether done by hand or any other process; and wrecking, stripping, dismantling and handling concrete forms and false work, cutting of concrete piles and filling of cracks by any method on any surface.

Section F(5) of the Laborer Group 1 PWD provides, in relevant part, that the following work is covered:

All work in the excavation, grading, preparation, concreting, asphalt and mastic paving, paving, ramming, curbing, flagging, traffic control by any method, and laying of other stone materials, and surfacing of streets, ways, courts, underpasses, overpasses and bridges.

Section F(7) of the Laborer Group 1 PWD states, in relevant part, that the following is covered:

. . . cutting of streets and ways for all purposes, including aligning by any method, digging of trenches, manholes, etc., handling and conveying of all materials for same; concrete of same; and the backfilling, grading and resurfacing of same.

The DLSE's Investigation.

In September 2014, DLSE opened an investigation of Micon's compliance with prevailing wage laws with respect to the Project. The investigation was conducted by Deputy Labor Commissioner Fred De Leon. On September 11, 2014, DLSE sent Micon an initial request for documents, including CPRs. On September 25, 2014, De Leon received from Micon documents pertaining to apprenticeship compliance, but no CPRs. De Leon sent Micon a notice via certified mail on December 19, 2014, advising Micon that if it did not send CPRs it would be debarred. Subsequently, on January 2, 2015, De Leon received from Micon CPRs for the Project, together with a transmittal letter dated December 31, 2014.

De Leon used the CPRs provided by Micon in performing his audit to determine whether Micon had complied with prevailing wage laws on the Project. The CPRs (DLSE Exhibit No. 22) covered 23 weeks of payroll for the period February 23, 2014, through August 2, 2014, and were signed under penalty of perjury by Napolitano,

Micon's then Vice President and General Manager, on various dates between April 4, 2014, and August 8, 2014.

DLSE served the Assessment on Micon by first class and certified mail on September 17, 2015. Micon submitted its Request for Review of the Assessment on October 21, 2015. On December 18, 2015, three months after the Assessment was served, Micon submitted to De Leon an amended set of payroll reports for the Project. These amended reports also covered the 23 weeks between February 23, 2014, and August 2, 2014, but were not certified; they contained no verification under penalty of perjury. (DLSE Exhibit No. 23).

At the Hearing, Micon introduced as an exhibit a third set of payroll records for the Project. These amended CPRs (Micon Exhibit A) covered a 27-week payroll period for the Project from February 23, 2014, through August 30, 2014, and were verified under penalty of perjury by Napolitano; all 27 verifications were dated June 20, 2016. Napolitano testified that these amended CPRs were the "final" CPRs for the Project. When asked by Micon's counsel why there were two sets of CPRs, Napolitano said:

The City of Riverside had their own compliance officer, and in order to get paid on a monthly basis, they require payroll reports. So we turn in payroll reports as we go along every month so they have some documentation so they can process our payment. At the end of the job we do a final and it closes the job. If we didn't do progress payroll reports we're not gonna get paid. It was a year and a half long project. So we do it as best we can to be current.⁵

Asked by Micon's counsel if he himself prepared these amended CPRs, Napolitano testified that: "The documents were prepared by our accounting people, and I reviewed them." He did not explain the process by which the accounting people prepared the documents, or his own review process.

⁵ Napolitano testified that the "first part" of the Project was completed in July 2014, but there was a "second part," which entailed maintenance work that extended through July 2015. However, for purposes of the Assessment at issue here, work on the Project was considered complete as of August 14, 2014, as stated in the City's Notice of Completion recorded August 22, 2014. The Assessment does not address work after August 14, 2014.

Reclassification of Landscape Laborer to Cement Mason.

The Assessment reclassified several workers from Landscape Laborer to Cement Mason. In DLSE's penalty review document (DLSE Exhibit No. 8), De Leon states he relied in part on information provided by two workers, Miguel Rojas and Juan Rivera, in questionnaires and interviews conducted by De Leon. He also relied on the Daily Construction Reports (DCRs) compiled by City inspectors. According to the penalty review:

The reports [DCRs] listed all the workers on the project on a given day, their name, their classification based on the work observed performed, hours worked, and a general description of the type of work performed on site by the contractor in question.

Upon a detailed inspection of the DCRs, it was apparent that Micon's CPRs misclassified several workers. Besides corroborating the questionnaire answers of Rivera and Rojas above, the DCRs classified several workers as cement masons and carpenter on days that Micon labeled them Landscape Irrigation Laborers. On those same days, the description of the work performed by Micon is described solely on the terms of dealing with cement and creating the wooden frames for cement.

(DLSE Exhibit No. 8.)

No City inspector testified at the Hearing, nor did any of the workers reclassified as Cement Masons. De Leon testified that for his audit he relied in part on the scope of work for Landscape Laborer to reclassify certain workers from that craft to Cement Mason. He testified that he did not reclassify any worker listed as Laborer in the CPRs.

On cross-examination, De Leon acknowledged that he never visited the Project site. Micon's attorney asked him about his understanding of the language in the Landscape Laborer scope of work regarding "installation of header boards and cement mowing edges." De Leon responded that he could not say what that work entailed, and could not say what a cement mowing edge was. He also stated that this language is included in the scope of work for Landscape Laborer, but not the scope of work for Landscape Tender.

Asked on direct examination what a cement mowing edge is, Napolitano testified: "It's a concrete strip that we use to separate the street from the landscape planting. It's

used as a trimming edge. On this project it was concrete as opposed to a header board.” He further stated: “This one was about twelve inches wide and about four to six inches deep. The concrete was stamped with a pattern, and this ran around the median ... in the center of the street. And this mow strip was next to the concrete curb done by the subcontractor, Coastline Concrete.” Napolitano further testified that installing cement mowing edges was the only cement work Micon did on the Project.

Napolitano stated that the classifications used by Micon on the Project included Cement Mason, Laborer Group 1, and Landscape Laborer, and that installation of cement mowing edges fell within the scopes of work of all three. He disputed De Leon’s statement in the penalty review that the Landscape Laborer and Cement Mason scopes of work could not be confused because the tools and materials used are distinctly different for each craft. Micon asserts that overlap exists in the PWDs.

When the Hearing Officer asked Napolitano why he used the Cement Mason classification if Laborers could do the work, he responded:

Because they’ve been with us for a long time, and when they have to get down on their knees and do some troweling, versus standing up and doing some work, I felt an obligation to pay them a higher rate, so we looked at the industry standard, and at that particular time it was \$51.50. When you have people 18 to 20 years with you, sometimes you give them a little benefit. So that’s what we do. At least we did when I was there.

Asked to describe the work, Napolitano testified:

Well, once the cement truck backs up, on this particular Project ... the mowing edge was, I believe, twelve to fourteen inches, and it’s colored concrete, so they’ve got to trowel it, and they’re down on their knees, and then they take these rubber stamps and they stamp it so they get the pattern, and then they take the color and they sprinkle the color. I said that wrong—they sprinkle the color first, and then they stamp when they’re done. And that’s a little bit harder work and it’s worth a little more money, and I recognize that, so I pay them more.

