STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

A & Y Asphalt Contractors, Inc. Case No. 22-0288-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor A & Y Asphalt Contractors, Inc. (A&Y) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on September 6, 2022, with respect to work performed for Purchase Order #622581 to Furnish Labor, Equipment, and Materials to Complete Asphalt and Concrete Repairs on List 20-01 (Project) for the Irvine Ranch Water District (Awarding Body) in Orange County. The Assessment determined that the following amounts were due: $793.45 in unpaid prevailing wages,[1] $280.00 in Labor Code section 1775 penalties,[2] $50.00 in section 1813 penalties, and $560.00 in section 1777.7 penalties.

A Hearing on the Merits occurred over two days, March 8, 2023 and March 29, 2023, before Hearing Officer Ann Wu. Thomas Kovacich appeared as counsel for A&Y and Sotivear Sim appeared as counsel for DLSE. Former A&Y worker Pablo Carrera and Deputy Labor Commissioner David Wong testified in support of the Assessment. A&Y President Allen Giese and A&Y Office Manager Sylvia Nye testified in opposition to the Assessment. DLSE Exhibit Numbers 1 through 15, and A&Y Exhibits C, E, F, G, H, I and K, were admitted into evidence. A&Y exercised the option to file a closing brief on April 28, 2023. The matter was submitted for decision on April 28, 2023.

[1] The Assessment found $783.64 in unpaid wages and $9.81 in unpaid training fund contributions, for a total of $793.45 unpaid prevailing wages.

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

Prior to the hearing, the parties stipulated to the following:

- The work subject to the Civil Wage and Penalty Assessment was subject to prevailing wage and apprenticeship requirements.
- The Request for Review was filed timely.
- The Labor Commissioner made its investigative file available to the contractor timely.
- Some back wages had been paid but no deposit made with the Department of Industrial Relations as a result of the Civil Wage and Penalty Assessment.[3]
- A&Y did not submit contract award information (DAS 140 Form) or request for dispatch of apprentices (DAS 142 Form) on the Project.

The issues for decision are as follows:

- Whether the Civil Wage and Penalty Assessment was served timely.
- Whether A&Y misclassified employees on the Project.
- Whether A&Y paid the correct prevailing wages for all hours worked on the Project.
- Whether A&Y paid the required overtime rates to its employees on the Project.
- Whether A&Y paid the required training fund contributions for all hours worked on the Project.
- Whether the Labor Commissioner abused her discretion in assessing penalties pursuant to section 1775.
- Whether A&Y is liable for penalties assessed pursuant to section 1775.
- Whether A&Y is liable for penalties assessed pursuant to section 1813.

[3] On March 8, 2023, the parties stipulated that A&Y made restitution payments to four workers as follows: (1) Francisco J. Ortez in the net amount of $20.05; (2) Maximo G. Barcenas in the net amount of $6.48; (3) Jose A. (Tony) Lopez in the net amount of $18.99; and, (4) Pablo Carrera in the gross amount of $4.79 which resulted in the net amount of $3.94 by check dated February 10, 2023. These stipulations were based on A&Y documents produced on the morning of March 8, 2023. Because the documents did not show the gross amounts paid to Ortez, Barcenas and Lopez, the Hearing Officer asked the parties to further research the gross amounts of the restitution payments. On March 29, 2023, the parties stipulated to the admissibility of A&Y Exhibit K, which set forth the gross amounts paid to Ortez, Barcenas and Lopez as $21.71, $7.87 and $20.57, respectively. (A&Y Exhibit K, pp. 1-3.) These restitution payments totaled $54.94, and were made on February 10, 2023. (*Ibid.*)

- Whether A&Y is liable for penalties assessed pursuant to section 1777.7.
- Whether A&Y is liable for liquidated damages on wages found due and owing.[4]

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence that provided prima facie support for the Assessment, and that A&Y failed, for the most part, to carry its burden of proving that the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this decision affirming and modifying the Assessment.

FACTS

The Project.

On January 27, 2021, A&Y submitted a proposal to the Awarding Body in the amount of $30,194.45 to perform the following scope of work: "[r]emove and replace 21 areas of damaged asphalt approx. 472 SF, tack edges and pave back with 6" of new hot asphalt in 2 lift[s]" and "[r]emove and replace 3 areas of damaged asphalt approx. 227 SF, tack edges and pave back with 8" of new hot asphalt in 3 lifts" at the locations on List 21-01.[5] (DLSE Exhibit No. 4, p. 35; A&Y Exhibit C, p. 1.) Thereafter, the Awarding Body sent A&Y a purchase order dated February 8, 2021 to "furnish labor, equipment, & materials to complete asphalt and concrete repairs on List# 21-01" in the amount of $30,194.45. (DLSE Exhibit No. 4, p. 34.)

On July 6, 2020, prior to submitting the proposal described above, Allen Giese signed on behalf of A&Y a document acknowledging "Irvine Ranch Water District Labor and Prevailing Wage Requirements" for "All Projects – Fiscal Year 2020/2021 – 7/1/2020 to 6/30/2021." (DLSE Exhibit No. 4, p. 31.) This document stated that the

[4] To the extent that A&Y objected to this last issue related to liquidated damages, the Hearing Officer has the discretion to define the issues prior to the hearing. (Cal. Code Regs., tit. 8, § 17243, subd. (d).)

[5] The parties did not submit the specific locations of List 21-01 into evidence.

contractor shall comply with the apprenticeship requirements of sections 1777.5 and 1777.6 and with the payment of prevailing wages under section 1775. (*Ibid*.)

A&Y had workers on the Project between February 11, 2021 and February 24, 2021, a duration of 19 days. (DLSE Exhibit No. 6, pp. 40-45; DLSE Exhibit No. 7, pp. 46-65.) A&Y performed work on the Project on five of those days: February 11, 2021, February 19, 2021, and February 22 through February 24, 2021. (*Ibid*.)

A&Y sent an invoice to the Awarding Body dated February 23, 2021 with an amount due of $30,194.45. (DLSE Exhibit 4, p. 33.) The Awarding Body's Project Manager confirmed that the work was completed on February 28, 2021. (DLSE Exhibit No. 4, pp. 36, 38.) The Awarding Body issued payment on March 4, 2021. (*Ibid*.)

