STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Micon Construction, Inc. Case No. 19-0253-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor Micon Construction, Inc. (Micon) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued on May 9, 2019, by the Division of Labor Standards Enforcement (DLSE) with respect to work performed by Micon on the Via Verde Park Improvement project (Project) for the City of San Dimas (City) in Los Angeles County. After the Assessment was issued, DLSE revised the underlying audit on January 29, 2020, and on January 31, 2020. [1] The second revised audit asserted that the following amounts were due: $5.52 in training fund contributions and $9,120.00 in penalties under Labor Code section 1777.7. [2]

On January 31, 2020, a Hearing on the Merits was held in Los Angeles, California, before Hearing Officer Mirna Solís. Luong Chau appeared as counsel for DLSE and Kimberly J. Manning appeared as counsel on behalf of Micon. DLSE Industrial Relations Representative Sara Brown testified in support of the Assessment. Kimberly Racette, Micon Project Manager, testified on behalf of Micon. The parties submitted the matter for decision on January 31, 2020.

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[1] Pursuant to California Code of Regulations, title 8, section 17726, subdivision (a)(1), during the January 31, 2020 Hearing on the Merits, DLSE moved to amend the Assessment downward based on a revised number of Labor Code section 1777.5 violations from 112 violations at $120.00 per violation to 76 violations at $120.00 per violation. The downward amendment removed the minimum apprentice to journeyworker ratio violations and assessed penalties only for violations for failure to send contract award information to all the applicable apprenticeship committees. With no objection from Micon, the Hearing Officer granted the motion. The amount of unpaid training fund contributions remained unchanged at $5.52.

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

The issues for decision are:

- Did the Assessment correctly find that Micon failed to make the required training fund contributions to an approved apprenticeship program or the California Apprenticeship Council?
- Did Micon submit contract award information to all applicable apprenticeship committees for the Cement Mason and Laborer classifications in a timely and factually sufficient manner?
- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1777.7?
- Does evidence provided by DLSE provide prima facie support for the Assessment?

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

FACTS

The parties stipulated to the following facts:

1. The work subject to the Assessment was performed on a public work and required the employment of apprentices and the payment of prevailing wages under the California Prevailing Wage Law.
2. The Civil Wage and Penalty Assessment was timely served.
3. The request for review was filed timely.
4. The enforcement file was requested and produced in a timely fashion.
5. No back wages have been paid or deposited with the Department of Industrial Relations as a result of the Assessment.

6. The applicable Prevailing Wage Determination for the Project for the Laborer classification is SC-23-102-2-2016-1.

The Project.

On October 7 and October 14, 2016, the City published its notice of invitation for bids for the Project. On December 14, 2016, Micon and the City executed the prime contract (Contract). At a cost of $462,245.10, Micon was to provide and install a Totlot Rubber surface and a wood shade shelter at the City's Via Verde Park. Micon's scope of work on the Project included installing fencing, demolishing and removing concrete, demolishing playground, and removing park furniture, among other work. In turn, Micon subcontracted with Top Turf, which installs rubber resurfacing on playgrounds and F and M United Grading, Inc., which does demolition work. The bid advertisement notified contractors that the Project was subject to prevailing wages and "employer payments for health and welfare, vacation, pension and similar purposes applicable to the work to be done."

The Applicable Prevailing Wage Determinations.

The parties stipulated to the applicable prevailing wage determination (PWD) for the Laborer classification in Los Angeles County in 2016 as SC-23-102-2-2016-1 (Laborer PWD). The Laborer PWD requires an hourly training fund contribution in the amount of 69 cents.

The applicable prevailing wage determination for the Landscape Irrigation Laborer/Tender classification in Los Angeles County in 2016 is SC-102-X-14-2016-1 (Landscape Laborer PWD). An hourly training fund contribution of 69 cents is required under this PWD.

The applicable PWD for the Cement Mason classification in Los Angeles County in 2016 is SC-23-203-2-2016-1.

The Assessment.

