STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Micon Construction, Inc. Case No. 15-0402-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Micon Construction, Inc. (Micon) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) served by the Division of Labor Standards Enforcement (DLSE) on August 17, 2015, with respect to work performed by Micon on the Sycamore Canyon Park Nature Center Pre-Engineered Building and Site Improvements project (Project) in the City of Riverside, Riverside County. The Assessment determined that $55,981.66 was due in unpaid prevailing wages and statutory penalties. A Hearing on the Merits occurred in Los Angeles, California over two dates, October 13, 2016, and November 29, 2016, before Hearing Officer Steven A. McGinty. Kimberly J. Manning appeared for Micon, and David D. Cross appeared for DLSE. Following the first day of testimony, DLSE filed a motion to amend the Assessment pursuant to California Code of Regulations, title 8, section 17226, subdivision (a)(1), to decrease the Assessment to $45,434.04, and the motion was granted. Subsequently, DLSE reduced the amount of training fund contributions claimed owed from $938.58 to $510.44; thus, the final total amount that DLSE claimed was owed was $45,005.90. The matter was submitted for decision on March 13, 2017.

The issues for decision are as follows:

- Were the correct prevailing wage classifications used in the audit?
- Were the hours worked as listed in the audit correct?
- Were the mathematical calculations as set forth in the Assessment correct?

- Were the wages paid to the workers listed correctly in the certified payroll records?
- Were all of the hours of individuals who worked on the Project listed correctly on the certified payroll records?
- Were all workers classified correctly on the certified payroll records?
- Were all required training fund contributions paid to an approved plan or fund?
- Did Micon provide contract award information to the applicable apprenticeship committees within ten days of the date of the execution of the prime contract?
- Did Micon request dispatch of apprentices for all employed crafts?
- Did Micon employ sufficient registered apprentices on the Project?
- Is Micon liable for penalties under Labor Code section 1775?
- Is Micon liable for penalties under Labor Code section 1777.7?
- Is Micon liable for liquidated damages under Labor Code section 1742.1, subdivision (a)?[1]
- If so, should the liquidated damages be waived?

In this Decision, the Director finds that Micon's original certified payroll records establish that Micon misclassified workers and underpaid those workers in violation of the public works laws. Further, Micon failed to employ any apprentices on the Project in violation of the law. Therefore, Micon is subject to penalties for those violations of the law.

FACTS

The Project was advertised for bid on March 14, 2013. (DLSE Exhibit No. 6.) Micon entered into a contract with the City of Riverside on May 30, 2013, to perform the work of the Project. (DLSE Exhibit No. 16 (Contract).) Paragraph numbers 14 and 15 of the Contract specified that the contractor was to pay prevailing wages as determined by the Director of Industrial Relations and to comply with various Labor Code provisions including making, keeping and disclosing detailed payroll records and employing registered apprentices. The Checklist of Labor Law Requirements to Review at Job

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

Conference Meetings signed by Don Napolitano, Vice President of Micon, likewise specified federal and state labor law requirements applicable to the Contract, including the ones noted above. In addition, at paragraph four there was a provision that required Micon to submit weekly certified payroll reports to the labor compliance program used by the City of Riverside, Alliant Consulting. (DLSE Exhibit No. 20.) According to DLSE's Labor Code Section 1775 Penalty Review, Alliant Consulting was the complainant. (DLSE Exhibit No. 7.)

The work of the Project Micon agreed to perform was to prepare a site to receive a pre-engineered (pre-fabricated) nature center building that had been manufactured off-site and then delivered and placed on-site by the manufacturer using a crane. Site improvements to be performed by Micon included preparation of the concrete foundation for the building and establishment of utility service; grading for concrete driveways and walkways; installation of two small shade structures; and minor landscape and irrigation modifications. Once the manufacturer had delivered the building, Micon was to install a retractable awning over the entrance. (DLSE Exhibit Nos. 16, 17, and 18.)