The Prevailing Wage Rate Determinations.

A&Y employed journey-level Laborers and Operating Engineers on the Project. (DLSE Exhibit No. 6, pp. 40-45; DLSE Exhibit No. 7, pp. 46-65.) The prevailing wage determinations (PWDs) at issue in this matter are that of Laborer, SC-23-102-2-2020-1 (Laborer), and that of Operating Engineer, SC-23-63-2-2020-2 (Operating Engineer).[6] (DLSE Exhibit No. 8, pp. 66-68; DLSE Exhibit. No. 9, pp. 69-74.) Both of those crafts are apprenticeable. (*Ibid*.) The scope of work provisions for the Laborer classification included the following:

> Article 1, Section B, Subsection 5, (b): Street and highway work, grading and pacing, excavation of earth and rock . . .
>
> Article 1, Section F, Subsection 1: All work necessary to tend all other building trades craftsmen, . . . the unloading of trucks and moving of equipment, material, on the jobsite . . .
>
> Article 1, Section F, Subsection 5: All work in the excavation, grading, preparation, concreting, asphalt and mastic paving, paving, ramming, curbing, flagging, traffic control by any method, and laying of other stone materials, and surfacing of streets . . .[7]

[6] There is no dispute as to the prevailing wage rates in the Laborer or Operating Engineer PWDs.

[7] The Director takes official notice of the Laborer PWD Scope of Work Provisions found at https://www.dir.ca.gov/oprl/2020-2/PWD/Scope/Southern/SC-023-102-2-Sco.pdf.

The scope of work provisions for the Operating Engineer classification included the following:

> Article B, Section 5, Subsection (a): It shall cover work on buildings, heavy, highway, and engineering construction, including the construction of, in whole or in part, or in improvement of modification thereof, including any structure or operations which are incidental thereto, the operation of all equipment, vehicles, and other facilities . . ., used in connection with the performance of the aforementioned work and services, and the assembly, maintenance and repair of all equipment, vehicles, and other facilities, which has normally and customarily been performed by unit employees, and including without limitation the following types or classes of work.
>
> Article B, Section 5, Subsection (b): Street and highway work, grading and paving excavation of earth and rock . . .
>
> Article B, Section 6: This Agreement shall also include: work in the Contractor's yards and shops, field survey work, asphalt screening, soil, cement and crushing plants and operations . . .[8]

The PWDs for both Laborer and Operating Engineer included a note that indicated, "contractors shall make travel and/or subsistence payments to each worker to execute the work." (DLSE Exhibit No. 8, p. 66; DLSE Exhibit No. 9, p. 69.) The Laborer PWD Travel and Subsistence Provisions, at section J, provided in relevant part:

> Employees shall travel to and from their daily initial reporting place on their own time and by means of their own transportation. The Contractor shall be responsible for payment of wages from the reporting point, as ordered by the Contractor, to the jobsite and from job to job and return. However, employees who voluntarily report to a point for free transportation to the jobsite will not be compensated from the time en route and return.[9]

The Operating Engineer PWD Travel and Subsistence Provisions, under Special Rule 4, contained substantially the same language:

> Employees shall travel to and from their daily initial reporting place on their own time and by means of their own transportation . . . The

[8] The Director takes official notice of the Operating Engineer PWD Scope of Work Provisions found at https://www.dir.ca.gov/oprl/2020-2/PWD/Scope/Southern/SC-023-63-2-Sco.pdf.

[9] The Director takes official notice of the Laborer PWD Travel and Subsistence Provisions found at https://www.dir.ca.gov/oprl/2020-2/PWD/Travel/Southern/SC-023-102-2-Tra.pdf.

> Contractor shall be responsible for payment of wages from the reporting point (parking area), to the jobsite, and from job-to-job and return. However, employees who voluntarily report to a point for free transportation to the jobsite will not be compensated for the time enroute and return.[10]

Because A&Y asserted that travel time may be paid at the rate of Driver (On/Off-Hauling To/From Construction Site) (Driver), the Driver PWD, C-DT-830-261-10-2016-1, is also at issue. (A&Y Exhibit E.) The Driver craft is not apprenticeable. (*Ibid*.) The scope of work provisions for the Driver classification set forth the following two definitions of dump truck drivers from the Dictionary of Occupational Titles (4th Ed., Rev. 1991) – Occupational Group Arrangement:

> 902 Dump-Truck Drivers
>
> This group includes occupations concerned with driving a dump truck to transport sand, gravel, coal, and similar cargo.
>
> 902.683-101 Dump-Truck Driver (any industry)
>
> Drives truck equipped with dump body to transport and dump loose materials, such as sand, gravel, crushed rock, coal, or bituminous paving materials: Pulls levers or turns crank to tilt body and dump contents. Moves hand and foot controls to jerk truck forward and backward to loosen and dump material adhering to body. May load truck by hand or by operating mechanical loader. May be designated according to type of material hauled as Coal Hauler (any industry); Dust-Truck Driver (any industry); Mud Trucker (steel & rel.). May be designated according to type of equipment driven for off-highway projects as Dump-Truck Driver, Off-Highway (any industry).

(A&Y Exhibit E, p. 2.) There were no required travel and subsistence provisions for the Driver craft.[11]

The Assessment.

The Assessment is based on DLSE's determination that A&Y failed to pay the correct prevailing wage for travel time from the A&Y yard to and from the Project sites.

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[10] The Director takes official notice of the Operating Engineer PWD Travel and Subsistence Provisions found at https://www.dir.ca.gov/oprl/2020-2/PWD/Travel/Southern/SC-023-63-2-Tra.pdf.

[11] The Director takes official notice of the Driver PWD Travel and Subsistence Provisions found at https://www.dir.ca.gov/oprl/2020-2/PWD/Travel/Statewide/C-DT-830-261-10-Tra.pdf.