Brown was assigned to investigate a complaint that Micon was not complying with prevailing wage requirements on the Project. On November 6, 2017, Brown received documents in response to DLSE's October 17, 2017 request for Micon's

certified payroll records (CPRs). Brown also received inspection logs from the City. The inspection logs, which were completed by Steve Farmer, the City's Project Inspector/Landscape Manager, and Daniel Ford, the City's Landscape Maintenance Manager, begin on January 30, 2017, and end on June 12, 2017. The inspection logs were completed on a daily basis and note weather conditions, a daily description of the work performed on the job, the number of individuals on the job, as well as their classifications. However, the inspection logs do not specify whether the workers on the job were employed by the subcontractors' or Micon's workers. The wages of only Micon's workers are implicated in the Assessment.

The first inspection log, dated January 30, 2017, states that three laborers were on the jobsite, installing fencing around the job site. According to the inspection log for the following day, the installation of the fencing had been completed.

Micon's CPRs reflect a start date on the Project of February 27, 2017, and the last day of work on the Project as June 16, 2017. According to the CPRs, the Laborers' first day on the job was March 10, 2017, the first day on the job for Landscape Laborer was February 27, 2017, and the Cement Masons' first day on the job was April 26, 2017.

During her investigation Brown noticed a January 30, 2017 inspection log. Since that date conflicted with the start dates on the CPRs, she sent Micon a second request for CPRs. Micon responded by letter stating that the subcontractor, F M United, was on the job on January 30, 2017, and provided Brown with F M United's CPRs. However, Brown testified that her review of F M United's CPRs showed its first day of work on the Project was February 1, 2017, not January 30, 2017. Micon did not send Brown the CPRs for its other subcontractor, Top Turf.

Since neither Micon's nor F M United's CPRs corroborated the January 30, 2017 start date, in preparing her audit of Micon's compliance with prevailing wage requirements, Brown testified that she relied on the inspection logs completed by Farmer to conclude that Micon's Laborers commenced work on January 30, 2017.

Using the CPRs, Brown determined that Landscape Laborers worked 1,478 hours, while Laborers worked 325 hours. She reviewed the PWD for Landscape Laborers, which requires training fund contributions of 69 cents for every work hour.[3] The Laborer classification also requires training fund contributions of 69 cents per hour. Brown calculated that, based on the hours of work shown in the CPRs and before credit for payments made, Micon owed training fund contributions in the amount of $1,019.82 for Landscape Laborers and $224.25 for Laborers.

Brown further testified that she also checked the California Apprenticeship Commission (CAC) website records for Micon and confirmed the amount of training fund contributions that Micon had paid for each classification. Based on the CAC records, Brown determined that Micon had paid $1,032.24 in training fund contributions for Landscape Laborers, $12.42 in excess of what was owed. For the Laborer classification, however, Micon had paid $218.73, $5.52 less than what was owed. Notwithstanding Micon's overpayment for the Landscape Laborer craft, Brown prepared the Assessment finding $5.52 was due in unpaid training fund contributions for the Laborer craft. Micon correctly paid training fund contributions for all the workweeks during the Project, except for the final workweek on the Project. The $5.52 corresponds to the training funds earned by Laborer Oscar Zazuetta.

Apprenticeship Requirements.

The Assessment also found that Micon owed penalties under section 1777.7 for violation of its duty to timely submit contract award information to applicable apprenticeship committees. Brown testified that she asked Micon for evidence of compliance with apprenticeship requirements. Micon provided her with confirmation that it had sent contract award information and requests for dispatch of apprentices to some apprenticeship committees for the Laborer and Cement Mason classifications. Brown investigated whether the information and requests were sent to all of the applicable committees, as required by law.

[3] Brown testified that, based on her investigation, Micon owed no unpaid prevailing wages, except for training fund contributions, as described *post.*

In the Penalty Review, Brown listed two applicable apprenticeship committees for the Laborer classification in the geographic area of the Project: the Laborers Southern California Joint Apprenticeship Committee (Laborers JAC); and the Laborers Southern California Landscape And Irrigation Fitter Joint Apprenticeship Committee (Laborers Landscape JAC).

Brown testified that she obtained evidence from Micon that on January 27, 2017, Micon faxed the contract award information (DAS 140 form) to one applicable committee for the Laborer craft—the Laborers Landscape JAC. [4] The DAS 140 was dated January 27, 2017. On the DAS 140 Micon stated the date of the expected or actual start date of the Project was January 30, 2017.

