

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Minako America Corporation
dba Minco Construction

Case No. 19-0188-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Minako America Corporation dba Minco Construction (Minco) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on March 1, 2019, with respect to work performed on the Vereda Laguna Sidewalk and Landscape Improvement Project (Project) for the City of Rancho Santa Margarita (Awarding Body or City) in Orange County.¹ The Assessment determined that the following amounts were due: \$32,683.19 in unpaid prevailing wages,² \$46,600.00 in Labor Code section 1775 statutory penalties,³ \$400.00 in section 1813 statutory penalties, and \$10,400.00 in section 1777.7 statutory penalties.

A Hearing on the Merits occurred in Los Angeles, California, before Hearing Officer Ann Wu on September 25, 2020, and January 27, 2021. Thomas Kovacich of the law firm Atkinson, Andelson, Loya, Ruud & Romo appeared as counsel for Minco. Lance Grucela appeared as counsel for DLSE. Deputy Labor Commissioner Jeffrey Pich testified in support of the Assessment. Minco manager Raffi Thomassian testified for

¹ On March 4, 2019, DLSE amended the Assessment to identify Minco as the prime contractor on the Project; Minco was incorrectly identified as the subcontractor in the original Assessment. (DLSE Exhibit No. 2, pp. 9-17.) The amended Assessment made no other changes. (*Ibid.*)

² The Assessment found \$31,503.46 in unpaid wages and \$1,179.73 in unpaid training fund contributions, for a total of \$32,683.19 unpaid prevailing wages.

³ All subsequent section references are to the California Labor Code, unless otherwise specified.

Minco. DLSE Exhibit Numbers 1 through 9, 11 through 25, and 27 through 28 were admitted into evidence, as well as Minco Exhibits A through F, and H through J. The parties filed simultaneous closing briefs on March 12, 2021.⁴ The matter was submitted for decision on March 12, 2021.

Prior to the first day of Hearing, the parties stipulated to the following:

- The work subject to the Civil Wage and Penalty Assessment was performed on a public work and required the employment of apprentices and the payment of prevailing wages under the California Prevailing Wage Law, Labor Code sections 1720 through 1861.
- The Request for Review was filed timely.
- The enforcement file was requested and produced in a timely fashion.
- No back wages have been paid nor deposit made with the Department of Industrial Relations as a result of the Civil Wage and Penalty Assessment.

The issues for decision are:

- Whether the Civil Wage and Penalty Assessment was timely served by DLSE.
- Whether Minco timely paid its employees the correct prevailing wage rates for all hours worked on the Project.
- Whether Minco properly paid the required overtime premium rates to employees.
- Whether Minco is liable for penalties assessed pursuant to sections 1775 and 1813.
- Whether Minco can establish that the Labor Commissioner abused her discretion in assessing penalties pursuant to section 1775.
- Whether Minco is liable for liquidated damages on wages found due and owing.

⁴ On March 29, 2021, DLSE objected to a chart contained in Minco's closing brief to the extent that it would be considered as evidence. Minco's response on April 2, 2021, stated that the chart included in its closing brief was a summary of evidence and not intended to be considered as evidence. DLSE's objection is overruled. The parties' respective closing briefs, as well as the chart contained in Minco's closing brief, are considered as argument and not as evidence.

- Whether Minco submitted contract award information to all applicable apprenticeship committees in a timely and factually sufficient manner.
- Whether Minco employed apprentices in the required minimum ratio of apprentices to journeypersons on the Project.
- Whether Minco is liable for penalties assessed pursuant to section 1777.7.
- Whether Minco can establish that the Labor Commissioner abused her discretion in assessing penalties pursuant to section 1777.7.

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, and that Minco failed to carry its burden of proving the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming the Assessment.

FACTS

The Project.

The Awarding Body advertised the Project for bid on March 11, 2017. (DLSE Exhibit No. 22, pp. 230-231; DLSE Exhibit No. 23, p. 275.) The notice inviting bids summarized the work as follows: “In general, the work is comprised of best management practices, mobilization, traffic control, landscaping, grading, clearing and grubbing, curb and gutter, sidewalk, retaining wall, security fencing, utility adjustments, and other miscellaneous improvements as shown on the plans and as required to complete the work.” (DLSE Exhibit No. 22, p. 230.)⁵

The notice inviting bids specified that prevailing wage rates applied to the contract. (DLSE Exhibit No. 22, pp. 230-231.) The successful bidder was Minco, which

⁵ Although the scope of work for the Project is referenced in the table of contents of the Contract Agreement (DLSE Exhibit No. 22, p. 210), the scope of work was not submitted into evidence. Deputy Labor Commissioner Pich described the scope of the Project as sidewalk reconstruction that involved the removal of trees, and Minco witness Thomassian described the scope of the work as sidewalk concrete work.

entered into a contract with the Awarding Body on or about April 12, 2017. (DLSE Exhibit No. 22, pp. 217-223.) Minco had workers on the Project from June 19, 2017, to August 17, 2017. (DLSE Exhibit No. 7, pp. 61-85.) The Awarding Body accepted the completion of the Project on September 27, 2017, and the Notice of Completion was recorded in the Official Records of the Orange County Clerk-Recorder's Office on October 5, 2017. (DLSE Exhibit No. 24, pp. 277-278.)

The Public Works Complaint.

On July 18, 2018, DLSE received a complaint from Gus Garcia of the Center for Contract Compliance alleging failure to provide contract award information, failure to request dispatch of apprentices, failure to employ registered apprentices in the correct ratio or not at all, failure to pay fringe benefits, and failure to make apprenticeship training fund contributions. (DLSE Exhibit No. 5, pp. 46-47.)

The Prevailing Wage Rate Determinations.

DLSE contends that Minco misclassified as Tree Trimmers workers who removed trees on the Project, such that these workers should be reclassified as Laborers. Accordingly, one of the prevailing wage determinations (PWDs) at issue in this matter is that of Laborer Group 1, SC-23-10-2-2017-1 (Laborer).⁶ (DLSE Exhibit No. 13, pp. 134-140.) The applicable scope of work for the Laborer craft includes, in relevant part: "street and highway work, grading and paving, excavation of earth and rock...," "demolition work," "[a]ll work in connection with excavation for building and other construction..." and "[a]ll work in connection with concrete work..." (DLSE Exhibit No. 13, pp. 138-139.) A second PWD relevant to this case is that of Tree Trimmer,⁷ for which the applicable scope of work provides, in relevant part:

⁶ The basic hourly rate for Laborer Group 1 is \$32.34, with hourly fringe benefit payments of \$19.05, not including training fund contributions of \$0.69, for a total hourly rate of \$51.39. The overtime rate for Laborer Group 1 is \$68.25. The Laborer PWD included a predetermined increase of \$1.65 per hour effective July 3, 2017, with \$0.85 allocated to the basic hourly rate, and \$0.80 to fringe benefits. This was an apprenticeable craft.