(DLSE Exhibit No. 1, p. 1.) The Assessment is also based on DLSE's determination that A&Y failed to pay sufficient training fund contributions to the California Apprenticeship Council (CAC) due to A&Y's failure to pay the correct prevailing wage for travel time. (*Ibid*.) The Assessment determined that the total amount of unpaid wages was $793.45, comprised of $783.64 in underpaid wages and $9.81 in underpaid training fund contributions. (DLSE Exhibit No. 1, pp. 1, 6.) The Assessment imposed section 1775 penalties of $280.00, based on seven violations assessed at $40.00 per violation, as well as section 1813 penalties of $50.00, based on two violations assessed at $25.00 per violation. (DLSE Exhibit No. 1, pp. 1, 6; DLSE Exhibit No. 3, pp. 23-24.)

The Assessment also found that A&Y failed to submit contract award information to all of the applicable apprenticeship committees in the geographic area of the Project and failed to employ apprentices in the required minimum ratio of apprentices to journeypersons on the Project. (DLSE Exhibit No. 1, p. 2; DLSE Exhibit No. 3, pp. 28-29.) The Assessment imposed section 1777.7 penalties of $560.00, based on 14 violations assessed at $40.00 per violation.[12] (DLSE Exhibit No. 1, p. 2; DLSE Exhibit 3., pp. 23-24.)

Testimony of DLSE Witnesses.

Pablo Carrera worked for A&Y for over a year, as a truck driver, machine operator and laborer.[13] He generally performed the same duties for each project. Carrera always reported to the A&Y yard at the beginning of the work day, at either 5:30 or 6:00 a.m., because he drove one of the two Peterbilt Super 10 dump trucks. He was usually assigned to drive truck number 147.

Typically, after Carrera arrived at the A&Y yard in Corona, he performed a safety check of the truck for 15 to 20 minutes before he drove the truck out of the yard.

[12] According to the Penalty Review, DLSE issued a prior demand letter and a prior assessment against A&Y for prevailing wage and apprenticeship violations. (DLSE Exhibit No. 3, p. 30.) The prior demand letter assessed section 1775 and section 1777.7 violations at $20/violation, and the prior assessment assessed section 1775 and section 1777.7 violations at $40/violation. (*Ibid*.)

[13] Carrera recalled that the two foremen at A&Y were Leo and Jose. The foremen determined which workers would work as machine operators and which workers would work as laborers.

Carrera explained that there were two dump truck drivers each day, and that one of the drivers would go obtain material at the materials plant before going to the job site, and the other driver would go directly to the job site. The dump truck that went directly to the job carried the heavy equipment, which was the skid steer and the roller, on a trailer behind the dump truck. At the end of the work day, the dump trucks either returned directly to the yard (dumping left over materials in the spoils pile in the yard), or stopped at a dump site, either in Santa Ana or Irvine, to dump materials before returning to the yard. According to Carrera, unloading the dump truck in the yard at the end of the work day took another 15 to 20 minutes.

Carrera testified that he was always paid by check, and that he was paid $15 per hour for driving the truck to and from the yard to the materials plant and the project sites. Carrera denied that he ever received the rate of $32.09 per hour for driving the truck. (Cf. DLSE Exhibit No. 6, p. 43.)

On cross-examination, Carrera testified that he had a Class A driver's license, which is a commercial license to operate large trucks. Carrera admitted on cross-examination that he was terminated from A&Y for a positive drug test.

David Wong testified he had worked for DLSE for over 10 years, and was currently a Deputy Labor Commissioner. Wong conducted an investigation of the Project and issued the Assessment against A&Y on September 6, 2022. (DLSE Exhibit No. 1, pp. 1-9; DLSE Exhibit No. 2, pp. 10-22; DLSE Exhibit No. 3, pp. 23-30.) On June 14, 2022, Wong mailed a notice of investigation to all parties, including a request to the Awarding Body for the notice of completion or acceptance document of the Project, as well as a request to A&Y for certified payroll records. (DLSE Exhibit No. 12, p. 86.) Wong testified that he did not receive a notice of completion or acceptance document, nor did he receive any certified payroll records, within 10 days of his request. On July 6, 2022, Wong received the purchase order by email, but no notice of completion or acceptance document. (See DLSE Exhibit No. 5, p. 39.) On an unspecified date, A&Y's Office Manager, Nye, emailed Wong payroll records that were not certified under penalty of perjury.

To determine the applicable PWDs for the Project, Wong relied on the date of January 27, 2021, which was the date of A&Y's proposal to the Awarding Body of the scope of work and the contract price. (DLSE Exhibit No. 4, p. 35; A&Y Exhibit C, p. 1.) Wong relied on the date of March 4, 2021 as the trigger for the 18-month statute of limitations to issue an Assessment, because no notice of completion was filed. March 4, 2021 is the date that the Awarding Body paid the purchase order, which Wong considered the date that the Awarding Body closed out the Project. Wong issued the Assessment on September 6, 2022, because September 4, 2022 was a Sunday and September 5, 2022 was a holiday.

Wong issued the Assessment against A&Y because he found that A&Y "failed to pay the correct prevailing wage for work performed at the company yard, travel time from yard to project, and project to yard,… [and] failed to pay some training fund contributions to California Apprenticeship Council." (DLSE Exhibit No. 1, p. 1.) Wong also found apprenticeship violations. (*Id*. at p. 2.) Wong prepared an audit summary of his investigation of this Project, which listed the worker names, worker classifications, the required prevailing wages, the amounts paid, the penalties assessed, and the training funds required to be paid. (DLSE Exhibit No. 2.) There is an audit worksheet for each worker. (*Ibid*.) Wong prepared the audit summary and audit worksheets using the information in the payroll records provided by A&Y, which listed travel time for certain workers, the rates of pay for travel time, and classifications for which the worker performed work on the Project. (DLSE Exhibit No. 6.) Wong calculated the underpayment of required prevailing wages by applying the appropriate prevailing wage rate for the travel time on the payroll records to workers Wong reclassified as Laborers or Operating Engineers, based on the classifications listed on the payroll records.[14]

[14] Wong explained that if a worker performed work in more than one classification on a day that the worker was paid travel time, Wong reclassified the worker to the classification for which the worker performed the most hours of work on that particular day. This was based on his experience as a Deputy Labor Commissioner. For example, on February 11, 2021, Barcenas worked 2 hours as a Laborer, Group 4, 6 hours as an Operating Engineer, Group 3, 1.25 hours overtime as a Laborer, Group 4, and had 2.75 hours of travel time. (DLSE Exhibit No. 6, p. 42; DLSE Exhibit No. 7, p. 49.) Wong reclassified Barcenas as an Operating Engineer, Group 3, for the 2.75 hours of travel time he worked on February 11, 2021. (DLSE Exhibit No. 2, p. 21.) On February 11, 2021, Carrera worked 2 hours as an Operating Engineer,