Brown also obtained from Micon evidence that on February 24, 2017, Micon faxed a DAS 140 to a second Laborer apprenticeship committee—the Laborers JAC. This DAS 140 was dated January 17, 2017. On the form Micon also stated that the expected or actual start date of the Project was January 30, 2017.

Brown also testified that besides Laborer and Landscape Laborer workers, Micon used Cement Mason journey-level workers on the Project. As to the apprentice requirements for Cement Masons, the Penalty Review prepared by Brown identified two applicable apprenticeship committees existing in the geographic area of the Project: the Southern California Cement Masons JAC (Cement Mason JAC) and the Southern California Laborers Cement Mason Joint Apprenticeship Committee (Laborers Cement Mason JAC). [5]

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[4] The facsimile confirmation for the form Micon sent to Laborers Landscape JAC identifies the facsimile telephone number for the recipient but does not otherwise identify the recipient. However, the facsimile telephone number listed on Request for Dispatch of an Apprenticeship (DAS 142 form) sent to the Laborers Landscape JAC matches the facsimile telephone number on the confirmation page.

[5] Micon conceded that the Cement Mason JAC was an applicable committee to which it was required to send the DAS 140 form. By virtue of its inclusion in the Penalty Review and Racette's testimony conceding as much (see *post*), the Cement Mason JAC was a second applicable committee to which Micon should have sent a DAS 140 form. However, Micon objected to DLSE Exhibit Number 24, which was a printout of the applicable apprenticeship committees in the geographic area of the Project for the Cement Mason classification. That exhibit lists a second JAC—the Cement Mason JAC. Micon contended the printout was not relevant because it was dated January 22, 2020, well after the 2016 bid

In DLSE's investigation, Brown determined that, on April 21, 2017, Micon faxed a DAS 140 to the Laborers Cement Mason JAC, although the DAS 140 was dated January 17, 2017. Again, on that form Micon stated that the date of expected or actual start date of the Project was January 30, 2017.

No evidence in the record establishes that Micon sent a DAS 140 form to a second Cement Mason apprenticeship committee—the Cement Mason JAC.

Brown testified that she based the apprenticeship penalties on Micon's failure as to the DAS 140 forms: a tardy submission to the Laborers JAC, and a failure to send the DAS 140 at all to the Cement Mason JAC. As reflected in the Penalty Review, Brown found 76 days of non-compliance with the DAS 140 requirement: 25 days as to the Laborers and 51 days as to the Cement Masons. Brown testified that the penalty period for failure to timely submit DAS 140s to the Laborer apprenticeship committees was counted from the Laborers' first day of work on the Project, January 30, 2017, until compliance was reached. On February 24, 2017, Micon submitted contract award information to the second applicable committee—the Laborers JAC. Brown counted 25 calendar days between January 30, 2017, and February 24, 2017.

Brown further testified that the penalty period for failure to submit a DAS 140 to each applicable apprenticeship committee for the Cement Mason classification was counted from when Cement Masons first worked on the job, April 26, 2017, until the end of Micon's work on the Project, June 16, 2017. Brown counted 51 calendar days between April 26, 2017, and June 16, 2017.

As affirmed by Brown's senior deputy, DLSE set the penalty rate at $120.00 per violation, in part due to evidence of Micon's prior history of violations. As amended, the Assessment found $9,120.00 due in section 1777.7 penalties.

Micon argues that DLSE committed numerous errors in its investigation. Micon disputes DLSE's asserted January 30, 2017 start date because DLSE arrived at that by relying on the inspection logs, which are incorrect and unreliable. Micon states that its

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advertisement date and the 2017 dates of Micon's work on the Project. Micon's objection is well-taken. This Decision sustains Micon's objection and will not consider DLSE Exhibit Number 24.

workers were not on the job on January 30, 2017, and any workers at the site were those of a subcontractor. As further support that the inspection logs are unreliable, Micon refers to the Penalty Review, in which Brown summarized a February 12, 2019 telephone conversation she had with the Project inspector, Steve Farmer. Brown wrote in the Penalty Review that "[The Inspector] confirmed that Micon began work on the [P]roject site in January, and they did not utilize any subcontractors." Micon interprets that statement as reflecting that the inspector erroneously believed Micon did not utilize any subcontractors on the job during the entire duration of the Project. However, Brown testified that the inspector's statement could be interpreted to mean that in January 2017 Micon did not utilize any subcontractors.[6]

Racette testified that she did not recall if F M United was working in January 2017 on the jobsite as the Project was completed two years prior to her testimony. She also did not recall if any Micon worker was on the jobsite in January 2017.