⁷ Neither party submitted the Tree Trimmer PWD as evidence.

Trims trees to clear right-of-way for communications lines and electric power lines to minimize storm and short-circuit hazards: Climbs trees to reach branches interfering with wires and transmission towers, using climbing equipment. Prunes treetops, using saws or pruning shears. Repairs trees damaged by storm or lightning by trimming jagged stumps and painting them to prevent bleeding of sap. Removes broken limbs from wires, using hooked extension pole. Fells trees interfering with power service, using chain saw (portable power saw). May work from bucket of extended truck boom to reach limbs.

(DLSE Exhibit No. 15, pp. 146-147.)

DLSE contends that Minco also underpaid other workers on the Project. Accordingly, the other PWDs at issue in this case are those of Carpenter, SC-23-31-2-2017-1 (Carpenter)⁸ (DLSE Exhibit No. 11, pp. 131-132), Cement Mason (SC-23-203-2-2016-1 (Cement Mason)⁹ (DLSE Exhibit No. 12, p. 133), and Operating Engineer Group 4, SC-23-63-2-2016-2 (Operating Engineer)¹⁰ (DLSE Exhibit No. 14, pp. 141-145).

The Assessment.

The Assessment found that Minco misclassified and underpaid workers for the removal of trees on the Project. It found that Minco failed to pay fringe benefits and training fund contributions on behalf of its workers on the Project, and that Minco failed to pay overtime premiums. It also found that Minco failed to timely submit contract award information to the applicable committees for the classifications of Laborer, Carpenter, Operating Engineer, and Cement Mason, and failed to timely request

⁸ The basic hourly rate for Carpenter is \$40.40, with hourly fringe benefit payments of \$16.85, not including training fund contributions of \$0.57, for a total hourly rate of \$57.25. The overtime rate for Carpenter is \$77.45. The Carpenter PWD included a predetermined increase of \$2.00 per hour effective July 1, 2017, with \$0.85 allocated to the basic hourly rate, and \$1.15 to fringe benefits. This was an apprenticeable craft.

⁹ The basic hourly rate for Cement Mason is \$33.30, with hourly fringe benefit payments of \$22.96, not including training fund contributions of \$0.64, for a total hourly rate of \$56.26. The overtime rate for Cement Mason is \$72.91. This was an apprenticeable craft.

¹⁰ The basic hourly rate for Operating Engineer Group 4 is \$44.41, with hourly fringe benefit payments of \$24.94, not including training fund contributions of \$0.95, for a total hourly rate of \$69.35. The Operating Engineer PWD included a predetermined increase of \$2.30 per hour effective July 1, 2017, with \$2.15 allocated to the basic hourly rate, \$0.10 to fringe benefits, and \$0.05 to training fund contributions. This was an apprenticeable craft.

dispatch of apprentices to the applicable committees for those classifications. Finally, it found that Minco failed to employ any apprentices on the Project for the classifications of Laborer, Carpenter, and Cement Mason. Altogether, the Assessment found that Minco underpaid the required prevailing wages in the amount of \$31,506.46, failed to pay training fund contributions in the amount of \$1,179.73, and imposed section 1775 penalties of \$46,600.00, section 1813 penalties of \$400.00, and section 1777.7 penalties of \$10,400.00, for a total amount of \$90,083.19.

Testimony of Deputy Labor Commissioner Pich and DLSE's Exhibits.

Deputy Labor Commissioner Pich conducted an investigation of the Project and issued the Assessment against Minco on March 1, 2019. (DLSE Exhibit No. 3, pp. 18-26.) According to Pich, the Assessment found that Minco misclassified and underpaid workers who performed tree removal work, failed to pay overtime premiums, failed to pay fringe benefits, failed to make training fund contributions, failed to submit contract award information, and failed to employ apprentices in the required one to five ratio of apprentice hours worked to journey-level hours worked.

Using the Contract Agreement between the City and Minco provided by the City, the certified payroll records (CPRs) provided by Minco, and the scope of work provisions for the Laborer classification, Pich determined that Minco misclassified three workers as Tree Trimmers when they should have been classified and paid as Laborers Group 1 on the Project. In this regard, Pich reclassified Pedro Rodriguez, Miguel Tapia, and Rafael Tapia from Tree Trimmer to Laborer Group 1, because the Project involved tree removal for sidewalk reconstruction, not tree trimming to maintain clearance for electric power lines. (DLSE Exhibit No. 9, pp. 61-62; DLSE Exhibit No. 15, p. 147; DLSE Exhibit No. 22, p. 230.) To calculate the amount of underpayment of wages due to the misclassification, Pich utilized the PWD for the Laborer Group 1 classification, gave credit for wage payments made by Minco as recorded on the CPRs for these three workers, and placed the amount of total wages due these workers on the Public Works Audit Worksheet (Audit Worksheet) and the Public Works Investigation Worksheets

(Investigation Worksheets) he prepared. (DLSE Exhibit No. 4, pp. 27, 39, 41, 44; DLSE Exhibit No. 7, p. 61; DLSE Exhibit No. 13, p. 134.)

With regard to other workers classified on the CPRs as Carpenters, Cement Masons, Laborers Group 1, and Operating Engineers Group 4, Pich determined that the CPRs purported to show payment of fringe benefits as required by the applicable PWDs. (DLSE Exhibit No. 7, pp. 61-85; DLSE Exhibit No. 11, pp. 131-132; DLSE Exhibit No. 12, p. 133; DLSE Exhibit No. 13, pp. 134-140; DLSE Exhibit No. 14, pp. 141-145.) However, Pich testified that he did not receive from Minco any proof of payment of fringe benefits paid on behalf of the workers employed on the Project in response to his request for such information during the course of his investigation. Pich explained that although Minco provided the Contractor Fringe Benefit Statement that showed that fringe benefits would be paid to John Hancock Retirement Services (John Hancock) (DLSE Exhibit No. 8, pp. 86-87), he did not receive any proof of payments to John Hancock.¹¹ As such, as reflected in the Audit Worksheet and Individual Worksheets he prepared, Pich did not give Minco any credit for fringe benefit payments identified on the CPRs. (DLSE Exhibit No. 4, pp. 27-45; DLSE Exhibit No. 7, pp. 61-85.) To calculate the amount of fringe benefits owed, Pich utilized the CPRs to determine the hours each worker worked in each classification per pay period, utilized the applicable PWDs to determine the fringe benefit rates, and placed the total amounts of unpaid fringe benefits due each worker on the Audit Worksheet. (DLSE Exhibit No. 4, pp. 27-45; DLSE Exhibit No. 7, pp. 61-85; DLSE Exhibit No. 11, pp. 131-132; DLSE Exhibit No. 12, p. 133; DLSE Exhibit No. 13, pp. 134-140; DLSE Exhibit No. 14, pp. 141-145.)