Micon employees worked on the Project from September 3, 2013, to December 31, 2013, in Riverside County, within the city limits of the City of Riverside. For Micon's work on the Project, the certified payroll records (CPRs) were prepared by Micon. On June 20, 2014, a Notice of Completion was filed with the County of Riverside Assessor, County Clerk & Recorder indicating that work on the Project was completed on June 6, 2014. (DLSE Exhibit No. 8.)

The Certified Payroll Records.

DLSE opened an investigation of Micon's compliance with prevailing wage laws with respect to the Project on July 28, 2014. The investigation was conducted by Deputy Labor Commissioner Fred De Leon. On July 29, 2014, DLSE sent Micon a notice of investigation, notice of apprenticeship compliance, and a request for payroll records. De Leon testified that he received a response from Micon on September 14, 2014, consisting of a cover letter and apprenticeship documents. He also received from the City of Riverside, the awarding body (City), documents including the Contract, the bid, and

copies of the CPRs that Micon had submitted to the City. Because Micon itself had not provided CPRs in response to the request, De Leon sent Micon a notice on October 14, 2014, advising Micon that if it did not send CPRs it would be debarred. Subsequently, On October 28, 2014, De Leon received from Micon CPRs for the Project. De Leon compared the CPRs Micon provided with the CPRs he had received from the City and testified they were exactly alike.

De Leon used the CPRs provided by Micon in performing his audit to determine if Micon had complied with prevailing wage laws while working on the Project. The CPRs (DLSE Exhibit No. 21), covering 18 weeks of payroll for the period September 1, 2013, through January 4, 2014, for the Project, were signed under penalty of perjury by Napolitano on various dates between September 23, 2013, and March 26, 2014. At the hearing, on cross-examination Napolitano was shown DLSE Exhibit No. 21, the CPRs. He acknowledged that Micon had submitted the CPRs, that he had signed them, and that they were signed a few weeks after the work on the Project was actually performed.

At the hearing Micon produced as an exhibit amended CPRs for the Project. The amended CPRs (Micon Exhibit A) covered the same 18-week payroll period for the Project as the CPRs Micon previously prepared (DLSE Exhibit 21), and were likewise signed under penalty of perjury by Napolitano; all 18 were dated October 20, 2014. Napolitano testified that the amended CPRs were the "final" CPRs and were prepared in response to a request from DIR for a final payroll report. In response to a question from his counsel to specify what he meant by final payroll report, Napolitano said:

> During the course of the project we do payroll reports and we submit them to the city compliance if they request them; and it is like a work in progress, and when the project is complete, we go back through and make sure everybody is accounted for and we do a final set or an amended set if needed, and give them to the city if they request them. They don't always request them, most of the time we turn them over, but sometimes they give us a checklist of what they want and we then will give them the final reports.

Napolitano also testified that the amended CPRs were prepared by employee Sue Patel who worked in Micon's office; she had been trained to do the CPRs. Napolitano reviewed and signed the amended CPRs. He is the only one who signs payroll reports.

He reviewed them for the ratio of apprentices and tenders to journeymen. In reviewing them, he relied on his personal observation of the workers at the work site once a week and review of the supervisor's daily reports. According to Napolitano, on the supervisor's daily reports, the supervisor lists the employees and what they did that day. Napolitano reviews those reports, then payroll is done at the end of the week, and then payroll reports are done the week after that. The hours used on the CPRs are the hours that the superintendent turned in each day.

According to Napolitano, his "office" sent the amended CPRs to De Leon by Fed Ex or UPS, second day delivery, within a day or two of them being signed on October 20, 2014. He testified he had a tracking number for the package showing when it was sent out but did not produce either the tracking number or a proof of service at the hearing. Nor did he or anyone else testify for Micon as to which person in his office sent the amended CPRs to De Leon. De Leon testified that the first time he saw the amended CPRs was the first day of hearing in this matter.

The Assessment.

