

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

HGM & Company, Inc.

Case No. 17-0141-PWH
Case No. 17-0142-PWH
Case No. 17-0143-PWH
Case No. 17-0152-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor HGM & Company, Inc. (HGM) submitted a request for review of four Civil Wage and Penalty Assessments (CWPA's or Assessments) served by the Division of Labor Standards Enforcement (DLSE) on April 12, 2017, with respect to work performed by HGM on the Whittier City School District Fire Alarm Upgrades Phase 1 project (Whittier 1 Project), the Los Nietos Middle School Special Education Phase 2 Restroom Renovations Building E project (Los Nietos Project), the Rosemead School District Various Site Miscellaneous Repairs project (Rosemead Project), and the Whittier City School District Fire Alarm Upgrade at Dexter Middle School and Jackson Elementary School project (Whittier 2 Project) (collectively, Projects) in Los Angeles County.

Collectively, the Assessments determined that \$124,335.80 was due in unpaid prevailing wages, and \$205,310.00 was due in statutory penalties. By agreement of the parties, the four Assessments were consolidated for resolution in one proceeding.

A Hearing on the Merits occurred in Los Angeles, California over two dates, December 6, 2017, and May 23, 2018, before Hearing Officer Steven A. McGinty. Michael K. Wolder appeared as counsel for HGM, and Sotivear Sim appeared as counsel for DLSE. Management Services Technician Patricia Rangel and HGM workers Daniel Sierra Rojas and Jose Antonio Sierra Lopez testified in support of the Assessments. Rima Mourey, co-owner of HGM, and HGM President and co-owner John Mourey testified for HGM. The matter was submitted for decision on May 23, 2018.

On the first day of hearing, the parties stipulated to the following:

- DLSE's Assessments used the correct classification of Labor Group 1 based on the work performed by the workers on the Project.
- DLSE's Assessments used the correct prevailing wage rate for Labor Group 1.
- HGM paid training fund contributions directly to the workers rather than the California Apprenticeship Council (CAC) or the applicable apprenticeship committees.
- HGM did not pay the predetermined increase for Labor Group 1 on the Whittier restroom phase II renovation (Case No. 17-0152-PWH).
- HGM did not keep accurate certified payroll records (CPRs) for the hours worked on the four Projects.
- HGM did not send out contract award information (the DAS form 140) to all applicable committees in the geographic area of the Projects.
- HGM did not request dispatch of apprentices (using the DAS form 142) for any of the four Projects
- HGM did not employ apprentices on the four Projects.

The issues for decision are as follows:

- Did the Assessments use the correct number of hours worked for each worker?
- Did the Assessments correctly find that HGM failed to pay the prevailing wage for all of the hours worked on the Projects by its workers?
- Did the Labor Commissioner abuse her discretion in assessing penalties under Labor Code section 1775?¹
- Is HGM liable under section 1742.1 for liquidated damages in the amount of the wages found due and owing?
- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1777.7?

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

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 Assessments for the most part, but that HGM thereafter carried its burden of proving the basis for the Assessments 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 Assessments.

FACTS

The public entity Awarding Bodies advertised the Projects for bid over eight months in 2015: on April 6, 2015 for the Los Nietos Project (DLSE Exhibit No. 10); on April 23, 2015 for the Rosemead Project (DLSE Exhibit No. 11); on July 28, 2015 for the Whittier 1 Project (DLSE Exhibit No. 12); and on November 12, 2015 for the Whittier 2 Project (DLSE Exhibit No. 13). Each bid advertisement specified that the successful bidder, and all subcontractors under it, were to comply with Labor Code provisions requiring the payment of not less than the prevailing wage to all workers employed by them in the execution of the contract. (DLSE Exhibit No. 10, p. 72; DLSE Exhibit No. 11, p. 75; DLSE Exhibit No. 12, pp. 78-79; DLSE Exhibit No. 13, p. 83.) The bid advertisements for the Los Nietos and Rosemead Projects also specified the obligation to employ apprentices on the Project. (DLSE Exhibit No. 10, p. 72; DLSE Exhibit No. 11, p. 75.)

HGM entered into a contract for each of the four Projects that included a specific provision labeled, "PREVAILING WAGES," that required it to pay prevailing wages in accordance with the Labor Code. (DLSE Exhibit No. 22, Article 8, pp. 98-99; DLSE Exhibit No. 23, Article 8, p. 102; DLSE Exhibit No. 24, Article 8, p. 106; DLSE Exhibit No. 25, Article 8, p. 111.) The contracts HGM signed for the Whittier 1 and the Whittier 2 Projects included a specific provision incorporating the entire set of prevailing wage laws, found at Chapter 1 of Part 7 of Division 2 of the Labor Code (section 1720 et

seq.). (DLSE Exhibit No. 24, p. 106; DSLE Exhibit No. 25, p. 111.) The prevailing wage determination for the craft of Laborer indicates that it is an apprenticeable craft. (DLSE Exhibit No. 26, p. 114.)

HGM had workers on the Projects from June 22, 2015, to August 5, 2016, as follows:

- (1) Los Nietos Project: June 22, 2015, to September 9, 2015;
- (2) Rosemead Project: August 24, 2015, to March 12, 2016;
- (3) Whittier 1 Project: November 23, 2015, to April 30, 2016; and,
- (4) Whittier 2 Project: January 25, 2016, to August 5, 2016.

(DLSE Exhibit No. 9, pp. 54-55.)

HGM stipulated that it did not keep accurate CPRs for the hours its employees worked on the Projects. Rima Mourey testified that she created the CPRs for the Projects after-the-fact, only after receiving notice from DLSE of the investigation and request for CPRs.

