STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Mega Air Co., Inc. Case No. 20-0010-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Mega Air Co., Inc. (Mega) submitted a Request for Review of a Civil Wage and Penalty Assessment (Assessment) issued on October 31, 2019, by the Division of Labor Standards and Enforcement (DLSE) with respect to work Mega performed for the University of California, Los Angeles (UCLA or Awarding Body) in connection with the 10889 Wilshire Building-External Affairs Tenant Refurbishment project (Project) located in Los Angeles County. The Assessment determined that Mega owed $75,539.26 in unpaid prevailing wages, training fund contributions, and statutory penalties. Pursuant to notice, a Hearing on the Merits was conducted on June 24 and July 21, 2021, via Webex Video Conference before Hearing Officer Steven A. McGinty. Luong Chau appeared as counsel for DLSE; Jae Il Bae appeared for Mega. DLSE Deputy Labor Commissioner Christopher Hightower testified in support of the Assessment.

At the beginning of the Hearing on the Merits, the parties appearing stipulated as follows:

- The Request for Review was timely;
- No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment.

At the beginning of the Hearing on the Merits, the parties appearing stipulated that the following were the issues for decision:

- Whether the Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
- Whether the Assessment was timely served by DLSE in accordance with

Labor Code section 1741.[1]

- Whether DLSE timely made its enforcement file available to the requesting party.
- Whether Mega under-reported hours worked on its Certified Payroll Records (CPR).
- Whether Mega paid its employees for all hours worked on the Project.
- Whether Mega timely paid its employees the correct prevailing wage rates for all hours worked on the Project.
- Whether Mega paid all required training fund contributions for the Project.
- Whether Mega is liable for penalties assessed pursuant to sections 1775 and 1813.
- Whether Mega is liable for liquidated damages for unpaid wages found due and owing.
- Whether Mega submitted contract award information to all applicable apprenticeship committees for the classification Sheet Metal Worker in a timely and sufficient manner, as required by section 1777.5, and California Code of Regulations, title 8, section 230.
- Whether Mega employed apprentices in the required minimum ratio of apprentices to journeypersons required by section 1777.5 for the classification Sheet Metal Worker on this Project.
- Whether Mega is liable for penalties assessed pursuant to section 1777.7.

For the reasons set forth below, the Director finds that DLSE carried its initial burden of presenting evidence at the hearing that provided prima facie support for the Assessment. However, there were some errors in the DLSE Audit that establish the basis for the Assessment was incorrect in part. The Director also finds that Mega failed to carry its burden of proving that the basis of the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this

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

Decision affirming the Assessment as modified herein.

FACTS

The Project.

The Advertisement for Bids for the Project included the following Description of Work:

> This Project will refurbish Floors 10 through 16 in the office tower of the 10889 Wilshire building to consolidate External Affairs in one location. The 10889 Wilshire Building's 16-story, 232,299 rentable square foot office tower was originally constructed in 1961. The refurbishment scope shall include replacement of finishes on Floors 10 through 15 (there is no 13th floor), and the east end of Floor 16. Existing build-out shall be re-used with limited removal of select partitions to accommodate the program. The work will include the following:
>
> …
>
> 2 Building improvements: Provide fixtures and finishes in a total of (5) unisex restrooms on Floors 10 through 15 that were built as shell space under a previous project. Scope shall include modifications and repairs to building systems and finishes impacted by the work; and hazardous materials abatement as required. Furniture and cabling will be provided separately from this contract. [2]

UCLA released the bidding documents for the Project to the public on March 13, 2018.[3]

The Advertisement for Bids included a provision that stated in part: "The work described in the contract is a public work subject to section 1771 of the California Labor Code."[4] The Advertisement's Supplementary Instructions for Bidders included an instruction that: "The California General Prevailing Wage Determination for this Project

[2] DLSE Exhibit No. 3, p. 26.

[3] *Ibid*.

[4] DLSE Exhibit No. 3, p. 27.

is 2018-1. Bidder is required to refer to the California Department of Industrial Relations website [link] and confirm the correct Prevailing Wage Determination for this Project."[5]

The prime contract was awarded to Tobo Construction, Inc. (Tobo), which entered into a contract with UCLA dated June 29, 2018.[6] On August 6, 2018, Mega entered into a subcontract with Tobo to perform the heating, ventilation and air conditioning (HVAC) work on the Project.[7]

Mega's subcontract with Tobo included the following provisions:

> 13.2 Subcontractor shall comply with and agrees to be bound by all applicable federal, state and local laws and regulations, including, but not limited to, all provisions of … the California Labor Code …. Upon request, Subcontractor shall submit certified payroll records to Contractor no later than three (3) working days after labor has been paid. The provisions of California Labor Code Section 1771, 1775, 1776, 1777.5, 1813 and 1815 attached hereto are incorporated into this subcontract when payment of prevailing wages is required by contract or law, and Subcontractor agrees to comply with these provisions and all interpretations thereof by the Director of the Department of Industrial Relations insofar as they are applicable to Subcontractor on this project. Subcontractor also shall comply with all laws and regulations regarding the use of apprentices and shall utilize apprentices in the legally required ration for all work on the Project. Subcontractor shall submit forms DAS-140 and DAS-142 to the proper persons in timely manner.
>
> 13.3 Prior to making final payment to Subcontractor, as a condition precedent, the Subcontractor must provide to Contractor an affidavit signed under penalty of perjury that Subcontractor has paid the correct prevailing wage rate to its employees pursuant to the Labor Code.[8]

Mega employees worked on the Project from September 5, 2018, through July 2, 2019, in the City of Los Angeles. According to DLSE's Penalty Review, a stop order was issued

---

[5] *Id.* at p. 28.

[6] DLSE Exhibit No. 4, p. 30.

[7] DLSE Exhibit No. 5, pp. 36-46.

[8] DLSE Exhibit No. 5, p. 40.

on the Project, and it had not been completed as of the date of writing.[9] UCLA informed DLSE of the stop order in a telephone call on October 28, 2019.[10]

The Assessment.