Reclassification from Landscape Tender to Landscape Laborer.

The Assessment reclassified workers Rojas and Gustavo Zazueta from Landscape Tender to Landscape Laborer on certain dates. De Leon testified that reclassification was necessary because Micon had not used the correct ratio of Landscape

Laborers to Landscape Tenders on various days while on the Project. The Landscape Laborer and Landscape Tender PWD specifies the ratio requirements for classifying workers on a project. It states as follows:

The first employee on the jobsite shall be a Landscape/Irrigation Laborer; the second employee on the jobsite must be an Apprentice or a Landscape/Irrigation Laborer; and the third and fourth employees may be Tenders. The fifth employee on the jobsite shall be a Landscape/Irrigation Laborer; the sixth employee on the jobsite must be an Apprentice or a Landscape/Irrigation Laborer; and the seventh and eig[hth] (*sic*) employees may be Tenders. Thereafter, Tenders may be employed with Landscape/Irrigation Laborers in a 50/50 ratio on each jobsite.

Napolitano testified that Micon met the correct ratio, citing the amended CPRs to dispute the ratio violations that De Leon had found in the original CPRs.

De Leon testified that he also relied upon the information provided by Rojas in a completed employee questionnaire and subsequent interview in reclassifying Rojas as a Landscape Laborer. In his questionnaire, Rojas described his work on the Project as "at first placing safety signs and cones, then digging holes, planting plants in soil, lay out compost and to this day I continue to maintain the street clear of trash and weeds right now is only one day per week." He listed the tools he used as "shovel, manual auger, measuring tape."

Rojas testified that he had worked for Micon on several projects, and that he worked on this Project for two to three months. He testified that he was a Laborer, and as such, he cut wood to prepare for pouring of concrete, helped pour concrete, did cleaning, and also did some work with plants during the last few days. He also stated that he hauled away trash in the company "stakebed" truck once a week. He also testified that his supervisor, Oscar Zazuetta, told him to tell City personnel that his name was Miguel Picasso and he was a Tender. Rojas testified that he sometimes did Tender work, but regarded himself as a Laborer. On cross-examination, Rojas testified that he did not work with compost as he stated in the questionnaire. He further stated that Zazuetta had told him not to say anything to get the company in trouble.

Oscar Zazuetta testified that had been employed by the company for 22 years. He remembered the Project, and was on site four hours a day, although not every single day.

He witnessed work Rojas did on the Project and described Rojas as a “landscape worker,” whose duties were digging holes and putting plants in soil, and cleaning up weeds and trash. He further testified that Rojas did not do Carpenter or Cement Mason work, and did not drive a truck. Zazuetta denied telling Rojas to say his name was Picasso, to tell people he was always a Tender, or to lie to inspectors or anyone.

In his testimony, Napolitano confirmed that Rojas was paid \$18.00 per hour. He testified that he saw Rojas on the Project site, and that “[h]e was doing maintenance work during that one-year contract that we had to provide the city.” Asked what he meant by maintenance work, Napolitano stated: “DIR has a category called Landscape Maintenance that has a rate of I believe \$9.00 per hour, and that’s trimming, weeding, edging,” as well as planting and watering. On cross-examination, Napolitano acknowledged that he took over management of the Project in June 2014, and did not have occasion to observe the work Rojas did in April and May. Neither party offered a PWD or scope of work for a Landscape Maintenance classification.

Underpayment of Prevailing Wage Rate.

The Assessment found that several workers correctly classified as Landscape Tender were underpaid as such. Micon insists it correctly classified and paid its workers as either Landscape Laborers or Tender Laborers.

Micon paid the Landscape Tenders a basic hourly rate of \$16.06 per hour, while the required hourly rate was \$16.46. In a letter to De Leon dated October 6, 2015, Napolitano contested the findings of the Assessment, stating that “Micon paid \$16.00 + .64,” for a total of \$16.64.

Napolitano admitted under cross-examination, however, that the 64 cents mentioned in the letter was paid to the training fund, not the workers. He further testified that the PWD did require the workers to be paid \$16.46, and that in the example he was asked about, the CPR indicated that the workers received only \$16.06. The CPRs, however, show that in some instances, Micon paid Tenders more than \$16.46 per hour.

Underpayment of Training Fund Contributions.

The Assessment found that Micon had paid no training fund contributions for any of its Cement Masons, Laborers and Landscape Laborers. It also found a total of

\$1,941.22 in training fund contributions were due. Three months after the Assessment, Micon submitted a letter from the California Apprenticeship Council itemizing training fund payments it received from Micon. The letter shows \$819.52 in training fund contributions for Laborers and \$112.00 for Cement Masons, for total training fund contribution amount of \$931.52.

Applicable Apprenticeship Committees in the Geographic Area.

According to De Leon, there were several apprenticeship committees in the geographic area of the Project in the trades of Cement Mason and Laborer, including Landscape Laborer. Those apprenticeship committees were: for Cement Masons, Southern California Cement Masons J.A.C., San Diego Associated General Contractors J.A.C.; and Southern California Laborers/Cement Mason J.A.C. For Laborers, including Landscape Laborers, De Leon testified the applicable apprenticeship committees were Laborers Southern California Landscape and Irrigation Fitters J.A.C. and Associated General Contractors of America, San Diego Chapter.

Notice of Contract Award Information.

Micon began work on the Project on February 24, 2014, according to Micon's CPRs. Micon provided De Leon with a copy of one notice of contract award information form (DAS 140) dated March 17, 2014, addressed to the Laborers Southern California JAC. There were no notices sent to apprenticeship committees for the Cement Mason craft; nor were there any notices sent to the other applicable apprentice programs for Laborer and Landscape Laborer crafts.

Request for Dispatch of Apprentices.

Micon provided De Leon with a copy of one request for dispatch of apprentice form (DAS 142) dated April 30, 2014, addressed to the "Laborers So Cal Joint App. Com."⁶ The form indicated the date for the apprentice to report was May 6, 2014. Based on the work commencement date of February 24, 2014, De Leon concluded that this DAS

⁶ On December 18, 2015, three months after the Assessment was served, Micon provided De Leon with two additional requests for dispatch of apprentice, both also addressed to the Laborers Southern California JAC. The first was dated April 1, 2014, with a report date of April 7, 2014; the second was dated May 6, 2014, with a report date of May 12, 2014.

142 did not constitute a timely request dispatch of Laborer apprentices.⁷ Further, Micon presented no evidence that it sent requests for dispatch of apprentices for the craft of Cement Mason. Napolitano testified, essentially, that he did not request dispatch of Cement Mason apprentices because they were not needed for the type of work being done.

Micon produced as an exhibit an employment referral form for one apprentice, Steve Valdez, from Laborers' International Union of North America, Local 1184, dated May 9, 2014. Valdez is listed in the CPRs as a Laborer apprentice.

De Leon testified that the penalties for violation of the requirement to provide contract award information are calculated starting on the second day of the Project and until the last day of the Project. He determined that there were 160 violations.

Assessment of Statutory Penalties.