DLSE opened an investigation of HGM's compliance with prevailing wage laws based on a complaint received on or about August 25, 2016, with respect to the Whittier 2 Project. (DLSE Exhibit No. 57, p. 1269.) The DLSE investigation expanded to all four Projects by January 2017 based on additional complaints.

Rangel conducted the investigation. She testified that she contacted the Awarding Bodies to obtain various documents regarding the Projects, and obtained daily inspection reports (Inspection Reports) among other documents. (DLSE Exhibit Nos. 27-32.) She requested that HGM provide CPRs, wage statements, pay stubs, cancelled checks, and weekly timesheets for the Projects, and obtained some of that documentation. (DLSE Exhibit No. 37, p. 905; DLSE Exhibit No. 38, p. 931; DLSE Exhibit No. 39, p. 958; DLSE Exhibit No. 40, p. 1010; DLSE Exhibit No. 57, p. 1270.) Rangel also interviewed two workers, Jose Antonio Sierra Lopez ("Lopez"), and Daniel Sierra Rojas ("Rojas"), both of whom testified at the Hearing.

Rangel testified that she prepared declarations for Lopez and Rojas to sign while interviewing them. She interviewed them regarding which of the Projects they worked on, what work they performed, the tools and equipment used, what hours they worked, what rate of pay they received, whether timecards were used and how hours of work were tracked, and how (the method) they were paid, including whether earnings statements and check stubs were issued to them. (DLSE Exhibit Nos. 48-52.) She also asked them with whom they had worked on the Projects. In addition, each worker listed on a calendar provided by DLSE the hours that he had worked on the Projects each day. Rangel testified that Lopez referred to notes and photographs when completing the calendar. Rojas completed the calendar based on his recollection. According to Rangel, the workers informed her they had never been given a pay stub, they did not know that the Projects required payment of prevailing wages, and Lopez was paid by the day. They both indicated that they had worked on Saturdays and holidays.

After completing the interviews, Rangel performed an audit of HGM's payroll for the workers on the Projects. She testified that she relied on the information provided by Lopez and Rojas to determine the number of hours worked on a given day. For the remaining workers, she relied on the number of hours from the CPRs (created by HGM after the fact) because she lacked other reliable documentation. Rangel took the number of hours, pay rates, and check numbers from the CPRs and matched those to the checks, check stubs, and earning statements provided by HGM. In doing so, she found that two workers, Lopez and Omar Aguilar, appeared on CPRs for different Projects on the same day. The CPRs for the different Projects used the same check numbers.²

² The checks, paystubs, and earnings statements did not indicate which Project the worker worked on.

To account for this anomaly, Rangel testified that she took two different approaches. For Lopez, she used the hours listed on his calendar. When the CPRs showed Lopez worked more hours than listed on his calendar for a particular day, Rangel used only the hours that Lopez had listed on the calendar. Accordingly, when the CPRs for three different Projects indicated that Lopez worked seven hours on each of three Projects on the same day for a total of 21 hours, but his calendar listed just seven hours of work, Rangel assigned Lopez seven hours. She arbitrarily divided the seven hours Lopez listed on the calendar between the three Projects that the CPRs indicated he worked on. She testified that the Projects overlapped in terms of the dates HGM had employees working, and that Lopez told her that a couple of times they were working on one Project and went to a different Project when called; however, Lopez never recalled working on three Projects in a single day. Nonetheless, Rangel divided Lopez's hours between three Projects when the CPRs indicated he worked on three Projects on the same day, as there were no other documents indicating exactly where the workers worked other than the CPRs.

For Aguilar, however, Rangel used all of the hours listed on the CPRs. Thus, when the CPRs for three different Projects indicated that Aguilar worked seven hours on each of the three Projects on the same day, Rangel assigned Aguilar 21 hours for that day.³ On cross-examination, Rangel testified that she knew the CPRs were incorrect, because she did not think that anyone could work 21 hours in one day. However, even though she knew that assigning 21 hours to Aguilar for a single day was incorrect, she did not know what the correct number of hours was, so in order not to assign a number less than the actual hours worked, she assigned the full 21 hours. Rangel also testified that another instance for which she was aware the CPRs assigned too many hours to

³ Rangel designated the 21 hours as follows: the first seven hours as straight time; the second seven hours as one hour of straight time, four hours of overtime, and two hours of double time; and, the third seven hours as double time. Interestingly, neither the Audit Summary Sheet for each Assessment nor the Individual Audit Sheets show the imposition of section 1813 penalties based on Aguilar's hours. (See DLSE Exhibit Nos. 1-8.)

Aguilar for a single day was the day following the 21-hour day. For that following day, a total of 24 hours was listed on the CPRs for Aguilar, appearing to show that he worked eight hours on each of three separate Projects for that day.

Rangel did not use the Inspection Reports to calculate the workers' hours. She testified that the Inspection Reports lacked detailed information on the Project, such as the names of the workers who were present or what they were doing. She also had doubts about the accuracy of the Inspection Reports. The inspector on the Rosemead Project indicated on his Reports that HGM had apprentices on the site, when HGM admitted they did not (DLSE Exhibit No. 28, p. 181), and he used the same picture for different dates to document work being done. (DLSE Exhibit 28, pp. 220 and 226.) Rangel also found that sometimes the Inspection Reports showed HGM working on a Project on a date when HGM did not report any workers on the CPRs for that date. For example, Rangel testified that the Inspection Report for the Los Nietos Project for Saturday, August 1, 2015, indicated that HGM had three Laborers working on the Project. (DLSE Exhibit No. 27, p. 158.) The CPRs for that day indicated no one worked. (DLSE Exhibit No. 33, p. 732.) (However, the fact that the Inspection Report indicated HGM had Laborers on site on a Saturday indicated to Rangel that Lopez and Rojas were credible when they told her they worked on Saturdays.) Finally, the times indicated on the Inspection Reports appeared to be the time during which the inspectors were onsite, not the hours the workers worked. Rangel testified that the inspector for the Rosemead Project told her the "TIME IN" and "TIME OUT" on the reports indicated when he was there, not when the workers were there.