Using the CPRs provided by Minco, Pich determined Minco paid straight time rates for overtime hours worked on the Project. (DLSE Exhibit No. 4, p. 27; DLSE

¹¹ The Contractor Fringe Benefit Statement provided by Minco is dated June 19, 2017, which was the first day that Minco had workers on the Project. (DLSE Exhibit No. 8, p. 86-87.) The Contractor Fringe Benefit Statement does not indicate that any payments were made to John Hancock, nor does it indicate the amount of fringe benefits owed to workers on the Project. (*Ibid.*) The Contractor Fringe Benefit Statement lists the classifications of Laborer Group 1, Operating Engineer Group 4, Tree Trimmer, Carpenter, and Cement Mason. (*Ibid.*)

Exhibit No. 7, pp. 61-85.) To calculate the amount of underpayment of overtime premiums, Pich utilized the overtime rates required by the PWDs for the classifications of Carpenter, Laborer Group 1, and Operating Engineer Group 4, and gave credit for wage payments made by Minco as recorded on the CPRs, but the CPRs did not show payment of the overtime premium amount. Therefore, DLSE placed the amount of overtime due each applicable worker on the Audit Worksheet.¹² (DLSE Exhibit No. 4, p. 27; DLSE Exhibit No. 7, pp. 61-85; DLSE Exhibit No. 11, pp. 131-132; DLSE Exhibit No. 12, p. 133; DLSE Exhibit No. 13, pp. 134-140; DLSE Exhibit No. 14, pp. 141-145.)

As reflected in the Audit Worksheet, Pich determined that Minco owed \$31,503.46 in unpaid wages. (DLSE Exhibit No. 4, p. 27.) This amount represents the total amount of underpayment of prevailing wages for the workers who were misclassified as Tree Trimmers, as well as nonpayment of fringe benefits and overtime premiums for all of the workers on the Project. (DLSE Exhibit No. 4, pp. 27-45.)

With regard to Pich's determination that Minco failed to pay training fund contributions on the Project, Pich testified that did not receive from Minco any proof of payment of training fund contributions during the course of his investigation. Pich explained that although Minco provided the Contractors Fringe Benefit Statement that showed that training fund contributions would be paid to the California Apprenticeship Council (CAC) (DLSE Exhibit No. 8, pp. 86-87), Pich obtained a certification of training fund contributions from the CAC that showed no training fund contributions by Minco for the Project (DLSE Exhibit No. 21, pp. 189-207). As such, Pich did not give Minco any credit on the Audit Worksheet for training fund contributions identified on the CPRs or the Contractor Fringe Benefit Statements provided to him by Minco. As reflected in

¹² The workers who were not paid overtime premiums were Angel Farfan in the amount of \$36.09 for 1.75 overtime hours worked as a Carpenter, Fahad L. Naama in the amount of \$58.08 for 3.5 overtime hours worked as a Laborer Group 1, Francisco Rivera Luna in the amount of \$10.31 for 0.5 overtime hours worked as a Carpenter, Juan C. Diaz in the amount of \$25.78 for 1.25 overtime hours worked as a Carpenter, Levi Valiente in the amount of \$157.65 for 9.5 overtime hours worked as a Laborer Group 1, Omar L. Naama in the amount of \$58.08 for 3.5 overtime hours worked as a Laborer Group 1, Rigoberto Cruz in the amount of \$40.11 for 1.75 overtime hours worked as an Operating Engineer Group 4, and Yadir Ramirez in the amount of \$8.30 for 0.5 overtime hours worked as a Laborer Group 1. (DLSE Exhibit No. 4, pp. 27-45.) These amounts total \$394.40 in unpaid overtime premiums.

the Audit Worksheet, Pich determined that Minco owed a total of \$1,179.73 in unpaid training fund contributions. (DLSE Exhibit No. 4, p. 27.)

Pich testified that the Senior Deputy Labor Commissioner assessed penalties under section 1775 of \$200 per day for underpayment of wages.¹³ (DLSE Exhibit No. 1, p. 2; DLSE Exhibit No. 7, p. 27.) Pich identified 233 days where Minco underpaid its workers. (DLSE Exhibit No. 1, p. 1; DLSE Exhibit No. 7, pp. 27-45.) Accordingly, Pich determined that the penalties under section 1775 at the \$200 rate for 233 days totaled \$46,600.00. (DLSE Exhibit No. 1, p. 2.)

Pich testified that he assessed penalties under section 1813 of \$25 per day for underpayment of overtime. (DLSE Exhibit No. 7, p. 27.) Pich determined that the penalties under section 1813 at the \$25 rate totaled \$400.00, indicating that he identified 16 days where Minco failed to pay overtime premium rates to its workers. (DLSE Exhibit No. 1, p. 1.)

With regard to the apprenticeship violations, Pich determined that Minco did not submit contract award information to the applicable apprenticeship committees for the Laborer classification until after work began on the Project, and that Minco did not submit contract award information to the applicable apprenticeship committees for the Operating Engineer classification at any time during the Project. (DLSE Exhibit No. 1, p. 8.) This was based on Pich's review of the applicable apprenticeship program information search results he obtained from the Department of Industrial Relations website (DLSE Exhibit No. 16, pp. 151-156), and his review of the Public Works Contract Award Information and facsimile transmission verification reports and email provided by Minco (DLSE Exhibit No. 17, pp. 157-175). Using the CPRs, Pich determined that Minco did not employ any apprentices on the Project. (DLSE Exhibit No. 7, pp. 61-85.) Pich also used the CPRs to determine the total journeyman hours worked for each classification of worker employed on the Project, and applied the 1:5

¹³ Pich listed Minco's prior history of prevailing wage violations in the Penalty Review he prepared. (DLSE Exhibit No. 1, p. 8.) In four prior cases against Minco, DLSE assessed section 1775 penalties at the rate of \$50 per day in two of the cases, and \$200 per day in the other two cases. (*Ibid.*)

ratio of apprentice to journey level hours to determine the minimum number of apprentice hours required on the Project. (*Ibid.*) As reflected in the Penalty Review, Pich determined that there were 52 apprenticeship violations between June 21, 2017, and August 17, 2017. (DLSE Exhibit No. 1, p. 8.) In this regard, Pich counted 36 calendar days, from June 21, 2017, to July 28, 2017, where Minco failed to submit the Public Works Contract Award Information form (Division of Apprenticeship Standards (DAS) 140 Form) to all applicable apprenticeship committees for the Laborer classification. (*Ibid.*) Pich counted 11 calendar days, from July 29, 2017, to August 8, 2017, where Minco failed to submit the DAS 140 Form to all applicable apprenticeship committees for the Operating Engineer classification. (*Ibid.*) Pich also counted five work days, from August 9, 2017, to August 17, 2017, where Minco failed to employ apprentices in the Laborer classification. (*Ibid.*)

Pich testified that the Senior Deputy Labor Commissioner assessed penalties under section 1777.7 of \$200 per day for apprenticeship violations.¹⁴ (DLSE Exhibit No. 1, p. 2.) Based on the 52 days of apprenticeship violations he identified in the Penalty Review, Pich determined that the penalties under section 1777.7 at the \$200 rate totaled \$10,400.00. (DLSE Exhibit No. 1, pp. 2, 8.)