As reflected in the Audit Worksheets, Wong determined that the following A&Y workers were underpaid travel time on the Project: (1) on February 11, 2021, Ortez was required to be paid travel time for 2.5 hours at the overtime hourly rate of $81.35 and 0.5 hours at the double time hourly rate of $100.87 for Laborer, Group 4, rather than the hourly rates of $27.28 and $44.06 reflected in the payroll records, respectively, for a total underpayment of $163.58; (2) on February 11, 2021, Lopez was required to be paid travel time for 2.75 hours at the overtime hourly rate of $101.485 for Operating Engineer, Group 2, rather than the hourly rate of $28.45 reflected in the payroll records, for a total underpayment of $200.84; (3) on February 19, 2021, Martinez was required to be paid travel time for 1 hour at the straight hourly rate of $77.26 for Operating Engineer, Group 3, rather than the hourly rate of $20.00 reflected in the payroll records, for a total underpayment of $57.26; (4) on February 11, 2021, Barcenas was required to be paid travel time for 2.75 hours at the overtime hourly rate of $101.92 for Operating Engineer, Group 3, rather than the hourly rate of $32.68 reflected in the payroll records, for a total underpayment of $190.41; and, (5) on February 11, 2021, Carrera was required to be paid travel time for 2.75 hours at the overtime hourly rate of $77.375 for Laborer, Group 1, rather than the hourly rate of $15.00 based on what he told Wong he received for travel time, for a total underpayment of $171.53. (DLSE Exhibit No. 2, pp. 15, 17, 19, 21, 22; DLSE Exhibit No. 6, pp. 40, 42, 43.)

Wong calculated the required training fund contributions based on the hours worked and the worker classification on the payroll records. After Wong applied a credit of $127.34 to A&Y for training fund contributions, Wong determined that A&Y still owed $9.81 in unpaid training fund contributions. Wong explained that the $9.81 in unpaid

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Group 4, 6 hours as a Laborer, Group 1, 1.25 hours overtime as a Laborer, Group 1, and had 2.75 hours of travel time. (DLSE Exhibit No. 6, p. 43; DLSE Exhibit No. 7, p. 52.) Wong reclassified Carrera as a Laborer, Group 1, for the 2.75 hours of travel time he worked on February 11, 2021. (DLSE Exhibit No. 2, p. 22.) On February 19, 2021, Martinez worked 1 hour as a Laborer, Group 4, 1 hour as an Operating Engineer, Group 3, and had 1 hour of travel time. (DLSE Exhibit No. 6, p. 43; DLSE Exhibit No. 7, p. 56.) Wong reclassified Martinez as an Operating Engineer, Group 3, for the 1 hour of travel time he worked on February 19, 2021. (DLSE Exhibit No. 2, p. 19.)

training fund contributions resulted from A&Y's failure to pay prevailing wages for travel time at the Laborer or Operating Engineer rate.

During the course of his investigation, Wong found that A&Y did not submit required contract award information to the applicable apprenticeship committees for this Project. (DLSE Exhibit No. 3, pp. 28-29.) Wong also found that A&Y did not employ any apprentices on this Project. (*Ibid*.)

Wong prepared a Penalty Review which summarized the findings from his investigation of the Project. (DLSE Exhibit No. 3.) Wong recommended section 1775 penalties and section 1777.7 penalties at $40 per violation. (DLSE Exhibit No. 3, p. 24.) Those penalty rates were approved by Senior Deputy Labor Commissioner Norbert Flores. (*Ibid*.)

Wong testified on cross-examination that in performing the audit, he relied on the DLSE Public Works Manual section entitled Compensable Travel Time, which Wong understood to require compensable travel time to be paid at the job site rate. Wong also relied on section 1720, as he considered the time the workers spent in the yard, as well as the time the workers spent driving the dump trucks, to constitute covered preconstruction and postconstruction work under section 1720.

Wong admitted on cross-examination that he did not consider reclassifying the travel time of the dump truck drivers to Driver (On/Off-Hauling To/From Construction Site) (Driver) because the dump truck drivers were not classified as Driver on the payroll records. (See A&Y Exhibit E; DLSE Exhibit Nos. 6, 7.) Wong agreed that workers who drove the dump truck to pick up or drop off materials could be classified as Driver. However, Wong testified that workers at the yard must be paid at the job site rate, based on his understanding of the Public Works Manual section entitled Compensable Travel Time. Wong also testified that the workers who drove the dump truck pulling the heavy equipment to the job site must also be paid at the job site rate, since the Driver scope of work does not allow for transport of heavy equipment.

Testimony of A&Y Witnesses.

According to Allen Giese, A&Y was licensed by the Contractors State License Board for A - General Engineering and C32 - Parking and Highway Improvement work. (DLSE Exhibit No. 14, p. 88.) A&Y specialized in putting in pavement for water districts and other public municipalities. Giese was responsible for estimating and project management. A&Y was not a signatory contractor to any union. It had previously performed work for the Awarding Body.

A&Y submitted a proposal for this Project in response to a bid put out by the Awarding Body. (DLSE Exhibit No. 4, p. 35; A&Y Exhibit C.) A&Y referred to this Project as Job Number 21-0133. Giese described the scope of work for this Project as removing and patching old asphalt with new asphalt in various locations in Irvine and Lake Forest. In response to A&Y's proposal, the Awarding Body issued a purchase order to A&Y for this Project on February 8, 2021. (DLSE Exhibit No. 4, p. 34.) A&Y completed the work on this Project on February 23, 2021, when it signed the Conditional Waiver and Release on Progress Payment.[15] (DLSE Exhibit No. 4, p. 32.) A&Y also issued the invoice for this Project on February 23, 2021 for the full amount of the contract, $30,194.45. (DLSE Exhibit No. 4, p. 33.)

