STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of: Case No. 18-0193-PWH

Hareon Solar USA Corp., dba Armona Solar

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

On July 5, 2018, the Division of Labor Standards Enforcement (DLSE) issued a timely Civil Wage and Penalty Assessment (Assessment) against the prime contractor, Hareon Solar USA Corp., dba Armona Solar H1 LLC (Hareon), and its subcontractor, The Solar Company (TSC). Hareon submitted a timely Request for Review of the Assessment.[1] The Assessment was issued with respect to installation of solar power systems at two schools within the Armona Union Elementary School District in Kings County (Project). The Assessment determined that there were unpaid prevailing wages and training fund contributions, penalties for prevailing wage violations under Labor Code sections l775 and 1813, and penalties for apprenticeship violations under Labor Code section 1777.7.[2]

On November 13, 2019, in Fresno, California, at a duly noticed Hearing on the Merits before Hearing Officer Edward Kunnes, DLSE submitted an amended audit that lowered the amount of unpaid wages and training fund contributions and the amount of penalties under sections 1775 and 1813. Accordingly, DLSE moved to amend the Assessment downward and the Hearing Officer granted the motion based on Hareon having no objection.

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[1] TSC, a dissolved corporation, did not request review. The Assessment, as against TSC, became final when TSC did not request review 60 days after the Assessment issued. (Lab. Code § 1742, subd. (a); Cal. Code Reg., tit. 8, § 17222.) As regards TSC, this Decision does not review the Assessment. The Director makes findings herein as relates to TSC to determine liability solely against Hareon.

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

At the Hearing, David Cross appeared as counsel for DLSE. Roger Mason and Rachael Brown appeared as counsel for Hareon. DLSE Deputy Labor Commissioner Lori Rivera and TSC worker Eduardo Baptista testified in support of the Assessment.[3] Mark Danenhower, President of TSC; Loren Bell, TSC Project Manager; and Nathan Dai, a former Senior Director for Hareon, testified on behalf of Hareon. DLSE Exhibit Numbers 1 through 17 and Hareon Exhibits A through PPP were identified and admitted into evidence. On December 20, 2019, the matter was deemed submitted for decision after the parties filed post-trial briefs.

On October 19, 2018, at a prehearing conference, Hareon stipulated that the work on the Project was performed on a public work and required the payment of prevailing wages under the California Prevailing Wage Law, sections 1720 through 1861. Hareon also stipulated that DLSE served the Assessment timely. Additionally, DLSE stipulated that Hareon filed the Request for Review timely. At the Hearing, Hareon further stipulated that TSC did not pay training fund contributions, did not submit contract award information to applicable apprenticeship committees and did not request dispatch of or hire apprentices.[4]

The issues for decision are:

- Did DLSE's audit use the correct prevailing wage classification for the workers employed by TSC on the Project?
- Did TSC pay the required prevailing wages, including that for travel and overtime, for all hours worked on the Project?
- Did TSC pay the required training fund contributions for all hours worked on the Project?
- Is Hareon jointly and severally liable for payment of prevailing wages and training fund contributions?

[3] Eduardo Baptista and Luis Baptista worked for TSC on the Project. Baptista, as used herein, refers to Eduardo Baptista.

[4] Hareon argues that TSC's violation of section 1777.5 affected fewer days than DLSE assessed.

- Is Hareon liable for penalties under section 1775, and did DLSE correctly assess such penalties at a proper penalty rate?[5]
- Is Hareon liable for penalties under section 1813, and did DLSE correctly assess such penalties?
- Is Hareon liable for TSC's failure to provide contract award information to the applicable apprenticeship committees?
- Is Hareon liable for TSC's failure to timely request dispatch of apprentices?
- Is Hareon liable for TSC's failure to employ registered apprentices on the Project?
- Is Hareon liable for penalties under section 1777.7, and did DLSE correctly assess such penalties at a proper penalty rate?
- Is Hareon liable for liquidated damages under section 1742.1?

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, as amended. Hareon carried its burden of proving that the basis for the Assessment was incorrect in that DLSE did not correctly credit all wages that TSC had paid to its workers. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) The Director also finds that Hareon, a prime contractor, is not jointly or severally liable under section 1813 for overtime violations committed by TSC, its subcontractor. Accordingly, the Director issues this Decision affirming the amended Assessment, except as modified.

[5] In their joint statement of issues, the parties did not use the express term, "joint and several liability" of Hareon, nor did they refer specifically to Hareon's liability under section 1743, subdivision (a). By proposing the issues of Hareon's liability for unpaid wages and penalties due from TSC, however, the parties implicitly raised the question of Hareon's joint and several liability under section 1743.

FACTS

The Project.

Following the business failure of a solar developer to whom Hareon had provided financing, Hareon assumed a contract with Armona Union Elementary School District in Kings County (School District) to install two solar power systems at an elementary and middle school (Contract). The original Contract, dated June 20, 2014, and identified as the Power Purchase Agreement, contemplated construction of a 12-foot high steel canopy over a parking lot and a 20- to 30-foot high steel structure over a sports field and installation of PV Panels, Inverters, Rack Systems, Monitoring Equipment, and Communication Cards.[6] Pursuant to the Contract and amendment thereto, Hareon leased the solar power systems to the School District, and the School District had the sole right to, title to and control of all electrical energy produced by the solar power systems.