Testimony of Raffi Thomassian and Minco Exhibits.

Thomassian testified that he has worked for Minco for 19 years, and that he is responsible for, inter alia, preparing the CPRs, paying the fringe benefits and training contributions, and for sending the DAS 140 and 142 Forms to applicable apprenticeship programs. Thomassian also testified that he is the bid coordinator for Minco, responsible for preparing bid documents and contract documents.

¹⁴ Pich listed Minco's prior history of apprenticeship violations in the Penalty Review he prepared. (DLSE Exhibit No. 1, p. 8.) In four prior cases against Minco, DLSE assessed section 1777.7 penalties at the rates of \$60 per day, \$100 per day, \$150 per day, and \$300 per day. (*Ibid.*)

Thomassian testified that Minco paid John Hancock a total of \$29,308.29 for fringe benefits attributed to workers on the Project.¹⁵ (Minco Exhibit A, p. 4; Minco Exhibit B, p. 7; Minco Exhibit E, pp. 19-36; Minco Exhibit F, p. 41.) Thomassian testified on cross-examination that the amounts of the fringe benefits indicated on Minco Exhibits A and B were paid after they were entered into Foundation, Minco's internal accounting software.¹⁶ Thomassian testified on cross-examination that Minco's exhibits were not provided to DLSE prior to the Hearing. Thomassian also testified on cross-examination that the fringe benefit payments to John Hancock were not paid when they were due, and that the payments were made to John Hancock more than 18 months after the completion of the Project.¹⁷ (Minco Exhibit E, pp. 19-36.) Thomassian testified that Exhibit E is the only document that shows that payments were made to John Hancock. The contribution records in Exhibit E, however, do not show that the contributions were related to the Project. Thomassian admitted that Exhibit E contained contributions for multiple projects, with no breakdown for Minco's fringe benefit obligation in the Project. The contribution records in Exhibit E also included warnings that the plan participants were terminated, and that contributions would be allocated and distributed or returned. (*Ibid.*) Thomassian testified that no contributions were returned.

Thomassian testified that Minco paid to the CAC training fund contributions owed on the Project in the amount of \$418.89, and that Minco paid to the Associated General

¹⁵ Thomassian testified that Minco Exhibits C and D represent the total fringe benefits Minco paid on behalf of all its workers on all its projects in July of 2017 and August of 2017, respectively. Minco Exhibits C and D contain worker names, but do not indicate the names of any public works projects.

¹⁶ Thomassian testified on cross-examination that Exhibits A and B were created prior to any payments being made to John Hancock. He also testified that Exhibits A and B were submitted to John Hancock with the payments, because John Hancock would not accept payment without those spreadsheets. However, Minco Exhibits A and B are dated May 19, 2020, and the earliest date of Minco's fringe benefit payment to John Hancock was September 20, 2019. (Minco Exhibit A, pp. 1-4; Minco Exhibit B, pp. 5-7; Minco Exhibit E, pp. 19-36.)

¹⁷ August 17, 2017 was the last day a worker was on the Project, and the earliest date of Minco's fringe benefit payment to John Hancock was September 20, 2019, over two years later. (DLSE Exhibit No. 7, p. 83; Minco Exhibit E, pp. 19-36.)

Contractors (AGC) Apprentice Trust training fund contributions in the total amount of \$1,214.35 (two checks of \$461.36 and \$752.99). (Minco Exhibit J, pp. 53-57.) In this regard, Thomassian testified that Minco is a signatory with the AGC. Thomassian conceded on cross-examination that the copies of the checks in Minco Exhibit J do not show that the checks were cashed (i.e., they were not canceled checks). Thomassian also conceded on cross-examination that the CAC certification of training fund contributions does not show any contribution by Minco in the amount of \$418.89. (DLSE Exhibit No. 21, pp. 189-207).

On cross-examination, Thomassian testified that the scope of work for the Project included the removal of several trees toward the beginning of the Project, and that the trees were removed for Minco to complete sidewalk and street repair.

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 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 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, supra*, at p. 985.) Section 1775, subdivision (a), requires that contractors and subcontractors pay

the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if the unpaid wages are not paid within 60 days following 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 or subcontractor may appeal the assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of presenting evidence that “provides prima facie support for the Assessment” (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that 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).)

The Assessment Was Timely.

The limitations period for DLSE to serve an assessment is set forth in section 1741, subdivision (a), which states in relevant part:

The assessment shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last.

The City accepted the completion of the Project on September 27, 2017, and the Notice of Completion was recorded on October 5, 2017. (DLSE Exhibit No. 24, pp. 277-278.) Accordingly, DLSE had 18 months from October 5, 2017, or April 5, 2019, to serve the

Assessment. DLSE timely served the Assessment on March 1, 2019, within the 18-month limitations period. (DLSE Exhibit No. 3, p. 18-26.)¹⁸

The statute of limitations is an affirmative defense and its elements must be proved by the party asserting it. (*Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1310.) Therefore, Minco bears the burden of proving that the Assessment was untimely. Minco did not submit any evidence or argument to controvert the timeliness of the Assessment. For this reason, Minco failed to meet its burden of proof to show that the Assessment was untimely.

DLSE Presented Prima Facie Evidence in Support of the Assessment.

The documentary and testimonial evidence in this case is generally undisputed. DLSE based its Assessment that Minco underpaid wages on the CPRs provided by Minco and the applicable PWDs for the worker classifications at issue.

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,

¹⁸ Even using the September 27, 2017 date of acceptance by the Awarding Body, the Assessment was timely issued.

social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journey[person], apprentice, worker, or other employee employed by him or her in connection with the public work.” (§ 1776, subd. (a).)