DLSE served the Assessment by mail on August 17, 2015. The Assessment was prepared by De Leon. The Assessment found that Micon had misclassified several landscape irrigation laborers as landscape irrigation tenders and misclassified laborers as modular furniture installers, and that ten workers had been underpaid prevailing wages by Micon in the amount of $15,991.22. Pursuant to section 1775, penalties were assessed in the amount of $25,200.00 for underpayment of prevailing wages and $938.58 for underpayment of training fund contributions. In addition, the Assessment found that Micon had failed to properly request dispatch of apprentices in the crafts of laborer and cement mason, and had failed to meet the minimum ratio of apprentices to journeymen for laborers and cement masons on the Project. As a result, Micon was assessed penalties pursuant to section 1777.7 in the amount of $14,280.00.

Subsequently, after the first day of hearing, DLSE moved for and was granted permission to amend the Assessment to decrease the amount due. DLSE changed the prevailing wage rate for landscape irrigation tenders from $17.71 an hour to $16.46 an

hour to reflect the correct rate, and reduced the penalty rate under section 1775 from $200.00 per violation to $120.00 per violation to reflect what the senior deputy had authorized. As a result, the number of workers underpaid was reduced to nine, the amount of wages due was assessed at $15,815.46, the amount of penalties assessed under section 1775 was $14,400.00, and the overall assessment was reduced to $45,434.04. At the beginning of the second day of hearing, DLSE stipulated that the correct amount of underpayment of training fund contributions claimed owed was $510.44 rather than $938.58; thus, the final total amount that DLSE claimed was owed was $45,005.90, inclusive of penalties under section 1777.7.

Applicable Employee Classifications and Prevailing Wage Determinations.

On the original CPRs, Micon classified its employees on the Project as cement masons, landscape irrigation laborers, landscape irrigation tenders, "landscape maintenance," landscape operating engineers, and "modular installers." There are six applicable Prevailing Wage Determinations (PWDs): cement mason (SC-23-203-2-2012-2); landscape/irrigation laborer and landscape/irrigation tender (SC-102-X-14-2013-1 and SC-102-X-14-2013-1A); landscape maintenance laborer (SC-LML-2008-1); landscape operating engineer (SC-63-12-33-2013-1); and "modular *furniture* installer (carpenter)," (SC-23-31-16-2013-1 [italics added]). The DLSE audit reclassified "modular installer" to laborer, thus, the other potential applicable PWD is laborer and related classifications (SC-23-102-2-2012-1).

De Leon testified that there is no classification "modular installer." The closest classification he could find was modular furniture installer. He reviewed the scope of work provision for modular furniture installer (carpenter) (DLSE Exhibit No. 15). The scope of work provision states in relevant part:

> a. This Agreement shall cover the detailing, handling, assembly, installation, disassembly, removal, and relocation of all types of manufactured Modular office furniture systems and all accessories, including Full Wall (floor to ceiling) demountable systems, (prefabricated and sold as modular wall systems).

> Also covered by this Agreements (*sic*) the installation of all types of modular and other types of shelving unit, file cabinets and mobile filing units (mechanical or electrical).

De Leon also reviewed documents provided by the City including the Notice of Completion (DLSE Exhibit No. 8), the Contract between the City and Micon for the Project (DLSE Exhibit No. 16, a memorandum prepared by the City of Riverside Parks, Recreation and Community Services Department addressed to the City Council regarding the purchase of a pre-engineered building and awarding of contract for site improvements for the nature center at Sycamore Canyon Park (DLSE Exhibit No. 17 (Memorandum)), and the Project Specifications for the Project. (DLSE Exhibit No. 18 (Project Specifications).) De Leon specifically pointed out that the Scope of the Project in the Project Specifications stated:

> The work to be done, in general, consists of furnishing all labor, materials, equipment, and incidental(s), unless otherwise specified, to provide and install a pre-engineered nature center building, and construct utilities and site improvements to support the building, in accordance with the Contract Documents.