Hareon subcontracted with TSC (Subcontract) to construct the steel canopy and steel structure and install each component of the solar power systems. The Subcontract, titled the Engineering, Procurement, and Construction Agreement, did not contain a copy of the Labor Code sections applicable for public works.

In the Subcontract, a subparagraph under the section Scope of Work sets forth that TSC will prepare the site; install temporary security fences; procure a steel canopy and steel structure; provide and install solar power systems (including electrical work); procure and install two power meters; and install modules, inverters, switchgear, and a Data Acquisition System. TSC subcontracted with a separate entity to erect the steel canopy and steel structure on which TSC placed the solar panels. No prevailing wage issues arose under the Assessment based on construction and installation of the steel canopy and structure.

[6] The Contract contained terms requiring compliance with prevailing wage laws. Hareon later entered into a Contract amendment with the School District that stated the Project was not a public work.

Applicable Prevailing Wage Determination (PWD).

TSC's certified payroll records (CPRs) identified 15 workers as either "Installer" or "CA3724" for work performed from February 15, 2016, to June 25, 2016. The CPRs showed that the hourly wages TSC paid for that work ranged from single digits to over $60.00. Neither "Installer" nor "CA3724" are recognized work classifications for prevailing wage requirements. For the Assessment, DLSE reclassified the work performed by TSC's workers as the "Electrician (Inside [Wireperson]) craft" (Inside Wireperson). The Prevailing Wage Determination (PWD) and scope of work for Inside Wireperson as of the date of the Contract are embodied in the PWD denominated KIN-2014-1 (Inside Wireperson PWD).[7] On and after May 31, 2015, the Inside Wireperson total hourly rate (with fixed increases therein) was a straight time rate of $54.38, including training fund contributions of $0.84, and fringe payments of $18.00. The Inside Wireperson PWD also contains travel time compensation and mileage reimbursement for travel beyond the established free zone. Travel time is paid at the workers' normal hourly wage and mileage is paid at the current published IRS Standard Mileage Rate.[8]

The Amended Assessment.

DLSE found that TSC failed to pay the applicable prevailing wage rate to 15 journey level workers and failed to pay one worker for his travel time and mileage costs. DLSE's audit, as amended, found that based on the hours of work as listed in the CPRs, the total prevailing wages owed on the Project were $172,186.48 and that TSC had paid total wages of $138,843.37.[9] After deducting the credit for paid wages

[7] DLSE and Hareon agreed to use the Contract date of June 20, 2014, to determine the applicable prevailing wage rates because neither party was able to find the bid advertisement date.

[8] DLSE interpreted "normal wages" to mean the wages the employer regularly pays the employee on private project, as opposed to prevailing wages on public work.

[9] DLSE agreed to a $138.24 wage reduction for mileage costs for the one worker, Baptista. Apart from payment for travel time, Baptista was not entitled to any mileage costs because he traveled to the jobsite in a company truck.

and mileage cost reduction, the unpaid wages found by the Assessment totaled $33,343.11. Additionally, in its amended audit, DLSE also found unpaid training fund contributions of $2,429.70.

The Assessment, as amended, found section 1775 penalties were due in the amount of $41,160.00, calculated at the rate of $140.00 for 294 violations in which the workers were either underpaid or no training fund contributions were paid to an approved apprenticeship program or the California Apprenticeship Council. The amended Assessment also found section 1813 penalties due at the rate of $25.00 for 196 violations for each calendar day on which a worker was not paid the prevailing rate for overtime and/or double time, for a total amount of $4,900.00.

Finally, for TSC's failure to provide the required contract award information, the amended Assessment found section 1777.7 penalties were due at the rate of $60.00 for 131 calendar days (commencing on the first penalty date of February 16, 2016, through the last penalty date of June 25, 2016) for a total amount of $7,860.00.

The Hearing.

Deputy Labor Commissioner Rivera testified that she initially based the audit on TSC not correctly classifying 15 journeypersons. Rivera reviewed the Contract and the Subcontract to determine the classification of work required by the Project, and she found that the Project required electrical work. She sent questionnaires to TSC's workers, but only Baptista, one of the 15 journeypersons, returned a questionnaire. Therein, Baptista described the work he performed on the Project as follows: laid solar panels, ran wire, pulled wire, and wired inverters. Rivera referred to the scope of work for the Inside Wireperson PWD, which states, "Work[ers] . . . shall do all electrical construction, installation or erection work, including, but not limited to PVC, EMT, P&C ducts and Electrical conduit raceway systems, including the final running tests and all electrical maintenance thereon." Rivera identified Inside Wireperson as the correct classification by comparing these scope of work provisions to Baptista's description of work in his questionnaire.

Rivera testified that she was unable to allocate work into discrete crafts in order to identify other worker classifications because, in the CPRs, TSC failed to identify a correct worker classification, let alone multiple worker classifications. Two pieces of information missing from the CPRs were any proper worker classification and, consequently, the actual duration of work within any classification. Rather than arbitrarily split work into various crafts, Rivera interpreted the scope of work provisions for Inside Wireperson to include work incidental to electrical construction, installation or erection work, such as unloading materials and digging ditches. On that basis, Rivera applied the Inside Wireperson PWD rate to the entire Project for all TSC's workers.

