

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Minako America Corporation  
dba Minco Construction**

**Case No. 17-0059-PWH**

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected contractor Minako America Corporation dba Minco Construction (Minco) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on January 5, 2017, with respect to work of improvement known as CCCD Utilities Infrastructure Phase 2 (Project) performed for the Compton Community College District (District) in the County of Los Angeles. The Assessment determined that the following amounts were due: \$56,675.32 in unpaid prevailing wages, \$43,440.00 in Labor Code section 1775 statutory penalties,<sup>1</sup> \$850.00 in section 1813 statutory penalties, \$143,700.00 in section 1777.7 statutory penalties, and \$800.00 in section 1776 statutory penalties. Minco timely filed its Request for Review of the Assessment on February 14, 2017.

A Hearing on the Merits was held in Los Angeles, California, before Hearing Officer Howard Wien on November 29, 2017, April 25, 2018, April 26, 2018, and November 14, 2018. Lance R. Grucela appeared as counsel for DLSE. Thomas Kovacich of the law firm Atkinson, Andelson, Loya, Ruud & Romo (the firm) appeared as counsel for Minco in all prehearing proceedings and in the first three days of the Hearing. Kovacich and the firm withdrew as counsel on July

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

27, 2018, and thereafter Minco was represented by its Chief Executive Officer, Refaat H. Mina.

In support of the Assessment, testimony was presented by DLSE's Industrial Relations Representative Reisee Salamero, and by Minco's worker Adan Rodriguez. On behalf of Minco, testimony was given by Mina, by Minco's superintendent on the Project, Mina Ghaloy, and by Minco's controller, Raffi Thomassian. The case stood submitted at the conclusion of the Hearing on November 14, 2018.

In the Hearing, DLSE moved to amend the Assessment by reducing the wages due from \$56,675.32 to \$54,802.88 on the ground that DLSE had used an incorrect prevailing wage rate for overtime. The Hearing Officer granted that motion.<sup>2</sup>

The issues for decision are:

- Whether the Assessment was timely issued.
- Whether the Assessment correctly found that Minco failed to report and pay the required prevailing wages for all hours worked on the Project by worker Adan Rodriguez and worker Manuel Cruz.
- Whether the Labor Commissioner abused her discretion in assessing statutory penalties under section 1775 at the rate of \$120.00 per violation for 362 violations, totaling \$43,440.00.
- Whether Minco is liable for liquidated damages under section 1742.1, subdivision (a), and if so, in what amount.
- Whether the Assessment correctly found that Minco failed to pay the overtime prevailing wage rate for all overtime hours worked, thereby

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<sup>2</sup> Since this amendment was based solely upon a correction of the wage rate assessed for overtime hours, it did not alter the assessment of the number of overtime hours or the number of workdays containing such overtime hours. Consequently this amendment did not alter the assessment of \$43,440.00 for the section 1775 penalty and \$850.00 for the section 1813 penalty.

making Minco liable for a section 1813 statutory penalty of \$25.00 per violation for 34 violations, totaling \$850.00.

- Whether Minco knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230, subdivision (a), by not issuing public works contract award information in a Division of Apprenticeship Standard (DAS) 140 form or its equivalent to the applicable apprenticeship committee in the geographic area of the Project for the crafts of Laborer, Iron Worker, Carpenter, Cement Mason, Landscape/Irrigation Laborer, and Operating Engineer.
- Whether Minco knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), by not issuing valid requests for dispatch of apprentices in a DAS 142 form or its equivalent to the applicable apprenticeship committee in the geographic area of the Project for the crafts of Laborer, Iron Worker, Carpenter, Cement Mason and Landscape/Irrigation Laborer.<sup>3</sup>
- Whether Minco knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), by not employing apprentices on the Project in the ratio of one hour of apprentice work for every five hours of journeyperson work in the crafts of Laborer, Iron Worker, Carpenter, Cement Mason and Landscape/Irrigation Laborer.

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<sup>3</sup> As to the craft of Operating Engineer, DLSE agreed that a special exemption for that craft applied to this Project, which exempted Minco from having to issue a DAS 142 form and having to meet the 1:5 apprentice to journeyperson hourly ratio. The exemption did not also apply to the form 140 requirement. This type of exemption is explained on the Department's website here: <https://www.dir.ca.gov/DAS/RatioExemption.htm> ["Contractors with an Individual Contractor Exemption granted by the Chief of DAS per Labor Code Section 1777.5 (j) or § 1777.5(k) still need to submit a Notice of Contract Award Information (DAS 140) to the appropriate apprenticeship committee(s). The Individual Contractor Exemptions and Apprentice Committee exemptions pertain only to the ratio of apprentices on a Public Works project."].

- Whether Minco is liable for section 1777.7 statutory penalties, and if so, in what amount.
- Whether Minco failed to timely submit certified payroll records (CPRs) after receipt of a written request from DLSE such that Minco is liable for a section 1776 statutory penalty, and if so, in what amount.

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

## **FACTS**

### The Project.

The District advertised the Project for bid on February 1, 2012, and awarded the contract to Minco on September 4, 2012. Under the contract, Minco was to construct site improvements on a portion of the District's college campus, including demolishing various hardscape and landscape features, re-grading of drive areas and parking lot areas, trenching for installation of underground utilities (including water, drainage and sewage, gas, electrical, communications and site lighting), and constructing new hardscape and landscape features.

### Assessment of Unpaid Prevailing Wages and Section 1813 Statutory Penalty.

DLSE assessed unpaid prevailing wages for two of Minco's journeypersons on the Project – Adan Rodriguez and Manual Cruz. The Assessment was based on the following: (1) alleged misclassification of part of Rodriguez's hours and all of Cruz's hours as Laborer Group 1 hours, whereas all of the hours should have

been classified at the higher prevailing wage classification of Operating Engineer, as described in more detail below; (2) under-reporting in the CPRs of hours worked compared with the higher number of hours stated on the workers' calendars submitted to DLSE; (3) Minco failing to pay the required overtime rate for overtime hours; and (4) Minco failing to pay required fringe benefits.