DLSE served the Assessment by ordinary first class mail and by certified mail upon Mega's agent for service of process, Jae Il Bae, on October 31, 2019. The Assessment found that Mega did the following: failed to pay prevailing wages to Sheet Metal Workers; failed to report all hours worked; and, failed to pay all required training fund contributions. It further found that Mega failed to meet apprenticeship requirements by failing to submit Contract Award Information (DAS 140) to all applicable committees for Sheet Metal Workers, and failed to meet the required minimum ratio for apprentices to journeypersons for Sheet Metal Workers.

The Assessment found that Mega underpaid required prevailing wages and training fund contributions in the amount of $36,139.26. The Public Works Audit Worksheet attached to the Assessment indicated that penalties were assessed under section 1775 in the mitigated amount of $180.00 per violation for 86 violations, in a total amount of $15,480.00. Penalties were also assessed under section 1777.7 in the mitigated amount of $80.00 per day for 299 days, totaling $23,920.00.

The Enforcement File.

Mega's Request for Review, dated December 11, 2019, was received by DLSE on January 6, 2020. On January 9, 2020, DLSE served upon Mega a "Notice of Opportunity to Review Evidence Pursuant to Labor Code Section 1742(b)." The Notice stated in part: "In accordance with Labor Code section 1742(b), this notice provides you with an opportunity to review evidence to be utilized by the DLSE at the hearing on the Request for Review, and the procedures for reviewing such evidence." It concluded by stating that the procedure to exercise the opportunity to review evidence was to transmit an attached Request to Review Evidence to DLSE at a specified address within five

[9] DLSE Exhibit No. 16, p. 274.

[10] DLSE Exhibit No. 20, p. 314.

calendar days.[11] There is no evidence in the record that Mega ever submitted such a request.

The Hearing on the Merits.

Prior to the commencement of testimony, the parties appearing stipulated to the admission of DLSE Exhibit numbers 1 through 24. Those exhibits were admitted into evidence. Mega's requests for review of two other assessments were also heard on June 24 and July 21, 2021, and the parties also stipulated to the admission of DLSE's exhibits in those cases. Case Numbers 19-0209-PWH and 19-0317-PWH involved a related UCLA project for which Tobo the prime contractor also filed a request for review. Case Number 20-0002-PWH involved the Signal Hill Public Library Project, for which the City of Signal Hill was the awarding body and Tobo was again the prime contractor. Some of the workers on the instant Project also worked on one or both of those other two projects. Accordingly, some of the evidence presented in those cases is also relevant to the present case.

DLSE called as a witness Christopher Hightower. He testified that he was employed by DLSE as a Deputy Labor Commissioner I, and that his duties entailed investigating complaints of labor law violations on public works projects. Hightower testified that he conducted the investigation that resulted in the Assessment at issue. His investigation stemmed from the investigation of a complaint from Public Works Contract Compliance regarding a related project that was the subject of Case Numbers 19-0209 and 19-0317. Hightower testified that his investigation of this Project resulted in the Assessment at issue. His investigation included obtaining documents from the Awarding Body and Mega, sending questionnaires to workers, interviewing the two workers who returned completed questionnaires, and obtaining affidavits from those workers. Hightower identified various DLSE exhibits and testified regarding their contents. He was cross-examined by Mega.

Mega called as its only witness Jae Il Bae, who did not contradict Hightower's testimony. Mega did not introduce any documentary evidence.

[11] DLSE Exhibit No. 19, pp. 295-296.

The matter was submitted at the conclusion of testimony on July 21, 2021.

Applicable Prevailing Wage Determination (PWD).

Set forth below is the relevant PWD that was in effect on the date the Project was advertised for bids:

> Sheet Metal Worker for Los Angeles County (LOS-2018-1), issued August 22, 2017. The basic hourly rate for this classification for work performed through June 30, 2018, was $42.78, the combined fringe benefits were $27.81 per hour, and the training fund contribution rate was $0.82 per hour, for a total of $71.41 for each straight-time hour.[12] A predetermined increase of $2.00 per hour, effective July 1, 2018, brought the total straight-time hourly rate to $73.41; an additional predetermined increase of $2.00 per hour, effective July 1, 2019, brought the total straight-time hourly rate to $75.41.[13]

Underpayment of Wages and Underreporting of Hours Worked.

The Assessment found that Mega underpaid workers for their work on the Project. This was primarily due to Mega's failure to pay the correct prevailing wage rate required by the PWD for Sheet Metal Worker, as well as its failure to pay for all hours worked. Mega's CPRs consistently reported payment to Sheet Metal Workers of a basic hourly rate of $44.48 and a total hourly rate of $73.66. (DLSE Exhibit No. 8, pp. 56-143.) However, the two workers interviewed by Hightower reported being paid at far lower rates, and provided paycheck stubs documenting the rates paid and showing that they worked hours not reported on the CPRs.

Hightower testified that in the course of his investigation, he obtained CPRs from Mega, and sent questionnaires to the employees identified in the CPRs. In the Penalty Review, he reported:

> The original employee questionnaires were sent out on 10/29/18 in case #40-62293. Responses from Jae Jung and Federico Bonilla were received.

---

[12] DLSE Exhibit No. 15, p. 264.

[13] (*Id.* at p. 269.) A note accompanying the predetermined increases states: "The predetermined increase shown is to be allocated to wages and/or employer payments. Please contact the Office of the Director-Research Unit at (415) 703-4774 when the predetermined increase becomes due to confirm the distribution. Please also examine the important notices to see if any modifications have been issued, as there may be reductions to predetermined increases." (*Id.* at p. 270.) In its Penalty Review, DLSE states that the basic hourly rate was $44.28 as of July 1, 2018, and $46.28 as of July 1, 2019, indicating that $1.50 of the first predetermined increase was allocated to the wage, and the remaining $0.50 to employer payments. (DLSE Exhibit No. 16, p. 274.)

> Jae Jung indicated that he was only paid $22 per hour on the project. He provided copies of paycheck stubs and a list of dates that he worked on the project. Federico indicated on his questionnaire that he was paid $14 per hour. I contacted both workers and set up times to interview them in person.

(DLSE Exhibit No. 16, p. 276.)

