

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**T.B. Penick & Sons, Inc.**

Case No. 16-0358-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected subcontractor T.B. Penick & Sons, Inc. (Penick) submitted a timely Request for Review of a Civil Wage and Penalty Assessment (Assessment) issued on July 25, 2016, by the Division of Labor Standards and Enforcement (DLSE) with respect to work Penick performed for the San Diego County Regional Airport Authority's (Authority or Awarding Body) Terminal 2 West Building and Airside Expansion project (Project) located in San Diego County. The Assessment determined that Penick owed \$671,861.20 in unpaid prevailing wages, training fund contributions, and statutory penalties. A Hearing on the Merits commenced in San Diego, California, before Hearing Officer Douglas P. Elliott on December 13, 2017, and continued on April 25-26, June 7, and July 11, 2018. James C. Diefenbach appeared as counsel for Penick and Sotivear Sim appeared as counsel for DLSE. Deputy Labor Commissioner Kari Anderson and eight Penick workers testified in support of the Assessment. Project superintendent Justin Klemaske, supervisor Bruce Hanlon, and foreperson William Lentz testified on behalf of Penick.

The parties stipulated as follows:

- The work subject to the Assessment was performed on a public work and required the payment of prevailing wages and the employment of

apprentices under the California Prevailing Wage Law, Labor Code sections 1720 – 1861.<sup>1</sup>

- The Request for Review was timely filed and served.
- The enforcement file was requested and timely made available.
- A deposit in the amount of \$20,000.00 has been made with the Department of Industrial Relations under section 1742.1, subd. (b).

The issues for decision are:

- Whether the Assessment correctly found that Penick failed to pay the required prevailing wages for all time worked on the Project by its workers.
- Whether the Assessment correctly found that Penick failed to pay the correct fringe benefit amount.
- Whether the Assessment correctly found that Penick failed to make all required training fund contributions for its workers on the Project.
- Whether the Assessment used the correct prevailing wages rates.
- Whether the Assessment used the correct prevailing wage classifications.
- Whether the Labor Commissioner abused her discretion in assessing penalties under section 1775.
- Whether Penick provided the required contract award information to all applicable apprenticeship committees in a timely and factually sufficient manner.
- Whether the Labor Commissioner abused her discretion in assessing

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

penalties under section 1777.7.

- Whether Penick is liable for liquidated damages on the wages found due and owing.
- Whether the evidence provided by DLSE constituted prima facie support for the Assessment.

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

## **FACTS**

### The Project.

The Project involved the expansion of the Terminal 2 West Building at San Diego International Airport. On or about April 10, 2009, the Awarding Body entered into a Design Build Agreement for the Project with The Turner Partnership (Partnership). On September 20, 2011, the Partnership's successor, Turner PCL Flatiron, a Joint Venture, advertised for bids on the terrazzo work. Attachment G to the Notice Inviting Bids (Bid Notice) provided that: "The greater of the Federal and California Prevailing Wage Determinations shall apply." It further required that:

The Bidders / Trade Contractor are required to check the applicable California General Prevailing Wage Determinations, in effect at the bid advertised date, at [www.dir.ca.gov](http://www.dir.ca.gov). All rates issued for San Diego County shall apply. The following California Determination is in effect:

**General Prevailing Wage Determinations: 2011-1 Effective February, 2011<sup>2</sup>**

(DLSE Exhibit No. 4, emphasis in original.)

Penick was awarded the terrazzo work and entered into a subcontract on or about December 1, 2011. Penick's work primarily involved installing an epoxy terrazzo system. This work entailed a number of tasks, including applying vapor barrier to the concrete floor; setting divider strips; mixing materials; spreading the epoxy terrazzo mix on the concrete; and grinding and polishing the surface. Penick employees worked on the Project from March 5, 2012, to August 27, 2014. The Project had not been completed as of the date of the Assessment.

The Assessment.

The Assessment found that Penick misclassified and paid several workers at the Terrazzo Finisher (Finisher) rate for work that should have been classified and paid at the Terrazzo Worker (Worker) rate. The Assessment further found that Penick improperly classified and paid one worker as a Finisher apprentice for work that should have been classified and paid at the Worker rate. It also found that Penick misclassified and paid two workers at the Finisher rate for work that should have been classified and paid at the Hoisting Equipment (Operating Engineer) Group 6 rate. Additionally, the Assessment found that Penick failed to fulfill its continuing obligation to provide contract award information to all applicable apprenticeship committees for the craft of Operating Engineer.

Altogether, the Assessment found that Penick underpaid the required prevailing wages and training fund contributions in the amount of \$283,231.20. Penalties were assessed under section 1775 at the mitigated rate of \$140.00 per violation for 2,665 violations, for a total amount of \$373,100.00, and under section 1813 at the rate of \$25.00 per violation for 538 violations, for a total

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<sup>2</sup> The Bid Notice specified the wrong General Prevailing Wage Determinations. The correct determinations in effect on the date of the Bid Notice were issued August 22, 2011, and were designated 2011-2.

amount of \$13,450.00. Penalties were assessed under section 1777.7 in the mitigated rate of \$10.00 per day for 208 days, for a total amount of \$2,080.00.

Applicable Prevailing Wage Determinations (PWDs).

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

1. Terrazzo Worker and Terrazzo Finisher for San Diego County (SDI-2011-2) (Terrazzo PWD).<sup>3</sup> The scope of work for the two subtrades governed by this PWD is divided into two sections, as follows:

Section 1. Terrazzo Worker/Mechanic. Marble, mosaic, venetian enamel and terrazzo. Cutting and assembling mosaics. The casting of all terrazzo in shops and on jobs. All rolling of terrazzo work to be assisted by the helper, at the direction of the terrazzo mechanic.

All scratch coat on walls and ceilings where mosaic and terrazzo is to be applied shall be done by plasterers, with an allowance of not less than one-half inch bed to be conceded to mosaic and terrazzo workers.

All bedding above concrete floors or walls, the preparation, cutting, laying or setting of metal, composition or wooden strips and grounds and the laying and cutting of metal, strips, lath, or other reinforcement, where used in mosaic and terrazzo work, shall be the work of the mosaic and terrazzo worker to be assisted by the helper at the direction of the terrazzo mechanic.

All cement terrazzo, magnesite terrazzo, Dex-o-Tex terrazzo, epoxy matrix terrazzo, exposed aggregate, rustic or rough washed for exterior or interior of buildings placed either by machine or by hand, and

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<sup>3</sup> The basic hourly rate for Terrazzo Workers is \$33.63, the combined fringe benefits are \$10.13 per hour, and the training fund contribution rate is \$0.57 per hour, for a total of \$44.33 for each straight-time hour. The basic hourly rate for Terrazzo Finisher is \$26.59, the combined fringe benefits are \$9.47 per hour, and the training fund contribution is \$0.36 per hour, for a total of \$36.42 for each straight-time hour.

any other kind of mixtures of plastics composed of chips or granules of marble, granite, blue stone, enamel, mother of pearl, quartz, ceramic colored quartz, and all other kinds of chips or granules when mixed with cement, rubber, neoprene, vinyl, magnesium chloride or any other resinous or chemical substance used on walls, floors, ceilings, stairs, saddles, or any other part of the building such as fountains, swimming pools, etc. Also all other substitutes that may take the place of terrazzo work shall be the work of the terrazzo mechanics, and they shall have the right to use all tools which are necessary in the performance of their work.

Cutting and assembling of art ceramic and glass mosaic comes under the jurisdiction of the mosaic workers and the setting of the same shall be done by tile layers.

Section 2. Terrazzo Helpers, Finishers and Finisher Improvers. It is hereby agreed that the established customs of the Terrazzo Industry as to laying, grinding, handling of material by finishers shall be maintained. The handling of sand, cement, lime, marble chips, terrazzo and all other materials that may be used for terrazzo and mosaic work after being delivered at the building; or shop; the Terrazzo Helpers/Finishers/Finisher Improvers will assist the mechanic in the handling of pipes, wire, strips and rolling of all terrazzo floors and walls; preparing, mixing by hand or machine, and distributing all kinds of concrete foundation necessary and all scratch coat used for terrazzo and mosaic work and substitutes therefore, or any composition used for such purpose; also rubbing, grinding (except that base grinding shall not be performed by Finisher Improvers), cleaning, scrubbing and waxing of all terrazzo floors, base and wainscoating when run on the building by hand or machine; also the use of the rake, shovel, come-a-long and broom will be the exclusive work of the Terrazzo Helpers/Finishers/Finisher Improvers. Delivery of all of the materials and/or equipment to the job site or the shop shall be the work of Terrazzo Helpers/Finishers/Finisher Improvers. Pick-up of

equipment, excess materials and marble slurry/slop (created by the grinding and finishing of the terrazzo installation) at the conclusion of the project or as needed on an ongoing basis shall be the work of Terrazzo Helpers/Finishers/Finisher Improvers.