First, as to misclassification, DLSE determined that during Rodriguez's initial two weeks of work in 2013, the CPRs classified all his hours as Laborer Group 1, whereas the correct classification was Operating Engineer Group 4. When Rodriguez returned to work on the Project from September 2014 through May 2015, the CPRs classified him Laborer Group 1 for some hours and Operating Engineer Group 1 for other hours. DLSE determined that the correct classification for all those hours was Operating Engineer Group 8. This was based on evidence that Rodriguez performed his work using heavy operating machinery such as an excavator, a mini excavator and a backhoe.

As to the alleged misclassification of Cruz, the CPRs classified all his hours as Laborer Group 1. DLSE determined that the correct classification for all his hours was Operating Engineer Group 8, based on evidence that in his work he used heavy operating machinery such as an excavator, a skip loader and a compactor.

In determining the assessment of unpaid prevailing wages due to misclassification, DLSE compared the prevailing wage rates of the applicable prevailing wage determinations. Based upon the bid advertisement date of February 1, 2012, the applicable prevailing wage determination for the relevant groups of Operating Engineer in Los Angeles County was SC-23-63-2-2011-2 (Operating Engineer PWD). It stated the following prevailing wage requirements<sup>4</sup>:

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<sup>4</sup> This chart and DLSE's audit include predetermined increases in effect when Rodriguez and Cruz performed all their work on the Project.

	<u>Group 1</u>	<u>Group 4</u>	<u>Group 8</u>
Basic Hourly Rate	\$36.13	\$39.96	\$40.29
Fringe benefits	\$20.69	\$20.69	\$20.69
1-1/2 Time <sup>5</sup>	\$75.255	\$79.09	\$79.59
Holiday & Sunday	\$93.32	\$98.44	\$99.10

For Laborer Group 1 the applicable prevailing wage determination for Los Angeles County was SC-23-102-2-2011-1 (Laborer PWD), which states \$27.29 as the basic hourly rate, \$17.39 for fringe benefits, \$58.325 for time and one-half rate, and \$71.97 for holiday and Sunday time.

Second, as to the determination that the CPRs under-reported hours worked, Salamero used calendars for Rodriguez and Cruz that DLSE received from the Center for Contract Compliance (CCC), a joint labor-management committee. These calendars had pre-printed blank squares for each day of the relevant months, and hours of work were handwritten for each day of alleged work. Wherever the calendars stated greater hours than those stated in the CPRs, Salamero used the calendar hours to calculate the hours worked.

Third, as to Minco's alleged failure to pay all overtime, DLSE determined from the calendars for Rodriguez and Cruz that Rodriguez had worked overtime on 14 days for which Minco had not paid him the required overtime rate, and Cruz had worked overtime on 20 days for which Minco had not paid him the required overtime rate. For these 34 days, DLSE assessed a section 1813 statutory penalty of \$850.00 at the statutory rate of \$25.00 per day.

Fourth, as to the determination that Minco had failed to pay fringe benefits, the written complaints that CCC filed with DLSE regarding Cruz and Rodriguez alleged that the workers were "Not paid all or some fringe benefits."

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<sup>5</sup> The sums stated here for time and one-half and Holiday and Sunday time include fringe benefits.

However, Cruz's paystubs submitted with the complaint showed that Minco had paid the required fringe benefits to him. Cruz's paystubs stated that Minco paid Cruz at the rate of \$45.29/hour; this exceeded the Laborer Group 1 PWD requirement that the basic hourly wage plus fringe benefits equal \$44.68. In finding the prevailing wages due for Cruz, DLSE credited Minco with all fringe benefit payments shown in the paystubs.

As to Rodriguez, the paystubs submitted with Rodriguez's complaint showed no payment of fringe benefits. DLSE issued a written request to Minco to produce documentation of its fringe benefit payments, but Minco never produced the requested documents.<sup>6</sup>

In summary as to Rodriguez, DLSE credited Minco with payments of \$60,545.80. DLSE calculated that the prevailing wages Minco had been required to pay Rodriguez totaled \$91,866.52 (as amended during the Hearing), based upon the reclassification, the addition of work hours as reflected on Rodriguez's calendar, and the overtime pay and fringe benefits allegedly due. Accordingly, DLSE asserted that Minco had failed to pay Rodriguez prevailing wages totaling \$31,340.26.<sup>7</sup>

In summary as to Cruz, DLSE credited Minco with payments of \$67,162.36. DLSE calculated that the prevailing wages Minco had been required to pay Cruz totaled \$90,624.98 (as amended during the Hearing), based upon the reclassification, the addition of work hours as reflected in Cruz's calendar, and the overtime pay and fringe benefits allegedly due. Accordingly, DLSE asserted that Minco had failed to pay Cruz prevailing wages totaling \$23,462.62.

The amended Assessment of unpaid prevailing wages due thus totaled

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<sup>6</sup> As addressed, *post*, Minco's failure to produce the fringe benefit documents requested by DLSE was also the basis for the Assessment of the \$800.00 statutory penalty under section 1776.

<sup>7</sup> The difference between the required wages of \$91,866.52 and the credit for payments of \$60,545.80 is \$31,320.72, which is \$19.54 less than the \$31,340.26 that DLSE found. This discrepancy will be discussed, *post*

\$54,802.88.

Assessment of Section 1775 Statutory Penalty.

