STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Montez Glass, Inc.**

**Case No. 16-0241-PWH**
[DLSE Case No. 40-48900-137]

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

## DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor, Montez Glass, Inc. (Montez Glass), submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment). The Division of Labor Standards Enforcement (DLSE) issued the Assessment on May 5, 2016, with respect to glazier work performed for awarding body Santa Clara County Facilities & Fleet Department, Capital Programs on the San Jose Downtown Health Center (Project) located in Santa Clara County (Santa Clara). The Assessment determined that Montez Glass owed $297,131.76 in unpaid prevailing wages; $93,355.00 in penalties under Labor Code sections 1775 and 1813; and $17,920.00 in penalties under Labor Code section 1777.7.[1]

The hearing on the merits took place in Oakland, California before Hearing Officer Edward Kunnes on December 6-7, 2016. The parties submitted post-hearing briefing on January 13, 2017.

On the first day of the hearing on the merits, DLSE moved to amend the Assessment downward to $295,456.56 in unpaid prevailing wages, while leaving penalties under sections 1775, 1813, and 1777.7 unchanged. The Hearing Officer granted the motion and allowed DLSE to amend the Assessment (Amended Assessment) because there was no prejudice to Montez Glass. On the second day of the hearing on the merits, based on the testimony of several workers, DLSE further adjusted its audit to provide credit to Montez Glass for employees who had carpooled. This Decision will discuss the latter adjustment under Summary of Facts.

Timothy M. Scully, counsel, represented Montez Glass and Galina Velikovich, counsel, represented DLSE at the hearing. The affected prime contractor, Flintco Pacific, Inc. (Flintco Pacific), did not request review of the Assessment.

At trial, the parties stipulated to the issues for decision as follows:

- Were the workers employed by Montez Glass paid the prevailing wage?
- Were the workers employed by Montez Glass entitled to compensation for travel time and mileage?
- Were the workers employed by Montez Glass correctly compensated for travel time and mileage?
- Did Montez Glass properly request apprentices from the appropriate apprenticeship committee?
- Did Montez Glass properly employ apprentices at the correct apprentice to journeyman ratio?
- Is Montez Glass liable for penalties under section 1775?
- Is Montez Glass liable for penalties under section 1813?
- Is Montez Glass liable for penalties under section 1777.7?

The Director finds that the workers employed by Montez Glass were entitled to compensation for travel time and mileage and that Montez Glass did not correctly compensate its workers for travel time and mileage. However, the Director also adjusts the amount of unpaid wages for a variety of factors: for workers who carpooled, for workers who DLSE erroneously identified as working on this Project, and for a worker to whom Montez Glass provided a company vehicle and hotel accommodations near the jobsite. The Director finds that Montez Glass properly requested apprentices from the appropriate and only apprenticeship committee in the area and that Montez Glass was not in violation of section 1777.5 because the apprenticeship committee did not respond within the 72-hour statutory deadline. Therefore, the Director issues this Decision affirming the Amended Assessment, in part, and denying the Amended Assessment, in part. Also, Montez Glass has not proven the existence of grounds for a waiver of liquidated damages for the unpaid wages due to workers. Pursuant to section 1742.1, subdivision (a), Montez Glass is liable for liquidated damages for unpaid wages.

[1] All further statutory references are to the California Labor Code, unless otherwise indicated.

## SUMMARY OF FACTS

On June 20, 2012, Santa Clara published a notice for bids for the Project, and the following month, it chose Flintco Pacific to construct the Project, which in turn contracted with Montez Glass as one of its subcontractors.