Hightower interviewed worker Jae Man Jung on December 4, 2018, and January 28, 2019. He summarized the initial interview, conducted with the assistance of interpreter See-Young Lee, as follows:

> Mr. Jung no longer works for the company, but did HVAC and sheet metal work for the contractor. Mr. Jung indicates that he was paid $22 per hour by the contractor, and sometimes 2 weeks were combined and paid as if they were one week. Mr. Jung never received any benefits or pension with the company. Mr. Jung said that most days he and Federico worked on the project, and during a period of time also worked the graveyard shift to complete work. They also worked overtime and were paid at the regular rate of pay and were sometimes paid in cash. If Federico was not available, the contractor would hire other day workers who are not reported on the CPRs. Mr. Jung signed an affidavit and provided a written list of days worked and the time that was worked on those days.

(DLSE Exhibit No. 16, p. 276.)

Jung's sworn affidavit confirmed that he was paid $22.00 per hour for his work on the Project.[14] He also submitted calendar pages showing that he worked eight hours per day on the Project for twelve days in September 2018, twelve days in October 2018, and four days in November 2018. In addition, he submitted paycheck stubs from Mega showing that he was regularly paid $880.10 per week through September 23, 2018. (DLSE Exhibit No. 12.)

Hightower interviewed worker Federico Bonilla on January 3, 2019. He summarized the interview as follows:

[14] On March 25, 2021, DLSE served upon the Requesting Parties a Notice of Evidence by Affidavits, stating that the affidavits of Jae M. Jung and Federico Bonilla would be introduced into evidence at the Hearing on the Merits, and that Requesting Parties needed to notify the DLSE attorney no later than April 4, 2021, if they wished to cross-examine the declarants. No such notification was submitted, and pursuant to Rule 34 [Cal. Code Regs., tit. 8, § 17234] the affidavits were therefore admissible. Pursuant to stipulation, they and the accompanying documents were admitted into evidence.

> He is still employed with the company. He described the work that he did and the tools used. He said that he worked with Jae Jung almost every day on the project. He worked regularly about 40 hours per week and was paid $14 per hour. He worked on both parts of the project at the UCLA Wilshire building. He worked from October 2017 to June 2018 and from July 2018 to November 2018 on the second part of the project. He filled out an affidavit and calendar.

(DLSE Exhibit No. 16, p. 276.)

Bonilla's affidavit confirmed that he was paid $14.00 per hour for his work on the Project. He also submitted a calendar page showing that he worked eight hours per day on the Project most weekdays between July 2, 2018, and November 30, 2018, as well as eight hours each Saturday in November 2018. In addition, he submitted several paycheck stubs from Mega showing that he was paid $560.00 per week for 40 hours of work, all of which were for dates prior to the commencement of work on this Project. (DLSE Exhibit No. 13.)

On January 28, 2019, Hightower met again with Jung, along with his daughter, Jennifer Jung, who translated. She provided a statement declaring that her father said he remembered signing time sheets a few times, but that the timesheets provided by the employer do not bear his signature, and that the times reported on the timesheets do not match the hours reported on the pay stubs. She further stated that she witnessed her father leaving home around 5:00-530 a.m. every time he went to work. (DLSE Exhibit No. 4, p. 47.)

Hightower stated in the Penalty Review that at the meeting on January 28, 2019:

> Jae Jung provided his ID and a DMV print out in which he signed and the signature differs from the signatures on the time sheets. Jae Jung's original affidavit, DMV document, ID and signature on the affidavit by his daughter are all consistent and do not match the signatures on the time-sheets.… Jae Jung brought all his paycheck stubs and the hours reported on the time sheet do not match the hours paid on the paycheck stub. The contractor paid for 40 hours per week, but indicated that Jae would only work 6 hours per day. Jae would have had to work 8 hours 5 days a week in order to be paid for a straight 40 hour work week.

(DLSE Exhibit No. 16, p. 277.)

Hightower determined Mega's payroll records to be unreliable, explaining in the Penalty Review:

> The payroll records provided by the contractor were deemed unreliable due to several inconsistencies. The first was that the contractor reported the owner and vice president almost every day on the project, but according to workers interviewed this was un-true [sic]. The contractor submitted copies of paycheck stubs, which were inconsistent in reporting the hours and rate of pay. Some paycheck stub [sic] contained the hours and rate, while others did not. Additionally, copies of paycheck stubs received from the contractor were inconsistent with the copies of . . . stubs received from Jae Jung. Mr. Jung's paycheck stubs show he was paid for 40 hours a week. The paycheck stubs submitted by the contractor to DLSE were edited to contain no hours or a lower amount of hours.
>
> …. Due to these inconsistencies and changes in records, in addition to conflicting worker testimony and records provided, the records provided by the contractor are un-reliable [sic]. The audit was conducted assuming that the workers were paid for 40 hours a week. The gross amounts paid were divided by the 40 hour work week to create each employees [sic] rate per hour paid.

(DLSE Exhibit No. 16, p. 277.)

Hightower's hearing testimony was consistent with the statements he made in the Penalty Review. He explained that in performing his audit, he credited Jung and Bonilla with the hours they indicated on their calendars.[15] Lacking such documentation for the remaining Sheet Metal Workers on the Project, Hightower credited them only with the hours reported on the CPRs. However, for purposes of determining their rates of pay, he assumed they had worked the same 40-hour weeks as Jung and Bonilla, and divided their gross weekly pay by 40 hours. Consequently, while Mega was found to have underpaid those workers, it accrued penalties only for the days it reported them to have worked. Mega produced no evidence that the Audit was incorrect with regard to the underpayments found therein.

[15] There were, however, instances in which the Audit did not credit hours reported on Bonilla's calendar. For example, the calendar shows Bonilla working each Saturday in November 2018, as well as Thanksgiving Day and the following Friday. (DLSE Exhibit No. 13, at p. 247.) The Audit did not credit him with work on those days, and indeed did not find that any overtime was worked on the Project. (DLSE Exhibit No. 2, p. 17.)

As set forth on DLSE's Public Works Audit Worksheet (DLSE Exhibit No. 2, p. 13) the workers in question were underpaid by the amounts shown in the table below, for the straight time hours listed:[16]

WORKER	HOURS	AMOUNT OWING
Jae Man Jung	240.0	$ 11,701.14
Wan Kim	84.0	$ 0.00
Federico Bonilla	332.0	$ 19,451.88
Jorge Rocha Alfaro	7.0	$ 417.13
Jae Bae	36.0	$ 0.00
Jose Arriega	17.0	$ 1,056.16
Jorge A. Rocha	11.0	$ 556.49
Si Kim	22.0	$ 1,112.98
Jae Yang Kim	19.0	$ 1,157.26
Ismael Alfaro	6.0	$ 435.54
Total Amount Owing and Unpaid		$ 35,888.58

Underpayment of Training Fund Contributions.