In this case, DLSE presented prima facie support for the Assessment. With regard to DLSE’s reclassification of Tree Trimmers to Laborers Group 1, DLSE relied on the CPRs which showed that Minco classified its workers as Tree Trimmers on June 21 through June 23, 2017, the scopes of work for the crafts of Tree Trimmer and Laborers, as well as Pich’s understanding that the scope of work for the Project was sidewalk reconstruction requiring the removal of trees. (DLSE Exhibit No. 7, p. 61; DLSE Exhibit No. 13, pp. 134-140; DLSE Exhibit No. 15, pp. 146-147; DLSE Exhibit No. 22, pp. 208-274.) The CPRs for the week ending June 25, 2017, show that Levi Valiente, classified as Laborer Group 1, was the sole worker on the Project on June 20, 2017, that he worked on June 21, June 22, and June 23, 2017, with Pedro Rodriguez, Miguel Tapia, and Rafael Tapia, who were all classified as Tree Trimmers. (DLSE Exhibit No. 7, p. 61.) Accordingly, DLSE presented prima facie evidence that Pedro Rodriguez, Miguel Tapia, and Rafael Tapia, performed work removing trees on June 21, June 22, and June 23, 2017, consistent with the Laborer Group 1 classification. Based on these facts, as well as the hours they worked and the hourly rate they were paid as set forth in the CPRs, DLSE met its burden to present evidence showing prima facie support for the finding in the Assessment that Minco underpaid prevailing wages to these three workers based on worker misclassification.

With regard to the other workers listed on the CPRs, classified as Laborer Group 1, Carpenter, Cement Mason, and Operating Engineer Group 4, DLSE relied on the CPRs, the applicable PWDs, Minco’s Contractor Fringe Benefit Statement showing that fringe benefits would be paid to John Hancock, and Minco’s failure to provide documentation of fringe benefit payments during the course of the investigation to show that these workers were not paid fringe benefits for their work on the Project. (DLSE Exhibit No. 7, pp. 61-85; DLSE Exhibit No. 8, pp. 86-87; DLSE Exhibit No. 11, pp.

131-132; DLSE Exhibit No. 12, p. 133; DLSE Exhibit No. 13, pp. 134-140; DLSE Exhibit No. 14, pp. 141-145.) DLSE's conclusion is reflected in the Audit Worksheet and the Investigation Worksheets. (DLSE Exhibit No. 4, pp. 27-45.) This evidence provides prima facie support for the finding in the Assessment as to underpaid prevailing wages to all other workers based on failure to pay fringe benefits.

DLSE also relied on the CPRs and the applicable PWDs to show that its workers on the Project were not paid overtime premium rates. (DLSE Exhibit No. 4, pp. 27-45; DLSE Exhibit No. 11, pp. 131-132; DLSE Exhibit No. 12, p. 133; DLSE Exhibit No. 13, pp. 134-140; DLSE Exhibit No. 14, pp. 141-145.) As reflected in the Audit Worksheet and the Investigation Worksheets, the CPRs show that Minco paid its workers straight time rates for hours worked in excess of eight hours per day. (DLSE Exhibit No. 4, pp. 27-45; DLSE Exhibit No. 7, pp. 61-85.) Based on these facts, the record shows prima facie support for DLSE's finding that Minco failed to pay required overtime rates.

DLSE also relied on the CPRs, the applicable PWDs, Minco's Contractor Fringe Benefit Statement showing that training fund contributions would be paid to the CAC, Minco's failure to provide documentation of training fund contribution payments during the course of the investigation, and the certification of training fund contributions from the CAC to show that training fund contributions were not paid on behalf of these workers for their work on the Project. (DLSE Exhibit No. 7, pp. 61-85; DLSE Exhibit No. 8, pp. 86-87; DLSE Exhibit No. 11, pp. 131-132; DLSE Exhibit No. 12, p. 133; DLSE Exhibit No. 13, pp. 134-140; DLSE Exhibit No. 14, pp. 141-145; DLSE Exhibit No. 21, pp. 189-207.) This is reflected in the Audit Worksheet and the Investigation Worksheets. (DLSE Exhibit No. 4, pp. 27-45.) These facts present evidence showing prima facie support for DLSE's finding that Minco failed to make the required training fund contributions.

Minco Failed to Carry Its Burden of Proof to Show the Assessment Was Incorrect in Reclassifying Its Workers from Tree Trimmer to Laborer Group I for the Tree Removal Work Performed on the Project.

The single prevailing rate of pay for a given "craft, classification, or type of work" is determined by the Director of Industrial Relations in accordance with the standards

set forth in section 1773. (*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1082) (*Sheet Metal Workers*). The Director determines the rate for each locality in which public work is performed (as defined in section 1724), and publishes a general prevailing wage determination (PWD) for a craft, such as Tree Trimmer or Laborer, to inform all interested parties and the public of the applicable prevailing wage rates. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125 (*Ericsson*).)

Ultimately, the Director's PWDs determine the proper pay classification for a type of work. The nature of the work actually performed, not the title or classification of the worker, is determinative of the rate that must be paid. The Department publishes an advisory scope of work for each craft or worker classification for which it issues a PWD. The decision about which craft or classification is appropriate for the type of work requires comparison of the scope of work contained in the PWD with the actual work duties performed.

In response to DLSE's prima facie showing that the tree removal work was that of the Laborer craft, Minco argues Pich had no personal knowledge of the work performed because he did not visit the job site, review inspection reports, or speak to workers. However, Pich reviewed the notice inviting bids and the Contract Agreement, and gained sufficient knowledge for him to conclude that the work at issue in the reclassification was not for the purpose of clearing rights-of-way for communications lines and electric power lines within the meaning of the Tree Trimmer scope of work.

Minco also argues that Pich arbitrarily reclassified the Tree Trimmers as Laborers Group 1. In this case, the tree removal does not fall within the Tree Trimmer scope of work, which refers to trimming trees "to clear right-of-way for communication lines and electric power lines," climbing trees "to reach branches interfering with wires and transmission towers," pruning treetops, removing broken tree limbs, and felling trees "interfering with power service." (DLSE Exhibit no. 15, p. 147.) Instead, the tree

removal falls under the Laborer scope of work, which expressly includes, in relevant part: "street and highway work, grading and paving, excavation of earth and rock...," "demolition work," "[a]ll work in connection with excavation for building and other construction..." and "[a]ll work in connection with concrete work..." (DLSE Exhibit No. 13, pp. 138-139.) Minco provided no evidence that the tree removal work on the Project involved making clearance for communications or electrical lines. Rather, Thomassian admitted on cross-examination that the Project required the removal of several trees so that Minco could perform the concrete work for the sidewalk and street repair. Based on the scopes of work for the Tree Trimmer and Laborer crafts and the totality of the evidence, the reclassification of workers is proper.