Montez Glass used glaziers on its portion of the Project. The following applicable prevailing wage determination (PWD) and scope of work for these workers were in effect on the bid advertisement date:

Glazier PWD for Santa Clara (STC-2012-1)(Glazier PWD): The basic hourly rate for glazier is $41.88, the fringe benefits are $20.72, and the training fund contribution is $0.50, totaling $63.10 straight-time. There is a predetermined increase to the basic hourly rate on January 1, 2013, for $1.50 and another increase on January 1, 2014, for $1.50. The travel time and subsistence portion of the Glazier PWD states that regular employees who are "required to jobsite report more than twenty-five (25) miles from the point of dispatch (employee's home or individual Employer's shop) as determined by the individual Employer, shall receive wages and benefits for all time spent traveling from the point of dispatch to the jobsite and return."

Jerry McClain, the Deputy Labor Commissioner, prepared the Assessment and Amended Assessment against Montez Glass. McClain testified at the Hearing on the Merits that he discovered violations of underpayment of wages resulting from a failure to pay travel time and mileage. Additionally, he found apprenticeship violations because Montez Glass failed to hire according to the required apprentice to journeyman ratio of 1:5.[2]

McClain, working from the travel-time-calculation sheet in the Glazier PWD, which is drawn from the Master Agreement between District Council 16 and Northern California Glass Management Association, set forth the miles and travel time for Montez Glass workers. McClain made these calculations based on employees traveling more than twenty-five (25) miles from the employee's home. Montez Glass did not argue that the exempt travel zone was anything other than 25 miles. Montez Glass did assert, however, that it had setup a shop in Santa Clara separate from its Sacramento shop and that it dispatched employees from the purported Santa Clara shop. Montez Glass identifies its location as being in Sacramento and the testimony confirmed that Montez Glass performed its administrative work from the Sacramento shop.

[2] The DLSE identified one apprentice who had worked on the Project but Montez Glass proved that the apprentice had worked on a different project in San Jose.

There was no corroborative testimony or documentary evidence concerning the dispatch of workers from the Santa Clara shop.

DLSE disputed that Montez Glass's Santa Clara shop constituted an "individual Employer's shop" as contemplated by the Glazier PWD. The testimony of four workers disclosed that each of them used a trailer on the San Jose jobsite for administrative needs and contacted the Sacramento Montez Glass shop for more involved administrative processes. These four workers did not have any knowledge of the existence of a shop in Santa Clara. John Hughes, an organizer with Painters District Council 16, testified that he visited the location in Santa Clara where Montez Glass had allegedly established a shop in an existing painting contractor's shop. Hughes interviewed employees of the painting contractor, Top Gun Industrial Finishing (Top Gun), and took pictures. The witness provided an overall impression that the office of Montez Glass at that location consisted of simply a space for Montez Glass's president, Tony Montez, to plug-in a computer while on the road. The president of Top Gun, Mike Martinez, also testified that Tony Montez only sporadically used the space for office work, no Montez Glass employees ever visited the Santa Clara space, and very little, if any, Montez Glass materials were stored in the space. Additionally, the record showed that Montez Glass did not raise the issue of having a Santa Clara shop during the DLSE investigation.

Tony Montez countered that the Santa Clara shop contained the physical elements (i.e., electricity, toilets, and telephone) of an operating shop as are listed in other portions of the DC 16 Mast Union Agreement (Agreement) from which the Glazier PWD was drawn.[3] However, Montez Glass conceded that the use it put to the Santa Clara shop was to store window frames at the Santa Clara space for Top Gun to paint them. Montez Glass also acknowledged that no employees of Montez Glass were aware of this shop.

Montez Glass and DLSE agreed that the testimony of the four workers indicated a reduction in travel expenses for those workers coming from Hollister in a carpool. DLSE reduced the wages by $11,506.88 among five workers. The revised audit, adjusted to give credit for carpools, showed wages due of $283,949.68. The penalties did not change.

Matthew Montez testified to working with Paulo Azevedo and Andrew Montez on Montez Glass's Stockton Courthouse project on the week for which DLSE had identified these same

[3] The list of physical elements for an "operating shop" is found in another section of the DC 16 Mast Union Agreement's definition of "Employer's shop" that is not incorporated by the Director into the PWD.