(DLSE Exhibit No. 18, section 2-1.1, Scope of Project, fourth page of exhibit labeled page 2.) He also referred to the Memorandum which described the work to be done:

> The Nature Center building will be pre-engineered and manufactured off-site, and then delivered to be placed on site using a crane. The construction/installation method requires a local contractor to prepare the site to receive the building. Site improvements include grading, concrete driveways and walkways, establishment of utility services, installation of two small shade structures, preparation of the concrete foundation for the building, and minor landscape and irrigation modifications.
>
> The pre-engineered building manufacturer will deliver the building to the site and connect the structure to utility services. After deliver, the contractor will install a retractable awning over the entrance to the Nature Center to provide a subtle entry statement and provide shade to the south facing windows.

(DLSE Exhibit No. 17, page 2, middle 3rd and 4th full paragraphs.) De Leon concluded that, based on the PWD scopes of work and the Contract documents, the work being done was more appropriate for the classification laborer rather than modular furniture installer.

Napolitano did the review of plans and estimate of bid for the Project. When he was asked about the trades that he thought would be required on the Project for purposes of the bid, Napolitano testified that based on the plans designed by a landscape architect, to him the plans indicated a landscape construction site, so Micon used the landscape and laborer classifications because there was some work over and above what a landscape classification would provide. He added that they also used the cement mason classification. According to Napolitano, the Project involved landscape irrigation, concrete, grading, and paving. All the trades Micon used on the Project were under Napolitano's supervision.

The scope of work provisions for landscape maintenance laborer indicate that there are two categories of work, routine and complex, and that the provisions do not apply to landscape construction. The Notice to Awarding Bodies states in relevant part:

> *ROUTINE* – mowing, watering, pruning, trimming, weeding, spraying, occasional planting and replacement of plants and janitorial work incidental to such landscape maintenance.
>
> *COMPLEX* – servicing of irrigation and sprinkler systems, repairing of equipment used in such landscape maintenance.
>
> Note: This determination does not apply to work of a landscape laborer employed on landscape construction (work incidental to construction or post-construction maintenance during the plant installation and establishment period).[2]

<u>Reclassification from Modular Installer to Laborer.</u>

The Assessment reclassified five workers from modular installer to laborer: Alejandro Rodriguez; Federico Talamantes; Henry Perez; Joey Perez; and Nick Perez. According to De Leon, the reclassification was done based on the work being done, general laborer work, as described in the Contract, the Memorandum, and the Project Specifications. There were no modular furniture systems in the Contract.

[2] The Hearing Officer has taken Official Notice of the scope of work provisions for landscape maintenance laborer and the PWD rates for that classification; the documents have been added to the Record.

On cross-examination, Napolitano acknowledged that in preparing Micon Exhibit A, the amended CPRs, he changed the classification modular installer. He testified that he changed modular installer to either a tender, or a journeyman, or a "maintenance guy." He then testified that the hours would have remained the same. However, when asked to compare the entries on payroll number two, the week ending September 14, 2013, in DLSE Exhibit No 21 which showed that A. Rodriguez worked 35 hours, 19 of which he had been classified as a modular installer, with Micon Exhibit A which showed for the same dates that Rodriguez worked only 26 hours, 24 of which he had been classified as a landscape irrigation laborer, Napolitano testified that amended CPRs showed Rodriguez working fewer hours because that is what amended and corrected CPRs are all about; and Micon goes back and fixes them. Napolitano said that for Rodriguez, there was a pay adjustment due to the reclassification, and a reduction in hours. Further, Napolitano testified that during the re-audit, payroll reports were checked, time sheets were checked before he signed them, and Micon made sure that they were correct. If not, Micon made adjustments.

Reclassification from Landscape Irrigation Tender to Landscape Irrigation Laborer.