Rangel further testified that the audits she prepared (DLSE Exhibit Nos. 5-8.) revealed that Lopez and Rojas worked more hours than HGM reported. In addition, HGM underpaid all of the workers and failed to pay overtime.⁴ To calculate the hourly

⁴ Rangel issued section 1813 penalties of \$25.00 per day for overtime violations related to Rojas and Lopez. (See DLSE Exhibit Nos. 1-8.)

payments made by HGM to Aguilar when the same check number appeared on more than one CPR, Rangel divided the amount of check by the total number of hours indicated by the CPRs, and split the resulting amount between the Projects for purposes of her audit.

The two workers who Rangel interviewed, Rojas and Lopez, testified at the Hearing that they gave Rangel signed declarations documenting the details of their work for HGM on the Projects. They also testified to the accuracy of the work hours they recorded in their own handwriting on the calendars given to them by Rangel to fill out.

Rojas testified that he worked for HGM on the Los Nietos Project from June 22 or 24 to August 11, 2015. HGM project superintendent John Shabo hired him; Shabo also fired him. He was paid by the week, worked approximately ten hours a day, six days a week including Saturdays and holidays. The workers started at 7:00 a.m. and finished around 6:00 p.m. No overtime was paid. Rojas testified he did not sign or punch anything to check in or check out. John Mourey paid him by check on Saturdays. When paid, he received only a check, with no check stub. Rojas prepared a calendar of days and hours he worked for HGM on the Los Nietos Project for Rangel, based on his memory. (DLSE Exhibit No. 52.)

Lopez, a cousin of Rojas, testified that he worked for HGM on all four Projects. Rojas referred him to Shabo in 2012 when the company used the name West Coast Construction. Lopez testified that Shabo supervised him on the Projects. Shabo was present every day, including on holidays, and Shabo had keys to the Project work sites. There were no sign-in or time sheets. John Mourey gave him a paycheck weekly at the job site. It was only a check; Lopez never saw a check stub. He was paid by the day not by the hour. On the Los Nietos Project, the workers' hours were 7:00 a.m. to 6:00 or 6:30 p.m., Monday through Friday, and 7:00 to 5:00 or 5:30 on Saturdays. On the Rosemead Project, they worked 3:00 p.m. to 11:00 p.m. at schools where students

were present during the day, and other times when the students were not present or when they worked at the administrative offices, 7:00 a.m. to 6:00 or 6:30 p.m. Lopez also testified that on some days, he worked on more than one Project. For example, he would be at one school painting and then was told that they had to do something else at another school. He prepared a calendar for Rangel showing the days and hours he worked for HGM on the four Projects, using notes and photographs. He testified that he created notes sometime after being let go by HGM in May 2016, when he went to see a lawyer. DLSE introduced the calendars, notes, and photographs into evidence. (DLSE Exhibit Nos. 48-51.) Lopez further testified to the accuracy of the days and hours that had written on the calendars.

Rima Mourey, co-owner of HGM, testified at the Hearing that she prepared the CPRs for the Projects. She created the CPRs after HGM had completed work on the Projects, when DLSE requested copies. Mourey testified that she did not keep contemporaneous records because the school districts were relaxed about requesting them and she was not aware that the records had to be completed weekly. To create the CPRs, Mourey reviewed earnings statements prepared for HGM by ADP payroll service (DLSE Exhibit No. 40), and spoke on the telephone with John Shabo to determine which workers worked at which Projects on which days. The ADP earnings statements summarized the workers' hours of work per week, their rate of pay, and various deductions. However, the statements did not indicate on which Project, on which date, and for how many hours the workers worked. Mourey relied upon Shabo's memory for that information.

Mourey also testified she made mistakes in creating the CPRs. She duplicated hours of work on the CPRs for Projects that overlapped in dates that HGM had employees working. She put the same hours and same information on the CPRs of different Projects that overlapped. After DLSE issued the Assessments, Mourey obtained the Inspection Reports from DLSE before the Hearing. She compared the

hours listed in the Inspection Reports to the hours of work on the ADP earnings statements. The hours were consistent for the most part, but there were some inconsistencies. Some of the Inspection Reports listed fewer hours than were shown on the ADP statement for the week in question. Mourey testified that the explanation for this inconsistency was that HGM understood that the workers had to be paid four hours minimum a day. Using the Inspection Reports and the accurate wage rates, Mourey prepared documents showing how much HGM owed the workers, which was far less than what DLSE had assessed. (HGM Exhibits A-D.)

On cross-examination, Mourey confirmed that HGM performed only public works construction. She was aware of a previous Assessment against West Coast Construction, the predecessor to HGM. Mourey testified that HGM still employed Shabo. Her husband John told her the hourly rate paid to the workers, and would tell her the hours to call in to ADP. She testified that Shabo probably gave her husband the workers' hours.

John Mourey, the president of HGM, testified that he was responsible for bidding on public works projects. For these four Projects, he used a rate of pay from an old project. On cross-examination, John Mourey confirmed that he relied on Shabo to report the workers' hours to him. Mr. Mourey further testified that Shabo wrote the hours in a small notebook. By Wednesday or Friday, Shabo would report to Mourey the hours for the pay week.

Assessment of Statutory Penalties.

Rangel testified that the penalties were assessed by the Senior Deputy Labor Commissioner, and that HGM had a history of two previous assessments for wage violations. (DLSE Exhibit Nos. 62, p. 1286, and 63, p. 1296.) One of the two previous assessments also involved the underpayment of Laborers and the failure to pay training fund contributions. (DLSE Exhibit No. 62, p. 1286.) With respect to penalties for

apprentice violations, Rangel testified that there was a loss of a minimum of 338 hours of apprentice training.