A&Y had a foreman on this Project, Jose Lopez. To perform the work on this Project, A&Y used two Super 10 dump trucks. One dump truck had a construction equipment trailer that carried a three to five ton vibratory roller as well as a skid steer (or Bobcat) with a milling attachment, breaker attachment, a power broom attachment, and a front bucket. The second dump truck did not have a trailer, because that truck was used to pick up material from the local asphalt plant. The drivers of the dump trucks were required to have a Class A license. For this Project, there was also a third truck—a crew truck—that carried other equipment and materials, including bags of cement, bags of silica sand, buckets of emulsion (tack), delineators, men working signs, and arrow boards.

[15] Although this document refers to progress payments, Giese explained that there was only the single payment on this Project.

On this Project, the Class A drivers reported to the yard in the morning and inspected their vehicles.[16] One driver drove the dump truck carrying the heavy equipment to the job site, and the other driver drove the dump truck to the asphalt plant.[17] The foreman and the crew went to the job site in the crew truck with the other equipment and materials. Usually, the dump truck carrying the heavy equipment would arrive to the job site after the foreman and crew, so that traffic control would already have been set in place. After the heavy equipment was unloaded, the workers excavated the location to be patched and prepared the area for the hot asphalt.[18] The hot asphalt would be applied after the arrival of the dump truck carrying the hot asphalt.[19] The hot asphalt was applied in two layers, and each layer was rolled and compacted after placement. The bottom layer consisted of a coarser size asphalt (3B2), and the top layer consisted of a finer size asphalt (3C3). After the final application of emulsion, the workers spread sand over the emulsion to prevent cars driving over the patch from tracking the emulsion. This process was repeated throughout the day for each patch location. Giese explained that the workers can complete at a minimum 4 to 5 patches per day, and up to 8 or 10 patches on a good day, depending on the size of the patches.

Giese testified that Carrera stopped working for A&Y in February of 2022. According to Giese, Carrera failed a drug test that was required by A&Y's insurance

[16] Giese explained that the specific time the drivers were required to report to the yard on any given day depended on the start time for the job that day and the travel time to the job site.

[17] On February 11, 2021, Carrera drove truck number 147 to the Vulcan Materials Company (Vulcan) and picked up hot asphalt. (A&Y Exhibit H, pp. 1-3.) On February 19, 2021, Martinez drove truck number 144 to Vulcan and picked up hot asphalt. (*Id.* at pp. 4-6.)

[18] The old asphalt that is excavated from the patch location is placed in the empty dump truck that has the equipment trailer.

[19] The hot asphalt must be used before it cools down, and a load of hot asphalt usually lasts at least 4 hours, depending on the weather. To help maintain the asphalt temperature, A&Y purchased more asphalt than was needed for the job. Whether left over asphalt at the end of the work day was dumped at a commercial dump or at the spoils pile in the yard depended on how much material was left over. Bigger loads were taken to the dump, and smaller loads were dumped in the yard. Hot asphalt that remained in the truck overnight would harden and be difficult to remove.

carrier. Further, Carrera did not respond to attempts by the lab that had performed the test to contact him. A&Y's insurance carrier refused to continue to insure Carrera as a driver. Although Giese asked Carrera to get the issue straightened out with the lab, Carrera did not do so, so Giese had to terminate Carrera's employment.

With respect to the apprenticeship violations, Giese testified that he was not aware of the requirement to employ apprentices on public works contracts of more than $30,000.00. Giese also explained that A&Y was deemed an essential business during the COVID-19 pandemic, and the workers took the recommended precautions and did not want to work with anyone who did not take the same precautions with respect to COVID.

On cross-examination, Giese testified that the dump truck drivers usually carried no passengers. The foreman's log identified the workers in each vehicle. Giese testified that the travel time represented on the payroll records represented the time from the yard to the job, and the time from the job to the yard. The foreman tracked the travel time on each project. There was also a Global Positioning System (GPS) on the trucks that tracked the location and movement of the trucks. Giese did not know the reason why travel time on the payroll records for the Project was not classified at the Driver prevailing wage rate, and stated that Nye was responsible for classifying the work performed by the workers.

Giese testified that only the drivers of the dump trucks and crew trucks were required to report to the yard in the morning. Other workers were not required to report to the yard in the morning, but they could go to the yard to get a ride to the job site if they did not want to drive their own vehicles to the job site. According to Giese, it took about five to 10 minutes in the morning to perform the vehicle safety checks, and perhaps another 10 to 15 minutes in the morning to load materials on the trucks. Giese explained that safety meetings would typically be held at the job site, not the yard. There were also vehicle safety checks at the end of the day, and the unloading of material to the spoils pile in the yard took only a few minutes.

Sylvia Nye testified to having worked for A&Y for 25 years, and was responsible for accounts receivable, accounts payable, contract proposals, and inputting payroll and job costing. Nye testified that A&Y participated in the Associated General Contractors of America (AGC) apprenticeship program and paid training fund contributions to the AGC Training and Apprenticeship Trust Fund. (DLSE Exhibit No. 10, p. 75.) A&Y was approved to train apprentices with AGC. Nye admitted that A&Y did not request apprentices for this Project, and explained that the Project was during the COVID-19 pandemic, and the workers did not want to work with anyone else.

According to Nye, the workers were paid portal to portal, meaning they were paid upon arrival to the yard at the beginning of the day until their departure from the yard at the end of the day. Nye explained that the field report prepared by the foreman indicated when the workers arrived and departed from the yard, the start and end times at the job site, the type of work each worker performed and/or the specific equipment that each worker used, and the duration of such work. (A&Y Exhibit G.) A&Y classified the work performed on the Project based on the foreman's field report. Nye also reviewed worker time cards to verify yard arrival and departure times.

Nye testified that A&Y also had GPS tracking on all of the trucks and equipment. The GPS on the trucks allowed Nye to determine when the ignition was started, as well as the movement and location of the trucks during the day in real time. (A&Y Exhibit I.) Nye testified that there were also cameras in the yard that she used to verify when workers arrived and left the yard, and what the workers did in the yard. According to Nye, the travel time identified on the payroll records corresponded to the time the worker traveled to and from the yard and the job site. Only the workers who drove A&Y vehicles received travel time. According to Nye, the rate of pay for the workers' travel time on the Project was calculated as the weighted average of their basic hourly rates paid for work at the job site, with application of overtime and double time premiums if indicated.[20] (A&Y Exhibit F.)