Montez Glass employees as working on this Project. Montez Glass employee Chanel Perinati confirmed that she had inadvertently included a Certified Payroll Record (CPR) for Matthew Montez, Paulo Azevedo and Andrew Montez from the Stockton Courthouse project in other CPRs she had provided to DLSE for this Project. Perinati and Sue Montez also testified that Tedarly Mason, an apprentice, worked on the Spartan Complex Renovation for Montez Glass but was erroneously included as a worker on the Project due to an inaccurate CPR. Also, Dennis Montez testified that he was fully compensated for all travel time, travel expenses and subsistence expenses as Montez Glass provided him with a company vehicle, provided him with hotel accommodations and provided him salary for travel time.

Sue Montez testified that Montez Glass submitted to a glazier apprenticeship training committee its request for dispatch of an apprentice on July 2, 2014, seeking an apprentice for July 9, 2014, but the apprenticeship committee did not respond until July 14, 2014, beyond the 72-hour statutory deadline for apprentice dispatch. DLSE conceded that the late response by the training committee excused the contractor from having to fulfill the apprentice ratio requirement, but DLSE argued that the request for dispatch of an apprentice was defective because an insufficient number of journeymen would have supervised an apprentice in the week that Montez Glass requested dispatch.

**DISCUSSION**

Section 1720 and following statutes set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. DLSE enforces prevailing wage requirements, for the benefit of not only 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 Construction Co. v. Aubry* (1992) 1 Cal. 4th 976, 985.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of unpaid wages, if those wages are not paid within sixty days following the service of a civil wage and penalty assessment.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor

may appeal that assessment by filing a request for review under section 1742. Subdivision (b) of section 1742 provides, among other things, that the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing. At the hearing, the contractor "shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§ 1742, subd. (b).) If the contractor "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." (§ 1742.1, subd. (a).) Furthermore, DLSE's determination "as to the amount of the penalty shall be reviewable only for abuse of discretion." (§ 1775, subd. (a)(2)(D).)

**1. Montez Glass Underpaid Wages For Travel Time and Mileage.**

The per diem wages include travel and subsistence payments. (§ 1773.1, subd. (a).) The Director of Industrial Relations ascertains and considers the prevailing rate for the craft in the locality by reference to the applicable collective bargaining agreement. (§ 1773.) By the Glazier PWD for Santa Clara (STC-2012-1), the Director adopted sections of the glazier collective bargaining agreement for travel and subsistence payments to apply to glaziers working in Santa Clara County. The Glazier PWD provided for payment of travel time and mileage from the point of dispatch in excess of 25 miles.

The Glazier PWD also provides a point of dispatch from the employee's home or "individual Employer's shop," as determined by the employer. The problem with Montez Glass's proposition that the Santa Clara shop should mark the "point of dispatch" is that as far as the record shows, the employer did not, in fact, dispatch from that location to the San Jose jobsite. The noun "dispatch" means "a sending off esp[ecially] to a particular destination <requested the [dispatch] of two companies to the front> <the [dispatch] of goods trains from important centers of traffic...." (Webster's Third New Internat. Dict. (1996), p. 653.)

No testimony establishes that Montez Glass sent off any worker from the Santa Clara shop to the San Jose jobsite. No evidence showed the workers reported in the morning to the Santa Clara shop for materials, training, or safety briefing before being sent to the jobsite. No evidence showed a supervisor imparting job instructions to the workers at the Santa Clara shop, or the workers loading equipment or ridesharing to the jobsite from the Santa Clara shop. Final-

ly, no evidence showed the workers reported back to the Santa Clara shop for any purpose at the conclusion of the workday. These activities, had they occurred, could conceivably support a claim that Montez Glass in fact determined that the Santa Clara shop was the "point of dispatch" under the Glazier PWD. As it is, no such evidence was presented, and the fact that the workers were unaware of the Santa Clara shop only adds to the conclusion that the Santa Clara shop had not been determined by Montez Glass as a point of dispatch.