DISCUSSION

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

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

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

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1813 provides additional penalties for failure to pay the correct overtime rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if the unpaid wages are not paid within 60 days following service of a civil wage and penalty assessment under section 1741.

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

DLSE Properly Relied On the Testimony of the Workers for Its Audit that Resulted in the Assessment.

The resolution of the wage portion of this case is tied directly to the question of the accuracy and reliability of the documentary and testimonial evidence. DLSE based its Assessments that HGM owed wages on the reporting and testimony of two workers, Lopez and Rojas, about the days and number of hours they worked. At hearing, HGM attempted to rely on Project Inspection Reports prepared by third parties to determine the days and hours worked by its employees, and therefore wages owed, because it had failed to prepare and keep its own contemporaneous records.

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

Every employer who has control over wages, hours, or working conditions, must keep accurate information with respect to each employee

including...name, home address, occupation, and social security number....[t]ime records showing when the employee begins and ends each work period....[t]otal wages paid each payroll period....[and] [t]otal hours worked during the payroll period and applicable rates of pay....

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

When an employer fails to keep accurate and contemporaneous time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount owed by a just and reasonable inference from the evidence as a whole. In such cases, the employer has the burden to come forward, with evidence of the precise amount of work performed or with evidence to rebut the reasonable estimate. (See, e.g., *Furry v. E. Bay Publ'g, LLC* (2019) 30 Cal. App.5th 1072, 1079 [“[A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate”], citing

Hernandez v. Mendoza (1988) 199 Cal.App.3d 721, 726-727, and *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687-88 [66 S.Ct.1187].) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

In this case, for the following reasons, DLSE presented prima facie support for the Assessment. DLSE relied on the declarations of two workers, Lopez and Rojas, as to the time they worked on the Projects. The two also testified credibly at the Hearing on the Merits. For its part, HGM failed to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference drawn from the employees' and DLSE's evidence.

Close examination of the documentary evidence relied upon by HGM demonstrates why it is unreliable on the issue of hours worked. The documentary evidence consisted of CPRs (created by HGM after-the-fact), employee checks, employee earnings statements, and Inspection Reports. HGM stipulated it did not keep accurate CPRs for the hours worked by its employees on the four Projects. In reality, it did not keep contemporaneous CPRs at all. Only when DLSE requested the CPRs did HGM create them from earnings statements and memory. The earning statements indicated the total number of hours allegedly worked during a week. To breakdown the weekly total into number of hours worked each particular day of each particular week for the CPRs, HGM claimed it relied on the memory of John Shabo.

Likewise, Shabo was the source for the creation of the earnings statements and checks initially. ADP created the earnings statements from information about the hours of work for each employee relayed by Shabo to John Mourey, from John Mourey to Rima Mourey, and from Rima Mourey to ADP. According to John Mourey's testimony, Shabo had a small notebook in which he kept the hours. Shabo called the hours into Mourey weekly.

It is noteworthy that HGM did not call Shabo as a witness. Shabo was the source for the hours of work for each employee, apparently kept a notebook with those hours, and HGM still employed him at the time of the Hearing on the Merits. Presumably, Shabo could have contradicted the testimony of Lopez and Rojas as to the hours they had worked, if he had evidence that their testimony was not accurate.

Instead of calling Shabo, at the Hearing HGM relied on Inspection Reports that it obtained from DLSE after DLSE issued the Assessments. The Inspection Reports, according to HGM, showed that the employees worked far fewer hours than DLSE determined, and also, fewer hours than HGM itself reported employees worked on various days.⁵

While DLSE stipulated to the admission of the Inspection Reports into evidence, it challenged their accuracy for determining payment of wages. In essence, DLSE argued that the information contained in the Inspection Reports alone was insufficient to support a finding on wage payment.

The Inspection Records are hearsay that cannot support a finding about the number of hours worked and consequent amount of wages owed. HGM did not establish the foundation for admission of the reports as business records. Evidence Code section 1271 creates the business records exemption to the hearsay rule, but to qualify the writing at issue must meet certain specified conditions, including that the custodian or other qualified witness testifies to its identity and mode of its preparation and the sources of information and time of preparation were such as to indicate its trustworthiness. The reports were allegedly prepared by inspectors named Clint Ticknor (Los Nietos Project), Babak Alavi (Rosemead Project), Bruce Williams and Amir Syyad (Whittier I Project), and Tony Payne (Whittier 2 Project). (DLSE Exhibit Nos. 27-32.)

⁵ Rima Mourey's testimony -- that the explanation for why some of the Inspection Reports listed fewer hours than were shown on the ADP statement for the week was that HGM understood that the workers had to be paid four hours minimum a day -- was not credible.

However, HGM did not call any one of the five as a witness to qualify the reports. Thus, the reports are not exempt from the hearsay rule.

The applicable hearing regulations at California Code of Regulations, title 8 section 17244, allow the introduction of hearsay evidence. However, under subdivision (d) of regulation section 17244, hearsay evidence is insufficient in itself to support a finding unless it would be admissible over objection in a civil action or no party raises an objection to such use. DLSE objected to use of the reports to determine the amount of wages owed to employees. Without evidence to establish the business records exception to the hearsay rule, and in light of DLSE's explanation as to why the records are unreliable, the records are insufficient to support a finding about the amount of wages owed.