De Leon testified that the penalties for both apprentice violations and unpaid prevailing wages were assessed by the Senior Deputy Labor Commissioner. DLSE's penalty review found that Micon had a history of five previous assessments for wage violations and four previous determinations of civil penalty for apprenticeship violations. Two of the five previous assessments also involved the misclassification of workers. Napolitano testified that Micon contested all of the wage violations, but did not state the outcome of these contests.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code section 1720, et seq., requires the payment of prevailing wages to workers employed on public works construction 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

⁷ Per the CPRs, Micon employed only one Laborer apprentice and no Cement Mason apprentice on the Project.

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).)

Additionally, 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.)

This Decision finds, for the reasons detailed below, that based on the totality of the evidence presented at the Hearing, DLSE met its initial burden of presenting prima facie support for the Assessment, and that Micon met its burden to prove the basis of the Assessment was incorrect, in part.

DLSE Properly Relied Upon the Original CPRs Prepared by Micon in Performing the Audit that Resulted in the Assessment.

This case involves dual sets of CPRs (the “original CPRs” and “the amended CPRs”), as well as a set of unverified payroll reports submitted to DLSE three months after the Assessment was issued. Because different legal results flow from each set, only one can be accepted as accurate as to the hours, dates, rates of pay and classifications applicable to Micon workers on the Project. All of the evidence in support of the amended CPRs proffered by Micon comes from just one person – Napolitano. The steps taken and the methodology employed by Micon’s “accounting people” in producing the amended CPRs remain unexplained.

The timing of the unverified payroll reports and the amended CPRs is suspect. The original CPRs were produced while work on the Project was underway, and they were submitted to DLSE prior to the Assessment. That timing creates an inference of accuracy as to those original CPRs. The unverified payrolls reports were submitted in December 2015, three months after the Assessment was served. Napolitano testified that “final” payrolls were produced about three months after the 2014 date that work on the Project was completed. The “final” payroll figures apparently were used to formulate the unverified payroll reports that Micon provided DLSE in December 2015. Napolitano’s testimony on this issue, however, lacked credibility given that the City filed its Notice of Completion in August 2014, 16 months prior to the submission of the unverified payroll reports. (DLSE Exhibit No. 7.) Even accepting Napolitano’s testimony that a “second part” of the Project continued through July of 2015, the unverified payroll reports were not submitted until five months later. Micon never explained the delay.

The amended CPRs (Micon Exhibit A) are even less credible. Napolitano purportedly verified the amended CPRs under penalty of perjury on June 20, 2016, nearly

two years after the work covered by the Assessment was completed. How Napolitano could recall two years after the fact the details about work performed and employee hours set out in the amendments was not explained at the Hearing. Moreover, Napolitano's testimony regarding Micon's practices is at odds with the statutory and contractual obligations required of every contractor on every public works project subject to the California Labor Code. He testified, essentially, that Micon submitted preliminary CPRs in order to receive monthly payments from the City, and then prepared final CPRs after the Project was completed. Section 1776, subdivision (a), however, provides:

Each contractor and subcontractor shall keep accurate payroll records, showing 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 journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

- (1) The information contained in the payroll record is true and correct.
- (2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

Thus, the required standard for certified payroll records is that they be "accurate" and "true and correct," and not simply preliminary or approximations. Napolitano did not testify as to the sources of information or methodology he used to amend the original CPRs. Given Napolitano's failure to describe the sources and methodology, Micon presents no reason to conclude that the amended CPRs are more accurate than the original CPRs; indeed, given the time that had elapsed since the work was done, the presumption would be the opposite.

De Leon noted in his penalty review that the CPRs showed that on certain days, Micon did not employ the required ratio of Landscape Laborers to Landscape Tenders, and accordingly, De Leon reclassified some workers to Landscape Laborer for those days in the audit. (DLSE Exhibit No. 8.) An example of one instance occurred on April 29, 2014. For that date, the original CPR reports three Landscape Laborers and three Landscape Tenders working. The workers listed as Landscape Tenders were J. De Luna, Salvador Hernandez and Miguel Rojas. The applicable ratio in the Landscape

Laborer/Tender PWD required that the sixth worker be a journey person or an apprentice, not a tender. As staffed by Micon on April 29, 2014, the employment of three journey persons and three tenders constituted a ratio violation. Accordingly, in his audit De Leon reclassified Rojas as a Landscape Laborer for that day.

Micon's amended CPR, in contrast, shows no hours worked on April 29, 2014, by Hernandez, and credits him instead with eight hours worked on Friday, May 2, 2014 – hours that were not reported for him on the original CPR for that date. The effect of these changes was to eliminate the ratio violation found by De Leon for April 29, 2014, with no change in the wages paid to Hernandez for the week. The Daily Construction Reports, however, show Hernandez working eight hours on *both* April 29, 2014, and May 2, 2014. Micon made no showing as to any factual basis for revising the original CPRs to delete the hours Hernandez worked on April 29, 2014.

Similarly, the original CPR for Week 19 shows for Wednesday, July 2, 2014, and Thursday, July 3, 2014, nine Landscape Laborers and ten Landscape Tenders (the latter consisting of Jose DeLuna, Rosalio Feliz, Roldan Marcelino, Rojas, Trinidad Zambrano, Gustavo Zazueta, Ismael Flores, Jr., Neftai Mar, Alex Salgado, and Jose Campos). Finding a Laborer/Tender ratio violation, De Leon reclassified Rojas and Zazueta for those dates. In the amended CPR for this week, Micon changed the classification of Campos from Landscape Tender to "Landscape Maintenance," with no change in pay, and without submitting at the Hearing a PWD for Landscape Maintenance. While the amended CPR thus purports to eliminate the ratio violation, Micon did so without presenting any evidence as to what tasks are properly included in a Landscape Maintenance PWD and without showing that the work by Campos on the days in question actually involved Landscape Maintenance duties.

Given the unreliable nature of the amended CPRs, in light of the obligation of a contractor to maintain accurate CPRs in the first instance, the passage of time, and the negative inferences to be drawn both from Micon's failure to present any evidence supporting a factual basis for the amended CPRs, and from the way the amendments appeared to fix ratio violations, the original CPRs (DLSE Exhibit No. 22) are accepted as proof of the hours and pay rates for Micon's employees on the Project. The amended

CPRs (Micon Exhibit A) were also admitted into evidence, but are not sufficient to support a finding of accuracy as to their contents. Accordingly, this Decision finds that the original CPRs, and other evidence presented by DLSE at the Hearing, “provide[d] prima facie support for the Assessment” (Cal. Code Regs. tit. 8, § 17250, subd. (b).)

Micon Misclassified Certain Workers and as a Result Failed to Pay the Proper Prevailing Wage Rate.

DLSE having met its initial burden, Micon had the burden of proving that the basis for the Assessment was incorrect. (§ 1742, subd. (b).) Micon met this burden to show DLSE’s reclassification of workers was incorrect in some, but not all, instances.

Cement Mason vs. Landscape Laborer.