Racette also testified that the basis of the section 1777.7 penalties was unclear. She thought the section 1777.7 penalties were based on the failure to send the DAS 140 to a Cement Masons apprenticeship committee in Ventura, which she stated was 80 miles away from the job site. But Racette was unable to name the apprenticeship committee for Cement Masons in Ventura and the record does not reflect any such committee in Ventura.[7]

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[6] DLSE objected on grounds of lack of foundation to Micon Exhibit A, which was a memorandum drafted by an unknown author. The memorandum presents three arguments to dispute the Assessment—1) that the DAS 140 was timely submitted for the Laborer classification; 2) it should not be penalized for failure to employ Cement Mason apprentices; and 3) it sent the DAS 140 to the "local committee most likely to dispatch an apprentice to the area." Racette testified she did not write the memorandum. The objection is overruled. To some extent Exhibit A is cumulative as to facts otherwise admitted into evidence. To the extent Exhibit A presents legal argument, foundational facts are not as critical as with factual exhibits. That said, Micon presents no legal authority for the propositions offered in Exhibit A and, while admitted into evidence, it is not considered persuasive.

[7] Micon further argues its errors as to the DAS forms should be overlooked because they were no different than DLSE's mistakes made during its investigation. Racette cited Brown's error as to the proper wages paid to worker Oscar Zazuetta, which was corrected in the first amended audit on January 29, 2020. Racette also cites a mathematical error Brown made in the number of total journeyworker hours as noted in the Penalty Review for Cement Masons.

In her testimony, however, Racette acknowledged that while Micon sent the DAS 140 to the Cement Mason apprenticeship committee in Azusa (the Laborers Cement Mason JAC), it did not send a DAS 140 to the apprenticeship committee for Cement Masons in Arcadia (the Cement Mason JAC).[8] Racette stated Micon's failure to send the DAS 140 to the apprenticeship committee for Cement Masons in Arcadia was unintentional and an oversight.[9]

Micon argues that it overpaid in training fund contributions and nothing is owed. When adding all of the training fund contributions paid for the Laborer classification and the Landscape Laborer classification, Micon contends it overpaid by $6.90 and should be credited the overpayment. Micon asserts it sent the CAC separate checks for each classification. However, according to Micon, if it had sent the CAC only one check for the training fund contributions owed for all the classifications on the Project, DLSE would have credited the $6.90. Micon relied on the CAC's Training Funds Contributions form, which permits submission of one check for all classifications. The form states "[o]ne check, payable to the California Apprenticeship Council, may be submitted for all jobsites and/or occupations." However, Brown testified that when she receives evidence of one check to the CAC for several classifications, she does not conduct a breakdown by classification. Instead she requests the breakdown from the contractor.

Brown also testified that she could not apply the $6.90 overpayment in training fund contributions for the Landscape Laborer classification as credit for the training

[8] Racette generally referred to the apprenticeship committee for Cement Masons in Azusa. The full reference is the Laborers Cement Mason JAC, which is based in Azusa. Racette also generally referred to the apprenticeship committee for Cement Masons in Arcadia. The full reference for that committee is the Southern California Cement Masons J.A.C.