In the course of its investigation, DLSE obtained certification from the California Apprenticeship Council (CAC) that it had received from Mega training fund contributions totaling $285.60 for this Project. (DLSE Exhibit No. 14, pp. 260-261.) The Public Works Audit worksheet attached to the Assessment found that Mega had underpaid the required training fund contributions by $250.68. Hightower explained in the Penalty Review:

> Mega … failed to pay the correct amount of training funds for hours worked due to under-reporting of hours. Due to the hours reported by the employees and on the calendars provided, the contractor owes training funds for hours that were worked and not reported. The contractor paid $285.60 in training funds and still owes an additional $250.68.

(DLSE Exhibit No. 16, p. 278.)

[16] All of the workers listed were classified as Sheet Metal Workers. The Assessment found no overtime hours worked.

The two workers found by the Audit to have under-reported hours were Federico Bonilla and Jae Man Jong. Thus, the training fund contributions found to be owing and unpaid are attributable to the unreported hours for those two workers. Mega disputed the finding that it had underreported hours for those workers, but presented no testimony or documentary evidence regarding its training fund contributions.

Applicable Apprenticeship Committees in the Geographic Area.

According to DLSE's Penalty Review (DLSE Exhibit No. 16), there were three apprenticeship committee in the geographic area of the Project for the trade of Sheet Metal Worker: Southern California Chapter of Associated Builders and Contractors, Inc. (ABC) Sheet Metal U.A.C.; Kern & Northern Los Angeles Counties Air Conditioning and Sheet Metal Workers J.A.T.C.; and Southern California Sheet Metal J.A.T.C. Hightower testified that he obtained this information by searching the DAS public works apprenticeship database for Sheet Metal Worker apprenticeship committees serving Los Angeles County.

Notice of Contract Award Information.

Mega began work on the Project on September 5, 2018, according to Mega's CPRs. On August 20, 2018, it faxed notice of contract award information forms (DAS 140) to the Southern California Chapter of Associated Builders and Contractors, Inc. Sheet Metal U.A.C. (DLSE Exhibit No. 17, p. 282), and the Southern California Sheet Metal J.A.T.C. (DLSE Exhibit No. 18, p. 284).

The Assessment found that Mega did not submit a DAS 140 to the Kern & Northern Los Angeles Counties Air Conditioning and Sheet Metal Workers J.A.T.C. (DLSE Exhibit No. 16, pp. 275, 279.) Mega does not dispute this finding. Rather, in his cross-examination of Hightower, Bae maintained that he telephoned that committee and was told not to submit the form because it did not dispatch apprentices to the geographic area of the Project.

Request for Dispatch of Apprentices.

On September 3, 2018, Mega faxed a DAS 142 to the Southern California Sheet Metal J.A.T.C., requesting one apprentice to report for work on the Project on

September 6, 2018. The form is marked "CANCELLED." (DLSE Exhibit No. 18, p. 286.) On September 14, 2018, Mega faxed another DAS 142 to the same committee, requesting one apprentice to report for work on the Project on September 19, 2018. The cover sheet accompanying the form included a handwritten notation stating: "Apprentice must be Abestos [*sic*] 3 day training certified." (*Id*. at pp. 289-290.) On October 12, 2018, Mega faxed a third request to the same committee, requesting one apprentice to report for work on the Project on October 16, 2018. The fax cover sheet contained the statement: "Apprentice must have asbestos trained [*sic*] due to facility not allowing anyone without the 3 days training." (*Id*. at pp. 291, 293.)

The Assessment credited Mega with submitting a DAS 142 to the Southern California Sheet Metal J.A.T.C. on September 14, 2018, but found that it had failed to submit that form to either of the other two applicable committees. (DLSE Exhibit No. 16, pp. 275, 279.) Mega does not dispute these findings. In his cross-examination of Hightower, Bae asserted that he did not send a DAS 142 to the ABC Committee because it said it could not dispatch apprentice "because they are not part of the union, union shop."

Minimum Ratio Requirement.

The Assessment found that Mega had failed to employ apprentices on the Project at the minimum ratio of apprentices to journeypersons. As explained by Hightower in the Penalty Review:

> Pursuant to Labor Code section 1777.5(d), if the contractor … in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, the contractor shall employ apprentices in at least the ratio of one hour of apprentice work for every five hours of journey[person] work.
>
> Mega … failed to meet the 20% required ratio for hired Sheet Metal Worker apprentices. The Certified Payroll Records had no apprentice hours reported during the project. Based on the hours reported by the contractor and additional hours reported by the employees the amount of apprentice hours required was 51 hours. The contractor worked a total of 37 days on the project and is subject to penalties authorized by the Labor Code [for 37 violations].

(DLSE Exhibit No. 16, pp. 278-279.) Mega offered no testimony or documentary evidence that it had met the required ratio.

Assessment of Statutory Penalties.

In the "Conclusions & Recommendations" section of the Penalty Review, Hightower summarized the allegations of the complaint and the violations found in his investigation. He then stated:

> In addition to these violations, the contractor submit[ted] in-accurate *[sic]* and fraudulent documents on three separate occasions during the investigation. The contractor has four CWPA's issued against them in the last three years, and an additional 5 CWPA's issued to them dating back to 2013. The contractor is aware of the prevailing wage laws and has been assessed wages in addition to 1775 and 1777.5 penalties multiple times. The contractor continues to blatantly disregard the prevailing wage laws and prior assessments. Penalties recommended to be assessed at the maximum amount allowed due to multiple willful violations and attempt to willfully mislead the DLSE during its investigation.

(DLSE Exhibit No. 16, pp. 279-280.)