Micon contends that the Landscape Laborer classification in its CPRs was proper for workers installing cement mowing edges, that several classifications overlap with respect to this work, including Cement Mason, and that it was therefore entitled to choose which classification to use. In its post-hearing brief, DLSE responded with a two-pronged argument. First, while it did not dispute that Landscape Laborers may install cement mowing edges, it argued that Landscape Tenders may not perform this work. Second, it contended that Micon’s concrete work was not limited to cement mowing edges.

According to the language of the Landscape Laborer and Landscape Tender scopes of work, Landscape Laborers may install cement mowing edges; Landscape Tenders may not. To the extent that DLSE reclassified Landscape Laborers performing such work to Cement Mason, the Assessment must be modified because where two PWDs clearly overlap, Micon has the latitude to select the lower paid craft.

As to DLSE’s contention that Micon was performing concrete work other than cement mowing edges, the evidence is not persuasive. The date of June 26, 2014, is the only date DLSE cites in its brief as one on which a DCR indicated that Micon was installing a section of curb. The only other reference DLSE made to Micon doing concrete work beyond cement mowing edges appears in the penalty report where De Leon quoted from the DCR for May 9, 2014: “*Micon Concrete Crew is on site; they are placing colored concrete and slate stamping the center median nose near Alessandro and*

a portion of the 1 foot mow strip. 8 yards placed today. Robertson's ready mix 560C3250 Quarry Red." (DLSE Exhibit No. 8, italics in original.)

Micon submitted into evidence Project drawings, one of which depicts the section of the median mentioned in the quoted DCR. It shows the median narrowing to a point as it approaches Alessandro Boulevard (apparently to accommodate a left turn pocket), with strips of stamped concrete (the mow strips) on either edge of the median. The two strips merge as the median narrows, and this is presumably the "median nose" referenced by the inspector. It is apparently the same colored, stamped cement as the rest of the mow strips, and there is no evidence that the "median nose" is other than a mow strip. Thus, this work done on May 9, 2014, properly fell within the scope of work of Landscape Laborer, the craft selected by Micon.

The audit worksheets show that De Leon reclassified the following workers to Cement Mason on various dates: Federico Talamantes, Joey Perez, Juan Rivera, Nick Perez, and Salvador Hernandez. The preponderance of the evidence, however, shows that Micon properly classified these workers in most instances, as follows:

Federico Talamantes. The original CPRs credit Talamantes with eight hours of work as Laborer Group 1 on each of the following dates: May 12, 13, 15 and 16, 2014; and June 17, 18, 19, 20, 25, 26 and 27, 2014. Although De Leon testified that he did not reclassify any workers from Laborer Group 1, a comparison of the CPRs with the audit worksheet shows that, in fact, he did reclassify Talamantes for each of the above dates to Cement Mason. The DCR for Tuesday, June 17, makes no mention of any concrete work being done by Micon. The DCRs for the other days in question show Micon doing "work in connection with concrete work" within the meaning of the Laborer Group 1 scope of work. Thus, there is no evidence that Talamantes actually performed work outside the Laborer Group 1 classification on any of those dates, and the record demonstrates that Micon correctly classified and paid Talamantes as a Laborer for this work.

The original CPRs credit Talamantes with eight hours of straight time as a Landscape Laborer on the following dates: July 7, 8, 9, 10, 11, 14, 15, 16, 17 and 18, 2014. They also credit him with one hour of overtime each day on July 7, 8 and 9, and two hours of overtime on July 14. De Leon reclassified Talamantes as a Cement Mason

for all of his hours on those dates. But the DCRs do not show Micon performing any concrete work on any of those dates; instead they state that Micon was engaged only in tasks such as tree planting and cleaning, which are properly within the scope of work for Landscape Laborer. Thus Micon correctly classified and paid Talamantes on each of the dates in question.

In sum, in every instance in which Talamantes was reclassified by De Leon, the preponderance of the evidence establishes that Micon correctly classified and paid him. Accordingly, the Assessment must be modified by subtracting the following aggregate amounts assessed for Talamantes: \$867.16 in unpaid wages, \$2,040.00 in section 1775 penalties, and \$100.00 in section 1813 penalties.

Joey Perez. Per its original CPRs, Micon classified and paid Perez as Laborer Group 1 for eight hours each on May 5, 7, and 8, 2014, and as a Cement Mason on May 9, 2014. In the Assessment, De Leon reclassified him as a Cement Mason for May 5, 7, and 8. The DCR for May 5 does not show Micon performing concrete work for those days. The DCRs for May 7 and 8 indicate that the only concrete-related work being done by Micon involved forms and preparation for mow strip installation. These functions constituted "work in connection with concrete work" within the meaning of the Laborer Group 1 scope of work. Accordingly, Perez was properly classified and paid on each of the three days in May. De Leon assessed section 1775 penalties not only for those three days, but also for underpayment for work on May 9, when it is undisputed that Micon correctly paid Perez as a Cement Mason. The Assessment must be modified to subtract an aggregate of \$119.05 in unpaid wages and \$480.00 in section 1775 penalties.

Juan Rivera. Although he did not testify at the Hearing, Rivera did submit a completed employee questionnaire, and was interviewed by De Leon before the Assessment. On his questionnaire, Rivera identified his job title as "Cement Mason Form Setter." He described his work as: "To set up forms and get it ready for the day we poured it out [*sic*]." He listed the tools used as: "Nail bags, saw, levels, hammer, tape measure, finishing tools, stamps, rubber boots and rubber gloves." Rivera's questionnaire further stated he was paid \$32.00 per hour with no benefits. Rivera did not provide any check stubs or other documentation of his hourly pay.

The original CPR for the week ending May 10, 2014, shows that on Friday, May 9, Micon classified him as Landscape Laborer, but paid him at the higher Laborer Group 1 rate of \$46.54 per hour. The CPR for the week ending May 17, 2014, shows the same Landscape Laborer classification and Laborer Group 1 pay rate for Perez for 40 hours worked Monday through Friday. In his audit, De Leon reclassified Rivera as a Cement Mason on each of these days. As discussed above, the only concrete work occurring on those days was related to cement mowing edge installation, and as demonstrated by a comparison of the relevant scopes of work of the PWDs, the work properly falls within both crafts, Landscape Laborer and Laborer Group 1. Thus, the preponderance of evidence establishes that Micon properly classified Rivera.

Not only did De Leon reclassify Rivera, but he accepted Rivera's claim that he was paid \$32.00 per hour with no benefits, even though there is no documentation to support that claim and it is contradicted by the original CPRs. Rivera's claim is uncorroborated hearsay, and cannot overcome the import of the original CPRs, which were made at or near the time of the actual work on the Project. (Cal. Code Reg., tit. 8, § 17244, subd. (d).) Additionally, DLSE presented no evidence that any other worker on the Project was paid less than the amounts shown on the original CPRs. Accordingly, the preponderance of the evidence establishes that Rivera was paid \$46.54 per hour (higher than required for Landscape Laborer) and not \$32.00 per hour asserted in the Rivera questionnaire.

The original CPRs also show that for the weeks ending May 24, 2014, and May 31, 2014, Micon classified Rivera as Laborer Group 1, and paid him at the required hourly rate for that classification, \$46.54, for seven days of work over 56 hours. De Leon did not reclassify Rivera for those days, but only credited Micon with paying the \$32.00 per hour claimed by Rivera. For the reasons stated above, the preponderance of the evidence establishes that Micon did not underpay Rivera on those dates.