While Rivera used the CPRs to calculate the days and hours worked, she testified that she was unable to comprehend the multiple wage rates for individual workers found in the CPRs. The CPRs listed all workers - at least twice, sometime three times- for the same pay period showing four or more different wage rates. As the example below for Bradford Louis Kennedy demonstrates, TSC paid him wage rates of $17.00, $25.50, $30.54, and $37.55, all for the same pay period.

In the Penalty Review, Rivera set forth an example of the CPRs for a worker, Bradford Louis Kennedy, showing four rates of pay for the same work, as follows:

Example:

Payroll #1, WE 2/21/16

	M	T	W	TH	F	S	S	
Bradford	2/15/16	2/16/16	2/17/16	2/18/16	2/19/16	2/20/16	2/21/16	Rate
Louis	8	8	8	8				17.00
Kennedy	2	2	2	2				25.50

	M	T	W	TH	F	S	S	
Bradford	2/15/16	2/16/16	2/17/16	2/18/16	2/19/16	2/20/16	2/21/16	Rate
Louis	8	8	8	8				30.54
Kennedy	2	2	2	2				37.55

While Rivera's investigation confirmed that TSC paid wages to its workers, given the multiple wage rates shown in the CPRs, she testified that she could not confirm payment of the other wage rates appearing on the CPRs as being actually paid on specific dates. In the absence of additional supporting wage information beyond the CPRs, Rivera gave credit to TSC for payments based on the lowest wage rate shown for each worker in the CPRs. Applying the above example, Rivera credited to TSC a wage rate of $17.00 to Bradford Louis Kennedy for the week ending February 21, 2016. Rivera took the same approach for each worker on each week of the Project. By applying the lowest wage rate to calculate the amount of underpayment based on the Inside Wireperson PWD, Rivera did not credit TSC for the higher wage rates reflected in the CPRs.

Furthermore, Rivera testified that TSC should have paid Baptista his normal wage rate for his weekly roundtrips from his home to the jobsite, as required by the travel and subsistence provisions of the Inside Wireperson PWD. Rivera calculated the travel time pay at the 2016 minimum wage for private work in California ($10.00 an hour) for ten five-hour round trips. Rivera explained that she calculated Baptista's wage at minimum wage because she received confusing and conflicting information from Baptista with regard to the amount TSC paid for his private wage. She also stated that Baptista's entitlement to wage payments for his travel time did not extend to mileage reimbursement since he had not travelled to the jobsite in his own vehicle.

Additionally, Rivera testified that she found that TSC failed to provide the contract award information to the applicable apprenticeship committees for the craft of Inside Wireperson and failed to request dispatch of apprentices from these apprenticeship committees. TSC also failed to employ any apprentices for the craft of Inside Wireperson or any other craft. Rivera found 131 days of section 1777.5 violations based on the date the work started, February 16, 2016, and the date the work ended, June 25, 2016. Based on the CPRs, Rivera chose June 25, 2016, as the penalty end date, notwithstanding DLSE's exhibit - Notice of Division of the State

Architect - reflecting the School District's acceptance of the Project on January 13, 2017. No notice of completion was recorded.

TSC worker Baptista testified that he and other workers attached inverters, constructed conduit runs between inverters and to the transformer, installed panels and pulled wire. He spent three months on the job with a crew that included his supervisor Loren Bell and co-workers Bradford Kennedy, Christopher Hess, Luis Baptista (his cousin), Joseph Panella, and Carson Wigfall. Baptista explained that there was another TSC work crew at the jobsite.

Baptista testified that for approximately the first two weeks of his work, he unloaded trucks with a Bobcat and dug with a shovel two-foot deep ditches to lay PVC pipes though which to pull wire. Next, he attached inverters, a power electronic device or circuitry that changes direct current to alternating current, to the steel canopy and structure while standing on a scissor lift approximately 12 feet above the ground. After attaching the inverters, he constructed conduit runs of PVC pipe estimated between 15 to 20 feet in length from inverter to inverter and pulled wire though the pipe conduit. Then, he installed and adjusted solar panels, connected wire from the solar panels to the inverters, and attached PVC pipe within the ditches and pulled wire through the conduit for approximately 600 feet to a transformer. At the conclusion of his work, he performed clean up duties for roughly a week.

Additionally, Baptista testified that, during the Project, he learned he was entitled to receive prevailing wages for hours worked. Baptista stated that TSC paid him additional wages a month or more after he had completed work on the Project. Baptista confirmed that he did not receive pay for time spent traveling but testified that TSC provided lodging in a hotel and a $35.00 per diem for subsistence pay. Baptista disclosed that he rode to the jobsite in a company truck.

TSC President Danenhower, who had never been to the jobsite, testified to having been unaware that the Project was a public work until the middle of March 2016. Between March and June 2016, TSC raised the wage rate paid to its workers and

made $40,000.00 of additional wage payments in restitution to its workers for their prior work on the Project. Danenhower asserted that the CPRs accurately reflected total wages of $145,582.64 paid to TSC's workers, including the increased wage rate and additional wage payments made after March 2016.