The Assessment determined there were 176 days in which Minco failed to pay the full prevailing wage due to Rodriguez, and 186 days in which Minco failed to pay the full prevailing wage due to Cruz. For the total of 362 worker-days in which Minco failed to pay the prevailing wage, DLSE assessed the section 1775 penalty at the rate of \$120.00 per day, totaling \$43,440.00.

Assessment of Section 1776 Statutory Penalty.

On December 19, 2016, DLSE served Minco by U.S. Mail with a formal request for CPRs consisting of: "Cancelled checks for fringe benefits, fringe benefits statements, reporting form for fringe benefits, calculation sheet for fringe benefits, breakdown of fringe benefits for this project." Minco had received the request by December 23, 2016, when Minco's controller Thomassian requested an extension of time to respond. DLSE did not grant an extension. Minco never produced the requested documents. Salamero testified that DLSE assessed the section 1776 penalty at the rate of \$100.00 per day for the eight-day period ending with DLSE's issuance of the Assessment, totaling \$800.00.

Assessment of Apprenticeship Violations.

The CPRs reported that that Minco had journeypersons working on the Project in the following eight crafts: Plumber, Electrician, Operating Engineer, Laborer Group 1, Iron Worker, Carpenter, Cement Mason, and Landscape/Irrigation Laborer. DLSE determined that Minco had fully complied with apprenticeship law and regulations for the crafts of Plumber and Electrician, but failed to comply as to the other six crafts.

The PWDs for these six crafts show the crafts are apprenticeable. In addition to the Operating Engineer and Laborer Group 1 PWDs, the applicable PWDs for the remaining four crafts as of the bid advertisement date of February



1, 2012 , were as follows: (1) Iron Worker: C-20-X-1-2011-2 (Iron Worker PWD); (2) Carpenter: SC-23-31-2-2011-1 (Carpenter PWD); (3) Cement Mason: SC-23-203-2-2010-1 (Cement Mason PWD); and (4) Landscape/Irrigation Laborer: SC-102-X-14-2011-1 (Landscape/Irrigation Laborer PWD).

For each of these six crafts, there was one apprenticeship committee in the geographic area of the Project site, except that there were two committees for the craft of Cement Mason. DLSE's investigation determined that for these six crafts, Minco did not issue to any of the apprenticeship committees public works contract award information (in a DAS 140 form or equivalent) or request dispatch of apprentices (in a DAS 142 form or equivalent), and that Minco did not hire any apprentices.

DLSE assessed the section 1777.7 statutory penalty based upon Minco's failure to issue a notice of public works contract award information (in a DAS 140 form or equivalent) to the applicable apprenticeship committees for the six crafts. The Labor Commissioner set the rate at \$150.00 per day of violation, commencing on December 7, 2012 (the day after the first day Minco worked on the Project) through July 22, 2015 (the last day Minco worked on the Project). This totaled 958 days, resulting in an assessed penalty of \$143,700.00.

The Evidence at the Hearing as to Cruz.

Cruz did not testify in the Hearing on the Merits. DLSE submitted as exhibits solely the complaint documents that CCC had submitted to DLSE, principally containing copies of 31 weekly paystubs for Cruz's work on the Project, a two-page complaint containing both handwritten and typewritten answers on a pre-printed complaint form, and a three-page calendar with numbers of hours handwritten on various dates. There was no testimony or other evidence as to how the complaint and the calendar were created. The transmittal letter from CCC, dated March 12, 2014, states: "Please find attached, copies of a complaint recently received during a field investigation. As the

complainant is unable to visit your office due to his/her work schedule, we are forwarding the complaint to your attention on behalf of the worker.”

The paystubs in the complaint package showed Minco classified Cruz as Laborer Group 1, Minco paid Cruz for both overtime and regular hours, and Minco paid Cruz the basic weekly rate and fringe benefits at rates slightly higher than required by the Laborer Group 1 PWD.

The written complaint form bore the handwritten initials “MC,” and boxes were checked for the pre-printed allegations: “Not paid all or some fringe benefits,” “Misclassification of worker,” and “Unpaid overtime/Sat/Sun/Holiday rate.” The second page of the complaint bore an indecipherable signature (plus initials “MC” next to several handwritten matters), and asserted the following matters: (1) the proper classification was “Operator,” which was followed in Spanish with the words “grupo 8 grupo 4”; (2) the complainant was paid \$45.29 per hour, and (3) payments were made by both check and by cash. The complaint also contained typewritten answers to questions, stating that the type of work was “Heavy Machine Operating . . .” using “Bobcat, Backhoe, Loader, Excavator, John Deer, tractor with tracks, mini excavator, jumping jack, jack hammer, compactor.”

The three-page calendar for Cruz had handwritten numbers in the boxes for dates from December 20, 2012, through September 6, 2013. Most hours marked were “8”, but they ranged from “1” to “11-1/2.”

The sole evidence Minco presented at the Hearing regarding Cruz was the testimony of Minco’s superintendent on the Project, Ghaloy. Ghaloy testified that he was present at the jobsite each day work was performed, he observed Cruz’s work, and Cruz solely performed the work of Laborer rather than the work of Operating Engineer.

The Evidence at the Hearing as to Rodriguez.

Rodriguez testified at the Hearing on the Merits, and corroborated the

assertions stated in the complaint documents. Those documents included a two-page written complaint, a completed declaration, a completed questionnaire, a two-page calendar on which Rodriguez handwrote his assertion of hours worked during the period September 8, 2014, through May 1, 2015, and copies of 16 weekly paystubs during the period beginning September 1, 2014, through May 24, 2015. Each paystub shows that Minco paid Rodriguez for some hours at the rate of \$30.19 and for other hours at the rate of \$39.05. Several paystubs also show Minco paid Rodriguez the overtime rate of \$45.29 for overtime hours.