The grinding of concrete floors, and the finishing of such floors by applying sealer or other similar material, regardless of whether or not additional aggregate or stone is added by spreading or sprinkling on top of the finished base and troweled or rolled into the finish, shall be the work of Terrazzo Helpers/Finishers/Finisher Improvers.

The Contractor will be allowed to use ready mix concrete now as dry pack, if it so desires. The ready mix concrete is to be deposited, either outside or inside of the building, where the Terrazzo Helpers, Finishers or Finisher Improvers will then by power buggy, wheelbarrow or disposing out of the truck shoot [*sic*], take the ready mixed concrete to the site of installation. Terrazzo or any other composition is to be mixed by the Terrazzo Helpers, Finishers, or Finisher Improvers, and no ready mix terrazzo will be allowed to be used.

2. Cranes, Pile Driving and Hoisting Equipment (Operating Engineer) for San Diego County (SD-23-63-3-2011-2B) (Hoisting Equipment PWD).<sup>4</sup> This Determination includes in Group 6 "Material Hoist/Manlift Operator."

The Assessment reclassified two Penick workers as Hoisting Equipment Group 6. The same Determination includes in Group 1 "Fork Lift Operator (includes Loed, Lull or similar types)." Penick contends that it correctly classified

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<sup>4</sup> The basic hourly rate for Hoisting Equipment Group 1 is \$37.48, the combined fringe benefits are \$19.97 per hour, and the training fund contribution rate is \$1.09 per hour, for a total of \$58.54 for each straight-time hour. The basic hourly rate for Hoisting Equipment Group 6 is \$39.02, the combined fringe benefits are \$19.97 per hour, and the training fund contribution is \$1.09 per hour, for a total of \$60.08 for each straight-time hour. A predetermined increase effective July 1, 2012, increased the total hourly rate by \$1.70 for both groups.

the workers in question as Terrazzo Finishers, or alternatively, that the correct classification was Fork Lift Operator Group 1 for time spent actually operating a fork lift.

Reclassification from Terrazzo Finisher to Terrazzo Worker.

The Assessment reclassified seven workers from Finisher to Worker for all their time on the Project and thereby found \$102,103.97 was due in unpaid wages. This issue was the principal focus of the parties at the Hearing.

DLSE Deputy Labor Commissioner Kari Anderson testified regarding the investigation and the Assessment. She testified that Penick employed approximately 100 workers on the Project, but the audit included only the ten workers who came forward to complain. The DLSE deputy who investigated the case before she was assigned to it interviewed complaining workers and had them sign affidavits. For purposes of the Penalty Review document supporting the Assessment, the investigating deputy relied on the certified payroll records (CPRs), contract and bid documents, and worker interviews and affidavits.

Anderson testified that, similar to those of certain other crafts, the scope of work for the Terrazzo PWD provides for Workers to be assisted by lower paid Finishers, but does not include a ratio requirement. Anderson testified that, nonetheless, it was not "feasible" for the work to be done with a "disproportionate" ratio of Finishers to Workers. Workers and Finishers cannot do the same thing; Finishers are there to help Workers. Section 2 of the scope of work specifies tasks that Finishers can do, but only under the direction of a Mechanic. Anderson further testified that on this Project, DLSE found that Penick had too many Finishers assisting too few Workers.

On cross-examination, Anderson testified that she had no prior experience with terrazzo work, but had considerable experience with the Cement Mason classification. She had some discussions with former DLSE employees about the



nature of terrazzo work, and did Google searches to understand it. At times, she asked the workers what terms meant. She believed the Project was mostly an epoxy terrazzo system.

Anderson testified that the Terrazzo PWD scope of work was similar to those for Landscape Laborers and Plasterers in that those crafts have tenders or helpers. Section 1 of the Terrazzo PWD scope of work provides that certain types of work are only for Workers, and other types of work can be done by Workers assisted by Finishers. Section 2 identifies tasks that Finishers can do, but only at the direction of a Mechanic.

In addition to Anderson, DLSE called as witnesses most of the workers that were reclassified under the Assessment from Finisher to Worker. As pertains to the reclassification issue, their testimony is summarized as follows.

Penick worker James Price: Price testified that he is one of the seven Finishers that DLSE reclassified to Worker under the Assessment. He had worked as a Cement Mason from 2005 through 2011. The Project was the last project he worked on for Penick, but was his first project working with terrazzo. He received on-the-job training in terrazzo installation, and worked on the Project on every step in the terrazzo process, but he was unable to estimate how much time he worked on each step. He did some mixing, did layout, installed Iso-Crack,<sup>5</sup> took measurements and glued strips. He worked with the guys that Penick brought out from Chicago, among others. He estimated that he was part of a crew of two to five workers 30 to 40 percent of his time, and the rest of the time everyone worked together in a large space. Klemaske supervised him, gave directions and worked side-by-side with him on occasion, sometimes directing

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<sup>5</sup> Iso-Crack Epoxy Membrane is a "solid, flexible epoxy membrane designed to suppress reflexive cracking in Terroxy Resin flooring systems." (Penick Exhibit N.)

corrections be made. Bruce Hanlon also supervised, providing Klemaske's instructions to the crew.

Penick superintendent Klemaske testified that Price was classified as a Finisher because he lacked terrazzo experience, even though he had been with the company for a long time. He never observed Price doing tasks that were reserved for Workers only, and estimated that 75 percent of his work was Finisher-only tasks. Price also did some concrete work.

Penick supervisor Hanlon testified that he started with the company in January 2000. He had worked for Penick as a Finisher on more than five previous terrazzo projects, and was promoted to Worker for the Project. He observed Price's work on the Project, and testified that Price handled Iso-Crack, mixed, and helped on layout, grinding, and edging. He never saw Price perform tasks that were specifically Worker tasks. In his opinion, Price was correctly classified as a Finisher.

Penick worker Manuel Perez Martinez: Martinez is another Finisher that DLSE upgraded to Worker. He testified that that he started as a novice with no prior construction experience, and received "on-site learning" from co-workers and instruction from Klemaske. He performed tasks of mixing, layout, hazmat, finishing, and prep work.

Klemaske testified that Martinez mainly just broke bags, ran a wheelbarrow and took out trash. He said that Martinez performed no tasks that were exclusively Worker tasks.

Penick worker Angelo Ciavirella: Ciavirella testified that he worked primarily on the Project, but also worked on smaller jobs during that period. The Project was his first construction job. He is a long-time friend of Klemaske and worked as a utility person on the Project, performing such tasks as moving materials, mixing, polishing, layout, and hazmat. On some days, he did nothing

but grinding. He received little training, and was occasionally supervised by Klemaske, among others.

Klemaske testified that Ciavirella undoubtedly did only Finisher work. Klemaske never considered promoting Ciavirella to a Worker position, and never observed him doing Worker tasks.

Penick worker Winton Joel Rudolph: Rudolph testified that he worked for Penick for more than 15 years, but had never done terrazzo work prior to the Project. He first worked with concrete, and later, shifted to terrazzo. He did grinding and polishing work perhaps a third of his time on the Project, and material handling for another third. He characterized grinding terrazzo as similar to grinding concrete: repetitive work performed on hands and knees. At times he physically laid out terrazzo. He sometimes worked side-by-side with out-of-town Workers, but they did not direct his work.

Klemaske testified that Rudolph was doing Finisher work. Penick foreperson William Lentz testified that he worked as a Finisher, and in that capacity did mixing, material handling, grinding, and assisting Workers in laying strips and gluing them down. He worked side-by-side with Rudolph as a Finisher doing grinding and observed him doing the same tasks that he did. He never saw Rudolph performing Worker tasks.

Penick worker Daniel Martino: Martino testified that he had previously worked for Penick, always as a Laborer, except for one project in which he worked as a Cement Mason. He had not previously been classified as a Finisher by Penick, but had done a year or less of terrazzo work for other employers before coming to Penick. His work mainly involved prepping and laying terrazzo. He "shot" elevations, worked on sand fill and membranes, and sometimes helped with mixing. He worked side-by-side with Workers who were brought in from Chicago. Klemaske supervised him most of the time.

Penick foreperson Lentz testified that he worked with Martino as a Finisher on the Project. He mostly saw Martino troweling and material handling. He never saw Martino perform Worker tasks.

Penick worker Michael Beczak: Beczak testified that he worked for Penick before and after the Project. He had no prior terrazzo experience, and did not receive any special training prior to the job. He received some on-the-job training from the "guys from Chicago" on the technique for smoothing out terrazzo. He did not understand the difference between Workers and Finishers, and did not know which Penick workers had what title. Beczak described the tasks he performed as pouring and laying down terrazzo, setting up terrazzo strips, setting elevations, grinding and polishing terrazzo, setting up and pouring concrete overlays, and sacking and patching concrete columns and walls. He testified that Klemaske would give work assignments in the morning, and would walk around and inspect the work periodically.