Penalties were assessed under section 1775 for 86 violations at the rate of $180.00 per violation, for a total of $15,480.00. (DLSE Exhibit No. 16, pp. 671-672.) Additionally, penalties were assessed under section 1777.7 for 299 violations at the rate of $80.00 per violation, for a total of $23,920.00. (*Ibid.*) In the Penalty Review, Hightower explained the basis of the section 1777.7 violations as follows:

> Upon review of the Certified Payroll Records, Mega Air Co., Inc. failed to submit the DAS 140 and DAS 142 in a timely manner to all approved apprentice committees. The first day a journeyman began work was on 9/5/2018 and the contractor failed to submit the DAS 140 and DAS 142 by this date. The DAS 140 was only submitted to two of the three committees, and the DAS 142 was only sent to one committee. The 37 day ratio violation penalty will be included with the DAS 140/142 penalties, but only one penalty per day will be assessed. The penalty calculation of 1777.7 is based on the DAS 140 violation, which begins on the 2nd day after the 1st journeyman's working day, and ended on the last day a journeyman worked on the project. The penalty accrual began on 9/6/2018 and ended on 7/2/2019 totaling 299 calendar days.

(*Id.* at p. 279.)

DISCUSSION

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

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

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

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

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review. (§ 1742.) The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of producing

evidence that "provides prima facie support for the Assessment …." (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that burden is met, "the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment … is incorrect." (Cal. Code Regs. tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

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

When an employer fails to maintain accurate time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount by a just and reasonable inference from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the reasonable estimate. (See, e.g., *Furry v. E. Bay Publ'g, LLC* (2019) 30 Cal.App.5th 1072, 1079 ["'[A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.'"], citing *Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687-688, 66 S.Ct. 1187; see also *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727; *In re Gooden Construction Corp.* (U.S. Dept. of Labor Wage Appeals Board 1986) 28 WH Cases 45 (BNA) [applying same rule to prevailing wage

claims under the federal Davis-Bacon Act, 40 U.S.C. §§ 3141 et seq.].) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

In this case, for the reasons detailed below, the Director determines that, based on the totality of the evidence presented, DLSE met its initial burden of presenting prima facie support for the Assessment, and that Mega failed to meet its burden to prove the basis of the Assessment was incorrect.

The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.

Section 1720, subdivision (a)(1) defines "public works" in part as: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by a public utility company pursuant to order of the Public Utilities Commission or other public authority." While the University of California is a public institution, not all of its construction, alteration, demolition and repair contracts are subject to prevailing wage requirement. This is due to Article IX, section 9, subdivision (a) of the California Constitution, which states in part:

> The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services.

In *Regents of the University of California v. Aubry* (1996) 42 Cal.App.4th 582, 591, the Court of Appeal for the Second District held that under that provision, the University could decide not to require prevailing wages on two UCLA projects that furthered its core educational function. On the other hand, in *Division of Labor Standards Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3rd 114, 124,, the Court of Appeal for the Fourth District held that payment of the California prevailing

wage was properly enforced where it was "not presented with a university rule excluding some types of contracts from prevailing wages laws, but rather a university contract explicitly providing for payment of the state law prevailing wage."

The facts of this case are similar to those in *Ericsson.* Here the Advertisement for Bids explicitly stated: "The work described in the contract is a public work subject to section 1771 of the California Labor Code." (DLSE Exhibit No. 3, p.27.) Moreover, the subcontract between Tobo and Mega expressly requires Mega to comply with the Labor Code's prevailing wage and apprenticeship requirements. (DLSE Exhibit No. 5, p. 40.) DLSE's exhibits thus provide prima facie support for a finding that the Project was a public work. Mega provided no evidence or argument to the contrary. Thus, DLSE established by a preponderance of the evidence that the Project was a public work subject to the Labor Code's prevailing wage and apprenticeship requirements.

The Assessment was timely served by DLSE in accordance with section 1741.

Section 1741, subdivision (a) provides in pertinent part:

> The assessment shall be served no 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. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first class and certified mail to the contractor, subcontractor, and awarding body.

DLSE established that the Assessment was served on Tobo, Mega, and the other appropriate parties by first class and certified mail on October 31, 2019. Through the testimony of Hightower, DLSE further established that as of that date, no notice of completion had been filed. The Project had not been completed due to the issuance of a stop order. (DLSE Exhibit No. 16, p. 274.)

Since neither specified triggering event had occurred prior to service of the Assessment, the statute of limitations had not begun to run. Accordingly, service was timely under section 1741.

DLSE timely made its enforcement file available to Mega.

Section 1742, subdivision (b) provides in pertinent part: "The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of a written request for a hearing." California Code of Regulations. title 8, section 17224 provides in pertinent part:

> (a) Within ten (10) days following its receipt of a Request for Review, the Enforcing Agency shall also notify the Affected Contractor or Subcontractor of its opportunity and the procedures for reviewing evidence to be utilized by the Enforcing Agency at the hearing on the Request for Review.
>
> (b) An Enforcing Agency shall be deemed to have provided the opportunity to review evidence required by this Rule if it (1) gives the Affected Contractor or Subcontractor the option, at the Affected Contractor or Subcontractor's own expense, to either (A) obtain copies of all such evidence through a commercial copying service or (B) inspect and copy such evidence at the office of the Enforcing Agency during normal business hours; or if (2) the Enforcing Agency at its own expense forwards copies of all such evidence to the Affected Contractor or Subcontractor.

Here Mega's Request for Review was received by DLSE on January 6, 2020. On January 9, 2020, DLSE served Mega with the Notice of Opportunity to Review Evidence Pursuant to Labor Code Section 1742, subdivision (b). It appears from the record that Mega never responded to that notice or otherwise attempted to review DLSE's evidence. Accordingly, in the absence of any evidence to the contrary, it must be concluded that DSLE satisfied its obligations under section 1742 and the above regulation.

Mega Failed to Pay the Proper Prevailing Wage Rate to Sheet Metal Workers.

The Assessment found that throughout the Project, Mega consistently underpaid Sheet Metal Workers, and that it failed to accurately report all hours worked by Federico Bonilla and Jae Man Jung. These findings were amply supported by the evidence presented by DLSE, including evidence obtained from Bonilla and Jung showing that Mega's CPRs were inaccurate and incomplete.