Danenhower stated that a payroll company prepared the CPRs for TSC. Danenhower was unable to explain why the CPRs showed multiple wage rates for the same person during the same pay period, but he did explain that worker job titles "Installer" and "CA3724," which appear on the CPRs, functioned as a code to procure workers' compensation insurance. Additionally, Danenhower stated that TSC's workers on the Project were not certified electricians, and that work on the Project had been substantially completed by April 13, 2016.

TSC Project Manager Bell testified that work had begun on February 15, 2016, and work had been substantially completed by April 13, 2016. Bell testified that he had a jobsite meeting with Hareon former Director Dai on June 25, 2016, but he emphasized that the meeting involved no construction work or repairs, and only a discussion of punch list items. Bell also stated (and the CPRs confirmed) that no other TSC workers were on the jobsite on June 25, 2016.

Like other witnesses, Bell testified that no workers on the Project were certified electricians, and additionally asserted the Project did not require complex electrical work. Bell stated that the work crews worked on the same tasks at the same time. The remainder of Bell's testimony primarily focused on specifying the crews' tasks and the time it took to complete those tasks. Bell's testimony and Baptista's testimony, with regard to details of tasks performed and the duration of those tasks performed on the Project, contained minor variations. However, the inconsistencies in their testimony did not indicate any serious deviations from the overall narrative that the crews spent three weeks performing incidental electrical work and the remaining time on electrical work. Bell also testified to receiving three additional wage payments from TSC in restitution for underpayments TSC had made to him.

Finally, Dai testified that Hareon, a solar panel supplier, unwittingly became involved in the Project, when a construction company, to which Hareon had provided financing, failed. Dai testified that Hareon initially believed that the Project was not a public work because it had leased the solar system to the School District, and the School District indicated that Hareon could disregard the public work references in the Contract because the School District had inadvertently inserted boilerplate language from a previous contract.

Dai, an offsite manager of the Project for Hareon, testified to the weekly tasks of the workers based on photographs he had taken of progress on the jobsite during the first two weeks and the third and fourth weeks. The photographs showed no workers. The first set of photographs showed earthwork, concrete, and steel fabrication, and the following photographs showed a steel canopy, with and without solar panels. Dai also attempted to reconstruct TSC's payment history on the Project through documents Hareon had subpoenaed from TSC's payroll company. Dai referenced copies of TSC's checking account records and/or payroll account statements covering TSC workers on the Project, including employee payroll history reports, payroll account statements prepared for TSC, and TSC's Chase Bank checking account statements. Additionally, Dai supported Bell's description of their meeting on June 25, 2016, during which Bell performed no construction work or repairs.

DISCUSSION

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

> The overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor

> from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987, citations omitted (*Lusardi*).) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a); see also *Lusardi,* at p. 985.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers who received less than the prevailing wage rate, and also prescribes penalties for failing to pay the prevailing wage rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors.

Section 1813 requires that workers are compensated for overtime pay pursuant to section 1815 when they work in excess of eight hours per day or more than 40 hours during a calendar week, and imposes a penalty of $25.00 per day per worker per violation. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty.

In general, and unless an exemption applies, 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 journey level workers in the applicable craft or trade. (§ 1777.5, subd. (d); Cal. Code Regs., tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs within the designed vicinity that can

supply apprentices to the project. (§ 1777.5, subd. (e).) The Division of Apprenticeship Standards (DAS) has prepared form DAS 140 that a contractor may use to submit contract award information to an applicable apprenticeship committee. (Cal. Code Regs., tit. 8, § 230, subd. (a).)

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio of apprentice to journeyperson 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. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DAS has prepared another form, DAS 142, which a contractor may use to request dispatch of apprentices from apprenticeship committees. 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 prevailing wage laws has occurred, including with respect to any violation of the apprenticeship requirements, 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, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of presenting evidence that "provides prima facie support for the Assessment …." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that 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).)

TSC Workers Were Underpaid on the Project and Hareon Is Jointly and Severally Liable for TSC's Underpayment.

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

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

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

When an employer fails to keep accurate and contemporaneous time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount owed by a just and reasonable inference from the evidence as a whole. In such cases, the employer has the burden to come forward, with evidence of the precise amount of work performed or with evidence to rebut the reasonable estimate. (See, e.g., *Furry v. E. Bay Publ'g, LLC* (2019) 30 Cal. App.5th 1072, 1079 (*Furry*) ["'[A]n employee has carried out his burden

if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate'"], citing *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727, and *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687-88 [66 S.Ct.1187].) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

In this case, TSC's designation of its workers as "Installer" and "CA3724" on the CPRs furnished no recognizable work classification. DLSE, working from the Contract, Subcontract and Baptista's questionnaire, determined that TSC's job on the Project required constructing PVC pipe conduit and pulling wire. DLSE made a positive match for this work to the scope of work provisions for Inside Wireperson. Hence, DLSE classified TSC's workers as Inside Wireperson. Furthermore, at Hearing, Baptista and Bell's testimony substantiate that TSC's workers performed electrical work on the Project and that a majority of the work was electrical.