For these reasons, as to the reclassification issue, Minco failed its "burden of proving that the basis for the Civil Wage and Penalty Assessment . . . is incorrect." (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, Minco is liable for \$917.40, the difference between the basic wage amounts Minco paid its workers as Tree Trimmers and the required basic wage amounts had they been paid as Laborer Group 1.¹⁹

Minco Failed to Carry Its Burden of Proof to Show the Assessment was Incorrect as to Failure to Pay Fringe Benefits.

In response to DLSE's prima facie showing that the Minco failed to pay fringe benefits for the workers on the Project, Minco contends that it did make fringe benefit payments to John Hancock, albeit untimely payments. Thomassian testified that Minco paid John Hancock a total \$29,308.29 for fringe benefits attributed to the workers on the Project. (Minco Exhibit A, p. 4; Minco Exhibit B, p. 7; Minco Exhibit E, pp. 19-36.) However, Thomassian admitted that Minco did not submit any proof of payments to John Hancock to DLSE during the course of its investigation or before the Hearing.

¹⁹ Minco paid the three workers who performed tree trimming work for 20 hours each at the hourly rate of \$17.05, for a total of \$1,023.00. (See DLSE Exhibit Nos. 4 and 7.) The Laborer Group 1 basic hourly rate of \$32.34 for 60 hours of work is \$1,940.40. Accordingly, the difference owed by Minco for the basic hourly rate is \$917.40. This amount does not include the required fringe benefits of \$19.05 per hour or required training fund contributions of \$0.69 per hour.

Moreover, Thomassian admitted that Minco's fringe benefit payments to John Hancock were late, and that they were paid more than 18 months after the completion of the Project, i.e., after the service of the Assessment.²⁰ (Minco Exhibit E, pp. 19-36; DLSE Exhibit No. 3, pp. 18-26.)

The John Hancock contribution records in Minco Exhibit E, which Thomassian admitted are the only proof of fringe benefit payments, are problematic. Thomassian testified that the spreadsheets in Minco Exhibits A and B, which set forth the fringe benefits Minco determined was owed to workers on this Project, were submitted to John Hancock along with the payments reflected in Minco Exhibit E. However, Thomassian's testimony must be discounted because Minco Exhibits A and B are dated May 19, 2020, coinciding with the last payment date to John Hancock as reflected in Minco Exhibit E; the first payment to John Hancock was dated September 19, 2019. (Minco Exhibit A, pp. 1-4; Minco Exhibit B, pp. 5-7; Minco Exhibit E, pp. 19-36.) In addition, as the payments to John Hancock on behalf of the workers constituted aggregate amounts for multiple unidentified projects, and because Minco Exhibits A and B cannot be relied upon as having been provided to John Hancock at the time of the payments, there is no evidence that these payments were attributable to the workers on this Project. (See Minco Exhibits A, B, C, and D.) Accordingly, there is no credible evidence that the John Hancock payments in Exhibit E were made on behalf of the workers for this Project.

Moreover, another circumstance prevents credit to Minco for the alleged payments made to John Hancock.

An employer may take credit for an employer payment specified in subdivision (b), even if contributions are not made, or costs are not paid, during the same pay period for which credit is taken, if the employer regularly makes the contributions, or regularly pays the costs, for the plan, fund, or program on no less than a quarterly basis.

²⁰ The earliest payment to John Hancock was made on September 19, 2019, more than six months after the issuance of the CWPA on March 1, 2019. (Minco Exhibit E, pp. 19-36; DLSE Exhibit 3, pp. 18-26.)

(Section 1773.1, subd. (d).) Here, Thomassian admitted that the payments to John Hancock were made more than 18 months after the end of the Project. Indeed, more than two years had passed from the last date worked on the Project, August 17, 2017, and the date of the first John Hancock payment, September 19, 2019. (DLSE Exhibit No. 7, pp. 61-85; Minco Exhibit E, pp. 19-36.) There was no evidence that Minco made payments to John Hancock regularly on no less than a quarterly basis. Accordingly, even if Minco had shown that the payments were actually related to the workers on the Project, Minco still cannot prove any entitlement to credit for the payments under section 1773.1, subdivision (d). For these reasons, Minco failed its burden of showing that the Assessment is incorrect as to its failure to pay fringe benefits. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, Minco is liable for unpaid fringe benefits in the amount of \$30,191.66.²¹

Minco Failed to Carry Its Burden of Proof to Show the Assessment Was Incorrect as to Failure to Pay Training Fund Contributions.

Section 1777.5, subdivision (m)(1), requires contractors on public works projects who employ journeypersons or apprentices in any apprenticeable craft to pay training fund contributions to the California Apprenticeship Council or to an apprenticeship committee approved by the Department of Apprenticeship Standards. In response to DLSE's prima facie evidence that Minco owed training fund contributions for all workers on the Project, Minco contends that it did make training fund contributions to both the CAC and to the AGC Apprentice Trust, and provided copies of checks purporting to show these payments.²² (Minco Exhibit J, pp. 53-57.) The Contractors Fringe Benefit Statement provided by Minco during the course of the investigation indicated that payment would be made to the CAC. (DLSE Exhibit No. 8, pp. 86-87.) However, the

²¹ The amount of unpaid fringe benefits is derived from the difference between the \$31,503.46 found in the Assessment for unpaid wages, less \$917.40 in underpaid wages based on reclassification of workers from Tree Trimmer to Laborer Group 1, minus \$394.40 in underpaid overtime premiums to the workers classified as Laborer Group 1, Carpenter, and Operating Engineer Group 4.

²² These check copies were not provided to DLSE prior to the Assessment.

certification from the CAC showed that Minco paid no training fund contributions for the Project. (DLSE Exhibit No. 21, pp. 189-207.) Minco's evidence does not show that any training fund contributions were made to either the CAC or the AGC Apprentice Trust. In this regard, Thomassian admitted that the copies of the checks to the CAC and the AGC Apprentice Trust in Minco Exhibit J do not show that they were cashed. The CAC certification of training fund contributions casts doubt on Thomassian's testimony that Minco paid training fund contributions for the Project.²³ As such, Minco failed to show that any training fund contributions were paid on behalf of its workers on the Project. Accordingly, Minco failed its burden of showing that the Assessment is incorrect as to its failure to pay training fund contributions, and Minco is therefore liable for those contributions in the amount of \$1,179.73. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

Minco Failed to Prove the Labor Commissioner Abused Her Discretion in Assessing Penalties Under Section 1775.