According to DLSE, the Inspection Reports are unreliable for several reasons. First and foremost, the reports do not list the names of employees working on the Projects. Second, the hours listed on the reports appear to be associated with the inspectors' time and not necessarily the workers. For example, the Inspection Reports prepared by Ticknor for the Los Nietos Project state, "Project Inspector, Clint Ticknor, Hours: 4," or "Clint Ticknor 4 hours." (DLSE Exhibit 27, pp. 126-179.) The Inspection Reports prepared by Payne for the Whittier 2 Project are labeled at the top "TYR I.O.R. Services," list "IOR Name Tony Payne," and list "IOR Hrs: [no.]" (DLSE Exhibit No. 32, pp. 529-718.) Third, some of the reports include obviously wrong information. For example, the inspector on the Rosemead Project said HGM had apprentices on the Project. HGM has admitted not employing any apprentices.

The Evidence Code encourages fact finders to view with distrust the type of second-hand evidence offered by HGM as to the hours worked. Evidence Code section 412 states, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." John Mourey testified that Shabo kept the

employees' hours of work in a small notebook, and that Shabo called Mourey with the hours on a weekly basis. Also, Rima Mourey testified that she relied upon Shabo's memory of the hours worked in preparing the CPRs. Yet, HGM failed to produce original records, namely Shabo's notebook, and also failed to call Shabo as a witness.

The Evidence Code likewise provides that the fact finder may draw negative inferences from failure of a party to explain or deny evidence. Evidence Code section 413 states, "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by his testimony such evidence or facts in the case against him...." DLSE alleged that HGM had underpaid workers by not reporting all hours worked and by not paying the correct wages. In doing so, DLSE relied on the testimony of Lopez and Rojas that they had worked six days a week, often for more than eight hours, had worked overtime and holidays, were paid by the day or week, were paid by check on Saturdays by John Mourey, and were not given earnings statements. HGM did not specifically deny any of those assertions. The inference to draw by the failure to refute specifically those assertions is that Lopez and Rojas were truthful.

HGM had the burden of proving that the basis for the Assessments was incorrect (§ 1742, subd. (b)). It failed to do so with respect to Lopez and Rojas in that their testimony established proof of the hours they worked on the Projects. HGM did provide DLSE with check stubs and earning statements that established the hours worked by the other workers on the Projects and the payments made to them, and Rangel used those hours and wages to credit HGM for what it had paid.

Rangel erred, however, when she used the CPRs to assert that Aguilar had worked more hours than those for which he was paid. The genesis of the error was the two different approaches she took to take into account the anomaly of the CPRs for different Projects showing that Lopez and Aguilar had worked on multiple Projects on

the same day. Even though Rangel knew the CPRs could not be accurate,⁶ and knew that a worker almost certainly did not work 21 or more hours in a single day, she credited all hours from the CPRs to Aguilar. Yet for Lopez, she only used the hours worked as stated on his calendar, which were less than the hours shown on days the CPRs indicated he worked on multiple Projects on the same day. Rangel also erred in arbitrarily dividing the hours of Aguilar and Lopez amongst the various Projects based on the same inaccurate CPRs. Her testimony was that Lopez recalled that a couple of times they worked on two different Projects on the same day, but he never worked on three different Projects. Yet, she divided his hours amongst three Projects during two weeks anyway, and divided his hours amongst overlapping Projects during a total 17 different weeks. (DLSE Exhibit No. 9, p. 65, Table labeled as Exhibit F.) That is more than a couple of times. Similarly, though Lopez told her that work on two different Projects on one day happened only a couple of times, Rangel likewise had Aguilar working multiple Projects on a single day during a total 16 different weeks. (DLSE Exhibit No. 9, p. 65, Table labeled as Exhibit E.) Further, when Rangel divided the hours amongst multiple Projects, she added penalties for each day on each Project, and thus doubled and tripled the section 1775 penalties. The evidence does not support Rangel's calculations.

To conform to the evidence, a reduction in the number of hours credited to Aguilar is required. For every week the CPRs indicated an overlap, the hours on the second and third Projects must be subtracted where there is overlap, the wages allegedly owed associated with those "excess" hours must be subtracted, and the "split" check (divided by Rangel and allocated among the Projects) must be credited entirely to the first Project in time (or the oldest Project first), with the resulting amount of allegedly unpaid prevailing wages reduced by the amount previously paid as evidenced

⁶ Indeed, DLSE stipulated at the Hearing on the Merits that HGM did not keep accurate CPRs for the hours worked on the four Projects.

by the check. The related training fund calculation must be reduced in direct relation to the number of hours reduced. Finally, because there are fewer violations, reduction in the section 1775 penalty is required as well. The necessary reductions in the determinations of unpaid wages, training fund contributions, and section 1775 penalties as found in the Assessments, solely for worker Aguilar are as follows:

Los Nietos, Case No. 17-0142 (DLSE case no. 40-53462-603):

Weeks ending 8/30/15 and 9/06/15, additional credit for wages paid as a result of restoring full amount of split checks: \$879.74.

(See individual audit sheets, DLSE Exhibit Nos. 5 and 6.)

Rosemead, Case No. 17-0143 (DLSE case no. 40-53690-603):

Weeks ending 8/30/15 and 9/06/15, reduce hours worked by 46 hours, reduce violations by 8 at \$200.00, and reduce training funds associated with those 46 hours.

Reduction in wages owed: \$2,618.06.

Reduction in training fund contributions owed: 0.64 (training fund contribution rate) x 46 = \$29.44.

Reduction in section 1775 penalties: \$1,600.00.

Week ending 3/06/16, additional credit for wages paid: \$765.45.

(See individual audit sheets, DLSE Exhibit Nos. 6 and 7.)

Whittier 1, Case No. 17-0141 (DLSE case no. 40-53658-603)

Week ending 3/06/16, reduce hours worked by 15 hours, and reduce violations by 2 at \$200.00, for two day overlap.

Reduction in wages owed: \$1,460.38.

Reduction in training fund contributions owed: 0.64 x 15 = \$9.60.