Klemaske testified that he considered Beczak a very good Finisher and troweler who also did a lot of concrete work. He was classified as a Finisher because his previous experience was in concrete rather than terrazzo. He never observed Beczak doing Worker tasks.

Lentz testified that Beczak worked on pours of floors and Iso-Crack. He never saw Beczak perform Worker tasks, but rather observed him assisting Workers. Similarly, Penick supervisor Hanlon testified that he also observed Beczak involved in pours, but never saw him perform Worker tasks.

Penick worker John Witthauer: The last of the seven workers who were reclassified under the Assessment, Witthauer, did not testify, nor did any percipient witness testify regarding his work on the Project. DLSE submitted into evidence, however, an affidavit executed by Witthauer, which listed the tasks he

performed on the Project.<sup>6</sup> Witthauer describe his work tasks as: "Demolition, floor prep, moisture vapor, primer Iso-crack, sand fill pouring, layout floor, set strips, [and] pour terrazzo."

Penick submitted into evidence a letter dated January 16, 2018, from Witthauer to Anderson stating: "I am no longer seeking any additional wages or compensation related to my work performed for T.B. Penick & Sons, Inc." (Penick Exhibit U.)<sup>7</sup>

Responding to DLSE's case in chief, Penick's primary witness was Project superintendent Klemaske. Klemaske testified that he scheduled and organized the work crews. He had overall responsibility for Penick's work on the Project, including performance, and quality controls. Klemaske started each day by breaking up the workforce into crews and providing them with instructions on the work to be done. In organizing the crews, Klemaske assigned Finishers to a crew with at least one Worker when they were performing tasks that the PWD scope of work did not permit Finishers to do independently.

Klemaske testified that Penick was unable to recruit enough experienced Workers locally and incurred considerable expense to bring in out-of-state Workers who had the expertise necessary to perform the portions of the work that could only be done by Workers. Penick did, however, promote four Finishers to Workers once they had acquired the necessary experience during the course of the Project.

Penick witness Lentz testified that he had been a Penick employee since 2006, and, by the time of the Hearing, was employed as a foreperson for the

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<sup>6</sup> Penick did not object to the affidavit, which was admitted into evidence as hearsay according to California Code of Regulations, title 8, section 17244.

<sup>7</sup> DLSE did not object to Witthauer's letter, which was also admitted into evidence as hearsay according to California Code of Regulations, title 8, section 17244.

company. Before the Project, he had five to six years of terrazzo experience and worked as a Finisher on this Project. The tasks he performed on the Project included mixing, material handling, grinding, coating, and assisting Workers in laying strips. He never cut terrazzo. He worked with at least eight different Workers, who gave him direction, describing the tasks to be completed.

He never thought he should be classified as a Worker on the Project, because he did not have the required knowledge. He testified that Workers are highly skilled and are in charge of reading plans, understanding the requirements, and measuring.

Penick witness Hanlon testified that he had been employed by the company since January 2000. He started as a Laborer, worked as a Cement Mason, and worked as a Finisher on five terrazzo projects. He was promoted to Worker for the Project, and, by the time of the Hearing, worked for Penick as a foreperson. Hanlon testified that as a Worker, he did layout, usually with the help of a Worker or Finisher. He never saw a Finisher do layout without a Worker assisting. The Worker ran and oversaw specific tasks. The Finishers assisted the Workers and did prepping and mixing materials. At the beginning of the Project, Hanlon poured and mixed materials, but his duties changed as the Project progressed to include checking elevations, doing layout and running equipment. He supervised anywhere from five to 15 Finishers, and worked with them throughout the day.

Reclassification from Terrazzo Finisher Apprentice to Terrazzo Worker.

The Assessment reclassified Alex Holcomb from Finisher Apprentice to Worker and found he was therefore underpaid \$45,503.73 in wages. Anderson testified that under the Terrazzo PWD, Finisher is not an apprenticeable craft in San Diego County. In PWDs, apprenticeable crafts are identified with a “#” symbol. In this case, there is such a symbol next to Worker, but not for Finisher. (DLSE Exhibit No. 7.) Holcomb did not testify, but did return a completed

questionnaire to DLSE, in which he listed his job title as "apprentice" and described his work simply as "laborer." Holcomb subsequently executed an affidavit in which he expanded upon those answers. He described the work he performed as: "Demo, clean up work area, moving material, mixing material, helping workers grind, polish terrazzo, cleaning terrazzo, sealing terrazzo, [illegible], iso-crack installation, primer installation, moisture vapor [*sic*] installing, [illegible]." Anderson testified that Holcomb should be classified as a Worker because his affidavit listed installation tasks a Finisher should not be doing.

Klemaske testified that he agreed to hire Holcomb as an apprentice if he signed up for the apprentice program. During the period of the Project, Holcomb progressed from Apprentice I to Apprentice II, but did not complete all the requirements to become a journeyman. Klemaske never observed Holcomb performing Worker tasks, but described him as a "run-around guy" who helped with simple tasks where needed. Klemaske did observe Holcomb assisting in setting strips, but stated that Holcomb never worked without a journeyman present. Penick introduced into evidence an undated letter from Glen Forman, Deputy Chief of the Division of Apprenticeship Standards certifying, inter alia, that Holcomb was registered as an apprentice in the occupation Terrazzo Finisher from May 2, 2013, until March 26, 2015. (Penick Exhibit I.)<sup>8</sup>

Hanlon also testified that Holcomb assisted in Worker tasks, but did not perform them independently.

#### Reclassification from Terrazzo Finisher to Operating Engineer.

The Assessment also reclassified two workers from Finisher to Operating Engineer, Group 6, based on their claims that they "operated a 10,000 pound retractable forklift-boom." (DLSE Exhibit Nos. 3, 11.) It found \$130,347.04 in unpaid wages for these two reclassified workers. Anderson testified that the

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<sup>8</sup> DLSE did not object to the letter from Forman, and the letter was admitted into evidence.

workers were reclassified because the Terrazzo PWD scope of work does not include the operation of forklifts or similar machinery. On cross-examination, Anderson acknowledged that Finishers can operate some equipment, such as pallet jacks to move materials, but not forklifts. She stated that the “cut-off point would be at the pallet jack.” She further testified on cross-examination that Group 6 was the correct Operating Engineer group because the workers were operating boom lifts, rather than forklifts, but conceded that she would have to investigate more to see if Group 1 was appropriate.

Penick worker Gregory Peterson testified that he worked for Penick on the Project and on a couple of smaller jobs. On the Project, he operated a retractable forklift, unloading trucks and moving material. The material was typically 55-gallon drums of epoxy on pallets, but also included rock, glass, and seashell mix. He operated the forklift his entire time on the Project over a period of about two years. There was a meter on the forklift that recorded mileage. Peterson testified that a co-worker named Pat also operated a forklift two or three times. In addition to operating the forklift, Peterson testified that he sometimes moved material with an electric pallet jack, and occasionally repaired tools. He also drove a truck to Home Depot or other destinations to pick up materials, but did not recall how often.

A declaration executed by Peterson on March 14, 2018, three months after his testimony, but nearly four months prior to the conclusion of the Hearing, stated in part:

I was hired by Penick for this project to work as a cement mason. At some point, I began operating a forklift intermittently while working on the Project. ...

I understand that the DLSE audit alleges that all of the time I worked was as an operator. This is not accurate. Based on further review, the total amount of time I operated the forklift was approximately 738 hours of the total 2,912 hours I worked on the Project. On many days, I did not operate the forklift at all. I



estimate that for the days I operated the forklift, I spent 6 hours ... working on and operating the forklift.<sup>9</sup>

Penick worker Patrick McDonnell testified that his initial work on the Project consisted of tasks such as mixing. He started operating a forklift after receiving forklift training from Penick's safety person. Klemaske enrolled him in classes for operating forklifts and, thereafter, assigned him to operate the forklift. He did not operate the forklift until he was certified by Penick's safety officer, but did not recall the date of his certification. Once he started operating the forklift, he did it for most of his time on the Project. In a typical eight-hour day, he spent seven hours on the forklift. However, he performed additional duties, such as picking up materials from Home Depot and mixing materials.

Penick produced a set of invoices from Sunstate Equipment Company (Sunstate) for forklift rentals, which include a record of the number of hours the forklift was running during the rental periods. Accompanying the invoices is a table prepared by Penick summarizing the data from the invoices and allocating the hours between Peterson and McDonnell. The total hours recorded are 1,158.28, with 882.97 allocated to Peterson and 195.3 to McDonnell. Penick's table does not represent the breakdown in hours as between straight time, overtime, and double time.