Accordingly, the Assessment must be modified as to Rivera to subtract an aggregate of \$1,750.24 in unpaid wages and \$720.00 in section 1775 penalties.

Nick Perez. The original CPRs credit Nick Perez with eight hours of work as Laborer Group 1 on each of the following dates: May 9, 12, 13, 14, 15, and 16, 2014. De

Leon reclassified Perez as a Cement Mason on each of these days. As discussed above, the only concrete work occurring on those days was related to cement mowing edge installation, and thus properly fell within the scope of work of the Laborer Group 1 PWD. Thus, the preponderance of evidence establishes that Micon properly classified Perez on the above dates in May.

The original CPRs credit Perez with eight hours of work as a Landscape Laborer on each of the following dates: June 26, 27 and 30, 2014. De Leon again reclassified him as a Cement Mason for those dates. As noted by DLSE, the DCR for Thursday, June 26, states: "Micon is pouring the remaining portion of the Center Median Curb today. Robertson's Ready Mix Concrete delivered the concrete.... 10 Yards was placed. Pictures have been taken." This description is consistent with the previous day's DCR, which states that Micon was "Setting Forms for tomorrow's concrete pour of the remaining Curb." Concrete work other than cement mowing edges does not find expression in the scope of work for Landscape Laborer. As a result, the preponderance of evidence supports De Leon's reclassification of Perez as a Cement Mason on June 26. However, the DCRs for June 27 and 30 indicate that the only concrete work being done by Micon involved mow edge installation. Again, this work properly falls within the Landscape Laborer scope of work, and it is concluded that Micon correctly classified Perez on June 27 and 30, 2014.

In sum, the preponderance of the evidence establishes that De Leon correctly reclassified Nick Perez on June 26, 2014, but Micon correctly classified him on all other dates at issue. Accordingly, the Assessment must be modified as to Nick Perez to subtract an aggregate of \$317.44 in unpaid wages and \$960.00 in section 1775 penalties.

Salvador Hernandez. The original CPR reflects that for Friday, May 9, 2014, Micon classified Hernandez as a Landscape Tender, and paid him at the hourly rate of \$21.25 for eight hours of work. De Leon reclassified Hernandez as a Cement Mason for that date. According to the DCR for that date, the only work done by Micon's workers was concrete installation. A review of the scope of work for the Landscape Tender PWD demonstrates that the craft does not include *any* concrete work. Accordingly, the preponderance of the evidence establishes that Micon incorrectly classified and paid

Hernandez on May 9, 2014, and the Assessment correctly reclassified him.

Landscape Laborer vs. Landscape Tender Ratio Violations.

Notwithstanding Micon's denials, a review of the original CPRs confirms that Micon did violate the required ratio for Landscape Laborer to Landscape Tenders on some days. The original CPR for the week ending April 26, 2014, shows Rojas was classified and paid as a Landscape Tender on Thursday, April 24, and Friday, April 25. There was only one worker classified as a Landscape Laborer on those days, Oscar Zazueta. The ratio in the PWD requires that the first employee be a Landscape Laborer and the second employee be either an apprentice or another Landscape Laborer (journeyperson). Therefore, the Assessment correctly reclassified Rojas as a Landscape Laborer on those days.

Similarly, the original CPR for the week ending May 3, 2014, shows that on Tuesday, April 29, 2014, Micon classified and paid three workers as Landscape Laborer and three (J. De Luna, Salvador Hernandez, and Rojas) as Landscape Tender. As stated, under the applicable PWD, the ratio requires that the sixth employee be an apprentice or Landscape Laborer. Hence, DLSE correctly reclassified Rojas on that date. The Assessment also correctly found ratio violations on July 2 and 3, 2014, and therefore properly reclassified Rojas and Zazueta from Landscape Tender to Landscape Laborer on those days. Finally, the Assessment correctly found ratio violations on July 10 and 11, 2014, and properly reclassified Rojas accordingly.

The Assessment also reclassified Rojas from Landscape Tender to Landscape Laborer on most of the other days he worked on the Project. Some, but not all, of these reclassifications are supported by the DCRs. The applicable scope of work strictly limits the tasks Landscape Tenders are allowed to perform, and does not include, for example, concrete work or traffic control.

The original CPRs classified Rojas as a Landscape Tender on Monday through Thursday in the week ending July 5, 2014. The Assessment reclassified him as Landscape Laborer for each of those days. The DCR for Monday, June 30, states: "Today Micon is placing Colored Stamped Concrete for the 1 foot mow strip in the Center Median." As discussed *ante*, installation of cement mow strips properly falls

within the scope of work for Landscape Laborers, but Landscape Tenders may not perform any concrete work. The DCRs for the next three days indicate that Micon's work was limited to placing sign posts and signs. This work also falls outside the permissible scope of work for Landscape Tenders. Accordingly, the preponderance of the evidence supports the reclassification of Rojas to Landscape Laborer for the week ending July 5, 2014, irrespective of the ratio violations found on July 2 and 3, 2014.

The original CPRs classified Rojas as Landscape Tender on Monday through Friday in the week ending July 12, 2014. The Assessment reclassified him as Landscape Laborer for each of those days. The DCR for Monday, July 7, states that it is the inspector's scheduled day off, so there is no description of the work performed that day. The DCRs for the remainder of the week state: "Micon is assisting Land Engineering on Planting Trees and Plants in the Center Median." Rojas's testimony regarding his work during this period is generally consistent with that description. Under the applicable PWD's scope of work, Landscape Tenders are permitted to assist in planting, at least with respect to cleanup and watering. Thus, the preponderance of the evidence supports Micon's classification of Rojas as Landscape Tender for Monday, July 7, through Wednesday, July 9. However, due to ratio violations, the Assessment correctly reclassified him on Thursday, July 10, and Friday, July 11.

The original CPRs also classified Rojas as Landscape Tender on Monday through Friday on the week ending July 19, 2014. The Assessment again reclassified him as Landscape Laborer for each of those days. The DCRs for each of those days indicate that Micon was doing predominantly cleanup work. Since Landscape Tenders are permitted to perform such work, the preponderance of the evidence supports Micon's classification of Rojas for each day of that week. The same is true for Monday, July 21, when the Assessment again reclassified Rojas from Landscape Tender to Landscape Laborer.

In sum, the preponderance of the evidence establishes that De Leon correctly reclassified Rojas and Zazuetta on days when ratio violations occurred, and also correctly reclassified Rojas on days when he performed work that properly fell outside the Landscape Tender scope of work. On all other dates in question, Micon correctly

classified these workers. Accordingly, the Assessment must be modified to subtract an aggregate of \$2,018.46 in unpaid wages and \$1,080.00 in section 1775 penalties.

Micon Underpaid Some Landscape Tenders Who Were Properly Classified As Such.