[20] However, Nye's testimony that the workers who drove A&Y vehicles were paid a weighted average of their basic hourly rates paid for work at the job site was not supported by the payroll records or the applicable PWDs for Laborer and Operating Engineer. For example, the payroll records showed that Ortez

Nye testified that A&Y paid reimbursement to workers for the difference between what they were paid for travel time and the higher of the Driver rate or the weighted average of a worker's basic hourly rate.[21] (A&Y Exhibit K.) A&Y also prepared checks to reimburse the workers for fringe benefits, presumably at the rates required for the Driver classification.[22] (*Ibid.*) Nye explained that the checks for fringe benefits were made out directly to the workers because some of the workers were no longer employed with A&Y. Nye testified that Carrera had not deposited any reimbursement checks.

On cross-examination, Nye admitted that she was not aware that travel time had to be paid at prevailing wage rates. Nye testified that A&Y did not use the Driver rate for travel time on the payroll records because A&Y was not aware of the Driver classification. However, Nye believed that the Driver classification was the correct classification for travel time on the Project, based on the scope of work provisions for Driver.

DISCUSSION

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

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was paid for 2.5 hours at the rate of $27.28 for travel time overtime premium and paid for 0.5 hour at the rate of $44.06 for travel time double time premium on February 11, 2021. (DLSE Exhibit No. 6, p. 43.) Ortez was classified as a Laborer, Group 4, for work performed at the job site that day. (*Ibid.*) For Laborer, Group 4, the basic hourly rate was $39.04, the overtime rate was $58.56, and the double time rate was $78.08. (DLSE Exhibit No. 8, p. 66.) Likewise, the travel time rates paid by A&Y to the other drivers on the Project were at rates less than the basic hourly prevailing wage rates for the classifications they worked at the job site. (DLSE Exhibit No. 6, pp. 40 [Martinez], 42 [Barcenas and Lopez], 43 [Carrera]; DLSE Exhibit No. 8, p. 66; DLSE Exhibit No. 9, p. 69.)

[21] This testimony contradicted Nye's testimony that the rate of pay for the workers' travel time on the Project was calculated as the weighted average of their basic hourly rates paid for work at the job site.

[22] By checks dated March 17, 2023, A&Y prepared restitution checks to five workers for fringe benefits as follows: (1) Barcenas in the gross amount of $5.89 which resulted in the net amount of $4.84; (2) Ortez in the gross amount of $7.52 which resulted in the net amount of $6.94; (3) Carrera in the gross amount of $5.89 which resulted in the net amount of $4.84; (4) Juan Martinez in the gross amount of $10.70 which resulted in the net amount of $9.88; and (5) Lopez in the gross amount of $9.00 which resulted in the net amount of $8.31. (A&Y Exhibit K, pp. 4-8.) These checks do not appear to be endorsed. (*Ibid.*)

construction projects. The purpose of the CPWL was summarized by the California Supreme Court as follows:

> The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

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

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers paid less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1813 provides additional penalties for failure to pay the correct overtime 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).) 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.

Pursuant to section 1741, subdivision (a), the Assessment had to be served on A&Y "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."

Here, it was undisputed that no notice of completion was recorded for this Project. DLSE relied on the Awarding Body's payment of the purchase order on March 4, 2021 as evidence of the Awarding Body's acceptance of the public work. (DLSE Exhibit No. 5, p. 38.) Accordingly, the Assessment issued on September 6, 2022 was timely, because the 18-month deadline fell on September 4, 2022, which was a Sunday, and September 5, 2022 was a holiday, such that September 6, 2022 was the last day to serve the Assessment.

Alternatively, DLSE argued that the time to serve the Assessment was tolled due to A&Y's failure to timely provide CPRs under section 1741.1, subdivision (a). In this regard, Wong requested CPRs from A&Y on June 13, 2022, and no CPRs were received as of August 31, 2022. (DLSE Exhibit No. 12, p. 86.) Therefore, A&Y's failure to provide CPRs to DLSE timely tolled the deadline to issue the Assessment by at least 80 days. Accordingly, the Assessment served on September 6, 2022 was timely.[23]

[23] To the extent that A&Y relied on the Project completion date of February 28, 2021, the tolling of the 18-month limitations period renders the Assessment served on September 6, 2022 timely.

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 A&Y underpaid travel time on the payroll records provided by A&Y, the information provided by the Awarding Body and one of the workers on the Project, along with the 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, 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, there is no dispute as to the accuracy of A&Y's payroll records with regard to how the workers were classified for job site work, the hours worked on the Project, or the prevailing wages paid to workers for job site work. The issue is whether A&Y paid workers the correct hourly rate for travel time.[24]

[24] There is no dispute as to the compensability of travel time. A&Y required the workers who drove A&Y vehicles to and from the yard to the materials plant and to the job sites to report to the yard at the beginning and end of the work day. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 588 [an employer that subjects its workers to its control by determining when, where and how they are to travel,

Here, DLSE presented prima facie support for the underpayment of travel time to workers on the Project. DLSE relied on A&Y's payroll records and accepted the classifications that A&Y assigned its workers for their work at the job sites, as well as the travel time that A&Y attributed to each worker who drove A&Y vehicles. DLSE also relied on the applicable PWDs to show that A&Y paid workers for travel time at less than the prevailing wage rates for the work they performed at the job site. DLSE reclassified the travel time of the workers who drove A&Y vehicles to the classification they worked at the job site. Where the worker performed work for two different classifications in one day, DLSE reclassified the worker to the classification for which the worker performed the most hours of work on that particular day.

DLSE also relied on the payroll records and the applicable PWDs to show that A&Y underpaid overtime premium rates to Lopez and Barcenas on February 11, 2021. (DLSE Exhibit No. 2, pp. 17, 21; DLSE Exhibit No. 6, pp. 42.) Lopez was underpaid the overtime premium due to a rounding error, and Barcenas was underpaid the required overtime premium due to the reclassification of his travel time to Operating Engineer, Group 3. Based on those facts, the record shows prima facie support for DLSE's finding that A&Y failed to pay required overtime rates on two instances.