Klemaske testified that he believed the Sunstate invoices accurately reflected the amount of time forklifts were needed on the Project. He believed Penick only rented forklifts from Sunstate. There was a forklift on the Project site nearly all the time, but it was not in operation the majority of the time and might not be used every day. Typically, a forklift would be used for an hour or

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<sup>9</sup> DLSE did not object to admission into evidence of the Peterson declaration, but argued that it must be given little to no weight because it is hearsay. Penick responded that Peterson's declaration was an admission against interest. Absent an objection, the declaration was admitted into evidence. Based on the CPRs, however, Peterson worked 3,301 total hours, of which 2,912.5 were straight time hours.

two in the morning, another hour or two at the end of the day, and intermittently in the middle of the day. Both Peterson and McDonnell used pallet jacks frequently throughout the day.

Klemaske testified that McDonnell was a “material guy” on the Project. The company’s safety officer certified McDonnell to operate a forklift on May 14, 2013. After certification, McDonnell operated a forklift, but also performed other duties, such as using a pallet jack and making runs to Home Depot to obtain supplies.

Lentz testified that Peterson was the main forklift operator on the Project, but he also fixed tools and used a pallet jack, among other tasks. He testified that McDonnell mostly did material handling, and worked with Iso-Crack and moisture barrier.

Hanlon testified that Peterson operated the forklift and also did a significant amount of other work. McDonnell ran the forklift for two months or so, but also did material handling and pick-ups from Home Depot during the same period.

#### Underpayment of Training Fund Contributions.

As a result of the reclassification of the ten workers at issue, the Assessment found that Penick had underpaid prevailing wages, which included training fund contributions in the amount of \$5,276.47, as required by the Terrazzo PWD.

#### Applicable Apprenticeship Committees in the Geographic Area.

According to DLSE’s Penalty Review, several approved apprenticeship committees existed in the geographic area of the Project in the trades of Terrazzo, Operating Engineer, and Cement Mason. Those apprenticeship committees were: Joint Apprenticeship Committee Tile & Terrazzo Industry for the Terrazzo craft (Tile & Terrazzo Industry J.A.C.); Associated General

Contractors of San Diego, Inc. Construction Equipment Operator J.A.C. for the Operating Engineer craft (San Diego AGC Equipment Operator J.A.C.); and San Diego Associated General Contractors J.A.C. for the Cement Mason craft (San Diego AGC J.A.C).<sup>10</sup> (DLSE Exhibit No. 3.)

Notice of Contract Award Information.

DLSE's Penalty Review also showed that Penick sent Public Works Contract Award Information (DAS 140) forms to the Tile & Terrazzo Industry J.A.C. on March 2, 2012, and to San Diego AGC J.A.C. on March 5, 2012. The first day of the Project was March 5, 2012. However, Penick sent the DAS 140 form to the San Diego AGC Equipment Operator J.A.C. late, on November 1, 2012. (DLSE Exhibit No. 15.) DLSE determined, based on its review of CPRs, that the first day of work on the Project performed by Operating Engineers was April 6, 2012. (DLSE Exhibit No. 3.)

Assessment of Statutory Penalties.

Anderson testified that the penalties for both apprentice violations and unpaid prevailing wages were assessed by the Senior Deputy Labor Commissioner, who set section 1775 penalties at \$140.00 per violation and section 1777.7 violations at \$10.00 per violation. DLSE's Penalty Review stated that Penick had a history of two previous assessments for wage violations and one previous determination of civil penalty for apprenticeship violations.<sup>11</sup>

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<sup>10</sup> DLSE's Penalty Review erroneously lists the Cement Mason committee as "San Diego Association of General Contractors J.A.C.," an apparent typographical error. (DLSE Exhibit No. 3.)

<sup>11</sup> Before DLSE assumed enforcement authority for apprentice requirements, DAS was the enforcing agency, issuing notices of civil penalty that could be contested by a contractor or subcontractor seeking a hearing before the Director as Administrator of Apprenticeships. (See Cal. Code Regs, tit. 8, §§ 232.01 et seq.)

Anderson also testified that the overtime penalties under section 1813 were based on the underpayment of overtime hours at the rates required after DLSE reclassified workers for purposes of the Assessment.

## **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 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*, at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of unpaid wages, if unpaid prevailing

wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review. (§ 1742.) The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of producing evidence that “provides prima facie support for the Assessment ....” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment ... is incorrect.” (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

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

In this case, for the reasons detailed below, the Director determines that, based on the totality of the evidence presented, and except as otherwise noted, DLSE met its initial burden of presenting prima facie support for the Assessment, and that Penick met its burden to prove the basis of the Assessment was incorrect in part.

Penick Did Not Misclassify Certain Terrazzo Workers as Terrazzo Finishers.

The Assessment reclassified seven workers from Terrazzo Finisher to Terrazzo Worker, based on the applicable scope of work provision. DLSE contends that:

[T]he Scope of Work for the Terrazzo [*sic*] Worker & Finisher does not make a bright line distinction between the work of a Worker and a Finisher. According to the Scope of Work the Finisher's primary objective is to assist and take direction from the Worker in all aspects of the Terrazzo [*sic*] process. Essentially, the Finisher can perform the majority of the task [*sic*] assigned to a Worker as long as the Finisher is directly assisting or taking direction from the Worker.

DLSE contends that the workers on the Audit were properly reclassified as Terrazzo [*sic*] Workers ... because they were not providing assistance to a Worker nor did they receive adequate direction from a Worker throughout the project.

(DLSE Brief at p. 2.)

Penick responds:

The DLSE improperly mischaracterizes and adds requirements that do not exist in the Scope of Work description for Terrazzo Workers and Terrazzo Finishers .... The Scope of Work does not provide any language related to a 'primary objective' for the Finisher ....

[T]he description for the Terrazzo Workers essentially outlines approximately nine types of work, three of which can be assisted by the Terrazzo Finisher. Section 2, labeled 'Terrazzo Helpers, Finishers, and Finisher Improvers' lists a total of eleven activities that are 'the exclusive work of the Terrazzo Helpers/ Finishers/ Finisher Improvers' and only one activity where the Terrazzo Finisher 'will assist the mechanic in the handling of pipes, wire, strips and rolling of all terrazzo floors;....'

The DLSE offers no support ... to support its contention that supervision or direction is required. There are a handful of tasks that the Terrazzo Finishers are to assist the Terrazzo Workers and a number of tasks that are exclusive to the Terrazzo Finishers....

...It is only the more skilled areas of work that are exclusive to the Terrazzo Workers, for which the Project had a limited amount.....

Further, the claimants [*sic*] own testimony and written records confirm that they only performed work identified in the Terrazzo Finisher category or they assisted Terrazzo Workers for work that they are allowed to assist on.

(Penick Reply Brief at pp. 1-3, footnote omitted.)

Penick has the better argument. The scope of work does not say or imply that the primary objective of the Finisher is to assist and take direction from the Worker. Nor does the scope of work state that some tasks, such as the rolling of terrazzo, and the preparation, laying, and setting of strips, cannot be performed by Finishers. The scope of work instead allows Finishers to assist Workers in those tasks, when done "at the direction of the terrazzo mechanic." (Terrazzo PWD scope of work, § 3.) While the testimony of the workers showed they did perform those tasks, the record as a whole shows proper direction was given, as the evidence presented by Penick suggests. To the extent the scope of work identifies tasks that Finishers may do independently, the record shows that such tasks (e.g., grinding, sealing, polishing or rubbing, picking up, and handling of materials including terrazzo and concrete) comprised the bulk of the work performed by the Finishers at issue.

Penick showed that a person installing terrazzo is engaged in a specialty craft, and, for this Project, it found a limited number of workers possessing the level of experience and skill necessary to perform the tasks required of a Worker. Indeed, the insufficient supply of such workers in the San Diego area made it necessary for Penick to go to added expense of bringing in experienced Workers from distant states. The more salient point, however, is that given the language of the scope of work that contemplates Finishers assisting Workers in certain tasks and given the evidence presented, it cannot be concluded that the Finishers were performing work reserved to Workers or Mechanics such as to entitle them to Worker-level wages.

Therefore, the Assessment must be modified to reduce the amount of wages due by \$102,103.97, which is the difference between the amount that Penick paid the Finishers at Finisher rates and the amount of wages DLSE found due under the Assessment based on Worker rates.

Penick Misclassified Holcomb as an Apprentice When His Correct Classification Was Terrazzo Finisher.