Reduction in section 1775 penalties: \$400.00.

Additional credit for wage paid as a result of restoring full amount of split checks: \$6,431.85.

(See individual audit sheets, DLSE Exhibit Nos. 7 and 8.)

Whittier 2, Case No. 17-0152 (DLSE case no. 40-52022-603)

Week ending 03/06/16, reduce hours worked by 24 hours, and reduce violations by 4 at \$200.00 each, for four day overlap.

Reduction in wages owed: \$1,698.40.

Reduction in training fund contributions owed: $0.64 \times 24 = \$15.36$.

Reduction in section 1775 penalties: \$800.00.

The remaining 13 weeks during the period 1/31/16 through 05/01/16, reduce the hours worked by 293 hours and reduce the violations by 51, at \$200.00 each.

Reduction in wages owed: \$17,553.78.

Reduction in training fund contributions owed: $0.64 \times 293 = 187.52$.

Reduction in section 1775 penalties: \$10,200.00.

(See individual audit sheets, DLSE Exhibit No. 8.)

Eliminating the arbitrary overlap on the audit sheets for Lopez to conform to the evidence likewise results in fewer days on which section 1775 penalties should be assessed.⁷ The reductions caused by the elimination of section 1775 penalties for Lopez, are as follows:

Rosemead, Case No. 17-0143 (DLSE case no. 40-53690-603)

⁷ Because Rangel used only the hours worked reported by Lopez and not the hours listed on the CPRs, the amount of wages for Lopez owed by HGM remains the same, and HGM got full credit for what it actually paid him.

For the week of 9/6/15, 5 violations at \$200.00 = \$1,000.00 reduction in section 1775 penalties.

(See individual audit sheets, DLSE Exhibit No. 6.)

Whittier 1, Case No. 17-0141 (DLSE case no. 40-53658-603)

For the 4 weeks of 1/17, 1/24, 3/6, 3/13/16, 24 violations at \$200.00 = \$4,800.00 reduction in section 1775 penalties.

(See individual audit sheets, DLSE Exhibit No. 7.)

Whittier 2, Case No. 17-0152 (DLSE case no. 40-52022-603)

For the 14 weeks 1/31 – 5/1/16, 84 violations at \$200.00 = \$16,800.00 reduction in section 1775 penalties.

(See individual audit sheets, DLSE Exhibit No. 8.)

With the foregoing deductions and credits applied, the amounts otherwise assessed by DLSE are supported by the evidence and justified. Accordingly, the total amount of unpaid wages due is \$92,928.14.

HGM Must Pay Training Fund Contributions to the CAC.

HGM is not entitled to a credit for any training fund contributions it may have paid directly to the workers. 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.

Section 1773.1, subdivision (a), includes in the definition of per diem wages employer payments for, among other things, Health and Welfare, Pension, and Apprenticeship training programs authorized by section 3093. However, any payment by an employer on behalf of an employee for apprenticeship training authorized by section 3093 is separate and apart from the payment to the CAC or an approved apprenticeship program that is required by section 1777.5, subdivision (m).

The payment required by section 1777.5, subdivision (m), is distinct from the per diem wages due to workers defined by section 1773.1, and must be distinguished from apprenticeship training programs offered as an employee fringe benefit under section 1773.1, subdivision (a)(6). It is not a direct employee fringe benefit because it is never paid to the worker and may be paid to programs that do not necessarily have a direct connection the workers employed on the Project. The contribution to the CAC is required when a contractor employs workers in an apprenticeable craft, even if the contractor chooses to pay the additional fringe benefit portion of the prevailing wage as additional wages to the workers. Laborer is an apprenticeable craft. HGM stipulated that it did not employ apprentices. HGM also stipulated that it paid training fund contributions directly to the workers rather than to the CAC or the applicable apprentice committee. Thus, HGM admitted it failed to pay training fund contributions to the CAC or an approved apprenticeship program. Training fund contributions are due to the CAC.

DLSE's Penalty Assessment Under Section 1775.

Section 1775, subdivision (a), states in relevant part:

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B)(i) The penalty may not be less than forty dollars (\$40) . . . unless the failure of the contractor . . . to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor...

(ii) The penalty may not be less than eighty dollars (\$80) . . . if the contractor...has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty dollars (\$120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^[8]

....

(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

Abuse of discretion by DLSE is established if the "agency's nonadjudicatory action ... is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage Assessment. Specifically, "the Affected

⁸ Section 1777.1 defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty.” (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

DLSE assessed section 1775 penalties at the rate of \$200.00 because HGM had underreported hours, underpaid workers, and failed to pay training fund contributions, all in significant amounts. The owners of HGM had a history of two previous cases with their predecessor company West Coast Construction, where they underpaid wages and failed to pay training fund contributions, the same violations as in these Assessments. The underpayment of wages in the previous cases was likewise for the classification Laborer as in these Assessments.

The burden was on HGM to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of \$200.00 per violation. HGM’s owners claimed to be public works contractors solely. Yet, they failed completely to meet their obligations under both the relevant Wage Order and the prevailing wage laws. There was no evidence that HGM made a good faith mistake in paying its workers for far fewer hours than they worked. There was no evidence that HGM relied on any reliable timesheets in paying its employees. In fact, the lack of reliable time keeping quite possibly shielded HGM from full scrutiny. And there was no evidence that HGM promptly and voluntarily corrected its errors and failure to pay the correct prevailing wage for all hours worked when these issues were brought to its attention. Indeed, HGM’s lack of any reasonable defense to the vast majority of violations supports a finding that HGM’s violations were willful.