[9] Micon also argues its failure to employ apprentices should not be a violation as a union would not dispatch apprentices because Micon had not subscribed with it. To support that argument, Micon introduced Micon Exhibit B, an email from an apprenticeship committee stating it would not dispatch apprentices. DLSE objected to Exhibit B on relevancy grounds. The objection is understandable, because the minimum ratio violation is not an issue at this Hearing given the amended the Assessment. Nor is a failure to request dispatch of apprentices an issue. An apprenticeship committee's failure to dispatch apprentices is not a defense to failure to timely submit contract information. (Cal. Code Regs., tit. 8, § 230, subd. (a); cf. Cal. Code Regs., tit. 8, § 230.1, subd. (a), where a failure to dispatch in response to a timely request for dispatch can constitute a limited defense for a contractor.) Nevertheless, DLSE's objection is overruled based on the exhibit's tangential relation to the issues in this case.

fund contributions owed for Laborer classification because these two classifications have separate PWDs. Since there are two different PWDs, Brown stated she kept the training fund contribution credits separate.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects. The 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 that contractors and subcontractors pay the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. Section 1813 provides additional penalties for failure to pay the correct overtime rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if those wages are not paid within 60 days following service of a civil wage and penalty

assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the burden of producing evidence that "provides prima facie support for the Assessment . . . ." (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that initial burden is met, the contractor or subcontractor "shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (Cal. Code Regs. tit. 8, § 17250, subd. (a); 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).)

Micon Failed to Pay Required Training Fund Contributions.

Section 1771 requires that all workers on a public work receive at least the general prevailing wage. There are three components to the prevailing wage: (1) the basic hourly rate; (2) fringe benefit payments; and, (3) a contribution to the California Apprenticeship Council (CAC) or an approved apprenticeship program that can supply apprentices to the site of the public works project (these are payments referred to as "training fund contributions"). The first two components (also known as the total prevailing wage) must be paid to the worker or on the worker's behalf and for his benefit (in the case of the fringe benefit payments). An employer cannot pay a worker less than the required basis hourly rate.

The mandatory apprenticeship training contribution is established by section 1777.5, subdivision (m)(1), which provides, in relevant part:

> A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journey[workers] or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is

> the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

Under section 1777.5, subdivision (m)(1), a contractor has a choice: it may make training fund contributions to the CAC, to the local apprenticeship committees, or to both, with credit for payments made to committees. The amount due for those training fund contributions, as an element of the required prevailing wage, is calculated according to the Director's prevailing wage determinations for each craft for which journeyworkers are employed on a project. (Cal. Code Regs., tit. 8, § 230.2, subd. (a).) Training fund contributions paid to the CAC are distributed first for expenses of the Division of Apprenticeship Standards, and then to applicable apprenticeship programs. Where there is only one applicable program in the same occupation for which contributions were made, the contributions will be distributed to that program. Where there are two or more applicable programs, the contributions will be distributed to each such program in proportion to the total number of registered apprentices. (Cal. Code Regs., tit. 8, § 230.2, subd. (d).)

DLSE contends that training fund contributions are due to applicable apprenticeship committees or the CAC according to the particular craft PWDs at issue in a project and payments on behalf of each craft are evaluated separately. DLSE's position has merit, in that the calculation of the "same amount that the director determines is the prevailing amount of apprenticeship training contributions" due, as stated in section 1777.5, subdivision (m)(1), can only be made by reference to the individual craft PWDs as applicable for a given project. Further, payments made for one craft should not be credited against payments for another craft, given the distribution scheme under the regulation, as stated *ante*. (Cal. Code Regs., tit. 8, § 230.2, subd. (d).)

After applying the credit Micon had paid for the Laborer classification, Brown determined that $5.52 in training funds were due for that classification, despite the fact

that Micon had a slight overpayment for the Cement Mason classification. Based on this understanding, DLSE carried its initial burden of providing prima facie support that Micon underpaid the required training fund contributions for the Laborer classification. (Cal. Code Regs., tit. 8, § 17250, subd. (a).)

In turn, Micon presented no evidence or legal authority that training fund credits must be applied across classifications. While Micon pointed to the Training Funds Contributions Form, which allows the submission of one training funds check for several classifications and even different projects, the training fund contribution requirement is established and measured by individual, applicable PWDs for each craft used on a Project. If a contractor could compel DLSE to give the contractor credit for excess training funds made to one apprenticeship committee in satisfaction of training funds owed to different craft apprenticeship committees, some craft committees could be disadvantaged, thereby impeding the statute's training goal.