Section 1775, subdivision (a), 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:

²³ Minco contends that Pich failed to confirm with the AGC Apprentice Trust whether Minco had made training fund contributions for the Project. However, Minco's Contractors Fringe Benefit Statement indicated that training fund contributions would be made to the CAC; there was no indication that training fund contributions would be made to the AGC Apprentice Trust. (DLSE Exhibit 8, pp. 86-87.) Moreover, Thomassian admitted that Minco's exhibits were not provided to DLSE prior to the Hearing. During his investigation of training fund contributions, then, Pich had no reason to contact the AGC Apprentice Trust to confirm training fund contributions. In addition, Minco did not provide any confirmation from the AGC Apprentice Trust as to any training fund contributions paid for this Project. Accordingly, Minco's Exhibit J consisting of non-cancelled checks are insufficient to substantiate the payment of any training fund contributions for the Project.

- (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 contractor . . . 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 . . .
- (ii) The penalty may not be less than eighty dollars (\$80) . . . if the contractor . . . 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 1777.1.²⁴
- . . .
- (D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

Abuse of discretion by DLSE 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.)

²⁴ Section 1777.1 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).)

DLSE assessed section 1775 penalties at the rate of \$200.00. The burden was on Minco to prove that DLSE abused its discretion in setting the penalty amount under section 1775. Although Minco disputed that it had misclassified workers for the tree removal work or that it failed to pay in timely fashion prevailing wages in the form of fringe benefits and training fund contributions, it provided no compelling or probative evidence establishing that the workers had not been misclassified or underpaid, for the reasons addressed above. Minco provided no evidence of abuse of discretion by DLSE in its selection of the penalty rate.

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. Further, the Director is not free to substitute her own judgment. Minco has not shown an abuse of discretion in the rate selected by the Labor Commissioner and, accordingly, the assessment of section 1775 penalties at the rate of \$200.00 is affirmed.

Minco Failed to Carry Its Burden of Proof to Show the Assessment Was Incorrect as to Failure to Pay Overtime Premiums.

Section 1815 states:

[w]ork performed by employees of contractors 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) 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.

Section 1813 prescribes a penalty of \$25.00 per calendar day for each worker found to have worked overtime without having been paid at the applicable hourly overtime wage rate. DLSE's un rebutted evidence established 16 such violations by Minco. Accordingly, the \$400.00 penalty is affirmed.

Minco Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, as follows:

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 . . .

At the time the Assessment was issued, the statutory scheme regarding liquidated damages provided contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE agreeing to waive liquidated damages). Under section 1742.1, subdivision (a), the contractor has 60 days to decide whether to pay the workers all or a portion of the wages assessed in the civil wage penalty assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the civil wage penalty assessment, the contractor deposits with the Department of Industrial Relations the full amount of the assessment of unpaid wages, including all statutory penalties.

In this case Minco did not pay any back wages in response to the Assessment; nor did it deposit with the Department the assessed wages and statutory penalties. Accordingly, Minco is liable for liquidated damages under section 1742.1 in the amount of the unpaid wages found under this Decision, \$31,503.46.

Minco Failed to Comply with the Apprenticeship Requirements of Section 1777.5.

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 CAC. (Cal. Code Regs., tit. 8, §§ 227 to 231.)²⁵

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 journeypersons in the applicable craft or trade. (§ 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 that can supply apprentices to the project. (§ 1777.5, subd. (e).) “The information shall be provided to the applicable committees “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” (§ 230, subd. (a).) DAS has prepared a form, the DAS 140 Form, that a contractor may use for that purpose.

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio if it has properly requested 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. The request for dispatch must be made by “written notice of at least 72 hours (excluding Saturdays, Sundays, and holidays) before the date on which one or more apprentices are required.” (§ 230.1, subd. (a).) DAS has prepared another form, the DAS 142 Form, that a contractor may use to request dispatch of apprentices from apprenticeship committees.

In this matter, the record demonstrates that Minco violated the apprenticeship requirements. Laborer Group 1, Carpenter, Cement Mason, and Operating Engineer

²⁵ All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

Group 4, are apprenticeable crafts, and it is undisputed that Minco did not employ any apprentices on the Project.²⁶ Minco concedes that it did not submit the DAS 140 Form to the applicable apprenticeship committees for the Operating Engineer craft.

With regard to the Laborer classification, DLSE contends that Minco failed to comply with the requirement to provide contract award information to all applicable apprenticeship committees in the area of the Project. Minco sent DAS 140 and 142 Forms to the two applicable Laborer apprenticeship committees, the Laborers Southern California Joint Apprenticeship Committee on July 26, 2017, and the Associated General Contractors of America Apprenticeship & Training Trust on June 28, 2017. (DLSE Exhibit No. 16, pp. 154-156, DLSE Exhibit No. 17, pp. 165-168, 170-171). Minco contends that the DAS 140 Form sent to the Associated General Contractors of America Apprenticeship and Training Trust was sent on June 19, 2017. However, DLSE argues that the second DAS 140 Form to the Laborers Southern California Joint Apprenticeship Committee was late. (§ 230, subd. (a) [contract award information due within ten days from execution of the contract, or no later than the first day of work].)

Any tardiness in the second DAS 140 notice is immaterial. Minco was not required to provide the contract award information to the Laborers Southern California Joint Apprenticeship Committee because the evidence of record shows Minco was approved by the Associated General Contractors of America Apprenticeship & Training Trust to train apprentices. Under section 230, subdivision (a), if a contractor is approved by an apprenticeship committee, the contractor complies with the notice requirement by providing the information to the committee that gave the approval. It is only when a contractor is not approved by a committee that it must proceed to provide the contract award information to all of the applicable apprenticeship committees in the geographic area.

²⁶ In this case, the parties do not dispute the Operating Engineer exemption from the requirements to request dispatch of apprentices for the Operating Engineer work or to employ apprentices in the craft of Operating Engineer at the 1:5 hourly ratio. The exemption for the Operating Engineer craft from the dispatch request and ratio requirements does not extend to the requirement under section 230, subdivision (a), to provide applicable apprenticeship committees the contract award information.

As for Minco's compliance with the dispatch request requirement, the DAS 142 Form to the Laborers Southern California Joint Apprenticeship Committee, which was sent on July 26, 2017, requested dispatch of a Laborer apprentice for July 24, 2017. (DLSE Exhibit No. 17, p. 167.) Because Minco failed to meet its duty to send the dispatch request at least 72 hours before Laborer apprentices were required, it is not entitled to the regulatory exception from the 1:5 apprentice to journeyman ratio. (See § 230.1, subd. (a).)²⁷

Accordingly, the record establishes that Minco violated the ratio requirement of section 1777.5 subdivision (g), for the Laborer classification, the notice requirement of section 1777.5, subdivision (e), for the Operating Engineer classification, and the related regulations, sections 230 and 230.1, and is therefore subject to penalties under section 1777.7.