In the instant case, the testimony from both DLSE's witnesses and Montez Glass's witnesses clearly show that communications to employees came from the well-established shop in Sacramento. While the Glazier PWD allows the employer to determine the point of dispatch, DLSE made a reasonable inference in concluding that Montez Glass chose the employee's home rather than the more remote Sacramento shop as the point of dispatch under the Glazier PWD. DLSE and Montez Glass disagreed whether the Santa Clara space qualified as an "individual Employer's shop" within the meaning of the Glazier PWD. Montez Glass focused on the physical elements at the location, drawing on portions of the Agreement lying outside the Glazier PWD. In that regard, Montez Glass argued that its Santa Clara space qualified as an "Employer's shop" because the location contained inventory, a telephone, electric power, and toilet facilities. DLSE responded by arguing that Montez Glass did not maintain inventory at the location, did not conduct regular business at the location, and did not function as a place from which employees regularly worked or reported in and out of Montez Glass.

The colloquy about the physical elements is inapt. The Director's task is to apply the plain meaning of the prevailing wage determination. Terms and matters as exist outside that determination should not control the analysis. Further, even if the Santa Clara space did constitute some sort of "shop" for Montez Glass based on the physical elements and limited use it put to the space, that fact would not resolve the issue of whether employees were in fact dispatched from that location. But the limited use Montez Glass put to the Santa Clara space suggests it was not intended as an "individual Employer's shop" within the meaning of the Glazier PWD and not a location from which an employee could have been dispatched.

Altogether, the testimony from both parties made it clear that the space at Santa Clara did not have employee visitors, except for possibly the occasional Montez Glass delivery of frames to Top Gun. It also made clear that the Santa Clara space was not generating communications to employees. All paychecks and administrative communications came from Sacramento. Fur-

thermore, the evidence did not support a finding that Montez Glass conducted the business of dispatching workers from the space. That leaves the "employee's home" as the point of dispatch under the Glazier PWD for purposes of calculating the travel time due the workers, as was done by DLSE in the Assessment.

Nonetheless, as indicated in the Summary of Facts, the Director must adjust the DLSE's audit. Based on the evidence the Director removes Matthew Montez, Andrew Montez, Paulo Azevedo, Tedarly Mason, and Kelly Montez from the audit. Hence, the wages owed and unpaid are $207,235.69.

### 2. DLSE Did Not Abuse Its Discretion by Assessing Penalties Under Section 1775 at the Minimum Rate.

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 her own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Rule 50, subd. (c) [Cal. Code Reg., tit. 8 §17250, subd. (c)].)

Thus, the burden is on Montez Glass to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of $40.00 per violation. Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. However, DLSE need not mitigate the statutory maximum penalty. And the Director is not free to substitute her own judgment.

DLSE assessed section 1775 penalties at the rate of $40.00 because Montez Glass does not have a history of prior violations but it has performed numerous public works. Montez Glass did not argue that the Labor Commission abused her discretion in setting the penalty rate at $40.00. Hence, Montez Glass has not shown an abuse of discretion and, accordingly, the as-

sessment of penalties at the rate of $40.00 is affirmed. The Director, in conjuncture with removing certain workers from the audit, removes 324 wage penalty violations, leaving 2,008 violations for a total of $80,320.00 in 1775 penalties.

### 3. Overtime Penalty Is Due for Three Occasions Where Overtime Was Not Paid.

Section 1813 states, in pertinent part, as follows:

> 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.

Section 1815 states in full as follows:

> Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1½ times the basic rate of pay.

The record establishes that Montez Glass violated section 1815 by paying less than the required prevailing overtime wage rate to a worker on three occasions. No testimony refuted DLSE's contention of unpaid overtime. 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. Accordingly, the assessment of the penalty under section 1813 is affirmed for $75.00.