None of the above documents pertained to Rodriguez's initial two-week employment from March 22, 2013, through April 4, 2013. However, Rodriguez testified that he performed the work of an Operating Engineer during that two-week period, but that Minco paid him at the Laborer rate.

None of the paystubs show any payment of fringe benefits to Rodriguez. Minco's witness Thomassian testified that for some of the time, Minco paid fringe benefits directly to Rodriguez, and for other parts of the Project Minco paid the fringe benefits to John Hancock Retirement Services on behalf of Rodriguez. However, Minco presented no documentary evidence of payment of fringe benefits either directly to Rodriguez or to John Hancock Retirement Services so as to corroborate Thomassian's bare testimony on this issue.<sup>8</sup> If such payments had been made, it is expected that corroborating documents would have existed.

Minco's superintendent Ghaloy testified at length on Rodriguez's work and the hours he worked, as follows. For the time period September 4, 2014, through May 12, 2015, Ghaloy was at the Project site each day that workers were present, and he prepared daily timesheets which he sent to Minco as a basis for the CPRs. Each daily timesheet showed the name of each worker present, the trade of each worker, and the start time and end time for each craft

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<sup>8</sup> DLSE did obtain statements from John Hancock Retirement Services for Minco's payment of fringe benefits on behalf of its workers, but those documents showed they were not for any work performed on this Project.

performed by the worker. For Rodriguez, each timesheet showed that Rodriguez worked in the two crafts of "Operator" and "Laborer," and stated the start and end times for each. Ghaloy testified that on each day, Rodriguez would dig a trench using heavy operating equipment, and for those hours he designated Rodriguez as "Operator." On each day when the trench was completed, Rodriguez would perform "Laborer" work, such as getting inside the trench to assist the other workers placing pipe in the trenches, using a tape measure to measure the depth of trenches, and using a hand shovel to dig trenches close to buildings or fences where the operating machinery could not fit. Ghaloy also presented as evidence photographs of Rodriguez using the tape measure and digging with a shovel on the jobsite.

The Evidence at the Hearing on Apprenticeship Requirements.

Minco did not present any testimony or other evidence disputing DLSE's contention that Minco did not issue DAS 140 or DAS 142 forms to the six crafts stated, *ante*. Rather, Minco's controller Thomassian testified that since Minco was not a union shop he believed Minco was not required to send those forms to any committees other than the two committees for Plumber and Electrician that had approved Minco to train apprentices.

## **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 California Supreme Court has summarized the purpose of the CPWL as follows:

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to

permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

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

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) on a contractor who has failed to pay the required prevailing wages 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, which will then be set for hearing before a hearing officer appointed by the Director of the Department of Industrial Relations. 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 initial 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).)

The Assessment Was Timely.

The limitations period for DLSE to serve an assessment is stated in section 1741, subdivision (a). Section 1741, subdivision (a), has been in effect without amendment since January 1, 2014. (Stats. 2013, ch. 792, § 1.)<sup>9</sup> It states in relevant part:

The assessment shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last.

Here, the District filed its Notice of Completion on September 1, 2015. That did not commence the running of the limitations period, however, because the Notice of Completion was not "valid" under Civil Code section 9204. That statute states:

- (a) A public entity may record a notice of completion on or within 15 days after the date of completion of a work of improvement.
- (b) The notice shall be signed and verified by the public entity or its agent.

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<sup>9</sup> For most purposes on a public works project, the bid advertisement date determines the applicable Labor Code sections and applicable sections of the California Code of Regulations, title 8. As stated above, the bid advertisement date of this Project was February 1, 2012. The version of section 1741, subdivision (a), in effect on that date provided that an assessment had to be served within 180 days of the filing of a valid notice of completion or acceptance of the public work, whichever occurred later. (Stats. 2000, ch. 954, § 9 [Assem. Bill 646], eff. July 1, 2001.) The limitations period applicable here, however, is the 18-month period under section 1741, subdivision (a), as amended effective January 1, 2014. It is well established that when the Legislature extends a limitations period, any matter not already barred is subject to the new period. (See, e.g., *Quarry v. Doe I* (2012) 53 Cal.4th 945, 956, citing *Mudd v. McColgan* (1947) 30 Cal.2d 463, 466.) DLSE's assessment was not barred as of January 1, 2014, because the work continued and the 180-day limitations period had not yet commenced running. As of that date, no notice of completion had been filed and no acceptance of the public work had occurred. Since the assessment was not already barred on the effective date of the amendment, the 18-month limitations period applies.

- (c) The notice shall comply with the requirements of Chapter 2 (commencing with Section 8100) of Title 1, and shall also include the date of completion. An erroneous statement of the date of completion does not affect the effectiveness of the notice if the true date of completion is 15 days or less before the date of recordation of the notice.

The invalidity of the Notice of Completion for this Project is clear. The Notice of Completion itself stated that the Project was completed on June 30, 2015, i.e., substantially more than 15 days prior to the recordation date of September 1, 2015. Further, Minco's CPRs showed the last day Minco worked on the Project was July 22, 2015, and there is no evidence that any other contractor worked on the Project after that date. As such, there is no evidence that the true date of completion was within the 15-day period preceding September 1, 2015.

The invalid Notice of Completion in this case nonetheless provides evidence of the date of "acceptance of the public work" under section 1741, subdivision (a), which alternatively commences the running of the limitations period. As stated by the District's Chief Business Officer under penalty of perjury in the Notice of Completion, the District accepted the Project on July 21, 2015. Thus the 18-month limitations period did not expire until January 21, 2017. Accordingly, the Assessment issued on January 5, 2017, was timely.

DLSE Failed to Present Evidence Supporting Its Assessment as to Cruz.