The Assessment found an underpayment of wages for Holcomb based on Terrazzo Finisher not being an apprenticeable craft and based on a finding that Holcomb should have been paid at Terrazzo Worker rates. Penick argues that:

The audit did not find that Penick did not employ the correct number of apprentices. Instead, it only found that Mr. Holcomb should have been classified as a Terrazzo Worker—thus the [issue] is ... whether or not Mr. Holcomb was correctly classified during his work on the Project and [not] whether or not Terrazzo Finisher is an apprenticeable trade.

(Penick Brief at p. 18.)

Penick is correct in asserting that the issue is whether or not Holcomb was correctly classified. But that issue cannot be resolved without addressing the question of whether Finisher is an apprenticeable classification. Contrary to Penick's claim, a finding that it did not employ the correct number of apprentices is not necessary to find that the classification is not apprenticeable. Penick erroneously conflates two distinctly different types of violation. Paying apprentice wages to a worker in a non-apprenticeable craft is a violation of section 1771, which requires the payment of prevailing wages to all workers on a public work. If a worker is paid apprentice-level wages while working in a craft that the Director has not designated as being apprenticeable, that worker is not paid at the required prevailing wage rates to which he or she is entitled. Further, that underpayment gives rise to penalties under section 1775.

DLSE established that Finisher is not an apprenticeable craft by showing that the applicable PWD lacks a "#" symbol for that classification. Penick's



evidence that Holcomb was registered as a Terrazzo Finisher Apprentice only shows that Holcomb may be employed as such in counties where the applicable PWD designates Terrazzo Finisher as an apprenticeable classification. San Diego County is not such a county.

Based on the foregoing, DLSE has established that Holcomb was underpaid the required prevailing wages for those hours in which Penick paid him apprentice wages. DLSE has failed, however, to present evidence showing that Holcomb was performing the tasks of a Worker to entitle him to Worker rates. The tasks listed by Holcomb in his affidavit are, for the most part, Finisher tasks under section 2 of the scope of work, while others are tasks section 1 authorizes Finishers to assist Workers in performing. Through the testimony of Klemaske, Penick demonstrated that Holcomb performed mostly simpler tasks, and not tasks at the level of the Worker craft. For example, Klemaske acknowledged that Holcomb assisted in setting strips, but section 1 of the PWD's scope of work permits Finishers to assist Workers in this task.

Accordingly, the preponderance of the evidence establishes that Holcomb's correct classification was Finisher, not Worker as found in the Assessment. The Assessment found Holcomb as a Worker was underpaid by \$45,503.73. Based on the discussion, *ante*, Holcomb was underpaid, but not by that much. Correctly classified as a Finisher, based on the hours of work shown in DLSE's audit and the CPRs, Holcomb was paid \$28,455.70, but was entitled to \$60,825.76 for his work. Crediting Penick with payments made to him on the Project, Holcomb was underpaid by \$32,370.06.

Peterson and McDonnell Were Misclassified as Finishers for the Hours They Spent Operating Forklifts.

DLSE argues that the Assessment correctly reclassified Peterson and McConnell, as follows:

DLSE's audit re-classified Greg Peterson and Patrick McDonnell as Hoisting Operator 6 because they operated heavy machinery to move material throughout the Project. Specifically Mr. Peterson and Mr. McDonnell operated two forklifts to move barrels of epoxy and aggregate throughout the project site. Mr. Peterson and Mr. McDonnell testified that they operated a forklift for the majority of their 8 hour day....

The Scope of Work provides that 'delivery of all the materials and/or equipment to the job site or the shop shall be the exclusive work of the Terrazo [*sic*] Helpers/Finishers/Finish Improvers.' TB Penick incorrectly interprets the scope to read that the delivery of material on a terrazzo project is the exclusive right of a Finisher without regard to the method of delivery. DLSE interprets these carve outs in the Scope of Work for Terrazo [*sic*] Finishers as a way to protect the classification of Terrazo [*sic*] Finisher. If not for the carve outs for Terrazo [*sic*] Finishers then a contractor could potentially have Terrazo [*sic*] Worker Apprentices or even Laborers employed to handle some of the moving of materials or assisting of Terrazo [*sic*] Workers.

(DLSE Brief at p. 3.)

Penick responds:

The classification for Terrazzo Finishers expressly and exclusively provides that the delivery of material is the work of Terrazzo Finishers—which is exactly why Penick classified them as such. ...

Penick respectfully requests that the Hearing Officer follow the plain language in the Scope of Work and logical conclusion that Terrazzo Finishers would have to operate machinery in order to perform this task.

(Penick Reply Brief at pp. 3-4.)

The problem with Penick's argument is that the plain language in the Terrazzo PWD scope of work does not lead to the conclusion it urges. The phrase "Delivery of all the materials and/or equipment to the job site ..." does not mean operation of all equipment in the delivery of materials. Nor does "to the job site" mean within the job site. The language relied upon by Penick would logically include the trips Peterson and McDonnell made to Home Depot and

other suppliers to obtain materials for delivery "to the job site." They made these trips in trucks, not on forklifts. Penick has made a persuasive case that these trips to suppliers were within the scope of work of Finishers. Operation of the forklifts falls into a different category. They were used not to deliver materials from suppliers "to the job site," but rather to distribute materials within or upon the job site.

Moreover, the language in question appears in the first paragraph of section 2 of the scope of work, which begins: "It is hereby agreed that the established customs of the Terrazzo industry as to laying, grinding, handling of material by finishers shall be maintained." This language manifests an intent to preserve the traditional work of Finishers within the Terrazzo craft, and not to claw away the work of other crafts such as Operating Engineers. Further evidence of this intent is found in the final paragraph of the scope of work, which specifies work belonging to Finishers, and the equipment they may use in performing it:

The contractor will be allowed to use ready mix concrete now as dry pack, if it so desires. The ready mix concrete is to be deposited either outside or inside of the building, where the Terrazzo Helpers, Finishers or Finisher Improvers will then by power buggy, wheelbarrow or depositing out of the truck shoot [*sic*], take the ready mixed concrete to the site of installation. Terrazzo or any other composition is to be mixed by the Terrazzo Helpers, Finishers, or Finisher Improvers, and no ready mix terrazzo will be allowed to be used.

(DLSE Exhibit No. 8.)

Based on the foregoing, the operation of the forklifts, as done by Peterson and McDonnell, must be accepted as the work of Operating Engineer, not Finisher, contrary to Penick's argument. This conclusion is buttressed by the Operating Engineer PWD, which clearly identifies forklift operation as Operating Engineer work.

Penick has shown by a preponderance of evidence, however, that both Peterson and McDonnell performed other duties for substantial portions of their time, and that those duties fell within the Finisher scope of work. Therefore, the Assessment must be further modified to reflect that they were correctly classified and paid for the hours they performed Finisher work.

The question remains how many hours did Peterson and McDonnell work as Operating Engineers. Neither party submitted time sheets, worker calendars, or inspection reports to support an estimate of those hours. In the end, the most reliable estimate of forklift hours of operation starts with the invoices from the rental company, Sunstate, which provide the best evidence of the number of hours a forklift was in operation on the Project. They memorialize the meter readings recorded on the machines. Klemaske testified that he believed them to accurately reflect the amount of time forklifts were used on the Project, and there is no evidence to the contrary.

With the Sunstate invoices, Penick took the total recorded hours of 1,158.28, and allocated 882.97, approximately 76 percent, to Peterson and 195.3, approximately 16 percent, to McDonnell.<sup>12</sup> The record as a whole demonstrates that McDonnell only operated a forklift during his final ten weeks on the Project, from May 14, 2013, through July 21, 2014. Penick allocated the hours the forklift was in operation equally between McDonnell and Peterson during this period, and that allocation is reasonable, given that the record shows

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<sup>12</sup> The total hours of operation, 1,158.28, exceed by 80 hours the 1,078.27 hours that Penick allocated between the two workers. These hours occurred during periods when McDonnell either was not certified to operate a forklift, or was no longer employed on the Project. Penick provided two tables purporting to show that Peterson had reported limited hours staging material during two periods of forklift rental. However, Penick did not provide time sheets to document these claims, nor do the tables provide the dates on which the hours were worked. Moreover, Penick presented no evidence to show that anyone besides Peterson operated the forklift during these periods. Therefore, the remaining 80 hours should be wholly allocated to Peterson. This result is reached as a function of Penick's failure to carry its burden to show the Assessment is incorrect in reclassifying Peterson from Finisher for these remaining 80 forklift hours. (Cal. Code Regs., tit. 8, §17250, subd. (b).)

that both workers performed that work during those ten weeks. The allocation to Peterson falls just above Peterson's own estimate and for that reason is accepted. In the absence of evidence identifying other workers who operated the forklift on specific occasions, all other hours preceding McDonnell's tenure on the forklift must be allocated to Peterson.

Taking the evidence together, the conclusion is that Peterson was underpaid for 963 hours (882.97 hours per Penick's table, plus 80 hours as stated in footnote 12, *ante*) of Operating Engineer work, and McDonnell was underpaid for 195.3 hours of that work.