Micon does not dispute that it underpaid the training fund contributions due on behalf of its Laborers. That is enough to show that Micon failed to carry its burden to prove the amended Assessment was incorrect with regard to the training funds owed. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, this Decision affirms the Assessment's finding that $5.52 in training fund contributions for the Laborer classification is due.

Micon Violated Apprenticeship Requirements.

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. DLSE enforces the apprenticeship requirements not only for the benefit of apprentices, but to encourage and support apprenticeship programs, which the Legislature has recognized as "a vital part of the educational system in California." (Stats. 1999, ch. 903, § 1 [Assem. Bill 921].) [10]

[10] In 2012 the Legislature shifted enforcement of the apprenticeship requirements applicable in this matter from the Division of Apprenticeship Standards to DLSE. (Stat. 2012, ch. 46, § 96 (Sen. Bill 1038).)

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 journeyworkers in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). (§ 1777.5, subd. (g); Cal. Code Regs., tit. 8, § 230.1, subd. (a).) [11] However, 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, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).) The Division of Apprenticeship Standards (DAS) has prepared a form (DAS 142) that a contractor may use to request dispatch of apprentices from apprenticeship committees.

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 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.

In the present case, DLSE found that Micon failed to submit timely notices of contract award information (the DAS 140 forms) to two applicable apprenticeship committees. The parties dispute the date when Micon's obligation to submit the notices

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Also, section 1777.7 was amended in 2014 to follow DLSE's enforcement procedures for civil wage and penalty assessments. (Stat. 2014, ch. 297 § 3 (Assem. Bill 2744).) Nothing in those changes affects the analysis in this case.

[11] All subsequent references to the apprenticeship regulations are to the California Code of Regulations, title 8, unless otherwise specified.

of contract award information was triggered.

Relying on the City's inspection logs and Micon's failure to show it was the subcontractors' workers who were installing the fencing on January 30, 2017, DLSE maintains that Micon's first day of work on the Project was January 30. Using the January 30, 2017 start date, DLSE contends the DAS 140 form that Micon sent—on February 24, 2017, to the Laborers JAC, was too late.

DLSE also contends that Micon failed to submit a DAS 140 to one applicable committee, the Cement Mason JAC. These failures to timely provide notices, if true, would subject Micon to penalties under section 1777.7(a).

Relying on its own CPRs, but nothing else, Micon maintains its first day of work for Laborers was February 27, 2017. Micon argues the inspection logs are unreliable and cannot form a valid basis for DLSE's asserted start date of January 30, 2017, because the inspector indicated to DLSE there were no subcontractors on the job, when, in fact, there were.

Micon's argument, however, relies on an assumption not firmly grounded in evidence. According to Brown's notes of her call with the inspector, the inspector stated that Micon began work in January 2017 and did not utilize subcontractors. Micon interprets that statement to mean Micon never used subcontractors on the Project. From there, Micon argues the inspector's logs are an unreliable source for establishing Micon's start date. However, Brown participated in the subject conversation with the inspector, and is in the best position to explain the reference. Brown testified that the statement by the inspector could also be interpreted to mean that Micon had not used subcontractors in January, not anytime during the Project.

Moreover, the inspection logs have other indicia of reliability that bolster its accuracy as to Micon's start date. The inspector completed a log entry for every day of work on the Project. Because each log contains very specific and detailed information, one can reasonably assume the inspector carefully completed these logs on a daily basis and they are thus reliable. Further, the inspection logs are corroborated by other evidence in the record. For instance, Racette and Brown both testified that F M

United's CPRs showed its first day on the job as February 1, 2017. Racette testified that F M United does demolition work. The inspection log for February 1, 2017, comports with this testimony. The inspection log for this date states that one operator was on the jobsite utilizing a bobcat to demolish concrete.