Since Cruz did not testify, DLSE relied solely on the complaint package of documents CCC had submitted to DLSE. The paystubs therein showed Minco satisfied the prevailing wage requirements for Cruz's work on the Project, with all hours in the classification of Laborer Group 1. DLSE solely relied upon the remaining two documents – the written complaint and the calendar – for its assertions that Cruz's hours belonged in the classification of Operating Engineer Group 8, that the CPRs under-reported Cruz's hours, and that Minco had failed to

pay Cruz the overtime rate for overtime hours. However, no foundation was laid as to the authenticity of the complaint documents. There was no evidence whatsoever on what input Cruz had in the creation of these documents, if any. This is no evidence that Cruz handwrote the initials "MC" or that he is the person whose signature appears on the complaint. And there is no evidence that he wrote or had any input into the number of hours of work stated each day on the calendar.

California Code of Regulations, title 8, section 17244, subdivision (d), applicable to a hearing under section 1742, states in part, "Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it either would be admissible over objection in a civil action or no Party raises an objection to such use." Minco objected to the admission into evidence of the complaint package that CCC submitted to DLSE on the ground of hearsay and a lack of foundation. The complaint package would not be admissible over objection in a civil action because there is no otherwise applicable exception to the hearsay rule that would apply. Accordingly, this Decision finds that DLSE's evidence is insufficient to support the assessment of unpaid prevailing wages for Cruz in the sum of \$23,462.62. As addressed, *post*, this Decision also disallows the assessment of section 1775 statutory penalties for the alleged underpayment to Cruz in the sum of \$22,320.00, and disallows the assessment of section 1813 penalties for the alleged underpayment of overtime pay for Cruz in the sum of \$500.00.

Minco Failed to Pay the Prevailing Wage to Rodriguez.

The portion of the assessed unpaid wages resulting from the reclassification of Rodriguez's work and increase in his straight time and overtime hours totaled \$10,589.33. The evidence presented by both sides on this portion of the assessment was equally persuasive. Rodriguez's testimony corroborated the written evidence on these issues, and Ghaloy's testimony corroborated the



daily timesheets he wrote based upon his daily observations of Rodriguez on the job. Minco's evidence, however, was not more persuasive than DLSE's evidence. Minco had the burden of proving that the basis of the amended Assessment was incorrect (Cal. Code Regs., tit. 8, § 17250, subd. (b)). Based on the totality of the evidence, Minco failed to satisfy this burden. Thus the assessment of prevailing wages due Rodriguez, based upon his classification and number of hours worked, is affirmed.

The portion of the assessed unpaid wages based on Minco's failure to pay Rodriguez the required fringe benefits was \$20,731.39. The evidence here clearly established that Minco failed to pay any fringe benefits for Rodriguez. Thomassian's assertion that Minco had paid these fringes was not supported by any corroborating documentary or other evidence.

Accordingly, this Decision affirms the amended Assessment's finding of unpaid prevailing wages for Rodriguez, but modifies it to \$10,589.33 plus \$20,731.39, for a total of \$31,320.72.<sup>10</sup>

Minco Is Liable for a Modified Section 1775 Statutory Penalty.

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

(1) 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 . . . .

(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

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<sup>10</sup> The amended Assessment found underpayment to Rodriguez in the amount of \$31,340.26, a figure derived from the difference between the required wages of \$91,866.52 and the credit for payments of \$60,545.80. However, the difference in those figures is \$31,320.72, or \$19.54 less than the amount DLSE found. Based on the Hearing Officer's calculation, the lesser figure will be found in this Decision.

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) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.

(§ 1775, subd. (a).)<sup>11</sup>

Section 1775, subdivision (a)(2)(D), states: "The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion." Abuse of discretion 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, the Director is not free to substitute his or her own judgment when "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.) The contractor "shall have

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<sup>11</sup> The reference immediately above to "willful" as being defined in "subdivision (c) of Section 1777.1" is a typographical error in the statute. The correct subdivision in former section 1777.1 is subdivision (d), stating: "A willful violation occurs when 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."

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).)

As stated above, this Decision disallows the assessment of unpaid prevailing wages as to Cruz, so no section 1775 penalty can properly be imposed as to those wages.

As to Rodriguez, the Labor Commissioner imposed the \$120.00 penalty rate under section 1775, subdivision (a)(2)(A)(iii), based on evidence that Minco’s violation was willful. The amended Assessment determined that Minco had failed to pay Rodriguez the prevailing wage for 176 days. As found *ante*, for each hour of each of those 176 days, Minco failed to pay Rodriguez the fringe benefits that were due under the applicable prevailing wage determination. The evidence established that Minco knew of its obligation to pay Rodriguez fringe benefits but deliberately failed to pay. Minco did not offer any evidence on which to find that the selected penalty rate of \$120.00 per violation constituted an abuse of discretion.<sup>12</sup>

As to the number of violations, section 1775, as quoted *ante*, states the penalty is imposed for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates. Accordingly, this Decision finds Minco liable for a modified 1775 statutory penalty of \$21,120.00, calculated at the rate of \$120.00 per violation for 176 violations.

Minco Is Liable for Liquidated Damages in the Sum of \$20,731.39.

Section 1742.1, subdivision (a) provides for the imposition of liquidated damages upon the contractor. It provides in part:

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<sup>12</sup> The fact that Minco’s other conduct on failing to pay the prevailing wage may not have been willful – i.e., misclassification, under-reporting of hours on CPRs, and failing to pay for all overtime hours – does not alter the conclusion that Minco did not show the \$120.00 rate was an abuse of discretion. Even if Minco’s conduct was solely failure to pay fringe benefits, such failure would constitute a willful violation of section 1775 for each hour Rodriguez worked on the Project.

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.