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The Director is not free to substitute his or her own judgment. HGM has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of \$200.00 is affirmed. This Decision does,

however, reduce the total number of assessed violations by 178 in order to correct for errors in DLSE's calculations, as discussed, *ante*. Accordingly, the amount assessed for section 1775 penalties is reduced by \$35,600.00; the remaining total is \$114,800.00.

The Assessment Correctly Imposed Penalties for HGM's Failure to Pay the Overtime Prevailing Wage Rate for All Overtime Hours Worked on the Projects.

Section 1815 states:

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

Section 1813 states:

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

Here, the Assessment is affirmed with respect to the number of hours that Laborers worked on the Project, with the exceptions noted above; the resulting findings as to hours worked include overtime hours for which the workers were not paid premium compensation as required by section 1815, and for which penalties are due pursuant to section 1813. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty; nor does it give the Director any authority to limit or waive the penalty. On that basis, the Assessment of section 1813 penalties is affirmed at the \$25.00 per violation rate for 174 violations, for a total of \$4,350.00, applicable to the four Projects as follows:

Los Nietos Project: \$2,475.00

Rosemead Project: \$1,075.00

Whittier 1 Project: \$725.00

Whittier 2 Project: \$75.00

HGM Is Liable for Liquidated Damages:

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

After 60 days following the service of a civil wage and penalty assessment under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the Assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

At the time the Assessments were 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:

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

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 to rely on the Director's 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.

Here, HGM did not pay any back wages to the workers in response to the Assessment; nor did it deposit with the Department the assessed wages and statutory penalties. That leaves the question whether HGM 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.⁹

⁹ On June 27, 2017 (after the service of the Assessments on April 12, 2017 and 60 days had expired), the Director's discretionary waiver ability was deleted from section 1742.1 by statutes 2017, chapter 28, section 16 (Senate Bill No. 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 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 civil wage and penalty assessment was issued (in 2016) 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.

Although this Decision finds that some portions of the Assessments were not supported by the evidence, HGM did not demonstrate that it had substantial grounds for appealing the aspects of the Assessments that are affirmed herein. It provided no evidence that it kept actual records of the hours its employees worked. It was only in discovery, after the Assessments issued and HGM had already requested a Hearing, that it obtained the Inspection Reports and developed a theory to dispute the accuracy of the Assessments based on the Inspection Reports. That theory does not demonstrate substantial grounds for appealing the core allegations in the Assessments, since it was not developed until after HGM had appealed, and further, it lacked credible evidentiary support. In addition, HGM admitted that it did not use the correct prevailing wage rate; it did not pay the predetermined increase; and it did not keep accurate CPRs. Based on the foregoing, the undersigned exercises her discretion not to waive liquidated damages with respect to the prevailing wages found due in this Decision. Accordingly, liquidated damages are due in the aggregate amount of \$92,928.14, as provided in the Findings, *post*.

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, title 8, sections 227 to 232.70.¹⁰ Section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journey level workers in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). In this regard, section 1777.5, subdivision (g) provides:

The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the

¹⁰ All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

The governing regulation as to this 1:5 ratio of apprentice hours to journey level worker hours is section 230.1, subdivision (a), which states:

Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with the required 1 hour of work performed by an apprentice for every five hours of labor performed by a journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter. Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

However, a contractor will 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).)

According to that regulation, a contractor properly requests the dispatch of apprentices by doing the following:

Request the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays, and holidays) before the date on which one or more apprentices are required. If the apprenticeship committee from which apprentice dispatch(es) are requested does not dispatch apprentices as requested, the contractor must request apprentice dispatch(es) from another committee providing training in the applicable craft or trade in the geographic area of the site of the public work, and must request apprentice dispatch(es) from each such committee either consecutively or simultaneously, until the contractor has requested apprentice dispatch(es)

form each such committee in the geographic area. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.

DAS has prepared a form, the DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees.

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. It provides its relevant part as follows

Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. The contract award information shall be in writing and may be a DAS Form 140 Public Works Contract Award Information. The information shall be provided to the applicable committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work. Failure to provide contract award information, which is known by the awarded contractor, shall 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....

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."

(§ 1777.7, subdivision (c)(2)(B).)

HGM Failed to Employ Laborer Apprentices.

Laborer was the apprenticeable craft at issue in this matter. HGM stipulated that it employed no apprentices on the Projects. Accordingly, the record establishes that HGM violated section 1777.5 and the related regulations, sections 230 and 230.1.

There was One Applicable Committees in the Geographic Area.

DLSE established that there was one applicable apprenticeship committee for Laborer in the geographic area of the Projects: Laborers Sothern California Joint Apprenticeship Committee. (DLSE Exhibit No. 9, at p. 54.) HGM did not dispute that the committee listed was the applicable committee for the Projects.

HGM Failed to Properly Notify the Applicable Committee of Contract Award Information, and Failed to Request Dispatch of Apprentices.

HGM stipulated that it did not send out contract award information (the DAS 140 or equivalent), and that it did not send out requests for dispatch of apprentices (the DAS 142 or equivalent) for any of the four Projects. Nor did HGM demonstrate it was exempt from employing apprentices on the Projects under section 230.1, subdivision (a). Accordingly, HGM violated section 1777.5 and its related regulations.

The Penalty for Noncompliance.

If a contractor "knowingly violated Section 1777.5" a civil penalty is imposed under section 1777.7. Here, DLSE assessed a penalty against HGM under the following portion of section 1777.7, subdivision (a)(1):

If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5 the contractor and any subcontractor responsible for the violation shall forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation. A contractor or subcontractor that knowingly commits a second

or subsequent violation of section 1777.5 within a three-year period, if the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars (\$300) for each full calendar day of noncompliance.

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.