Penick argues in the alternative that if the time Peterson and McDonnell spent operating forklifts is deemed Operating Engineer work, the Assessment nonetheless chose the wrong group within that craft, because Klemaske testified that forklift operation should have been classified as Operating Engineer Group 1, not Group 6.

Penick is correct in this regard. It has shown by a preponderance of the evidence that Peterson and McDonnell were operating forklifts. One who operates a forklift is, by definition, a Forklift Operator, and the Operating Engineer PWD includes "Fork Lift Operator" in Group 1. Peterson and McDonnell were entitled to be paid the Group 1 rate of \$59.15 for the hours they spent operating forklifts, not the Finisher rate of \$36.06 that Penick paid them (discounting training fund contributions), and not the Group 6 rate of \$60.69 that the Assessment found.

The parties do not dispute the total number of hours worked by Peterson and McDonnell as reflected in the CPRs. According to the DLSE audit and the CPRs, Peterson worked 3,301 total hours. Of that total the CPRs show, and DLSE's audit found, that 2,912.5 were straight time hours, 305.5 were overtime hours, and 83 were double time hours. Based on the analysis, *ante*, Peterson is to be credited with 963 hours (29.2 percent of his total hours) at Operating

Engineer Group 1 rates, and 2,338 hours at Finisher rates. Apportioning his overtime and double time hours between the two classifications using the 29.2 percent figure results in crediting 89.08 overtime and 24.17 double time hours to Operating Engineer Group 1, with the remainder credited to Finisher.<sup>13</sup> Based on these figures, applying the straight time, overtime, and double time rates from the applicable PWDs, and before credits for payments made are applied, Peterson is entitled to \$88,736.24 for Finisher work,<sup>14</sup> plus \$59,896.10<sup>15</sup> for Operating Engineer Group 1 work. Therefore, his entitlement for work in both crafts is \$148,632.34. Crediting Penick with payments made to him on the Project in the amount of \$124,896.90, according to the DLSE audit and CPRs, this Decision finds Peterson was underpaid by \$23,735.44, minus payments made by Penick mid-Hearing in the amount of \$15,010.92. That calculation leaves a net amount of unpaid wages for Peterson in the amount of \$8,724.52.<sup>16</sup>

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<sup>13</sup> Penick did not present a clear basis on which to calculate the two workers' entitlement to overtime and double time pay. Because the 963 forklift hours found for Peterson, *ante*, occurred throughout his nearly two years of employment on the Project and represent 29.2 percent of Peterson's total work hours of 3,301, that percentage provides a reasonable basis for measuring his straight time, overtime and double time pay entitlement at the Operating Engineer Group 1 rate. McDonnell's 195.3 forklift hours all occurred during his last ten weeks on the Project, so all of his overtime hours prior to May 14, 2013, were properly paid at the Finisher rate. Accordingly, only the hours he worked on or after that date need be apportioned between Finisher and Operating Engineer Group 1. The 195.3 forklift hours represent 49.256% percent of his 396.5 total work hours between May 14, 2013 and July 21, 2013. That 49.256% percent will be applied to determine McDonnell's straight time, overtime and double time pay entitlement at the Operating Engineer Group 1 rate.

<sup>14</sup> The calculation for Peterson's Finisher pay entitlement is as follows: 2,062.835 hours x \$36.06 = \$74,385.83 straight time; 216.267 hours x \$49.355 = \$10,673.86 overtime; and 58.684 hours x \$62.65 = \$3,676.55 double time. The sum of these three wage amounts is \$88,736.24.

<sup>15</sup> The calculation for Peterson's Operating Engineer Group 1 pay entitlement is as follows: 849.63 hours x \$59.44 = \$50,502.01 straight time; 89.08 hours x \$78.815 = \$7,020.84 overtime; and 24.17 hours x \$98.19 = \$2,373.25 double time. The sum of these three wage amounts is \$59,896.10.

<sup>16</sup> Attachments to Peterson's declaration (Penick Exhibit U) show that on March 14, 2018, Penick paid him the sum of \$15,010.92 in "settlement." DLSE did not rebut that evidence or dispute that the payment pertained to wages earned on the Project. The conclusion is drawn that Penick is entitled to that amount as a further credit against unpaid wages. (§1773.1, subd. (c).)

A similar analysis applies to McDonnell. According to the DLSE audit and the CPRs, McDonnell worked 1,723.5 hours, including 202 overtime hours and 32 double time hours. However, based on the analysis, *ante*, McDonnell is entitled to Group 1 rates for only 195.3 hours (49.256 percent) of his 396.5 work hours from May 14, 2013, to July 21, 2013, his last day of work on the Project. Based on these figures, applying the straight time, overtime, and double time rates from the applicable PWDs, and before credits McDonnell is entitled to \$58,099.82 for Finisher work,<sup>17</sup> plus \$13,100.74 for Operating Engineer Group 1 work.<sup>18</sup> His entitlement totals \$71,200.56. Crediting Penick with payments made to him on the Project in the amount of \$66,007.02, according to the DLSE audit and CPRs, this Decision finds McDonnell was underpaid by \$5,193.54.

Combining the two figures for underpayment to the two forklift operators, \$8,724.52 and \$5,193.54, with the underpayment to Holcomb in the amount of \$32,370.06, the total unpaid wages under this Decision is \$46,288.12.

Penick Did Not Pay All the Required Training Fund Contributions.

The Assessment found that Penick failed to make training fund contributions in a total amount of \$5,278.47 for this Project. Each of the classifications at issue requires a different hourly contribution rate. For Finisher, the rate is \$0.36, and for Worker \$0.57. (DLSE Exhibit No. 7.) For Operating Engineer (all classifications), the rate is \$0.80. Consequently, the Assessment found contributions due for each of the ten workers it reclassified.

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<sup>17</sup> The calculation for McDonnell's Finisher pay entitlement is as follows: 1,329.172 straight time hours x \$36.06 = \$47,929.94; 172.939 overtime hours x 49.355 = \$8,535.40; and 26.089 double time hours x \$62.65 = \$1,634.48. The sum of these three wage amounts is \$58,099.82.

<sup>18</sup> The calculation for McDonnell's Operating Engineer Group 1 pay entitlement is as follows: 160.328 straight time hours x \$59.44 = \$9,529.90; 29.061 overtime hours x \$78.815 = \$2,990.44; and 5.911 double time hours x \$98.19 = \$580.40. The sum of these three wage amounts is \$13,100.74.

This Decision finds—contrary to the Assessment—that Penick correctly classified Price, Martino, Rudolph, Witthauer, Ciavarella, Martinez, and Beczak as Finishers. Accordingly, the Assessment must be modified to eliminate the training fund contributions assessed for these workers.

This Decision finds that Penick incorrectly classified Holcomb as a Finisher Apprentice, but that his correct classification was Finisher, not Worker as found by the Assessment. However, notwithstanding the misclassification, Penick correctly paid training for contributions for Holcomb at the Finisher rate. Therefore, the Assessment must be further modified to eliminate the contributions assessed for Holcomb as if he were classified as a Worker, resulting in a reduction of \$337.58.

This Decision further modifies the Assessment to reclassify Peterson and McDonnell from Finisher to Operating Engineer for some, but not all, hours worked. Based on the finding that Peterson and McDonnell collectively worked 1,158.28 hours on the forklift, the amount of unpaid training fund contributions at the Operating Engineer hourly rate of \$0.80 is \$926.62.<sup>19</sup> Therefore, the Assessment must be modified accordingly.

DLSE's Penalty Assessment Under Section 1775.

Former section 1775, subdivision (a), as it read at the time the Project was advertised for bids, 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 fifty dollars (\$50) 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

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<sup>19</sup> As training fund contributions must be paid to the craft apprenticeship committee for each craft employed on the Project, payment made by Penick to the committee for the Terrazzo Finisher craft cannot be credited toward the obligation to pay training fund contributions to the Operating Engineer committee.



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 ten dollars (\$10) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.

(ii) The penalty may not be less than twenty dollars (\$20) if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred thirty dollars (\$30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.<sup>[20]</sup>

...(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

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<sup>20</sup> Section 1777.1, subdivision (c), as it existed on the bid advertisement date in 2011, 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."

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).) The Assessment found that Penick underpaid ten workers on 2,665 calendar days, or portions thereof. However, 1,768 of those violations were associated with DLSE’s reclassification of seven employees from Finishers to Workers, which this Decision, as stated *ante*, has not endorsed. As a result penalties under section 1775 on the basis of that reclassification cannot be imposed.