DLSE carried its initial burden of producing evidence that provides prima facie support for the Assessment. Thus, the burden was on Mega to prove that the basis for the Assessment was incorrect. Mega failed to produce any evidence that the Assessment was incorrect with regard to the underpayment of wages. Mega was given the opportunity to present witness testimony, and Jae Il Bae testified as its only witness. Despite repeated invitations by the Hearing Officer to respond to Hightower's testimony as to the violations he found, Bae declined to do so.

There are, however, some inconsistencies in DLSE's evidence regarding hours worked by Jung and Bonilla. Apparently on the basis of the calendars submitted by both workers, the Audit credited them with first working on the Project on Tuesday, September 4, 2018. (DLSE Exhibit No. 2, pp. 15, 17.) Yet DLSE's Penalty Review states: "The first day a journey[person] began work was on 9/5/2018 …." (DLSE Exhibit No. 16, p. 279.) That determination was supported by Mega's CPR for the week ending September 9, 2018. (DLSE Exhibit No. 8, p. 56.) Given DLSE's finding that the first day Sheet Metal Workers were employed on the Project was September 5, 2018, Jung and Bonilla could not have worked on the Project the previous day, September 4, 2018. The Audit must be modified accordingly.

There is an additional discrepancy in the Audit with regard to the days worked by Jung during the week ending September 16, 2018. The Audit shows him working three days that week: Monday, September 10; Tuesday, September 11; and, Friday, September 14. (DLSE Exhibit No. 2, p. 16.) Mega's CPR, however, shows him working only two days, Monday and Tuesday. (DLSE Exhibit No. 8, p. 58.) On his calendar, Jung also indicated that he worked only two days that week, but that those days were Monday and Friday. (DLSE Exhibit No. 24, p. 320.) Thus, there is no dispute that Jung worked Monday, and documents submitted by both Jung and Mega show that he worked only two days that week, disagreeing only as to whether the second day was Tuesday or Friday. There is no evidence that he worked both Tuesday *and* Friday. The Audit must therefore be modified to reflect that Jung worked two days, rather than three, during the second week of the Project.

Accordingly, the hours worked by Jung must be reduced by eight for each of those two weeks. For the week ending September 9, 2016, the Audit found that Jung worked four eight-hours days for a total of 32 hours. It calculated that the total wages required for the week were $2,322.88. The total wages paid were $1,144.46, leaving the amount due and owing of $1,178.42. (DLSE Exhibit No. 2, p. 15.) Subtracting 8 hours from 32 results in a corrected total of 24 hours worked, a reduction of 25%. Reducing the total required wages by the same percentage results in a corrected total of $1,742.16. Subtracting the total wages paid from that amount results in a corrected total due and owing of $597.70, a reduction of $580.72 from the amount found by the Audit.

For the week ending September 16, 2018, the Audit credited Jung with working three eight-hour days when he actually worked only two. Reducing his hours for that week by one-third and performing calculations similar to those described above results in a corrected total due and owing amount of $633.44, a reduction of $580.72 from the amount assessed. The total reduction for both weeks is $1,161.44. These reductions have the effect of reducing the total amount owing and unpaid to Jung for the Project from the $11,701.14 found in the Audit to $10,539.70. This reflects a reduction of 16 hours, from the 240 total hours worked found in the Audit, to 224 hours.

The amounts due and owing Bonilla found by the Audit must also be reduced. As with Jung, the Audit incorrectly credited Bonilla with 8 hours worked on Tuesday, September 4, 2018, when no work was performed. (DLSE Exhibit No. 2, p. 17.) Thus, Bonilla worked 24 hours during the week ending September 9, 2018, rather than the 32 hours found in the Audit. Reducing the total wages required by 25% and performing the other calculations described for Jung results in a modified amount due and owing of $1,294.16, a reduction of $580.72 from the $1,874.88 found in the Audit.

For the week ending October 14, 2022, the Audit found that Bonilla worked 8 hours Monday through Friday for a total of 40 hours. (DLSE Exhibit No. 2, p. 17.) However, Mega's CPR for the Signal Hill Library project shows him working there on Tuesday, October 9, and Wednesday, October 10. DLSE's assessment for the Signal Hill

Library project also shows him working there on those dates. Bonilla cannot have worked on both projects at the same time. Accordingly, the hours found by the Audit for this Project must be reduced by 16. This reduction in hours results in a reduction of the amount due and owing of $1,161.44, leaving a modified amount due and owing of $1,182.16.

For the week ending November 25, 2018, the Audit credited Bonilla working 8 hours each on Monday through Wednesday, for a total of 24 hours. (DLSE Exhibit No. 2, p. 17.) However, Mega's CPR for the Signal Hill Library project showed him working there on Monday, November 19, 2018, and DLSE's Assessment for that project showed him working 8 hours there that Monday. Moreover, in Mega's CPR for this Project, it certified "under penalty of perjury that no work was performed for the week … ending on: 11/25/18." (DLSE Exhibit No. 8, at p. 76.) Bonilla's calendar, however, showed him working 8 hours per day Monday through Saturday that week—including Thanksgiving Day and the following Friday. DLSE apparently found the calendar unreliable for that week, as the Audit does not credit him with working on the holiday or the two days following it. The calendar, standing alone, cannot be taken as substantial evidence that Bonilla worked on the Project on the three days preceding Thanksgiving in the face of persuasive evidence that he did not. The preponderance of the evidence shows that Bonilla did no work on the Project that week. Accordingly, the Audit must be modified to reduce the amount due and owing him by the $1,406.16.

For the week ending December 2, 2018, the Audit found that Bonilla had worked 8 hours per day Monday through Friday, (DLSE Exhibit No. 2, at p. 17.) for a total of 40 hours, although it found no work performed on the Project by any other worker during that week. Again, Mega certified under penalty of perjury that no work was performed on the Project for that week. (DLSE Exhibit No. 8, p. 77.) The Audit's finding appears to have been based solely on Bonilla's calendar. Again, the preponderance of the evidence shows that Bonilla did not work on the Project that week. Accordingly, the Audit must be modified to reduce the amount due and owing him by the $2,343.60 found in the Assessment.

These modifications result in a reduction of $5,491.92 in the total amount owing and unpaid to Bonilla, resulting in a revised total amount due and owing of $13,959.96. His total unreported hours worked are reduced from the 332 found in the Audit to 244, a reduction of 88 hours. When combined with the reduction in the amount owing and to Jung of $1,161.44, the total reduction of wages owing and unpaid on the Project is $6,653.36. This has the effect of reducing the total of $35,888.58 to $29,235.22. The Assessment must be modified accordingly.