DLSE established prima facie support for A&Y's underpayment of training fund contributions. It is undisputed that A&Y did not pay training fund contributions for travel time. For the reasons stated above, DLSE's reclassification of workers' travel time resulted in an underpayment of $9.81 for training fund contributions for the Laborer and Operating Engineer classifications. Thus, the evidence showed prima facie support for DLSE's finding that A&Y underpaid the required training fund contributions.

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must compensate workers for that travel time].) Moreover, the work performed by drivers in the A&Y yard and the work performed while they drove A&Y vehicles between the yard and the job site (with stops at the materials plant, commercial dump site, or gas station) fall under the definition of "public works" as preconstruction and postconstruction phases of construction. (§ 1720, subd. (a)(1).)

A&Y Failed to Carry Its Burden of Proof to Show the Assessment Was Incorrect as to the Underpayment of Travel Time, Except as to Carrera and Martinez.

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.) 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 for a craft, such as Laborer or Operating Engineer, 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.)

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.

To counter DLSE's prima facie showing that travel time was required to be paid at the prevailing wage rates for the work performed at the job site, A&Y set forth a straw man argument based on section 1772. According to section 1772: "[w]orkers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." A&Y argued that DLSE impermissibly relied on section 1772 in contravention of *Mendoza v. Fonseca McElroy Grinding Co., Inc.* (2021) 11 Cal.5th 1118 (*Mendoza*). In *Mendoza*, the Supreme Court found that section 1772's "in the execution" language did not expand the categories of public works covered by the CPWL and therefore could not independently serve as a basis for covering mobilization work, which is preparatory work that includes the

transport of equipment and materials to the job site. (*Id.* at p. 1141.) However, DLSE did not rely on section 1772. Wong testified that he relied on the Public Works Manual section on Compensable Travel Time, as well as the definition of "public works" in section 1720, subdivision (a)(1).

Moreover, *Mendoza* does not stand for the proposition that mobilization work can never be covered by prevailing wage requirements. The *Mendoza* court specifically noted that it "does not rule out the possibility that prevailing wages must be paid for mobilization work under some other theory." (*Mendoza*, 11 Cal.5th at p. 1141.) In a footnote, the court stated that it "express[es] no view as to whether mobilization qualifies as construction, street improvement work, or any other category of public works defined in section 1720 et seq." (*Mendoza*, 11 Cal.5th at 1141, fn. 22 (quotation marks omitted).) Here, DLSE found that the travel time at issue was covered as preconstruction and postconstruction work under section 1720, subdivision (a)(1).

In addition, A&Y argued that it could have paid travel time at the Driver rate, because the Driver scope of work covers dump truck drivers that "transport and dump loose materials, such as sand, gravel, crushed rock, coal, or bituminous paving materials." (A&Y Exhibit E, p. 2.) Wong conceded that the Driver classification could cover the dump truck drivers that picked up asphalt from the materials plant, but testified that classification would not cover the dump truck drivers that pulled the equipment trailer. A&Y established that Carrera drove the dump truck to Vulcan on February 11, 2021 to pick up hot asphalt, and that Martinez did so on February 19, 2021. (A&Y Exhibit H, pp. 1-3, 4-6.)

For these reasons, except as to Carrera and Martinez, A&Y 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, the Assessment with regard to unpaid prevailing wages is affirmed and modified as to the required prevailing wages

attributed to Carrera and Martinez, and as to the restitution payments made by A&Y on February 10, 2023, such that A&Y is liable for $628.79 in unpaid wages.[25]

A&Y Failed to Carry Its Burden of Proof to Show the Assessment Was Incorrect as to Failure to Pay Training Fund Contributions, Except as to Carrera and Martinez.

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 Division of Apprenticeship Standards (DAS). DLSE stated a prima facie case of underpayment of training fund contributions for the drivers who were underpaid travel. For the same reason as discussed above with regard to the reclassification of Carrera and Martinez as Driver, A&Y met its burden to show that the Assessment was incorrect as to the underpayment of training fund contributions for those two workers, because the Driver classification does not require any training fund contributions. (A&Y Exhibit E, p. 3.) However, for the reasons explained above with respect to the other drivers, A&Y failed to meet its burden of proof that DLSE's reclassification of travel time was incorrect.

Therefore, except with respect to Carrera and Martinez, A&Y failed its burden of showing that the Assessment was incorrect as to its underpayment of training fund contributions. A&Y is therefore liable for underpaid training fund contributions in the amount of $6.83.[26] (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

[25] This is the amount of the total unpaid wages identified in the Audit Worksheet, $783.64, less $142.655—the difference of the basic hourly rate for Laborer, Group 1, and Driver for 2.75 hours attributed to Carrera, less $57.26—the amount found due and owing for Martinez, and less the restitution payments made on February 10, 2023 in the total amount of $54.94. (DLSE Exhibit No. 2, pp. 10, 19, 22; A&Y Exhibit K; stipulation of the parties as to Carrera.)

[26] This is the amount of the total unpaid training fund contribution identified in the Audit Worksheet, $9.81, less the unpaid training fund contributions attributed to Carrera in the amount of $1.93 and to Martinez in the amount of $1.05. (DLSE Exhibit No. 2, pp. 10, 19, 22.)

A&Y Failed to Prove the Labor Commissioner Abused Her Discretion in Assessing Penalties Under Section 1775, Except as to Carrera and Martinez.

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:

(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.

. . .

(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.)

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 mitigated rate of $40.00. The burden was on A&Y to prove that DLSE abused its discretion in setting the penalty amount under section 1775. A&Y provided no evidence or argument of abuse of discretion by DLSE in its selection of the penalty rate.

Accordingly, the assessment of section 1775 penalties at the rate of $40.00 is affirmed, except that the total number of violations must be reduced by two for the travel time assessed on behalf of Carrera on February 11, 2021 and Martinez on February 19, 2021. Therefore, A&Y is liable for section 1775 penalties in the amount of $200.00.[27]

A&Y 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.

[27] This amount is the total section 1775 penalties in the amount of $280.00 less the $40.00 in penalties attributed to Carrera and $40.00 attributed to Martinez. (DLSE Exhibit No. 2, pp. 10, 19, 22.)

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 unrebutted evidence established two such violations by A&Y. (DLSE Exhibit No. 2, p. 10.) Accordingly, A&Y is liable for the $50.00 penalty assessed under section 1813.