The Assessment also found that Penick underpaid Holcomb on 245 calendar days, or portions thereof, and this Decision accepts the fact of underpayment, although not in the exact amount found by DLSE. Since the underpayment to Holcomb occurred on the same days as found in the Assessment, penalties under section 1775 for those days are proper.

Further, the Assessment found that Penick underpaid Peterson and McDonnell based on 1,158.28 hours of work operating the forklift, as identified in the Sunstate invoices. Those invoices, however, do not indicate the number of calendar days on which the hours were performed. To date the parties have not addressed whether the record contains an indication of the calendar days, or portions thereof, on which those hours of underpayment occurred. For this reason, the section 1775 part of the Assessment must be vacated and remanded for redetermination of the section 1775 penalties on account of the underpayment to Peterson and McDonnell, in light of the other findings in this

Decision.

DLSE assessed section 1775 penalties at the rate of \$140.00 because Penick misclassified workers and underpaid workers in a significant amount. In addition, Penick had a history of two previous assessments for wage violations. The burden was on Penick to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of \$140.00 per violation. Penick's burden to establish abuse of discretion is met due to DLSE's failure to use the applicable version of section 1775.

The bid advertisement date was September 20, 2011. Yet, in its Assessment DLSE used the version of 1775 that was effective January 1, 2012. Under the version of section 1775 in effect on the bid advertisement date, the maximum penalty rate was \$50.00. DLSE's use of the incorrect version of section 1775 amounts to an abuse of discretion. Because the discretion to set penalties under that section is committed to the Labor Commissioner, the use of the incorrect version of section 1775 provides a second reason to vacate the section 1775 part of the Assessment and remand it for redetermination of the penalties in light of the version of section 1775 in effect on the date that the Project was advertised for bids and the other findings in this Decision.

DLSE's Penalty Assessment under Section 1813.

Section 1813 provides in pertinent part:

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

Thus, the contractor is liable for section 1813 penalties whenever it fails to pay the overtime rate as required in the applicable PWD. The Assessment found that Penick was liable for \$13,450.00 in section 1813 penalties for 538 violations. These violations arose from instances of underpayment for overtime hours where the Assessment found that Penick had misclassified workers. The reclassification of these employees meant that a higher hourly pay rate applied, and therefore a higher overtime rate.

While section 1813 provides no discretion as to the penalty rate, the Assessment must nonetheless be modified in instances where the facts do not support a finding of a section 1813 violation. DLSE assessed a total of 299 violations of section 1813 with regard to the seven workers it found to be misclassified as Finishers, but are found herein to have been properly classified. Therefore, the Assessment must be modified by reducing those penalties by \$7,475.00 with respect to those workers. DLSE further assessed \$830.00 in section 1813 penalties with regard to Holcomb, based on 34 violations of failure to pay overtime rates. Since this Decision finds Holcomb should have been paid as a Finisher, not a Finisher Apprentice, it follows that section 1813 penalties are due for Penick's failure to pay Holcomb at Finisher overtime rates. Accordingly, the Assessment is affirmed as to the \$830.00 in penalties attributable to Holcomb's work.

DLSE also assessed violations of section 1813 with regard to Peterson and McDonnell, on the premise that they were misclassified as Finishers when they were doing the work of Operating Engineers. This Decision finds that these two workers did, in fact, perform Operating Engineer work for a portion of their hours, but to date the parties have not addressed whether the record contains an indication of any calendar days on which Peterson and McDonnell worked unpaid overtime hours as Operating Engineers.

Accordingly, and as was done with the matter of section 1775 penalties,

the section 1813 part of the Assessment must be vacated and remanded for redetermination of the section 1813 penalties on account of the underpayment to Peterson and McDonnell, in light of the other findings in this Decision.

Penick Has Shown Justification for a Waiver of Liquidated Damages.

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

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 three alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These required the contractor to make key decisions within 60 days of the service of the CWPA on the contractor.

First, the above-quoted portion of section 1742.1, subdivision (a), states that the contractor shall be liable for liquidated damages equal to the portion of the wages “that still remain unpaid” 60 days following service of the CWPA. Accordingly, the contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the CWPA, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Under section 1742.1, subdivision (b), a contractor would entirely avert liability for liquidated damages if, within 60 days from issuance of the CWPA, the contractor deposited into escrow with DIR the full amount of the assessment of

unpaid wages, plus the statutory penalties under sections 1775. Section 1742.1, subdivision (b), stated in this regard:

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

Lastly, the contractor could choose not to pay any of the assessed wages to the workers, and not to deposit with DIR the full amount of assessed wages and penalties, and instead ask the Director to exercise her discretion to waive liquidated damages under the following portion of section 1742.1:

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

((Former) §1742.1, subd. (a).)

In this case, Penick did not pay any back wages to the workers within 60 days after the Assessment or deposit with the Department the full amount of assessed wages and statutory penalties.<sup>21</sup> That leaves the question whether Penick has demonstrated to the Director's satisfaction it had substantial grounds for appealing the Assessment as a basis for the Director's discretionary waiver of liquidated damages.<sup>22</sup> The Director finds sufficient grounds for a discretionary waiver of liquidated damages.

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<sup>21</sup> Penick did deposit \$20,000.00 with the Department, but that deposit was far short of the full amount of the Assessment and thus did not satisfy the statutory requirement to avoid liquidated damages. The disposition of Penick's deposit shall be governed by the procedures described in section 1742.1, subdivision (b).

<sup>22</sup> On June 27, 2017 (after service of the Assessment on July 25, 2016, and 60 days had expired), the Director's discretionary waiver power was deleted from section 1742.1 by statutes 2017, chapter 28, section 16 (Sen. Bill 96) (SB 96)). Legislative enactments are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Further, "[a] statute is retroactive if it

Penick prevailed entirely on the principal issue it raised, the Assessment's reclassification of Finishers to Workers, and it also demonstrated substantial grounds for appealing the two smaller classification issues. The majority of the unpaid wages for which Penick is found liable herein stem from its misclassification of two workers as Finishers for hours they worked as Forklift Operators. The Assessment reclassified those workers as Hoisting Equipment Operators for all of their hours on the Project. Penick proved by a preponderance of the evidence (1) that it correctly classified the workers as Finishers for the majority of their time, and (2) that for the time they actually spent operating forklifts, the correct classification was not the higher-paying Hoisting Equipment Operator. As to the other classification issue, DLSE demonstrated that Terrazzo Finisher is a non-apprenticeable craft in San Diego County, and thus Penick misclassified Holcomb as a Finisher Apprentice. Penick proved by the preponderance of the evidence, however, that the Assessment incorrectly reclassified Holcomb as a Worker. By showing that the Assessment used the wrong classifications, Penick demonstrated that it had substantial grounds for appealing as to both of these issues.

Based on the foregoing, the undersigned exercises her discretion to waive liquidated damages with respect to the prevailing wages found due in this Decision. Accordingly, no liquidated damages are due, as provided in the Findings, *post*.

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substantially changes the legal effect of past events." (*Kizer v. Hannah* (1989) 48 Cal.3d 1, 7.) Here, the law in effect at the time the Assessment was issued allowed a waiver of liquidated damages in the Director's discretion, as specified, which could have influenced the contractor's decision as to how to respond to the assessment. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what the contractor elected to do in response to the Assessment). Accordingly, this Decision finds that the Director's discretion to waive liquidated damages in this case under section 1742.1, subdivision (a), is unaffected by SB 96.

Apprenticeship Violations.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. (California Code of Regulations, tit. 8, §§ 227 to 232.70.)<sup>23</sup>

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

Also, a contractor shall not be considered in violation of the regulation if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project. Further, prior to requesting the dispatch of apprentices, the regulation, section 230, subdivision (a), provides that contractors should alert apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed.

The statute and regulations also require contractors to alert all applicable apprenticeship programs to the fact that they have been awarded a public works contract under which apprentices may be employed. (§ 1777.5, subd. (e); § 230, subd. (a).) DAS has prepared a form (DAS 140) that a contractor may use to notify all apprenticeship committees for each apprenticeable craft in the area of the site of the project. The required information must be provided to the applicable committees within ten days of the date of the execution of the prime

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<sup>23</sup> All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.



contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work. (§ 230, subd. (a).) Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

When DLSE determines that a violation of the apprenticeship laws has occurred, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." ((Former) § 1777.7, subd. (c)(3), as it existed on the date of the bid advertisement for the Project, September 20, 2011.)

Penick Was Required to Notify Three Applicable Committees in the Geographic Area of Contract Award Information, and Failed to Notify One.

DLSE established that Penick was required to provide contract award information to the following three applicable apprenticeship committees in the geographic area of the Project: the Tile & Terrazzo Industry J.A.C., the San Diego AGC Equipment Operator J.A.C., and the San Diego AGC J.A.C. (DLSE Exhibit No. 3.)