DLSE's amended audit together with testimony showed that TSC owed prevailing wages of $172,186.48 and paid its workers $138,843.37. As Rivera testified, DLSE credited TSC for payments made at the lowest wage rate shown on the CPRs because Rivera could not confirm payment of the other wage rates appearing on the CPRs.

Hareon elicited testimony that the State had not certified these workers to perform electrical work and the work they did perform were simple tasks. This evidence, however, fails to rebut DLSE's classification of the workers because the scope of work provisions for Inside Wireperson do not require a state certificate to perform

the work of an Inside Wireperson and do not distinguish between simple and complex electrical work.

Additionally, Hareon argued in its post-trial brief that Dai's testimony supported a finding that TSC's workers should receive the lower prevailing wage rate of Roofer and Laborer for four weeks of work rather than the Inside Wireperson prevailing wage rate for all work performed on the Project. Hareon based its argument upon the scope of work provisions for Roofer and Laborer, exhibits Hareon submitted at the Hearing. The scope of work provision for Roofer, however, does not mention solar panels. The extent of TSC workers' alleged "roof" work was limited to bolting solar panels to the steel structure installed over a sports field and steel canopy installed over a parking lot. Hareon's own witnesses, Danenhower, Bell, and Dai, attributed the entire support system on which TSC's workers bolted the solar panels exclusively to a different contractor, which is not the subject of a DLSE assessment. Based on the evidence of record, the work, even as described by Hareon, does not match the scope of work provision for Roofer.

Further, the scope of work provision for Laborer recognizes "work necessary to tend . . . building trades [craftspersons]." While the scope of work provision for Laborer describes work incidental to electrical work, TSC did not delineate in its CPRs, or anywhere else, classifications of work, nor did it indicate the hours during which any worker purportedly performed that incidental work. A contractor may define different classifications for work performed by a worker on a project. However, the contractor must show when its workers worked in the classification with detailed evidence (e.g., CPRs, timesheets, and/or inspector logs) to sustain the burden of rebutting an otherwise acceptable work classification. (See *Furry,* 30 Cal. App.5th at p. 1079.)

Hareon failed to present the specific evidence necessary to attribute work to multiple classifications. Hareon attempted to carry its evidentiary burden using Dai's photographs and testimony to show work in classifications for the trades of Laborer, Roofer and Inside Wireperson. But this evidence failed to specify by hour or day when

workers began and ended work in the different work classifications. Similarly, TSC's wage documentation, subpoenaed by Hareon and referenced by Dai's testimony, did not specify the work performed or the projects for which TSC made wage payments. Hence, that evidence too did not add the evidentiary support needed to make a finding of different work classifications.

Furthermore, Dai had no personal knowledge of the daily and hourly work performed at the jobsite, as he was an offsite manager for the Project, and likewise, as a Hareon employee, he had no personal knowledge of TSC's wage payments to its workers. While Baptista and Bell had personal knowledge of the facts to which they testified, they were equally unable to identify specifically when workers began and ended work in various tasks. In short, Hareon did not carry its burden to prove that the basis for the Assessment was incorrect as to DLSE's reclassification of the work to Inside Wireperson. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

Evidence from TSC president Danenhower, however, did sufficiently rebut the Assessment as to the amount of the credit to be given for wage payments TSC made. Danenhower testified affirmatively that TSC paid all wages shown on the CPRs, accounting for $145,582.64 of total wages paid. Those amounts included the restitution wages made to the workers after TSC and Hareon became aware that the Project was a public work. DLSE did not attempt to counter Danenhower's testimony. Therefore, an evidentiary basis exists for granting credit for the full amount of paid wages reflected in the CPRs, as Danenhower's testimony sufficiently rebutted Rivera's conclusion that she could not confirm TSC's payment of more than the lowest wage rate appearing in the CPRs. Notwithstanding the deficiencies in the CPRs, inexplicable variations in wage rates and misclassifications of work, the full amount of the paid wages as reflected in the CPRs is accepted.

While Hareon was able to rebut DLSE's accounting of credits for wage payments, it did not rebut DLSE's finding that, based on the hours in the CPRs and including unpaid travel time, the overall amount of prevailing wages required on the Project

totaled $172,186.48. Nor did Hareon show evidence of the paid amount of travel time in order to rebut DLSE's finding that TSC failed to pay $500.00 in wages for Baptista's 50 hours of travel time in ten trips to and from the jobsite at $10.00 per hour. Therefore, of the $172,186.48 in wages due under the Inside Wireperson PWD, Hareon carried its burden to prove that the amount the Assessment credited as paid wages was understated, and that TSC paid $145,582.64, leaving unpaid wages due in the amount of $26,603.84.

Accordingly, Hareon is jointly and severally liable under section 1743 for payment of prevailing wages in the aggregate sum of $26,603.84. Additionally, based on Hareon's stipulation that TSC failed to pay training fund contributions to an approved apprenticeship program or the California Apprenticeship Council in the amount of $2,429.70, that sum is also due from Hareon.

DLSE's Penalty Assessment under Section 1775 Is Affirmed.