### 4. There Are No Grounds for a Waiver of Liquidated Damages.

At all times relevant to this Decision, section 1742.1, subdivision (a) provided in pertinent part 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. 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. . . . .

Absent waiver by the Director, Montez Glass is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is partially tied to Montez Glass's position on the merits and specifically whether, within the 60-day period after service of the Assessment, it had "substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment."

There is no doubt that Montez Glass had substantial grounds for appealing the Assessment as to wages DLSE contended were owed to Matthew Montez, Andrew Montez, Paulo Azevedo, Tedarly Mason, and Kelly Montez, as found in this Decision. Additionally, Montez Glass had substantial grounds for appealing the Assessment as to mileage expended by those workers in a carpool, a point accepted by DLSE as reflected in an amended audit it issued during these proceedings. However, the statutory test whether the Director is satisfied that Montez Glass had substantial grounds for appealing the Assessment is not linked to those matters for which no wages are due under the Director's decision. Rather under the statutory language of section 1742.1, subdivision (a), the proper focus is whether Montez Glass had substantial grounds for appealing the Assessment for portions of the Assessment that are being upheld by this Decision, the amounts for those workers who found to be owed travel time and expenses. The inquiry directly questions the strength of the argument whether Montez Glass had a qualified shop in Santa Clara. We already know the outcome of the argument, as set forth above. Still, the ultimate finding on unpaid wages does not, in and of itself, answer the inquiry as to whether Montez Glass had substantial grounds for its argument, for that approach would make meaningless the section 1742.1 reference to substantial grounds to appeal the "portion of the unpaid wages" alleged in the Assessment.

No testimony showed that workers were dispatched from the Santa Clara space. A bare contention of dispatch from that location contributes nothing to the inquiry whether Montez Glass had substantial grounds for appealing the Assessment on that issue. The contention went unproven and uncorroborated, lacked supporting detail, and was disputed by the countervailing

testimony of four workers who knew nothing of the Santa Clara space. Montez Glass argued that the Santa Clara space was a qualifying shop because it rented space at Top Gun to perform incidental computer work. That argument is untenable. Whether computer work was done at the space bears little if any relation to the requirements of the Glazier PWD and, in particular, to the question whether Montez Glass had determined the space to be a point of dispatch of the workers for the San Jose jobsite. The remaining arguments by Montez Glass, such as the delivery of inventory, or lack thereof, and the regularity or irregularity with which Tony Montez performed tasks in the Santa Clara space appeared more as an afterthought than as a reflection of an actual designation and use of the shop as a point of dispatch. The fact that the space had electricity, a telephone and toilet facilities is similarly irrelevant. That those facilities were available for Tony Montez sheds no light on whether the space was determined or used as a point of dispatch for workers. It is also significant that Montez Glass did not raise the fact that it had rented space in Santa Clara until after the deputy completed the audit and issued the Assessment. Nor did Montez Glass raise the issue in its Request for Review of the Assessment. The tardiness of the argument allows for the inference that Tony Montez intended to use and did use the space for incidental work but not as a shop for dispatching Montez Glass workers. Moreover, Hughes testified that Montez Glass could have sought a determination from the union as to whether the space qualified as an Employer's shop through the local union, but it did not. Overall, the evidence and circumstances establish that an argument that Montez Glass had determined as a point of dispatch its Santa Clara shop lacks substantiality.

Montez Glass has therefore not shown the substantial grounds for appealing the Assessment to allow the Director to waive liquidated damages for the workers found to be underpaid. Because the travel time and mileage remained due more than sixty days after service of the Assessment, and Montez Glass has not demonstrated grounds for waiver, it is also liable for liquidated damages in an amount equal to the unpaid wages of $207,235.69.

### 5. Montez Glass Was Excused from Employing Glazier Apprentices Because the Applicable Committee Did Not Respond within 72 Hours.

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 journeymen in the applicable craft or trade. 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 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 journeyman hours states, in pertinent part:

> 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 a 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.