Minco Failed to Prove the Labor Commissioner Abused Her Discretion in Assessing Penalties Under Section 1777.7.

If a contractor "knowingly violate[s] Section 1777.5" a civil penalty is imposed under section 1777.7. Section 1777.7 provides, in relevant part:

(a) (1) If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5, the contractor and any subcontractor responsible for the violation shall forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than 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 within a three-year period, if the noncompliance results in apprentice training not being provided as 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.

²⁷ Minco also argues it need not comply with the dispatch request requirement because the applicable committees would not dispatch apprentices to it because it was a non-union contractor. The regulatory requirement applies to all contractors, whether union or non-union. Further, argument about what an apprenticeship committee would do with a timely dispatch request provides no substitute for compliance with the regulation.

(§ 1777.7, subd. (a)(1).) 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, or the contractor had previously employed apprentices on a public works project.

Failure to provide a contract award notice is a continuing violation for the duration of the work, starting no later than the first day in which the contractor has workers employed upon the public work, and ending when a Notice of Completion is filed by the awarding body. (§ 230, subd. (a).) Penalties for that failure, as well as failure to meet the required 1:5 ratio, can be assessed "for each full calendar day of noncompliance" (§ 1777.7, subd. (a)(1).) The determination of the Labor Commissioner as to the penalty is reviewable only for an abuse of discretion. (§ 1777.7, subd. (d).) A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment, namely, the affected contractor has the burden of proving that the basis for assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Minco did not provide contract award information to the applicable apprenticeship committees for the Operating Engineer craft at any time during the duration of the Project.

By the Assessment, DLSE calculates the calendar days of noncompliance with the ratio requirement based on the number of journeyman calendar days of work on the Project in the craft at issue. Minco "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journeyman hours for Laborers because it admittedly employed no Laborer (or any) apprentices. The irrebuttable presumption that Minco knew or should have known of the apprenticeship requirements of section 1777.5 applies because Minco was issued prior assessments for apprenticeship violations and

because the notice of bid notified Minco of its obligation to comply with the apprenticeship requirements. (DLSE Exhibit No. 1, p. 8; DLSE Exhibit No. 22, pp. 230-231.) Since Minco was aware of its obligations under the law yet failed to submit contract award information to the applicable Laborer and Operating Engineer apprenticeship committees, Minco failed to meet its burden of proof by providing evidence of compliance with section 1777.5. Since Minco knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a penalty rate of \$200.00 per violation for 52 calendar days of noncompliance based on three different periods of violations: Minco's failure to give notice of its contract award for the craft of Laborer for the 36 calendar days from June 21, 2017, to July 28, 2017, which was the date the notice was finally given; Minco's failure to give notice of its contract award for the craft of Operating Engineer for the 11 calendar days from July 29, 2017 to August 8, 2017, which was the last day that an Operating Engineer was on the Project according to the CPRs; and Minco's failure to meet the 1:5 ratio for the craft of Laborer for the five work days from August 9, 2017, to (and excluding) August 17, 2017, which was the last day that a Laborer was on the Project according to the CPRs.

DLSE's imposition of a penalty under section 1777.7 for the 36 calendar days during which the DAS 140 information was not given to the second Laborer committee, Laborers Southern California Joint Apprenticeship Committee, cannot be endorsed. Because Minco had been approved to train apprentices by the Associated General Contractors of America Apprenticeship and Training Trust, under the wording of section 230, subdivision (a), it was not required to provide the information to the second committee.²⁸ However, as to the other 16 days of penalty under section 1777.7, Minco did not show an abuse of discretion under section 1777.7, subdivision (d), as to either

²⁸ While some evidence suggests at least some of the 36-day penalty period could also have been based on Minco's failure to provide the DAS 140 to the applicable committees for the Operating Engineer craft, not only is that evidence incomplete, but DLSE did not argue for imposition of the penalty on that basis. Nor did DLSE's Penalty Review present the failure as to the Operating Engineer craft as an alternative basis for the 36-day penalty.

the penalty rate or those number of days of violations as found in the Assessment. Accordingly, penalties at the rate of \$200.00 for 16 days in the amount of \$3,200.00 is affirmed.

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

FINDINGS AND ORDER

1. The work subject to the Civil Wage and Penalty Assessment was performed on a public work and required the employment of apprentices and the payment of prevailing wages under the California Prevailing Wage Law, Labor Code sections 1720 through 1861.
2. The Labor Commissioner timely served the Civil Wage and Penalty Assessment.
3. The Request for Review was timely filed.
4. The Labor Commissioner's enforcement file was requested and produced in a timely fashion.
5. Minako America Corporation dba Minco Construction did not timely pay its employees the correct prevailing wage rates for all hours worked on the Project in the amount of \$31,503.46.
6. Minako America Corporation dba Minco Construction did not properly pay the required overtime premium rates to workers on the Project.
7. Minako America Corporation dba Minco Construction is liable for penalties assessed pursuant to Labor Code section 1813 in the amount of \$400.00.
8. Minako America Corporation dba Minco Construction failed to establish that the Labor Commissioner abused her discretion in assessing penalties pursuant to Labor Code section 1775.
9. Minako America Corporation dba Minco Construction is liable for penalties assessed pursuant to Labor Code section 1775 in the amount of \$46,600.00.

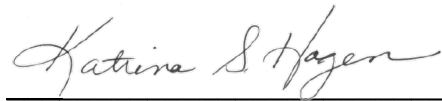
10. Minako America Corporation dba Minco Construction is liable for liquidated damages on wages found due and owing in the amount of \$31,503.46.
11. Minako America Corporation dba Minco Construction failed to submit contract award information to all applicable apprenticeship committees for the crafts of Laborer and Operating Engineer in a timely and factually sufficient manner.
12. Minako America Corporation dba Minco Construction failed to employ Laborer apprentices in the required minimum ratio of apprentices to journeypersons on the Project.
13. Minako America Corporation dba Minco Construction failed to establish that the Labor Commissioner abused her discretion in assessing penalties pursuant to Labor Code section 1777.7.
14. Minako America Corporation dba Minco Construction is liable for penalties assessed pursuant to Labor Code section 1777.7 in the amount of \$3,200.00.
15. The amount found due under the Assessment is as follows:

Basis of the Assessment	Amount
Wages Due:	\$31,503.46
Training Fund Contributions Due:	\$1,179.73
Penalties under section 1775:	\$46,600.00
Penalties under section 1813:	\$400.00
Liquidated damages:	\$31,503.46
Penalties under section 1777.7	\$3,200.00
TOTAL:	\$114,386.65

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

The Civil Wage and Penalty Assessment is affirmed, as modified, 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: 6/2/2021



Katrina S. Hagen
Director,
Department of Industrial Relations