Section 1775, subdivision (a)(1), states:

> 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…

Section 1775, subdivision (b), provides that:

> a prime contractor is not liable for any penalties under subdivision (a), unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:
>
> (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of this section andSections 1771, 1776, 1777.5, 1813, and 1815…..

Section 1775, subdivision (a)(2)(D), provides that the Labor Commissioner's

determination as to the amount of the penalty shall be reviewable only for an abuse of discretion. Abuse of discretion 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.)

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).)

DLSE presented prima facie evidence that TSC incurred 294 violations due to a failure to pay the required prevailing wage and training fund contributions. Even with the credit given by this Decision to wages paid by TSC according to Danenhower, 294 violations remain. Hareon presented evidence to carry its burden to prove that DLSE had not accounted for all wages paid by TSC to its workers. Wages notwithstanding, the failure to pay training fund contributions, when considered alone, supports DLSE's finding of violations under section 1775. Accordingly, DLSE sustained its burden of evidence, providing prima facie support for the Assessment determining that TSC incurred 294 violations.

Additionally, Hareon did not take the necessary actions to avail itself of the safe harbor protection for prime contractors in section 1775, subdivision (b). Hareon did not include a copy of the relevant statutes in the Subcontract, and while there are other requirements that Hareon did not meet, this failure alone suffices to establish its liability for section 1775 penalties. (§ 1775, subd. (b)(1).)

DLSE mitigated the penalty rate from the statutory $200.00 level to $140.00 per

violation. Consideration for setting the penalty rate consisted of whether TSC and Hareon had a prior history of penalties, whether the failure to pay the correct rate of per diem wages was a good faith mistake, and whether TSC took corrective action. Rivera noted on the Penalty Review that TSC and Hareon had no prior history of violations, and that the type of violations indicated that TSC was ignorant of CPWL requirements.

Baptista and Bell both testified to receiving additional wage payments from TSC, and Danenhower and Dai confirmed that TSC paid restitution to all workers on the Project after learning the Project was a public work. Notwithstanding, TSC took no corrective action to classify work correctly on the CPRs. While erroneous CPRs are not, in themselves, violations under section 1775, the resulting consequence of DLSE not being able to determine the workers' classification at any time during the Project caused DLSE to classify the workers under one classification – Inside Wireperson. As stated above, the testimony, photographs, payroll company's documents and TSC's bank accounts did not provide the specificity needed to carry Hareon's burden so that the Hearing Officer could accurately determine the classification of work for any particular day and hour. TSC's failure to address prevailing wage requirements - correctly identifying the worker classification and correctly paying the prevailing wage rate for that work classification - after learning the Project was a public work, justifies the penalty rate of $140.00. Therefore, the penalty rate is warranted given the facts supporting the prevailing wage violations.

Hareon failed to demonstrate that the Labor Commissioner's penalty rate was arbitrary, capricious, unlawful, and inconsistent with the statute or public policy. Accordingly, Hareon is jointly and severally liable under section 1743 for section 1775 penalties in the sum of $41,160.00, calculated at the $140.00 penalty rate for 294 violations.

Hareon Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a) provides for the imposition of liquidated damages on 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.

The statutory scheme regarding liquidated damages, as applicable to this case, provides contractors two 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 two alternative means required the contractor to make key decisions within 60 days of the service of the civil wage penalty assessment.

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 Assessment. Accordingly, the contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the Assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Under section 1742.1, subdivision (b), a contractor could entirely avert liability for liquidated damages if, within 60 days from issuance of the civil wage penalty assessment, the contractor deposited with the Department of Industrial Relations the full amount of the assessment of unpaid wages, including all statutory penalties. Section 1742.1, subdivision (b) stated in this regard:

> [T]here 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.

Here, no evidence shows Hareon or TSC paid any back wages to the workers in response to the Assessment. While this Decision acknowledges that TSC made restitution payments before the Assessment and gives credit for those payments, the payments were inadequate in that Hareon did not prove that TSC paid all wages due under the Inside Wireperson PWD due to misclassification of work. Additionally, no evidence shows Hareon or TSC deposited with DIR the assessed wages and statutory penalties. Accordingly, Hareon is liable for liquidated damages in the amount of $26,603.84, representing the underpaid prevailing wages.[10]

Hareon Is Neither Jointly Nor Severally Liable for the Penalties Assessed Against TSC under Section 1813.

Section 1815 states:

> [w]ork performed by employees of Requesting Parties in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1½ times the basic rate of pay.

Section 1813 states:

> The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25.00) for each worker employed in the execution of the contract by the … contractor … for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article.

Hareon is not liable under section 1743 for penalties assessed under section 1813 against TSC. (See Director's decision in *W.A. Thomas Company*, Inc., Case No. 12-0106-PWH, posted at https://www.dir.ca.gov/oprl/1742decisions/12-0106-PWH.pdf.) As stated *ante*, the Director does not have jurisdiction over TSC to review the

[10] In that training fund contributions are not due to be paid to the workers, a failure to make those contributions is not used to measure the amount of liquidated damages due under section 1742.1.

Assessment. Consequently, the applicability of this Decision's factual findings involving TSC is limited to determining Hareon's joint and several liability under the Assessment. Since a prime contractor has no joint and several liability for a subcontractor's liability under section 1813 penalties, the Director will not review the underlying facts supporting the Assessment for section 1813 penalties.