As of DLSE's issuance of the Assessment on January 5, 2017, the statutory scheme regarding liquidated damages provided contractors three ways to avert liability for liquidated damages (in addition to prevailing on the case, or settling with DLSE agreeing to waive liquidated damages).

First, under section 1742.1, subdivision (a), within 60 days of service of the assessment, the contractor could pay the workers all or a portion of the wages stated in the assessment, and thereby avoid liability for liquidated damages on the amount of wages paid. Second, under section 1742.1, subdivision (b), a contractor could avert liability for liquidated damages if, within 60 days from issuance of the assessment, the "full amount of the assessment or notice, including penalties has been deposited with the Department of Industrial Relations . . . ." And, third, the contractor could choose to rely on the Director's discretion to waive liquidated damages under (former) section 1742.1, subdivision (a), which stated:

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.<sup>13</sup>

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<sup>13</sup> On June 27, 2017, the Director's authority to waive liquidated damages in his or her discretion was deleted from section 1742.1 by legislative amendment. (Stats. 2017, ch. 28, § 16 [Sen. Bill 96].) Legislative enactments, however, are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Here, there was no expression of legislative intent that SB 96 apply retroactively to pending cases. (Accord, *Kizer v. Hannah* (1989) 48 Cal.3d 1, 7, "A statute is

((Former) § 1742.1, subd. (a).)

In this case, Minco stipulated prior to the Hearing on the Merits that it had not deposited the amount of the Assessment, or any part thereof, with the Department within 60 days following service of the Assessment. In the Hearing, Minco did not offer any evidence that it had paid any back wages to any of its workers.

As found above, this Decision disallows the assessment of \$23,462.62 in alleged unpaid prevailing wages as to Cruz. Accordingly, Minco has no liability for liquidated damages as to that sum.

As to the assessment of \$31,320.72 in prevailing wages for Rodriguez that is affirmed above in this Decision, apart from the portion attributable to non-payment of fringe benefits, Minco relied on the daily reports provided by its superintendent Ghaloy as to the workers, their classifications, and the hours worked each day in each classification. Ghaloy testified that he prepared those reports based on what he observed at the jobsite each work day. Accordingly, it appears that Minco may have reasonably relied on those daily reports, and as such had substantial grounds to appeal the assessment as to the portion of the \$31,320.72 attributable to DLSE's reclassification of Rodriguez, and DLSE's increase in straight time and overtime hours of Rodriguez. That portion totaled \$10,589.33; as to this sum, the Director exercises her discretion to waive the liquidated damages.

The remaining \$20,731.39 assessment of unpaid prevailing wages for Rodriguez was for fringe benefits. As noted, Minco presented no evidence supporting Thomassian's testimony that Minco had paid fringe benefits for Rodriguez. Accordingly, the Director does not exercise her discretion to waive

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retroactive if it substantially changes the legal effect of past events.") Therefore, the prior version of section 1742.1 in effect on the date the Assessment was issued in this matter will be applied to the Assessment.

these liquidated damages, and affirms the assessed sum of \$20,731.39.

Minco is Liable for a Modified Section 1813 Statutory Penalty in the Sum of \$350.00.

Section 1815 states in full:

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 at not less than 1½ times the basic rate of pay.

Section 1813 states the penalty for violation of section 1815 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.

The disallowance of the assessment of unpaid prevailing wages as to Cruz, as discussed, *ante*, also requires a disallowance of the assessment of the \$500.00 section 1813 penalty as to Cruz. As to Rodriguez, the evidence established Minco failed to pay Rodriguez the overtime rate for 14 days in which Minco worked overtime hours. Accordingly, Minco is liable for a modified section 1813 statutory penalty of \$350.00.

Minco Violated Apprenticeship Requirements.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California

Apprenticeship Council (CAC). (See Cal. Code Regs., tit. 8, §§ 227 to 232.70.)<sup>14</sup> In review of an assessment asserting violation of apprentice requirements, “[t]he affected contractor, subcontractor, or responsible officer has the burden of producing evidence of compliance with Section 1777.5.” ((Former) § 1777.7, subd. (c)(3)<sup>15</sup>); accord, § 232.50, subd. (b).)

Former section 1777.5, subdivision (d), establishes that every contractor awarded a public works contract by the state or any political subdivision who employs workers in any apprenticeable craft or trade “shall employ apprentices in at least the ratio set forth in this section . . . .” Former section 1777.5, subdivision (g) specifies the ratio as not less than one hour of apprentice work for every five hours of journeyperson work in each particular craft or trade:

The ratio of work performed by apprentices to journey[persons] 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 journey[person] work.

The governing regulation as to this 1:5 ratio of apprentice hours to journeyperson hours is section 230.1, subdivision (a), which states in 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 apprentice for every five hours of labor performed by a journey[person], unless covered by one of the exemptions

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<sup>14</sup> All subsequent references to the apprenticeship regulations are to the California Code of Regulations, title 8, unless otherwise specified.

<sup>15</sup> As addressed *ante* regarding section 1775, this Decision applies the provisions of section 1777.5 and 1777.7 in effect when the Project was advertised for bid in February 2012.

enumerated in Labor Code Section 1777.5 or this subchapter.<sup>16</sup> Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

The regulatory scheme establishes a two-step process by which the contractor obtains apprentices to satisfy the 1:5 ratio: (1) the contractor is required to notify the applicable apprenticeship committees of upcoming apprentice work opportunities in the particular craft or trade; and (2) the contractor is required to request the applicable apprenticeship committees to dispatch apprentices in the craft or trade to work on the project. (§ 1777.5, subd. (e); §§ 230, subd. (a) and 230.1, subd. (a).)