DLSE established that Operating Engineers first performed work on the Project on April 6, 2012, but Penick did not notify the San Diego AGC Equipment Operator J.A.C. of contract award information until November 1, 2012. Penick presented no evidence to the contrary. The applicable regulation required the notice be sent no later than the first day on the Project. Thus, Penick violated section 1777.5, subdivision (e), and the applicable regulation, section 230, subdivision (a).

The Penalty for Noncompliance.

If a contractor "knowingly violated Section 1777.5" a civil penalty is imposed under former section 1777.7.

Here, DLSE assessed a penalty against Penick under the following portion

of former section 1777.7, subdivision (a)(1):<sup>24</sup>

A contractor or subcontractor that is determined by the Chief of the Division of Apprenticeship Standards to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Chief if the amount of the penalty would be disproportionate to the severity of the violation.<sup>25</sup>

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.

DLSE imposed a penalty rate of \$10.00 for each of 208 days of violations. To analyze whether the penalty is correctly calculated, under the version of former section 1777.7 applicable to this case, the Director decides the appropriate penalty de novo.<sup>26</sup> In setting the penalty, the Director considers all of the following circumstances (which also guide DLSE's Assessment):

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<sup>24</sup> Former section 1777.7 was amended a few times, most recently in 2014. (See Stats. 2014, ch. 297, § 3 (AB 2744).) For purposes of this Decision, the Director has applied the language of former section 1777.7 that was in effect at the time the Project was advertised for bid on September 20, 2011.

<sup>25</sup> Effective June 27, 2012, the duty to enforce sections 1777.5 and 1777.7 changed from the Chief of the Division of Apprenticeship Standards to the Labor Commissioner. (Stats. 2012, ch. 46, § 96). This change does not alter the analysis in this case.

<sup>26</sup> As noted *ante*, section 1777.7 was amended effective January 1, 2015. Applying the version of section 1777.7, subdivision (f), that was in effect on the bid advertisement date, the Director reviews de novo the penalty for violation of section 1777.5.

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

((Former) § 1777.7, subd. (f).)

Penick's violations were "knowing" violations under the irrebuttable presumption quoted above in that Penick was an experienced public works contractor and had been assessed for apprenticeship violations on at least one prior occasion. Moreover, Penick's timely notification of other applicable committees and employment of apprentices on the Project demonstrates an awareness of its obligations. Penick presented no evidence that it was unfamiliar with the requirement to notify apprentice committees of contract award information. Indeed, Penick did belatedly notify the committee in question, and there is no evidence that it could not have timely done so.

Since Penick was aware of its obligations under the law, and provided no evidence of why it could not have complied with the law, Penick failed to meet its burden of proof by providing evidence of compliance with section 1777.5. Since Penick knowingly violated the law, a penalty should be imposed under former section 1777.7.

Applying the de novo standard for this case, factors "A" and "B" would suggest a substantial penalty rate. DLSE submitted evidence to justify finding

that Penick's violations of the notification requirements were intentional. Penick did not deny that it was on notice that it was required to employ apprentices. The applicable prevailing wage determination states that the relevant Operating Engineer craft was apprenticeable. Penick did not bear its burden of proving by a preponderance of the evidence that the violations were not intentional. Moreover, DLSE's penalty review reveals that Penick previously was assessed for apprenticeship violations on one occasion in 2003. (DLSE Exhibit No. 3.)

Factor "C" is neutral in this case. DLSE's evidence shows that DLSE did not notify Penick of its violations prior to issuing the Assessment. Hence, Penick had no opportunity to voluntarily remedy the violations after receiving notice.

Factors "D" and "E" would suggest a low penalty rate. DLSE's Penalty Review indicates that Penick was not required to request dispatch of Operating Engineer apprentices on this Project, noting that: "There is an existing hourly ratio exemption for Operating Engineers for Southern California." Accordingly, the Assessment found no violations for failing to request or employ Operating Engineer apprentices. Thus, there is no evidence that Penick's belated notification resulted in lost training opportunities for apprentices or otherwise harmed apprentices or apprenticeship programs.

Overall, based on a de novo review of the five factors above and in light of the evidence as a whole in this case, the Director finds that a penalty rate of \$10.00 is appropriate, and accordingly the Assessment is affirmed in this respect.

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

#### **FINDINGS AND ORDER**

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. The Civil Wage and Penalty Assessment was timely served by DLSE in accordance with section 1741.

3. Affected subcontractor, T.B. Penick & Sons, Inc., filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. DLSE timely made available to T.B. Penick & Sons, Inc. its enforcement file.
5. T.B. Penick & Sons, Inc. deposited \$20,000.00 with the Department of Industrial Relations as a result of the Assessment.
6. Alex Holcomb performed work in San Diego County during the pendency of the Project, was misclassified as Terrazzo Finisher Apprentice when he should have been classified as Terrazzo Finisher, and was entitled to be paid the journeyman rate for Terrazzo Finisher for that work.
7. Gregory Peterson and Patrick McConnell performed work in San Diego County during the pendency of the Project, were misclassified as Terrazzo Finisher for certain hours when they should have been classified as Forklift Operator, and were entitled to be paid the journeyman rate for Operating Engineer, Group 1, for that work.
8. James Price, Daniel Martino, Jr., Winton Rudolph, John Witthauer, Angelo Ciavarella, Manuel Perez Martinez and Michael Beczak performed work in San Diego County during the pendency of the Project, were properly classified as Terrazzo Finisher, and were paid the required rate for that classification.
9. In light of findings and 6 and 7 above, T.B. Penick & Sons, Inc. underpaid wages for its employees on the Project in the aggregate amount of \$46,288.12.
10. T.B. Penick & Sons, Inc. had substantial grounds to appeal the Assessment, and on that basis, the Director waives liquidated damages in the amount of the unpaid wages.

11. T.B. Penick & Sons, Inc. failed to pay the prevailing overtime rate for employees, but the number of days of underpayment cannot be determined on the basis of the parties' submissions. The amount of the penalty is therefore remanded to DLSE for redetermination in light of the other findings in this Decision and pursuant to the Order, *post*.
12. T.B. Penick & Sons, Inc. did not pay required training fund contributions in the amount of \$926.62 for its employees on the Project.
13. DLSE abused its discretion in setting section 1775 penalties at the rate of \$140.00 per violation based on the use of an incorrect version of section 1775, and the number of violations cannot be determined on the basis of the parties' submissions to date. Therefore, this matter must be remanded to DLSE to redetermine section 1775 penalties in accordance with the version of the statute in effect when the Project was advertised for bid, in light of the other findings in this Decision and pursuant to the Order, *post*.
14. The unpaid wages found in Finding No. 9 remained due and owing more than 60 days following issuance of the Assessment, but T.B. Penick & Sons, Inc. had substantial grounds to appeal the Assessment as to the wages found due and unpaid. Accordingly, T.B. Penick & Sons, Inc. is not liable for an additional amount of liquidated damages under section 1742.1.
15. T.B. Penick & Sons, Inc. was required to timely issue a Notice of Contract Award Information to three applicable apprenticeship committees in the geographic area of the Project: (1) Tile & Terrazzo Industry J.A.C.; (2) Associated General Contractors of San Diego, Inc. Construction Equipment Operator J.A.C.; and (3) San Diego Associated General Contractors J.A.C.

16. T.B. Penick & Sons, Inc. failed to timely issue a Notice of Contract Award Information to the applicable apprenticeship committee for the craft of Operating Engineer, the Associated General Contractors of San Diego, Inc. Construction Equipment Operator J.A.C.
17. Section 1777.7 penalties at the rate of \$10.00 per violation for 208 violations are appropriate, and the resulting total penalty of \$2,080.00 is affirmed.
18. The amount found due in the Assessment is modified and affirmed by this Decision are as follows:

<b>Basis of the Assessment</b>	<b>Amount</b>
Wages Due:	\$46,288.12
Training Fund Contributions:	\$ 926.62
Penalties under section 1775, subdivision (a):	Remanded
Penalties under section 1813:	Remanded
Penalties under section 1777.7:	\$ 2,080.00
<b>TOTAL:</b>	<b>\$49,294.74</b>

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

As to all issues decided here, the Decision is final. With respect to the remanded portion of this Decision only, DLSE shall have 60 days from the date of service of this Decision within which to issue a new penalty assessment under section 1775, subdivision (a), in light of the version of section 1775 in effect on

the date the Project was advertised for bids and under section 1813, in light of the other findings in this Decision. Should DLSE issue a new penalty assessment, T. B. Penick & Sons, Inc. shall have the right to request review in accordance with section 1742, subdivision (a), within 60 days of the new assessment, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for that purpose.

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

Dated: 10-21-2020



/s/ Katrina S. Hagen

Katrina S. Hagen  
Director, Department of Industrial  
Relations