TSC Violated Apprentice Requirements.

DLSE determined, and Hareon stipulated, that TSC violated section 1777.5 requirements for 1) sending contract award information on the form DAS 140 (or its equivalent) to the applicable apprenticeship committees for the craft of Inside Wireperson, 2) requesting dispatch of apprentices from the applicable committees (i.e. issuing form DAS 142 or its equivalent), and 3) hiring apprentices in the 1:5 ratio.

DLSE premised its imposition of the section 1777.7 penalties on TSC's failure to send a form DAS 140 (or its equivalent). The resulting penalty assessed by DLSE was from the first penalty day, February 16, 2016, to the last penalty day, June 25, 2016, totaling 131 days. The penalty period for a failure to issue form DAS 142 (or its equivalent) and hiring apprentices in the 1:5 ratio is computed on the journeypersons' days of work in that craft, which would be shorter than the 131-day period for violation of the DAS 140 requirement.

California Code of Regulations, title 8, section 230, subdivision (a) states that, contract award information shall be provided to the applicable apprenticeship committees no "later than the first day in which the contractor has workers employed upon the public work." It further states:

> Failure to provide contract award information, which is known by the awarded contractor, shall be deemed to 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.

(Cal. Code. Regs., tit. 8, § 230, subd. (a), emphasis added.)

DLSE and Hareon agree that the first penalty day is February 16, 2016, the date on which TSC's contract award information was due to the applicable apprenticeship committees. The parties disagree on the last penalty day. Hareon argues in its post-trial brief that the last penalty day should be May 13, 2016, because it was the last day on which workers performed construction work on the Project.[11] DLSE found that TSC's last day of work and last penalty day was June 25, 2016, because the CPRs showed journeyperson Bell having worked that day on the Project.

The last day of work on the Project, however, is not determinative of the end date for penalties arising from a failure to send the contract award information to the applicable apprenticeship committees. Rather, the applicable regulation states that the penalty period begins no later than the first day the subcontractor has workers on the project and ends when the awarding body records a Notice of Completion. (Cal. Code Regs., tit. 8, § 230, subd. (a).)

Hareon and DLSE used the "closed date" of January 13, 2017, on the Notice of Division of the State Architect as the School District's acceptance date for measuring the timeliness of the Assessment. As the School District did not record a Notice of Completion, the acceptance date operates in lieu of the recording date. This Decision affirms DLSE's finding that TSC is liable for a total of 131 days because it is substantially less than the maximum allowable days for TSC's section 1777.7 penalties under a failure to send the DAS 140 or its equivalent to applicable apprenticeship committees.[12]

Hareon Is Jointly and Severally Liable for Penalties under Former Section 1777.7 at a Rate of $60.00.

If a contractor knowingly violates section 1777.5, a civil penalty is imposed under

[11] The date May 13, 2016, appears to be a departure from the testimony elicited by Hareon concerning the substantial completion date of April 13, 2016.

[12] The number of days from February 16, 2016, to January 13, 2017, is 332 days, substantially more than 131 days.

section 1777.7 in an amount not exceeding $100.00 for each full calendar day of noncompliance. (See former § 1777.7, subd. (a)(1), as applicable on the date of the Contract, June 20, 2014.) A contractor "knowingly" violates 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. (Cal. Code Regs., tit. 8, § 231, subd. (h).)

DLSE mitigated the penalty rate from the statutory $100.00 level for a first-time violation to $60.00 per violation. The Labor Commissioner may reduce the amount of this penalty if the amount of the penalty would be disproportionate to the severity of the violation. (§ 1777.7, subd. (a)(1).)

To analyze whether the penalty is correctly calculated, under the former version of section 1777.7 applicable to this case, the Director decides the appropriate penalty de novo.[13] In setting the penalty, the Director considers all of the following circumstances (which also guide DLSE's Assessment):

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)(l) and (2).)

In this case, Hareon provided evidence that violations under section 1777.5 were a result of its lack of familiarity with public work projects and not learning of the Project being a public work until a date in mid-March 2016. The School District had initially told

[13] Section 1777.7 was amended effective January 1, 2015. (See stats. 2014, ch. 297, § 3.) Applying former section 1777.7, subdivision (f)(2), as it existed on the June 2014 date of the Contract, the Director reviews de novo the penalty for violation of section 1777.5.

Hareon that references to public work were drafting errors caused when the School District duplicated boilerplate from a previous contract into the subject Contract. Subsequently, the School District and Hareon entered into an amended Contract that stated the Project was not a public work. Additionally, Hareon did not reference a public work anywhere in its Subcontract with TSC. Thus, TSC also was not aware that the Project was a public work until mid-March 2016.

After Hareon and TSC knew the Project was a public work, TSC's journey level workers continued work on the Project until May 13, 2016, not including the one-day of work on June 25, 2016, when Bell walked the jobsite with Dai. Notwithstanding those two months from mid-March to mid-May, Hareon and TSC did nothing to correct the section 1777.5 violation. Since TSC and Hareon failed to correct the section 1777.5 violations, imposition of a section 1777.7 penalty is warranted. Applying the de novo standard for this case, however, favors a lower penalty rate than found in the Assessment.