As to notification to apprenticeship committees of upcoming work opportunities in each craft or trade, section 230, subdivision (a) states in relevant part:

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. This 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 apprenticeship 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 deemed to be a

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<sup>16</sup> As noted above, based on the specific facts of the Operating Engineer work on the Project, DLSE agreed that, for purposes of the Assessment, Minco was exempt from the requirements to request dispatch of apprentices for the Operating Engineer work or to employ apprentices in the craft of Operating Engineer at the 1:5 hourly ratio. Under section 1777.5, subdivision (h), DAS is empowered to grant an apprenticeship program an exemption where the hourly apprenticeship ratio is not feasible.



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.

As to the request to the applicable apprenticeship committees to dispatch apprentices to the project job site in each craft or trade, section 230.1, subdivision (a) states in relevant part:

Contractors who are not already employing sufficient registered apprentices (as defined by Labor Code Section 3077) to comply with the one-to-five ratio must 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. . . . All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.

DAS provides a form (DAS 142) that contractors may use to request dispatch of apprentices from apprenticeship committees.

It is undisputed that for the five crafts of Laborer, Iron Worker, Carpenter, Cement Mason, and Landscape/Irrigation Laborer, the crafts were apprenticeable, Minco failed to issue forms DAS 140 and DAS 142 (or their equivalent) to the apprenticeship committees in the geographic area of the Project site, and Minco employed no apprentices despite extensive journeyman hours as follows:

<u>Craft</u>	<u>Total Journeyman Hours Worked</u>	<u>Minimum Apprentice Hours Required by 1:5 Ratio</u>
Laborer	23,963	4,792
Iron Worker	320	64
Carpenter	775	155
Cement Mason	615	123

Landscape/Irrigation Laborer      1,075      215<sup>17</sup>

Accordingly, this Decision finds that Minco violated section 1777.5 and section 230, subdivision (a), and section 230.1, subdivision (a), with respect to each of these crafts.

A Section 1777.7 Penalty in the Sum of \$95,800.00 Is Justified Under A De Novo Review of the Facts.

Former section 1777.7, as it existed on the February 1, 2012 bid advertisement date of the Project, states in relevant part:

(a) (1) A contractor or subcontractor that is determined by the Chief of the Division of Apprenticeship Standards<sup>18</sup> to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Chief if the amount of the penalty would be disproportionate to the severity of the violation. A contractor or subcontractor that knowingly commits a second or subsequent violation of Section 1777.5 within a three-year period, where 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 section 231, subdivision (h) as follows:

For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor’s control. There is an irrebuttable presumption that a contractor knew or should have

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<sup>17</sup> As noted, the craft of Operating Engineer was exempt from the form 142 and ratio requirement for this particular Project.

<sup>18</sup> Senate Bill 1038 (stats. 2012, ch. 46, § 96) changed the duty to enforce sections 1777.5 and 1777.7 from the Chief of the Division of Apprenticeship Standards (DAS) to the Labor Commissioner as of June 27, 2012. This change in enforcement by the Chief of DAS to the Labor Commissioner does not alter the analysis in this case.

known of the requirements of Section 1777.5 if the contractor had previously been found to have violated that section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects, . . . .

Under former section 1777.7, subdivision (f), the Director decides the appropriate penalty de novo. In setting the penalty de novo, the Director is to consider all of the following circumstances:

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

((Former) § 1777.7, subd. (f).)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment; namely, the affected contractor has the burden of proving that the basis for the assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

Here, the evidentiary record establishes that Minco “knowingly” violated section 1777.5. Minco issued valid DAS 140 and DAS 142 forms to the applicable apprenticeship committees for the crafts of Electrician and Plumber, thus showing it knew the apprenticeship requirements, it knew how to comply, and there were no circumstances preventing compliance. Further, Thomassian’s testimony that since Minco was a non-union contractor he thought Minco was only required to issue DAS 140 and DAS 142 forms to the two committees that

had approved Minco for training has no basis in the applicable statutes and regulations quoted above. Nothing stated in those statutes and regulations supports Thomassian's alleged belief. From the plain language of those statutes and regulations, Thomassian knew or should have known that Minco was required to submit the DAS 140 and DAS 142 forms to the apprenticeship committees for the additional crafts.

Given that Minco committed a "knowing" violation not due to circumstances beyond its control, the analysis turns to the five de novo review factors "1" through "5" listed above.

Factor "1" – whether the violation was intentional – favors a high penalty. The facts stated above on Minco's violations being "knowingly" made also support a finding that Minco's violations were intentional.

Factor "2" – whether Minco had committed other violations of section 1777.5 is a neutral factor. Although the evidence at hearing established that Minco was issued other Assessments by DLSE prior to the Assessment issued in this matter, the evidence did not clearly show that the earlier Assessments were issued prior to *the work* (and the violations) on this Project (i.e., that Minco was necessarily on notice of the violations in light of the earlier Assessments).

Factor "3" – whether, upon notice of the violation, Minco voluntarily took steps to remedy the violation – is not applicable here. There is no evidence that DLSE communicated with Minco regarding the Project prior to Minco's completion of its work.

Factors "4" and "5" – whether, and to what extent, the violation resulted in lost training opportunities for apprentices and otherwise harmed apprentices or apprenticeship programs – strongly favors a high penalty. As detailed in the chart, *ante*, the total amount of apprenticeship hours required by the 1:5 ratio was 5,349 hours for the five crafts of Laborer, Iron Worker, Carpenter, Cement Mason and Landscape/Irrigation Laborer. Minco's violations thus deprived

apprentices and apprenticeship committees a total of 5,350 hours – the equivalent of over two and one-half years -- of on-the-job training.

The weighing of the five de novo review factors thus supports a \$100.00 penalty rate. Under section 1777.7, any penalty rate greater than \$100.00 requires a determination that the contractor knowingly committed a second or subsequent violation of section 1777.5 within a three-year period. (§ 1777.7, subd. (a)(1).) The evidence in this proceeding was unclear and incomplete as to the relative timing and dates of work for the assessments issued to Minco by DLSE on other projects, and thus did not clearly establish prior violations (as opposed to prior assessments) so as to support a higher penalty rate.