The Assessment found that Micon paid the following Landscape Tenders at the rate of \$16.06 per hour instead of the \$16.46 required by the Landscape Laborer/Tender PWD: Jose Campos, Meftai Mar, Rosalino Felix, Trinidad Zambrano, Alex Salgado and Ismael Flores, Jr. In his testimony, Napolitano acknowledged that Micon had paid the workers at the rate of \$16.06. Insofar as the Assessment found unpaid wages for Landscape Tenders based on this shortfall, the Assessment is affirmed.

Summarizing the result of the misclassification and underpayment analyses provided *ante*, the reduction in unpaid wages from the amount found in the Assessment comes to \$5,072.35, leaving a total amount of unpaid wages of \$4,231.18.

Micon Did Not Pay All the Required Training Fund Contributions.

The Assessment found that Micon failed to make training fund contributions in a total amount of \$1,941.22 for this Project. This amount includes contributions for Rojas on days he was reclassified from Landscape Tender to Landscape Laborer. This Decision finds that Rojas was properly classified as Landscape Tender on nine of those days, during which he worked a total of 75 hours. The Landscape Laborer/Tender PWD does not require training fund payments for Tenders. Accordingly the assessed amount must be reduced by 64 cents for each of those 75 hours, or \$48.00. The training fund contribution amount found in DLSE's audit should thereby be reduced by \$48.00 from \$1,941.22 to \$1,893.22.

Further, Micon provided evidence at the Hearing that it paid to the California Apprenticeship Council training fund contributions totaling \$931.52 for this Project. DLSE did not rebut that evidence. When this amount is subtracted, Micon's training fund liability is further reduced to \$961.70.

DLSE's Penalty Assessment Under Section 1775.

Former section 1775, subdivision (a), as it read at the time the City advertised for bids on the Project, states in relevant part:

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2) (A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B)(i) The penalty may not be less than forty dollars (\$40) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.

(ii) The penalty may not be less than eighty dollars (\$80) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty dollars (\$120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^[8]

Abuse of discretion by the Labor Commissioner is established if the "agency's nonadjudicatory action . . . is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

⁸ Section 1777.1, subdivision (d), as it existed on the bid advertisement date, defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

The Labor Commissioner assessed section 1775 penalties at the rate of \$120.00 because Micon misclassified workers and underpaid workers in a significant amount comprising over 100 violations. In addition, Micon had a history of four previous assessments for wage violations and one of the four previous assessments also involved the misclassification of Laborers as Modular Installers.

The burden was on Micon to prove that the Labor Commissioner abused her discretion in setting the penalty amount under section 1775 at the rate of \$120.00 per violation. Micon disputed that it had misclassified workers and underpaid them. However, Micon did not satisfy its burden of proving that the Assessment was incorrect as to all such workers. Nor did Micon introduce evidence of abuse of discretion by the Labor Commissioner as to the penalty. The number and variety of prevailing wage violations committed by Micon, and Micon's lack of reasonable defense to some violations, support a finding that Micon's violations were willful.

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The Director is not free to substitute his or her own judgment. Here the Labor Commissioner reduced the penalty proposed by the deputy from the maximum \$200.00 per violation to \$120.00 per violation, for a total of \$16,080.00. Micon has not shown an abuse of discretion as to the penalty rate and, accordingly, the assessment of penalties at the rate of \$120.00 is affirmed. This Decision, however, reduces the total number of assessed violations to take into account modifications to the Assessment set forth herein. Given the discussion as to the instances of unpaid wages, *ante*, 44 instances of penalty assessment at \$120.00 per violation are removed from the total of 134 violations listed in the Assessment, reducing the total

penalty assessment by \$5,280.00. After that reduction, 90 violations remain at the rate of \$120.00 per violation, for a total amount of \$10,800.00

DLSE's Penalty Assessment Under Section 1813.

Section 1813 provides in pertinent part:

The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article.

Thus, the contractor is liable for section 1813 penalties whenever it fails to pay the overtime rate as required in the applicable PWD. The Assessment found that Micon was liable for \$425.00 in section 1813 penalties for 17 violations. These violations mostly arose from instances where the Assessment found that Micon had misclassified workers. The reclassification of these employees meant that a higher hourly pay rate applied, and therefore a higher overtime rate.

While section 1813 provides no discretion as to the penalty rate, the Assessment must nonetheless be modified in instances where the facts do not support a finding of a section 1813 violation. Here, as discussed above, in some instances workers reclassified in the Assessment were properly classified by Micon, given the scopes of work of the applicable PWDs and the duties being performed as demonstrated in the DCRs. In those instances, Micon paid the workers the correct rates, including for overtime work. Six of the section 1813 penalties assessed fall within this category: four for Talamantes and two for Rojas. Accordingly, the Assessment must be modified by reducing the section 1813 penalties by \$150.00, resulting in section 1813 penalties calculated at the rate of \$25.00 for each of 11 violations, for a total amount of \$275.00.

Micon Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages upon the contractor, essentially a doubling of the unpaid wages. It provides in part:

After 60 days following the service of a Civil Wage and Penalty Assessment under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an

amount equal to the wages, or portion thereof, that still remain unpaid. If the Assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

During the pendency of the present case through the conclusion of the Hearing on the Merits and the submission of the case for decision on November 21, 2017, the statutory scheme regarding liquidated damages provided contractors three alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These required the contractor to make key decisions within 60 days of the service of the CWPA upon the contractor.

First, the above-quoted portion of section 1742.1, subdivision (a), states that the contractor shall be liable for liquidated damages equal to the portion of the wages “that still remain unpaid” 60 days following service of the CWPA. Accordingly, the contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the CWPA, and thereby avoid liability for liquidated damages on the amount of wages so paid. Second, under section 1742.1, subdivision (b), a contractor would entirely avert liability for liquidated damages if, within 60 days from issuance of the CWPA, the contractor deposited into escrow with DIR the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775. Section 1742.1, subdivision (b), stated in this regard:

There shall be no liability for liquidated damages if the full amount of the assessment . . . , including penalties, has been deposited with the Department of Industrial Relations, within 60 days of the service of the assessment . . . , for the department to hold in escrow pending administrative and judicial review.

And thirdly, the contractor could choose to rely on the potential for the Director to exercise his or her discretion to waive liquidated damages under the following language of former section 1742.1:

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment . . . , the director may exercise his or her

discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

((Former) §1742.1, subd. (a).)⁹

In this case, Micon did not pay any back wages to the workers in response to the Assessment or deposit with the Department the assessed wages and penalties. That leaves the question of whether Micon has demonstrated to the Director's satisfaction that it had substantial grounds for appealing the Assessment so as to warrant a discretionary waiver of liquidated damages.

Noting that the section 1742.1, subdivision (a), provides that liquidated damages are "payable only on the wages found to be due and unpaid," and further noting that this Decision has found that the Assessment was error in some respects and has reduced the amounts of wages due, the Director does not find grounds for a waiver of liquidated damages as to the remaining wages found due. Although Micon may have had substantial grounds for appealing the findings in the Assessment with respect to the reclassification of Laborers and Landscape Laborers to Cement Mason, it did not have substantial grounds for appealing the findings with respect to the ratio and other violations. Accordingly, this Decision finds that liquidated damages are due for those unpaid wages.