The Assessment reclassified six workers from landscape/irrigation tender to landscape/irrigation laborer: Federico Talamantes; Gabriel Alarcon; Ismael Flores; Ismael Flores, Jr.; Jose de Luna; and, Marcelino Roldan. Reclassification was necessary because Micon had not used the correct ratio of laborers to tenders on various days while on the Project. The prevailing wage determination for landscape/irrigation laborer and landscape/ irrigation tender (SC-102-X-14-2013-1 and SC-102-X-14-2013-1A) specifies the proper method for classifying workers on a project. It states as follows:

> The first employee on the jobsite shall be a Landscape/Irrigation Laborer; the second employee on the jobsite must be an Apprentice or a Landscape/Irrigation Laborer; and the third and fourth employees may be Tenders. The fifth employee on the jobsite shall be a Landscape/Irrigation Laborer; the sixth employee on the jobsite must be an Apprentice or a Landscape/Irrigation Laborer; and the seventh and eig[hth] (*sic*) employees may be Tenders. Thereafter, Tenders many be employed with Landscape/Irrigation Laborers in a 50/50 ratio on each jobsite.

Napolitano testified that Micon met the correct ratio. He had the amended CPRs color coded - yellow for the higher classification of landscape irrigation laborer and orange brown for landscape irrigation tender - to show that the correct ratios had been met.

Underpayment of Prevailing Wage Rate.

The final Assessment found that nine workers were underpaid: Alejandro Rodriguez; Federico Talamantes; Henry Perez; Joey Perez; and, Nick Perez, for days when they were classified as modular installers and paid $25.41 an hour, when they should have been classified as laborers and paid $45.54 an hour,[3] and Federico Talamantes; Gabriel Alarcon; Ismael Flores, Ismael Flores, Jr.; and Marcelino Roldan for days when they were classified as landscape irrigation tenders and paid between $16.06 and $25.00 an hour as tenders, when they should have been classified as landscape irrigation laborers and paid $44.65 an hour.[4] To calculate the underpayment, De Leon used the hours of work provided by Micon in the CPRs which Micon submitted to him and that he received on October 28, 2014. He went through the CPRs day-by-day.

At the hearing Micon produced as an exhibit what Napolitano testified was an audit of the amended CPRs. (Micon Exhibit Q.) He said the amended CPRs were given to a compliance company that works as a third party reviewer for the State of California. He could not identify the company, however, as it would not allow him to disclose its name or location. Napolitano did not state why disclosure was prohibited. He gave the company the color-coded payroll reports, it did an audit, and then Micon employees Sue Patel and Gabby Hawkins transcribed the results. The audit was done within 30 days before the second day of hearing. He said that Sue Patel found the audit was correct,

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[3] SC-23-102-2-2012-1 indicates that the total hourly rate for a laborer during the Project was $47.18 an hour, which included a predetermined increase effective July 1, 2013. Subtracting the training fund payment of $0.64, results in the figure $46.54 an hour. (DLSE Exhibit No. 8.) The DLSE deputy used $45.54 an hour, which was apparently an error in favor of the contractor of $1.00.

[4] SC-102-X-14-2013-1 indicates that the total hourly rate for a landscape irrigation laborer during the Project was $45.29 an hour, which included a predetermined increase effective August 1, 2013. Subtracting the training fund payment of $0.64, results in the figure used: $44.65 an hour. (DLSE Exhibit No. 11.)

but did not state the basis for her opinion. She worked for Micon for six years and did Micon's payroll. Napolitano testified that the audit matched Micon's amended CPRs. According to Napolitano, the conclusion of the audit was that Micon did not owe any employees any additional funds and Micon did not owe the training fund any additional funds other than that already paid. Napolitano testified that the payroll checks matched the wages owed, which matched the hours worked by the employees.

Underpayment of Training Fund Contributions.

The final Assessment found that no training fund contributions were paid for the following 12 workers: Alejandro Rodriguez, Armando Zazuetta, Federico Talamantes, Gabriel Alarcon, Henry Perez, Ismael Flores, Ismael Flores, Jr., Joey Perez, Juan Rivera, Marcelino Roldan, Nick Perez, and Oscar Zazuetta. Micon produced as an exhibit a letter from the California Apprenticeship Council indicating that it had made the required training fund contribution payments for work done on the Project. (Micon Exhibit H.) The listed payments total $659.46.