A&Y 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 . . . is 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 had 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 deposited with the Department of Industrial

Relations the full amount of the assessment of unpaid wages, including all statutory penalties.

In this case, A&Y paid some back wages in response to the Assessment, but did not do so within 60 days of the Assessment. Likewise, A&Y did not deposit with the Department the full amount of the assessed wages and statutory penalties. Accordingly, A&Y is liable for liquidated damages under section 1742.1 for the unpaid prevailing wages found in this Decision in the amount of $628.79.

A&Y 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. The apprenticeship requirements apply to public works contracts of $30,000.00 or more. (§ 1777.5, subd. (o).) These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. (Cal. Code Regs., tit. 8, §§ 227 to 231.)

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. (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 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 . . ." (Cal. Code Regs., tit. 8, § 230, subd. (a).) DAS has prepared a form, the DAS 140, 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 dispatched 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." (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DAS has prepared another form, the DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees.

The record demonstrates that A&Y violated the apprenticeship requirements with regard to the classifications of Laborer and Operating Engineer. Both the Laborer and Operating Engineer classifications are apprenticeable crafts. (DLSE Exhibit No. 8, pp. 66-68; DLSE Exhibit. No. 9, pp. 69-74.) It is undisputed that A&Y did not employ any apprentices. Giese testified that he was not aware of the requirement to employ apprentices on public works contracts of more than $30,000.00. A&Y stipulated that it did not submit contract award information (DAS 140 Form) or request for dispatch of apprentices (DAS 142 Form) on the Project. Accordingly, the record establishes that A&Y violated the ratio requirement of section 1777.5 subdivision (g), the notice requirement of section 1777.5, subdivision (e), and the related regulations, sections 230 and 230.1.

A&Y 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.

(§ 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 requirement 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. (Cal. Code Regs., tit. 8, § 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).)

A&Y did not submit contract award information or request for dispatch of apprentices to all of the applicable apprenticeship committees for the Laborer or Operating Engineer classifications. It did not employ any apprentices on the Project.

DLSE established that A&Y "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journeyperson hours because it employed no apprentices. The irrebuttable presumption that A&Y knew or should have known of the apprenticeship requirements of section 1777.5 applies because A&Y signed the Irvine Ranch Water District Labor and Prevailing Wage Requirements which acknowledged A&Y's obligation to comply with the prevailing wage and apprenticeship requirements. (DLSE Exhibit No.

4, p. 31.) Because A&Y was aware of its obligations under the law, it failed to meet its burden of proof by providing evidence of compliance with section 1777.5. Since A&Y knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE calculated the calendar days of noncompliance with the ratio requirement based on the number of journeyperson calendar days of work on the Project. It imposed a mitigated penalty rate of $40.00 per violation for 14 calendar days of noncompliance, based on "the first day in which the contractor has workers employed upon the public work," to the last day the contractor had a worker on site. (Cal. Code Regs., tit. 8, § 230, subd. (a); DLSE Exhibit No. 3, p. 23; DLSE Exhibit No. 7, pp. 46-65.)

In its defense, A&Y argued that the Project amount—$30,194.45—was only $194.45 over the minimum contract amount triggering apprenticeship requirements. (§ 1777.5, subd. (o).) However, the penalty statute provides no exception for contract amounts of $30,000.00 or more, and A&Y does not offer any legal authority for such an exception. Next, A&Y argued that it should not be required to comply with the apprenticeship requirements because the Project took place during the COVID-19 pandemic. There is no legal authority for A&Y's position that the pandemic relieved contractors of complying with public works requirements. Finally, A&Y argued that DLSE did not present evidence that it considered the factors listed in section 1777.7, subdivision (b), in setting the penalty rate of $40.00. On the contrary, the Penalty Review indicates that DLSE did consider the listed factors. (DLSE Exhibit No. 3, p. 25.)

Thus, A&Y did not show an abuse of discretion under section 1777.7, subdivision (d), as to either the mitigated penalty rate or the number of days of violations as found in the Assessment. Accordingly, section 1777.7 penalties at the rate of $40.00 for 14 days in the amount of $560.00 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 served the Civil Wage and Penalty Assessment timely.
3. The Request for Review was filed timely.
4. The Labor Commissioner's enforcement file was requested and produced in a timely fashion.
5. A&Y Asphalt Contractors, Inc. misclassified employees on the Project.
6. A&Y Asphalt Contractors, Inc. did not pay the correct prevailing wages for all hours worked on the Project.
7. A&Y Asphalt Contractors, Inc. did not pay the required overtime rates to its employees on the Project.
8. A&Y Asphalt Contractors, Inc. did not pay the required training fund contributions for all hours worked on the Project.
9. The Labor Commissioner did not abuse her discretion in assessing penalties pursuant to section 1775.
10. A&Y Asphalt Contractors, Inc. is liable for penalties assessed pursuant to section 1775.
11. A&Y Asphalt Contractors, Inc. is liable for penalties assessed pursuant to section 1813.
12. A&Y Asphalt Contractors, Inc. is liable for liquidated damages on wages found due and owing.
13. A&Y Asphalt Contractors, Inc. did not submit contract award information (DAS 140 Form) or request for dispatch of apprentices (DAS 142 Form) on the Project.

14. A&Y Asphalt Contractors, Inc. is liable for penalties assessed pursuant to section 1777.7.

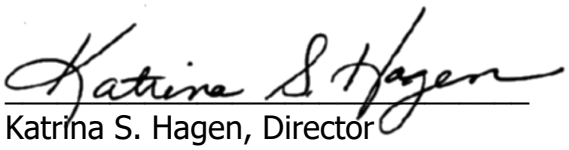
15. The amount found due under the Assessment is as follows:

Basis of the Assessment	Amount
Wages Due:	$628.79
Training Fund Contributions Due:	$6.83
Penalties under section 1775:	$200.00
Penalties under section 1813:	$50.00
Liquidated damages:	$628.79
Penalties under section 1777.7	$560.00
TOTAL:	**$2,074.41**

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

The Civil Wage and Penalty Assessment is affirmed 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: 06-09-2023



Katrina S. Hagen, Director
California Department of Industrial Relations