Micon argues that a subcontractor was on the job on January 30, 2017, but argument is no substitute for evidence. Micon had the burden to prove the Assessment was incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Micon had the option to present evidence to show that either F M United or Top Turf were, in fact, on site on January 30, 2017, and not its own workers. Racette did not affirmatively testify that F M United was indeed on the jobsite in January 2017, nor did she unequivocally deny that Micon's employees were on jobsite. During DLSE's investigation, Micon evidently sent DLSE a copy of F M United's CPRs, but those records did not confirm the asserted January 30, 2017 start date. Further, no CPRs from F M United or Top Turf were submitted into the record, nor did Micon call any witnesses from F M United or Top Turf to confirm that they were on site on January 30, 2017. Moreover, according to the inspection log, the workers on site on January 30, 2017, were installing fencing around the job site, work that logically could fall to Micon as prime contractor. Two days later, on February 1, 2017, F M United's demolition work began. It is unlikely that Top Turf, which installs rubber resurfacing on playgrounds would have been on site on January 30, 2017, before the demolition work. Lastly, the DAS 140 forms called for Micon to indicate the date of the expected or actual start date of the Project. On forms that Micon submitted after January 30, Micon answered that the expected or actual start date was January 30. That answer, being given after January 30, allows the inference that the Project start date was not merely "expected" to be January 30, 2017—but that it *was* the actual start date.

Based on the foregoing, DLSE carried its initial burden of presenting evidence that provided prima facie support for the Assessment as to the fact that January 30, 2017, was the first day on the job. (§ 230, subd. (a); Cal. Code Regs., tit. 8, § 17250, subd. (a).) In turn, Micon had the burden to prove the Assessment was incorrect in

that regard, which Micon failed to do. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) It was required to send contract award information to Laborers JAC before January 30, 2017, but did not send that information until February 24, 2017.

With respect to the Cement Mason classification, Micon also failed to send contract award information to all applicable apprenticeship committees before the April 26, 2017 start date. Racette conceded that Micon did not send its contract award information to the Cement Mason JAC.

Based on the entirety of the record, Micon did not rebut DLSE's evidence or otherwise carry its burden to prove the amended Assessment is incorrect with regard to sending contract award information in a timely fashion. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, it is concluded that Micon violated section 1777.5, subdivision (e), and the applicable regulation, section 230, as to the notice requirement.

The Labor Commissioner Did Not Abuse Her Discretion in Assessing Penalties under Section 1777.7 for 75 violations.

If a contractor knowingly violates section 1777.5, a civil penalty is imposed under section 1777.7 in an amount not exceeding $100.00 for each full calendar day of noncompliance. (§ 1777.7, subd. (a)(1).) [12] The phrase "knowingly violated Section 1777.5" is defined by California Code of Regulations, title 8, 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, ...

[12] A contractor who knowingly commits a second or subsequent violation within a three-year period faces a penalty up to $300.00 for each full calendar day of noncompliance. (§1777.7, subd. (a)(1).)

In setting the penalty, the Labor Commissioner shall consider all of the following circumstances:

(1) Whether the violation was intentional.

(2) Whether the party has committed other violations of section 1777.5.

(3) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.

(4) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.

(5) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

(§ 1777.7, subd. (b).) The Labor Commissioner's determination of the amount of the penalty, however, is reviewable only for an abuse of discretion. (§ 1777.7, subd. (d).) A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment, namely, the affected contractor has the burden of proving that the basis for assessment is incorrect. (§ 17250, subd. (b).)

In this case, the Assessment set the section 1777.7 penalty at the rate of $120.00 per violation. DLSE provided prima facie evidence that Micon knowingly did not provide notice of the contract award to all apprenticeship committees for each classification. Micon correctly and timely notified the Laborers Landscape JAC on January 27, 2017, before work started on the Project, demonstrating that it was aware of the requirement to provide notice of its public works contract. For the Cement Mason classification, Micon failed to timely submit the contract award information to the Cement Masons JAC.

DLSE based its penalties under section 1777.7 on Micon's failure to submit contract award information as required under section 1777.5, subdivision (e), and the regulation at section 230, subdivision (a). The regulation states:

> Failure to provide contract award information, which is known by the awarded contractor, shall be deemed to be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed by the awarding body for the purpose of determining the accrual of penalties

under Labor Code Section 1777.7.