Applicable Apprenticeship Committees in the Geographic Area.

According to De Leon there were several apprenticeship committees in the geographic area of the Project in the trades of cement mason and laborer, including landscape irrigation laborer. Those apprenticeship committees were as follows: for cement masons, (1) Southern California Cement Masons J.A.C.; and (2) San Diego Associated General Contractors J.A.C.; and for laborers – including landscape irrigation laborers, (1) Laborers Southern California Landscape and Irrigation Fitters J.A.C.; (2) Associated General Contractors of America, San Diego Chapter; and (3) Laborers Southern California Joint Apprenticeship Committee. (DLSE Exhibit Nos. 7 and 19).

Notice of Contract Award Information.

De Leon testified that Micon began work on the Project on September 3, 2013, according to Micon's CPRs. Micon provided De Leon with a copy of one Notice of Contract Award Information form (DAS 140) dated September 16, 2013, addressed to the Laborers Southern California JAC. (DLSE Exhibit No. 19.) It was sent after work on the

Project had started. There were no notices sent for the other crafts used on the Project, laborer and cement mason.

Request for Dispatch of Apprentices.

Micon provided De Leon with a copy of one Request for Dispatch of Apprentice form (DAS 142) dated September 30, 2013, addressed to the "SoCa Cement Mason." (DLSE Exhibit No. 19.) There was no date listed on the form for the apprentice to report. So, according to De Leon, Micon did not timely request dispatch of cement mason apprentices and, per the CPRs, did not employ any apprentices on the Project. Further, no request for dispatch was sent for the other crafts or trades on the Project.

Micon produced as an exhibit the same Request for Dispatch that DLSE produced in its Exhibit No. 19. (Micon Exhibit G.) However, Micon Exhibit G included additional handwriting, which appeared to be different than the original handwriting on the DLSE exhibit, indicating that the request was also for "& Laborer Landscape." When asked on cross-examination about the additional writing, Napolitano did not know why the additional language was added. He admitted that the Request for Dispatch was sent to the cement mason apprenticeship committee.

De Leon testified that the penalties for apprentice violations are calculated starting on the second day of the Project and until the last day of the Project. He determined that there were 119 violations.[5]

Napolitano acknowledged that Micon did not employ apprentices on the Project. He asserted that the apprenticeship programs did not dispatch apprentices to Micon because Micon did not follow specifically the training that the affiliated union wants to be done.

Assessment of Statutory Penalties.

De Leon testified that the penalties were assessed by the Senior Deputy Labor Commissioner, and that Micon had a history of four previous assessments for wage

[5] The Hearing Officer has taken Official Notice of a calendar for the year 2013 that shows that there were 119 days from September 4, 2013, through and including December 31, 2013.

violations (DLSE Exhibit No. 7, page 5) and three previous determinations of civil penalty for apprenticeship violations (DLSE Exhibit No. 7, page 8). One of the four previous assessments also involved the misclassification of laborers as modular installers.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

> 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), and see *Lusardi, supra,* 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 wage rate; section 1775, subdivision (a) also prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty 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, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the assessment by filing a request for

review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect."

DLSE Properly Relied Upon the Original CPRs Prepared by Micon in Performing Its Audit that Resulted in the Assessment.

This case involves dueling sets of CPRs (the "original CPRs" and "the amended CPRs"). With the significantly different legal results flowing from each set, only one can be accepted as accurately reflecting the hours, dates, rates of pay and classifications for Micon workers on the Project. All of the evidence of the amended CPRs that Micon argues for comes from just one person, Napolitano. Napolitano alone created the data in the amended CPRs, and notwithstanding his attempts to identify independent support for the accuracy of the amended CPRs, nothing corroborates his contentions. The steps taken by Sue Patel, a Micon employee who allegedly had a role of some sort in producing the amended CPRs, remains unexplained. The "re-audit" or audit by the unidentified "compliance company" cannot provide independent justification for the amended CPRs, for as the record stands, its work was based wholly on the amended CPRs.