DLSE Has Established that Mega is Liable for Unpaid Training Fund Contributions.

The Assessment found that Mega had underpaid the required training fund contributions due to its under-reporting of hours worked. It determined that the total contributions required were $536.28, and that had paid $285.60, leaving $250.68 unpaid and owing. The underpayment found in the Assessment was due to unreported hours found to have been worked by Federico Bonilla and Jae Man Jung. The modifications herein reduce those unreported hours by 104. The required training fund contribution as $0.82 per hour, and multiplying that rate by 104 results in a reduction of $85.28. Subtraction of that amount results in a modified total of $165.40 in unpaid training funds. Mega provided no evidence to rebut DLSE's evidence, and thus failed to meet its burden of proving that it did not underpay the required training fund contributions. Accordingly, the Assessment is modified to find that the contributions were unpaid in the reduced amount of $165.40.

DLSE's Penalty Assessment Under Section 1775.

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

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars ($200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
>
> (2) (A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

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

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

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

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

(iii) The penalty may not be less than one hundred twenty dollars ($120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[17]

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

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

[17] The citation in section 1775 to section 1777.1, subdivision (c) is mistaken. Section 1777.1, subdivision (e), as it existed on the contract date, defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or deliberately refuses to comply with its provisions."

section 1775 penalties at the mitigated rate of $180.00. This was in keeping with the nature of Mega's violations (Penalty Review, DLSE Exhibit No. 16.), and evidence that they were willful as defined by section 1777.1, subdivision (e).

The burden was on Mega to prove that DLSE abused its discretion in setting the penalty amount under section 1775. Here the Labor Commissioner reduced the penalty from the maximum $200.00 per violation recommended by Hightower to $180.00 per violation, a ten percent reduction. Mega failed to establish that the Labor Commissioner abused her discretion in assessing section 1775 penalties at $180.00 per violation. However, the above modifications with respect to the days worked by Jung and Bonilla have the effect of reducing the number of violations from 86 to 73. Accordingly, as determined by DLSE and modified herein, Mega is liable for 1775 penalties at $180.00 per violation for 73 violations, for a total amount of $13,140.00.

Mega Is Liable for Liquidated Damages.

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

> 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.

The statutory scheme regarding liquidated damages provides contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These require the contractor to make key decisions within 60 days of the service of the CWPA on the contractor.

First, the above-quoted portion of section 1742.1, subdivision (a), states that the contractor shall be liable for liquidated damages equal to the portion of the wages "that still remain unpaid" 60 days following service of the CWPA. Accordingly, the contractor

had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the CWPA, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Under section 1742.1, subdivision (b), a contractor would entirely avert liability for liquidated damages if, within 60 days from issuance of the CWPA, the contractor deposited into escrow with DIR the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775. Section 1742.1, subdivision (b), states in this regard:

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

In this case, Mega did not pay any back wages to the workers in response to the Assessment or deposit with the Department the assessed wages and statutory penalties. Therefore, under the express language of section 1742.1, Mega is liable for liquidated damages in the full amount of the unpaid wages found herein. Accordingly, liquidated damages are due in the aggregate amount of $29,400.62, as provided in the Findings, *post*.

Apprenticeship Violations.

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

Section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeypersons in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). (§ 1777.5, subd. (g); Cal. Code Regs., tit. 8, § 230.1, subd. (a).) A contractor shall not be considered in violation of the regulation if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency

of the project.

Contractors are also required to notify apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed. (§ 1777.5, subd. (e); Cal. Code Regs., tit. 8, § 230, subd. (a).) The Division of Apprenticeship Standards has prepared a form for this purpose (DAS 140), which a contractor may use to notify all apprenticeship programs for each apprenticeable craft in the area of the site of the Project. The required information must be provided to the applicable committees within ten days of the execution of the prime contract or subcontract, "but in no event no later than the first day in which the contractor has workers employed on the public work." (Cal. Code Regs., tit. 8, § 230, subd. (a).) Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities for training and work, and to request dispatch of apprentices for specified dates with sufficient notice. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).)

There Were Three Applicable Committees in the Geographic Area.

DLSE established that there were three applicable apprenticeship committees for Sheet Metal Worker in the geographic area of the Project. Mega offered no evidence to the contrary.

Mega Failed to Properly Notify All of the Applicable Committees of Contract Award Information.

DLSE established that Mega failed to notify one of the applicable committees, Kern & Northern Los Angeles Counties Air Conditioning and Sheet Metal Workers J.A.T.C., of contract award information. Mega offered no testimony or documentary evidence to the contrary. Rather, in the course of cross-examining Hightower, Bae made unsworn representations that the committee in question had instructed him not to submit the DAS 140 to it. Since Bae was not testifying under oath at that point, his representations were uncorroborated double hearsay, and he did not provide either the date or the identity of the person with whom he claimed to have spoken. In any event, apprenticeship committees have no legal authority to excuse compliance with the Labor Code's DAS 140 requirement. Accordingly, Mega has not met its burden of proving that

the Assessment was incorrect in finding that it failed to notify all applicable apprentice committees of its public works contract and thereby violated section 1777.5, subdivision (e) and the applicable regulation, section 230, subdivision (a).

Mega Failed to Request of All Applicable Committees the Dispatch of A Sheet Metal Apprentice.

All requests for dispatch of apprentices must be in writing and provide at least 72 hours' notice of the date on which one or more apprentices are required. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DLSE established that Mega made no such request of two of the three applicable committees. Mega produced no evidence that it complied with the above regulation in this respect, and accordingly failed to meet its burden of proving the Assessment incorrect.

Mega Failed to Employ Sheet Metal Worker Apprentices in the Required Ratio.