HGM "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journeyman hours for laborer apprentices. There was no testimony on behalf of HGM that it was unfamiliar with the requirement for the employment of apprentices on the Project, or unfamiliar with the need to contact apprentice committees and request the dispatch of apprentices. In addition, John Mourey, the president of HGM signed contract documents requiring HGM to comply with all Labor Code provisions, or specifically incorporating Chapter 1 of Part 7 of Division 2 of the Labor Code section 1720 et seq., including the employment of registered apprentices on the Project. (DLSE Exhibit Nos. 22, 23, 24, and 25.)¹¹ He testified that HGM was a public works contractor. Thus, there was no evidence that HGM could not have sent contract award information to the applicable committee and could not have requested dispatch of apprentices from that same committee. Since HGM was aware of its obligations under the law, and provided no evidence of why it could not have complied with the law, HGM knowingly violated the law, a penalty should be imposed under section 1777.7.

¹¹ Two of the four bid documents specifically mention the requirement to employ apprentices as well. (DLSE Exhibit Nos. 10, p. 72, and 11, p. 75.)

DLSE imposed a penalty of \$80.00 for 632 days of violations. The DLSE senior deputy reduced the maximum penalty of \$100.00 to \$80.00 per violation as HGM did not have a history of apprentice violations. However, the violations were intentional, resulted in significant loss of training opportunities for apprentices, and otherwise harmed apprentices or apprenticeship programs. HGM has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of \$80.00 for 632 violations is affirmed for a total of \$50,560.00.

FINDINGS

1. The Projects were public works subject to the payment of prevailing wages and the employment of apprentices.
2. The Civil Wage and Penalty Assessments were timely served by DLSE in accordance with section 1741.
3. Affected contractor HGM & Company, Inc. filed a timely Request for Review of each of the Civil Wage and Penalty Assessments issued by DLSE with respect to the Projects.
4. DLSE timely made available its enforcement files.
5. No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessments.
6. The Assessments used the correct classification of Laborer Group 1 based on the work performed by the workers on the Projects.
7. The Assessments used the correct prevailing wage rate for Laborer Group 1.
8. John Shabo, Jose Antonio Sierra Lopez, Daniel Rojas, Omar Aguilar, Ghassan George Mourey, George Shabo, and Antonie I. Aychouh performed work in Los Angeles County during the pendency of the Projects, and were entitled to be paid the journeyman rate for Laborer Group 1 for that work.
9. In light of findings 6 through 8 above, HGM underpaid its employees on the Projects in the aggregate amount of \$92,928.14.

10. HGM failed to pay training fund contributions to the California Apprenticeship Council. Training fund contributions are due in the aggregate amount of \$3,293.55.
11. DLSE did not abuse its discretion in setting section 1775 penalties at the rate of \$200.00 per violation, and the resulting total penalty of \$114,800.00, as modified, is affirmed.
12. Penalties under Labor Code section 1813 are due in the amount of \$4,350.00 at the rate of \$25.00 per calendar day for two affected employees, Daniel Rojas and Jose Antonio Sierra Lopez.
13. The unpaid wages found in Finding No. 9 remained due and owing more than 60 days following issuance of the Assessments. HGM is liable for an additional amount of liquidated damages under section 1742.1 and there are insufficient grounds to waive payment of these damages. Liquidated damages are due in the aggregate amount of \$92,928.14.
14. HGM failed to issue a Notice of Contract Award Information to all applicable apprenticeship committees for the craft of Laborer.
15. HGM failed to properly request dispatch of Laborer apprentices from the apprenticeship committees in the geographic area of the Projects, so it was not excused from the requirement to employ apprentices under Labor Code section 1777.7.
16. HGM violated Labor Code section 1777.5 by failing to employ apprentices in the craft of Laborer Group 1 on the Projects in the minimum ratio required by the law.
17. DLSE did not abuse its discretion in setting section 1777.7 penalties at the rate of \$80.00 per violation for 632 violations, and the resulting aggregate penalty of \$50,560.00 is affirmed.
18. The amounts found remaining due in the Assessments is modified and

affirmed by this Decision are as follows:

Los Nietos, Case No. 17-0142 (DLSE case no. 40-53462-603):

Wages due:	\$39,961.68
Penalties under section 1775:	\$39,000.00
Penalties under section 1813:	\$2,475.00
Training fund contributions:	\$1,069.76
Liquidated damages:	\$39,961.68
Penalties under section 1777.7	\$6,320.00
SUBTOTAL:	\$128,788.12

Rosemead, Case No. 17-0143 (DLSE case no. 40-53690-603)

Wages due:	\$22,499.94
Penalties under section 1775:	\$22,800.00
Penalties under section 1813:	\$1,075.00
Training fund contributions:	\$554.56
Liquidated damages:	\$22,499.94
Penalties under section 1777.7	\$16,080.00
SUBTOTAL:	\$85,509.44

Whittier 1, Case No. 17-0141 (DLSE case no. 40-53658-603)

Wages due:	\$21,909.20
Penalties under section 1775:	\$36,400.00
Penalties under section 1813:	\$725.00
Training fund contributions:	\$851.84
Liquidated damages:	\$21,909.20
Penalties under section 1777.7	\$12,720.00

SUBTOTAL:	\$94,515.24
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Whittier 2, Case No. 17-0152 (DLSE case no. 40-52022-603)

Wages due:	\$8,557.32
Penalties under section 1775:	\$16,600.00
Penalties under section 1813:	\$75.00
Training fund contributions:	\$817.39
Liquidated damages:	\$8,557.32
Penalties under section 1777.7	\$15,440.00
SUBTOTAL:	\$50,047.03

TOTAL for the four Projects: \$358,859.83

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

ORDER

The Civil Wage and Penalty Assessments are 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: December 24, 2019

/s/ Victoria Hassid
Victoria Hassid,
Chief Deputy Director
Department of Industrial Relations¹²

¹² See Government Code sections 7 and 11200.4.