(Cal. Code. Regs., tit. 8, § 230, subd. (a).) Thus, per the regulation, a failure to provide contract award information is a violation that runs throughout the duration of a contract. There are 276 calendar days from and after January 30, 2017, when the Project began to November 2, 2017, when the City filed its Notice of Completion. However, DLSE did not assess a penalty based on 276 violations—one violation per each full calendar day that Micon failed to send contract award information to all the applicable committees. Rather, DLSE only counted from the first day of work on the job, April 26, 2017, to the last day on which Cement Mason journeyworkers worked on the Project, June 16, 2017—a period of 51 calendar days for Micon's failure to submit contract award information to all the applicable apprenticeship committees for the Cement Mason classification. For failure to timely submit contract award information to both of the Laborers JAC, DLSE assessed penalties for 25 days of violations, representing a period beginning January 30, 2017, and ending February 24, 2017, when Micon sent the DAS 140 to the second Laborer committee, the Laborers JAC. Brown combined the 25 and 51 violations for a total of 76 violations.

However, DLSE presented prima facie evidence of only 75 violations for failure to submit contract award information to all applicable Laborer and Cement Mason apprenticeship committees. The error lies in DLSE's computation method for section 1777.7 penalties based on failure to timely send contract award information to the applicable Laborer apprenticeship committees. Brown calculated 25 calendar days from the Laborers' first day of work on the Project, January 30, 2017, until compliance was reached, February 24, 2017, when Micon submitted contract award information to the Laborers JAC. However, not including the first day of work on the job, there are only 24 calendar days from January 30, 2017, to and including February 24, 2017. Accordingly, after combining 24 and 51 violations, DLSE has presented evidence providing prima facie support for a total number of 75 violations.

Micon argued the failure to send contract award information was an unintentional mistake and an oversight. Notwithstanding, the evidence meets the

"knowing" definition under the regulation, section 231, subdivision (h). In the Penalty Review, DLSE listed six prior assessments against Micon in fixing the penalty rate at $120.00 per violation. Two of these prior assessments were issued in 2015 and included section 1777.7 penalties. Given Micon's history of section 1777.5 violations, the irrebuttable presumption is that Micon knew or should have known of the requirements of section 1777.5. Even if the violations were unintentional mistakes, Micon should have known of its obligation to send contract award information to all apprenticeship committee for both classifications, but failed to fulfill its obligation. Micon's reference to the DLSE's mistakes is of no consequence as the errors pointed out by Micon do not excuse Micon's non-compliance, as found in the Assessment.

According to the Penalty Review, DLSE also took into the consideration the lost training opportunities for apprentices and harm to the apprenticeship programs. For the Laborer classification, 65 apprenticeship hours were lost. For the Cement Mason classification there are two apprenticeship committees in the geographic area of the Project, but Micon sent DAS 140 forms to only one apprenticeship committee. According to the CPRs, the total report hours worked by Cement Masons was 52 hours. Applying the 1:5 ratio, the required number of apprenticeship hours was 10.4 hours. This, too, represents a lost training opportunity.

Based on the evidence as a whole, Micon did not establish that the Labor Commissioner abused her discretion in assessing the penalties at $120.00 per violation. Accordingly, as amended by the Assessment and hereby modified, Micon is liable for section 1777.7 penalties at $120.00 per violation for 75 days for a total amount of $9,000.00.

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

FINDINGS AND ORDER

1. The Assessment, as amended, correctly found that Micon Construction, Inc. failed to make the required training fund contributions to an approved

apprenticeship program or the California Apprenticeship Council in the amount of $5.52.

2. Micon Construction, Inc. did not timely submit contact award information (using the DAS 140 form or its equivalent) to all of the applicable apprenticeship committees.
3. Micon Construction, Inc. is liable for penalties under Labor Code section 1777.7 at the rate of $120.00 per violation for 75 violations, for an aggregate sum of $9,000.00.
4. The amounts found due in the Assessment, as affirmed and modified by this Decision, are as follows:

Basis of the Assessment	**Amount**
Training Fund Contributions Due:	$5.52
Penalties under section 1777.7:	$9,000.00
TOTAL:	**$9,005.52**

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

Dated: __7/17/20_____ /s/ Katrina S. Hagen

Katrina S. Hagen
Director, Department of Industrial Relations