Apprenticeship Violations.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. (See California Code of Regulations, title 8, sections 227 to 232.70.)¹⁰

⁹ On June 27, 2017, the Director's discretionary waiver power was deleted from section 1742.1 by Senate Bill 96 (stats. 2017, ch 28, § 16 (SB 96)). Legislative enactments are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Further, "[a] statute is retroactive if it substantially changes the legal effect of past events." (*Kizer v. Hannah* (1989) 48 Cal.3d 1, 7.) Here, the law in effect at the time the Assessment was issued and at the time the Request for Review was filed allowed a waiver of liquidated damages in the Director's discretion, as specified. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what Micon elected to do in response to the Assessment). Accordingly, this Decision finds that the Director's discretion to waive liquidated damages in this case under section 1742.1, subdivision (a) is unaffected by SB 96.

¹⁰ All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

Section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeypersons in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). (§ 1777.5, subd. (g); Cal. Code Regs., tit. 8, § 230.1, subd. (a).) In this regard, section 1777.5, subdivision (g) provides:

The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

The governing regulation as to this 1:5 ratio of apprentice hours to journeyman hours is section 230.1, subdivision (a), which states:

Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with the required 1 hour of work performed by an apprentice for every five hours of labor performed by a journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter. Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

However, a contractor is not considered in violation of the regulation if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).)

According to the regulation, a contractor properly requests the dispatch of apprentices by doing the following:

Request the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays, and holidays) before the date on which one or more apprentices are required. If the apprenticeship committee from which apprentice

dispatch(es) are requested does not dispatch apprentices as requested, the contractor must request apprentice dispatch(es) from another committee providing training in the applicable craft or trade in the geographic area of the site of the public work, and must request apprentice dispatch(es) from each such committee either consecutively or simultaneously, until the contractor has requested apprentice dispatch(es) from each such committee in the geographic area. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.

DAS has prepared a form, DAS 142 that a contractor may use to request dispatch of apprentices from apprenticeship committees.

The regulations further provide that prior to requesting the dispatch of apprentices, contractors should alert apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed. Section 230, subdivision (a), states in part as follows:

Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. The contract award information shall be in writing and may be a DAS Form 140 Public Works Contract Award Information. The information shall be provided to the applicable committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work. Failure to provide contract award information, which is known by the awarded contractor, shall be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed by the awarding body, for the purpose of determining the accrual of penalties under Labor Code section 1777.7....

Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

When DLSE determines that a violation of the apprenticeship laws has occurred, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." ((Former) § 1777.7, subd. (c)(2)(B), as it existed on the date of the bid advertisement for the Project, August 22,

2013.)

Micon Failed to Employ Cement Mason and Laborer Apprentices in the Required Ratios.

Cement Mason, Landscape Laborer, and Laborer Group 1 were the apprenticeable crafts at issue in this matter. Micon employed only one Laborer apprentice, and De Leon determined that he worked only 104 total hours on the Project. De Leon further determined that in the Laborer and Landscape Laborer crafts, Micon's use of apprentices resulted in a ratio of apprentice hours to journey person hours of only 3.79 percent, well below the required minimum ratio of 20 percent (1:5) required by statute. Further, since Micon employed no Cement Mason apprentices on the Project, the resulting ratio for that classification was zero percent.

Micon argues that it was not required to employ Cement Mason apprentices because it did not need Cement Masons for the Project. However, Napolitano acknowledged in his testimony that Micon in fact classified some workers in its CPRs as Cement Masons. Its use of the Cement Mason classification carried with it the requirement to employ Cement Mason apprentices. Accordingly, the record establishes that Micon violated section 1777.5 and the related regulations, sections 230 and 230.I, in its failure to meet the required 1:5 apprentice to journey person ratios.

There Were Five Applicable Committees in the Geographic Area.

DLSE established that there were three applicable apprenticeship committees for Cement Mason in the geographic area of the Project: (1) Southern California Cement Masons J.A.C.; (2) San Diego Associated General Contractors J.A.C.; and (3) Southern California Laborers/Cement Mason J.A.C. Further, DLSE established that there were two applicable apprenticeship committees for Laborer -- including Landscape Laborer -- in the geographic area of the Project: (1) Laborers Southern California Landscape and Irrigation Fitters J.A.C.; and (2) Associated General Contractors of America, San Diego Chapter. Micon did not dispute that the five committees listed were the applicable apprenticeship committees for the Project.

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Micon Failed to Properly Notify the Five Applicable Committees of Contract Award Information.

Micon provided proof of sending contract award information to just one committee: the Laborers Southern California JAC. However, that notice was not timely. It was sent three weeks after Micon had workers employed on the Project; the applicable regulation requires that the notice be sent no later than the first day of work on the Project. Thus, Micon violated section 1777.5, subdivision (e), and the applicable regulation, section 230, subdivision (a).

Micon Failed To Properly Request The Dispatch Of Cement Mason and Laborer Apprentices.

All requests for dispatch of apprentices must be in writing and provide at least 72 hours' notice of the date on which one or more apprentices are required. (§ 230.1, subd. (a).) Micon failed to introduce any documentary evidence that it complied with this requirement. Micon did produce three requests for dispatch of a single apprentice sent to the Laborers Southern California J.A.C. in Azusa, dated April 1, 2014, April 30, 2014, and May 6, 2014. However, this was more than two months after Micon had begun employing Laborers and Landscape Laborers on the Project. Micon does not dispute that it never requested the dispatch of Cement Mason apprentices.

The Penalty for Noncompliance.

If a contractor "knowingly violated Section 1777.5" a civil penalty is imposed under section 1777.7. Here, the Labor Commissioner assessed a penalty against Micon under the following portion of section 1777.7, subdivision (a)(1):¹¹

A contractor or subcontractor that is determined by the Labor Commissioner to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation.... A contractor or subcontractor that knowingly commits a second or subsequent violation of section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as

¹¹ Section 1777.7 was amended, effective January 1, 2015. (See Stats. 2014, ch. 297, § 3 (AB 2744).) For purposes of this Decision, the Director has applied the language of section 1777.7 that was in effect at the time the Project was advertised for bid.

required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars (\$300) for each full calendar day of noncompliance....

The phrase quoted above -- "knowingly violated Section 1777.5" -- is defined by the regulation, section 231, subdivision (h), as follows:

For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control. There is an irrebuttable presumption that a contractor knew or should have known of the requirements of Section 1777.5 if the contractor had previously been found to have violated that Section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects.

The Labor Commissioner imposed a penalty rate of \$150.00 for each of 160 days of violations, a rate that the Labor Commissioner reduced from the \$300.00 rate proposed by the deputy.

Under the version of section 1777.7 applicable to this case, the Director decides the appropriate penalty de novo.¹² In setting the penalty, the Director considers all of the following factors:

- (A) Whether the violation was intentional,
- (B) Whether the party has committed other violations of Section 1777.5,
- (C) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation,
- (D) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices,
- (E) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

((Former) § 1777.7, subd. (f)(1) and (2).)