Cal. Code Reg., tit. 8 § 230.1, subd. (a).) DAS has prepared form DAS 142 that a contractor may use to request dispatch of apprentices from apprenticeship committees. Pursuant to the regulation, a contractor properly requests the dispatch of apprentices by doing the following:

> [R]equest 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 dispatches from 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.

However, the regulation provides for no violation by the contractor when the apprenticeship committee fails to timely respond (§ 230.1, subd. (a)):

> Conversely, if in response to a written request no apprenticeship committee dispatches, or agrees to dispatch during the period of the public works project any apprentice to a contractor who has agreed to employ and train apprentices in accordance with either the apprenticeship committee's standards or these regulations within 72 hours of such request (excluding Saturdays, Sundays and holidays) the contractor shall not be considered in violation of this section as a result of failure to employ apprentices for the remainder of the project, provided that the contractor made the re-

quest in enough time to meet the above-stated ratio.

DLSE admitted that Montez Glass timely submitted the DAS 142 request.[4] DLSE also admitted that the apprenticeship committee responded after the 72-hour deadline. Montez Glass provided sufficient evidence that it made the request in enough time to meet the ratio of 1:5 apprentice hours to journeyman hours. Notwithstanding the admissions and evidence, DLSE argues that Montez Glass did not have a sufficient number of journeymen to supervise an apprentice on the week that Montez Glass requested dispatch. The Director is not required to determine the status of the work force on the week Montez Glass requested an apprenticeship committee to dispatch because the requirement to employ apprentices terminated when the apprenticeship committee did not timely respond to Montez Glass's request for dispatch. Not only would engaging in such an inquiry exceed the requirements of the regulation but it would also cause the Director to speculate as to how Montez Glass would have responded if the apprenticeship committee had timely responded. The Director may not speculate on such a hypothetical.

## FINDINGS AND ORDER

1. Affected subcontractor, Montez Glass, Inc. timely requested review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Affected contractor Montez Glass, Inc. failed to pay all its workers the required prevailing wages for travel time and mileage. Montez Glass underpaid its workers $207,235.69. The wages due reflect those workers the Director has removed from the Civil Wage and Penalty Assessment because they worked on a different project. It also reflects removal of another worker from the Civil Wage and Penalty Assessment because Montez Glass provided a company vehicle, hotel accommodations and paid travel time. Additionally, the wages due reflect the savings in travel costs provided by those workers who carpooled.

3. DLSE did not abuse its discretion by setting penalties under section 1775, subdivision (a) at the rate of $40.00 per violation for 2,008 violations, totaling $80,320.00.

4. Penalties under section 1813 at the rate of $25.00 per violation are due for three

[4] DLSE did not raise as an issue the submission of another DAS form--Form 140--that is used to fulfill a contractor's statutory duty under section 1777.5, subdivision (e) to submit contract award information to an applicable apprenticeship committee. As such, the Director assumes a DAS Form 140 was properly submitted. Additionally, the parties did not address at hearing whether there was but one glazier apprenticeship committee in the geographic area, thereby dispensing with any issue that a second apprenticeship committee should have been sent a DAS form 142.

overtime rate violations, totaling $75.00.

5. Montez Glass, Inc. is liable for liquidated damages on the Project under Labor Code section 1742.1, subdivision (a) in the amount of $207,235.69.

6. Montez Glass, Inc. did not violate section 1777.5.

7. The amounts found due against Montez Glass, Inc. and as affirmed by this Decision are as follows:

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|---|---|
| Wages Due: | $207,235.69 |
| Penalties under section 1775, subdivision (a): | $80,320.00 |
| Penalties under section 1813: | $75.00 |
| Liquidated Damages: | $207,235.69 |
| **TOTAL:** | **$494,866.38** |

The Amended Civil Wage and Penalty Assessment is affirmed in part and denied part in 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: 3/3/2018

Christine Baker
Director of Industrial Relations