As to the number of penalty days, under section 230, subdivision (a), the Labor Commissioner could have calculated the penalty commencing on December 7, 2012 (the day following the first day Minco had journeypersons working on the Project) to September 1, 2015 (the date the District filed Notice of Completion). Instead, the Labor Commissioner ended the penalty period earlier, i.e., on July 22, 2015 (the final day Minco had journeypersons working on the Project). This Decision concurs with that determination.

Accordingly, this Decision affirms the amended Assessment's finding that Minco is liable for the section 1777.7 statutory penalty in the sum of \$95,800.00, computed at the rate of \$100.00 per day for 958 days.

Minco is Liable for a Modified Penalty Under Section 1776.

Contractors on public works projects have ten days to comply subsequent to their receipt of DLSE's written notice requesting production of certified payroll records. (§ 1776, subd. (h).) If a contractor fails to comply within the ten day period, it is subject to a penalty of \$100.00 for each calendar day, or portion thereof, for each worker, "until strict compliance is effectuated." (*Id.*) The penalty rate provided by the statute is mandatory.

In this case, the evidence established that DLSE issued its request to

Minco for fringe benefit payment documents on December 19, 2016. Minco received it by December 23, 2016, as shown by Salamero's testimony that on that day Minco's controller Thomassian responded via email requesting an extension of time to submit the requested documents. DLSE did not grant an extension. The tenth day to produce the documents was January 2, 2017. Salamero testified that she calculated the penalty at \$100.00 per day up to the date DLSE issued the Assessment, which she asserted was eight days. DLSE thereby assessed the penalty as \$800.00. However, Salamero erred in counting the days. The Assessment was issued on January 5, 2017 – only three days after January 2, 2017. The \$100.00 per day penalty stated in the Assessment could be no greater than \$300.00 as of the issuance of the Assessment.<sup>19</sup>

Accordingly, this Decision reduces the section 1776 statutory penalty from \$800.00 to \$300.00.

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

### **FINDINGS AND ORDER**

1. Affected contractor Minako America Corporation dba Minco Construction timely filed a Request for Review of the Civil Wage and Penalty Assessment timely issued by the Division of Labor Standards Enforcement.
2. Minako America Corporation dba Minco Construction underpaid the prevailing wages owed to one worker on the Project, Adan Rodriguez, in the sum of \$31,320.72. Accordingly, Minako America Corporation dba Minco Construction is liable for payment of prevailing wages in the sum of \$31,320.72.

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<sup>19</sup> DLSE could have imposed a penalty greater than \$100.00 per day, since section 1776 allows the penalty to be \$100.00 *per worker* per day. DLSE did not do so. This Decision will not impose a penalty calculated at a daily rate greater than the daily rate imposed by the Assessment.

3. Minako America Corporation dba Minco Construction is liable for a modified statutory penalty under section 1775, subdivision (a), at the rate of \$120.00 per violation for 176 violations, totaling \$21,120.00.

4. Minako America Corporation dba Minco Construction proved a basis for waiver of liquidated damages as to the unpaid prevailing wages for worker Adan Rodriguez in the sum of \$10,589.33, and as to that sum the Director hereby waives liquidated damages. Minako America Corporation dba Minco Construction did not prove a basis for waiver of liquidated damages as to unpaid prevailing wages for Adan Rodriguez consisting of unpaid fringe benefits in the sum of \$20,731.39. Accordingly, under section 1742.1, subdivision (a), Minako America Corporation dba Minco Construction is liable for liquidated damages in the sum of \$20,731.39.

5. Minako America Corporation dba Minco Construction is liable for a modified statutory penalty under section 1813 in the sum of \$350.00.

6. Minako America Corporation dba Minco Construction knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230, subdivision (a) by not issuing public works contact award information in a DAS 140 form or its equivalent to the applicable apprenticeship committees for the six crafts of Laborer, Iron Worker, Carpenter, Cement Mason, Landscape/Irrigation Laborer and Operating Engineer in the geographic area of the Project.

7. Minako America Corporation dba Minco Construction knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a) by: (a) not issuing a valid request for dispatch of apprentices in a DAS 142 form or its equivalent to the applicable apprenticeship committee in the geographic area of the Project in the five crafts of Laborer, Iron Worker, Carpenter, Cement Mason and Landscape/Irrigation Laborer; and (b) not employing apprentices on the Project in each of those five crafts in the ratio of one hour of apprentice work for every five hours of journey person work.

8. Minako America Corporation dba Minco Construction is liable for a statutory penalty under section 1777.7 in the sum of \$95,800.00, computed at \$100.00 per day for the 958-day period from the day after Minco's first day of work on the Project through the last day of Minco's work on the Project.

9. Minako America Corporation dba Minco Construction is liable for a modified statutory penalty under section 1776 in the sum of \$300.00.

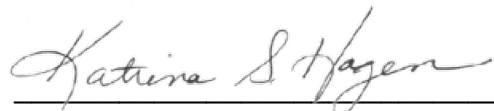
10. The amounts found due in the Assessment, as affirmed and modified by this Decision, are as follows:

Wages due:	\$31,320.72
Penalties under section 1775, subdivision (a):	\$21,120.00
Liquidated damages under section 1742.1:	\$20,731.39
Penalties under section 1813:	\$350.00
Penalties under section 1777.7:	\$95,800.00
Penalties under section 1776:	\$300.00
<b>TOTAL:</b>	<b>\$169,622.11</b>

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

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

Dated: 10-16-2020



Katrina S. Hagen  
Director  
Department of Industrial Relations