¹² As noted *ante*, section 1777.7 was amended effective January 1, 2015. Among other changes, the amendments removed the Director's role in determining the penalty de novo, and instead now provide that the Labor Commissioner's determination as to the amount of the penalty is reviewable only for an abuse of discretion. (§ 1777.7, subd. (d).) This decision applies the former section 1777.7, as in effect on the project bid advertisement date.

Micon hired only one Laborer apprentice for the Project, no Landscape Laborer apprentices, and no Cement Mason apprentices. Further, Micon did not attempt to obtain apprentices by sending timely DAS 140 and DAS 142 forms to all the applicable apprenticeship committees. Micon's violations were "knowing" under the irrebuttable presumption quoted above in that Napolitano signed the Contract acknowledging that Micon was aware of and would comply with laws requiring the employment of registered apprentices on the Project. Napolitano did not testify that he was unfamiliar with the requirement for the employment of apprentices on the Project, or unfamiliar with the need to contact apprentice committees and request the dispatch of apprentices. Indeed, Micon did belatedly request dispatch of a single Laborer apprentice. There was no evidence that Micon could not have sent contract award information to all the applicable committees and could not have requested dispatch of apprentices from those same committees. Napolitano's argument that Micon sought no Cement Mason apprentices because they were not needed on the Project is unfounded, because Micon in fact employed journeyman Cement Masons on the project, regardless of whether that work could also have been performed by Laborers, and accordingly, there were Cement Mason apprenticeship requirements.

Applying the de novo standard for this case, factor "A" would suggest a penalty rate on the higher end. The Contract put Micon on notice that it was required to employ apprentices, the company is experienced in public works projects, and has had prior assessments.

As to the de novo review factors "D" and "E," DLSE's evidence established that Micon's Laborer and Landscape Laborer journeymen worked 2,742 total hours on the Project, but only 104 apprentice hours were booked according to the CPRs. Applying the five-to-one ratio for Laborers and Landscape Laborers only, and not counting Cement Masons, Micon's violations of the ratio requirement deprived apprentices of 444 hours of paid on-the-job training and also deprived the relevant apprenticeship committees of the opportunity to provide that training to their apprentices.

Factor "C" is neutral in this case. DLSE's evidence shows that DLSE did not notify Micon of its violations until September 11, 2014, almost one month after the City

recorded its Notice of Completion. Hence, Micon had no opportunity to voluntarily remedy the violations after receiving notice.

Factor "B" supports a penalty rate of \$150.00. The record shows that Micon had been issued four previous determinations of civil penalty for apprenticeship violations within 16 months of the issuance of the Assessment.

Overall, based on a de novo review of the five factors above and in light of the evidence as a whole in this case, the Director finds that a penalty rate of \$150.00 is appropriate, and accordingly the Assessment is affirmed in this respect.

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

FINDINGS AND ORDER

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. The Civil Wage and Penalty Assessment was timely served by DLSE in accordance with section 1741.
3. Affected contractor Micon, Inc., filed a timely Request for Review.
4. DLSE timely made its enforcement file available to Micon.
5. No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment.
6. Nick Perez and Salvador Hernandez performed work in Riverside County during the pendency of the Project, were misclassified as Landscape/Irrigation Laborer and Landscape/Irrigation Tender respectively when they should have been classified as Cement Mason, and were entitled to be paid the journeyman rate for Cement Mason for that work.
7. Miguel Rojas and Gustavo Zazueta performed work in Riverside County during the pendency of the Project, were misclassified as Landscape/Irrigation Tender when they should have been classified as Landscape/Irrigation Laborer, and were entitled to be paid the journeyman rate for Landscape/Irrigation Laborer for that work.

8. Jose Campos, Meftai Mar, Rosalino Felix, Trinidad Zambrano, Alex Salgado and Ismael Flores, Jr. performed work in Riverside County during the pendency of the Project, were properly classified as Landscape/Irrigation Tender but were paid less than the required rate for that classification.
9. In light of findings through 6 through 8 above, Micon, Inc. underpaid its employees on the Project in the aggregate amount of \$4,231.18.
10. Micon, Inc. failed to pay the prevailing overtime rate for work performed on 11 days. Accordingly, statutory penalties under section 1813 in the sum of \$275.00 are due from Micon, Inc.
11. Micon, Inc. did not pay required training fund contributions in the amount of \$961.70 for its employees on the Project.
12. The Labor Commissioner did not abuse her discretion in setting section 1775 penalties at the rate of \$120.00 per violation, and the resulting total penalty of \$10,800.00 as modified for 90 violations, is affirmed.
13. The unpaid wages found in Finding No. 9 remained due and owing more than 60 days following issuance of the Assessment, and Micon, Inc. had no substantial grounds to appeal the Assessment as to the wages found due and unpaid. Accordingly, Micon, Inc. is liable for an additional amount of liquidated damages under section 1742.1 in the amount of \$4,231.18.
14. There were three applicable apprenticeship committees in the geographic area of the Project in the craft of cement mason: (1) Southern California Cement Masons J.A.C.; (2) San Diego Associated General Contractors J.A.C, and (3) Southern California Laborers/Cement Mason J.A.C.
15. There were two applicable apprentice committees in the geographic area of the Project in the craft of Laborers – including Landscape/Irrigation laborers, (1) Laborers Southern California Landscape and Irrigation Fitters J.A.C.; and (2) Associated General Contractors of America, San Diego Chapter.

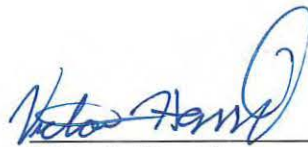
16. Micon, Inc. failed to issue a Notice of Contract Award Information to all applicable apprenticeship committees for the crafts of Cement Mason and Laborer.
17. Micon, Inc. failed to properly request dispatch of Cement Mason apprentices from the three applicable apprenticeship committees in the geographic area of the Project, and it was not excused from the requirement to employ apprentices under Labor Code section 1777.7.
18. Micon, Inc. failed to properly request dispatch of a sufficient number of Laborer apprentices from the two applicable apprenticeship committees in the geographic area of the Project, and it was not excused from the requirement to employ apprentices under Labor Code section 1777.7.
19. Micon, Inc. violated Labor Code section 1777.5 by failing to employ apprentices in the crafts of Cement Mason and Laborer on the Project in the minimum ratio required by the law.
20. Section 1777.7 penalties at the rate of \$150.00 per violation for 160 violations are appropriate, and the resulting total penalty of \$24,000.00 is affirmed.
21. The amount found due in the Assessment is modified and affirmed by this Decision are as follows:

Wages due:	\$ 4,231.18
Penalties under section 1775(a):	\$10,800.00
Penalties under section 1813:	\$ 275.00
Training Fund Contributions:	\$ 961.70
Liquidated damages:	\$ 4,231.18
Penalties under section 1777.7	\$24,000.00
TOTAL	\$44,499.06

In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

The Civil Wage and Penalty Assessment is affirmed in part and modified in part 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: November 1, 2019



Victoria Hassid
Chief Deputy Director
Department of Industrial Relations¹³

¹³ See Government Code sections 7, 11200.4.