Sheet Metal Worker was the apprenticeable craft at issue in this matter. DLSE introduced evidence showing that Sheet Metal Workers began work on the Project on September 5, 2018, and last worked on the Project on July 2, 2019. The Assessment found that Mega employed journeyperson Sheet Metal Workers for 255 hours on the Project. Thus, according to the Assessment, to meet the one to five ratio, Mega was required to employ Sheet Metal Worker apprentices for a total of 51 hours. Mega failed to employ any Sheet Metal Worker apprentices. Thus, while the modifications to the Assessment made herein reduce the number of journeyperson hours worked, this has no impact on the Assessment's finding that Mega failed to comply with the ratio requirement. Accordingly, the record establishes that Mega violated section 1777.5 and the related regulation, section 230.1, in its failure to meet the required one to five apprentice to journeyperson hour ratios.

The Penalty for Noncompliance.

If a contractor knowingly violates Section 1777.5 a civil penalty is imposed under section 1777.7 in an amount not exceeding $100.00 for each full calendar day of noncompliance. (§ 1777.7, subd. (a)(1).) The phrase "knowingly violated Section 1777.5" is defined by regulation, section 231, subdivision (h), as follows:

> For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control. There is an irrebuttable presumption that a contractor knew or should have known of the requirements of Section 1777.5 if the contractor had previously been found to have violated that Section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects.

In determining the penalty amount, the Labor Commissioner 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.

(§ 1777.7, subd. (b).) The Labor Commissioner's determination of the amount of the penalty, however, is reviewable only for abuse of discretion. (§ 1777.7, subd. (d).) A contractor or subcontractor has the burden of proof with respect to the penalty, namely, that the Labor Commissioner abused discretion in determining that a penalty was due and the amount of the penalty. (Cal. Code Regs., tit. 8, § 17250.)

In this case, DLSE based section 1777.7 penalties on Mega's failure to submit contract award information as required by section 1777.5, subdivision (e), and section 230, subdivision (a) of the applicable regulations. Section 230, subdivision (a) states as follows:

> Failure to provide contract award information, which is known by the awarded contractor, shall be deemed to be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed by the awarding body, for the purpose of determining the accrual of the penalties under Labor Code Section 1777.7

Thus, per the regulation, a failure to provide contract award information is a violation that runs throughout the duration of the contract. DLSE imposed a mitigated penalty rate of $80.00 for each of 299 days of noncompliance, based on the period from the day on which the DAS 140 notice was required to be given through the last day Mega worked on the Project. (These penalties were assessed on the basis of Mega's failure to notify all applicable committees; no additional penalties were assessed for the additional section 1777.5 violations found.)

By sending a DAS 140 to two of the three applicable committees, and a DAS 142 to one of the three, Mega demonstrated that it knew or should have known of the requirements of section 1777.5, and thus its violations were "knowing" under the definition quoted, *ante*. DLSE established that Mega's violations resulted in lost training opportunities for apprentices and otherwise harmed apprentices and apprenticeship programs. At the same time, DLSE took into consideration that Mega had a record of previous violations of section 1777.5, and previous assessments of section 1777.7 penalties. On these facts, DLSE arguably would have been justified in setting the penalty rate at the maximum of $100.00, as Hightower recommended; yet the Labor Commissioner reduced that rate by twenty percent.

Mega failed to establish that the Labor Commissioner abused her discretion in assessing section 1777.7 penalties at the rate of $80.00 per violation. Accordingly, as determined by DLSE and specified in the Assessment, Mega is liable for 1777.7 penalties at $80.00 per violation for 299 days, for a total amount of $23,920.00.

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

FINDINGS AND ORDER

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

3. Affected subcontractor Mega Air Co., Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. DLSE timely made its enforcement file available to Mega Air Co., Inc.
5. No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment.
6. Mega Air Co., Inc. underpaid workers performing the work of Sheet Metal Worker by paying them less than the rates specified in the applicable PWD for that classification.
7. Mega Air Co., Inc. underreported the hours worked by at least two workers in its Certified Payroll Records.
8. Mega Air Co., Inc. failed to pay workers Federico Bonilla and Jae Man Jung for all hours worked.
9. In light of findings 6 through 8 above, Mega Air, Inc. underpaid its employees on the Project in the aggregate amount of $29,235.22.
10. Mega Air Co., Inc. failed to pay $165.40 in required training fund contributions.
11. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code section 1775 at the rate of $180.00 per violation. The Labor Commissioner's finding of 86 violations is modified downward to 73, resulting in the aggregate sum of $13,140.00.
12. Mega Air Co., Inc. is liable for liquidated damages in the full amount of the unpaid wages, which is $29,235.22.
13. There were three applicable apprenticeship committees in the geographic area of the Project in the craft of Sheet Metal Worker: Southern California Chapter of Associated Builders and Contractors, Inc. (ABC) Sheet Metal U.A.C.; Kern & Northern Los Angeles Counties Air Conditioning and Sheet Metal Workers J.A.T.C.; and, Southern California Sheet Metal J.A.T.C.

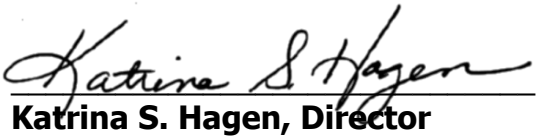
14. Mega Air Co., Inc. failed to issue a Notice of Contract Award Information to one of the applicable apprenticeship committees for the craft of Sheet Metal Worker.
15. Mega Air Co., Inc. failed to properly request dispatch of Sheet Metal Worker apprentices from two of the three applicable apprenticeship committees in the geographic area of the Project, and it was not excused from the requirement to employ apprentices under section 1777.7.
16. Mega Air Co., Inc. violated section 1777.5 by failing to employ apprentices in the craft of Sheet Metal Worker on the Project in the minimum ratio required by the law.
17. The Labor Commissioner did not abuse her discretion in setting section 1777.7 penalties at the rate of $80.00 per violation for 299 violations, and such penalties are due from Mega Air Co., Inc. in the amount of $23,920.00.
18. The amount found due in the Assessment is affirmed as modified by this Decision as follows:

Basis of the Assessment	**Amount**
Wages Due:	$29,235.22
Training Fund Contributions:	$ 165.40
Penalties under section 1775:	$13,140.00
Liquidated damages:	$29,235.22
Penalties under section 1777.7:	$23,920.00
TOTAL:	**$95,695.84**

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

The Civil Wage and Penalty Assessment is affirmed as modified herein, 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: 11-08-2022



Katrina S. Hagen, Director
California Department of Industrial Relations