Factor "A" – whether the violation was intentional – favors a low penalty. Rivera noted on the Penalty Review that the type of violations indicated that TSC was ignorant of CPWL requirements. Hareon presented testimony confirming that Hareon and TSC were novices to public work projects. Additionally, the School District misinformed Hareon regarding the public work status of the Project, and entered an amended Contract stating that the Project was not a public work.

Factor "B" – whether TSC and Hareon had committed other violations of section 1777.5 –favors a low penalty. Rivera noted on the Penalty Review that TSC and Hareon had no prior history of violations.

Factor "C" – whether, upon notice of the violation, TSC and Hareon voluntarily took steps to remedy the violation – is neutral here. While TSC and Hareon learned of the public work status of the Project in mid-March 2016, nothing in the record shows they took any steps to comply with section 1777.5 after that date. On the other hand,

DLSE did not commence its investigation and initiate communication with TSC and Hareon until after work on the Project had ceased.

Factors "D" and "E" – whether, and to what extent, the violation resulted in lost training opportunities for apprentices and otherwise harmed apprentices or apprenticeship programs – favors a high penalty. Inside Wireperson journeypersons worked a total of 2,892.5 hours on the Project. Applying the 1:5 ratio, TSC's violation of section 1777.5 deprived apprentices of 578.5 hours of training, amounting to over 14 weeks over the course of the entire Project. However, 1,626.5 of the journeyperson hours were worked after week March 13, 2016, the approximate time-period when TSC first became aware that the Project was a public work. Applying the 1:5 ratio to journeyperson hours worked after mid-March 2016, TSC's violation cost apprentices a loss of training opportunities of 325.3 hours, or just over eight weeks of on-the-job training. Correspondingly, the applicable apprenticeship programs for the craft of Electrician were deprived of the opportunity to provide that amount on-the-job training.

The Director finds that two factors (A and B) as applied in this case support a low penalty rate, two factors (D and E) support a high penalty rate, and one factor (C) is neutral. While the loss of training opportunities is not insubstantial, the lack of any prior violations, the School District's misinformation about the public works status, and TSC's and Hareon's inexperience with public works supports $40.00 as the appropriate penalty rate. Accordingly, the Assessment is modified to reduce the total section 1777.7 penalty to $40.00 per violation for 131 violations, for a total amount of $5,240.00.

Former section 1777.7, subdivision (d), provides prime contractors a safe harbor from liability for violations of section 1777.5 committed by their subcontractors. Hareon, however, is not entitled to the safe harbor because it did not include a copy of the relevant statutes in the Subcontract, and while there are other requirements that Hareon had not met, this failure alone suffices to establish its liability for section 1777.7 penalties. (Former § 1777.7, subd. (d)(1).) Based on the record as a whole, Hareon is

liable for penalties under former section 1777.7 for TSC's violations of section 1777.5.

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

FINDINGS AND ORDER

1. Hareon Solar USA Corp., dba Armona Solar H1 LLC is jointly and severally liable for The Solar Company's underpayment of prevailing wages to its workers in the amount of $26,603.84.
2. Hareon Solar USA Corp., dba Armona Solar H1 LLC, is jointly and severally liable for The Solar Company's failure to pay $2,429.70 in training fund contributions.
3. Hareon Solar USA Corp., dba Armona Solar H1 LLC does not qualify for the safe harbor provisions for prime contractors under section 1775, and therefore is liable for penalties arising from The Solar Company's failure to pay prevailing wages, including training fund contributions, and to send contract award information to the applicable apprenticeship committees.
4. Penalties under section 1775 are due from Hareon Solar USA Corp., dba Armona Solar H1 LLC in the amount of $41,160.00 for 294 violations at the rate of $140.00 per violation.
5. Liquidated damages are due from Hareon Solar USA Corp., dba Armona Solar H1 LLC in the full amount of the unpaid wages of $26,603.84.
6. Hareon Solar USA Corp., dba Armona Solar H1 LLC is not jointly and severally liable for penalties under section 1813.
7. Hareon Solar USA Corp., dba Armona Solar H1 LLC does not qualify for the safe harbor provisions for prime contractors under former section 1777.7, and therefore is liable for penalties arising from The Solar Company's failure to send contract award information to the applicable apprenticeship committees.
8. Penalties under former section 1777.7 are due from Hareon Solar USA

Corp., dba Armona Solar H1 LLC in the amount of $5,240.00 at the modified rate of $40.00.

9. The amounts found due under the Assessment, as affirmed and modified by this Decision, are as follows:

Wages Due:	$26,603.84
Training Fund Contributions:	$2,429.70
Penalties under section 1775, subdivision (a):	$41,160.00
Liquidated damages:	$26,603.84
Penalties under section 1777.7:	$5,240.00
TOTAL:	**$102,037.38**

In addition, interest is due from Hareon Solar USA Corp., dba Armona Solar H1 LLC and shall accrue on unpaid wages in accordance with Labor Code section 1741, subdivision (b).

The Civil Wage and Penalty Assessment, as amended, is modified and affirmed as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 5/11/20

Katrina S. Hagen
Chief Deputy Director
Department of Industrial Relations