Adding to Micon's problem, it maintains it produced the amended CPRs about a week *before* it produced the set of original CPRs on which DLSE based the Assessment. Napolitano prepared the first set of CPRs (the "original CPRs") on an on-going basis at or near the time that the work was being done on the Project (DLSE Exhibit No. 21). Napolitano prepared this first set and signed them as the work progressed between September 23, 2013, and March 26, 2014. Napolitano signed those sets under penalty of perjury. In addition, he revised several weeks of the original CPRs to correct errors in the prevailing wage rates. DLSE, at some point, received this set of original CPRs from the City and on July 24, 2014, requested Micon provide a copy of the CPRs. After non-production by Micon, DLSE warned of possible debarment if CPRs were not provided. On October 28, 2014, Micon relented and gave DLSE a set of CPRs. That set, the original CPRs, was identical to the set DLSE obtained from the City and used as a basis for the Assessment. (DLSE Exhibit 21.)

Later, Micon produced a second set of CPRs (Micon Exhibit A) covering the same 18-week payroll period as the original CPRs, but amended in a way that showed no underpayment of wages (the "amended CPRs"). All 18 amended CPRs were signed by Napolitano under penalty of perjury and dated October 20, 2014. Napolitano testified without corroboration that his "office" sent the second set of amended CPRs to De Leon within a day or two of them being signed on October 20, 2014. Yet, De Leon did not see the amended CPRs until the first day of hearing.

It strains credulity to accept that the amended CPRs were sent to DLSE on or about October 20, 2014. Napolitano testified they were, but he offered no service document and no witness from his office to confirm that claim. Further, eight days *after* October 20, 2014, DLSE received from Micon a set of CPRs identical to that which DLSE obtained from the City and based the Assessment on (the original CPRs). Given that Micon sent the first set of CPRs (the original CPRs) to DLSE on October 28, it is incongruous that Micon would have sent a drastically different, amended set of CPRs to DLSE a week earlier, on October 20.

Napolitano never addressed this incongruity. Instead, Micon argues that the amended CPRs, all bearing the date October 20, 2014, were the accurate ones reflecting the "final payroll," changed after he looked at supervisor daily reports and recalled his personal observation of the workers at the work site once a week. Given the asserted timing of the changes and Micon's failure to offer the supervisor daily reports or anything else to corroborate the truth of the changes, that argument is rejected. The conclusion is compelled that the original CPRs, created as work was done, is much more likely to be accurate than the amended CPRs, created some eleven months after Micon's employees last worked on the Project.

Napolitano's testimony indicated that, in preparing CPRs, he reviewed the supervisor's daily reports, then payroll was done at the end of the week, and then payroll reports were done the week after that. Napolitano also testified that in preparing the amended CPRs, he viewed the supervisor daily reports and thought about on his weekly visits, and prepared the amended CPRs. Yet, by the time he was amending the CPRs,

Napolitano had already looked at the supervisor daily reports. No explanation was given as to why a second look of those reports, many months later, could have produced a drastically different set of data, as it purportedly did. Nor is it credible that Napolitano's past visits to the job site once a week could provide a valid basis, months later, to change the hours, dates of work, and work tasks and classifications of workers, adding and subtracting hours and workers on particular days and changing workers' classifications on some days and not others on many dates. The detailed nature of the many changes Napolitano made on the amended CPRs drives the conclusion as well that the original CPRs must be accepted over the amended set.

Napolitano testified in summary fashion that, based on his amended CPRs, Micon met the ratio of landscape irrigation laborers to tenders laid out in the applicable PWD. But, Napolitano failed to explain why he used the classification "modular installer" in the original CPRs in the first instance. That classification is non-existent. The classification of "modular furniture installer," with its low pay rate compared to landscape irrigation laborer, clearly does not apply and Micon concedes as much. That Micon would use, without explanation, a non-existent classification at all is reason to doubt that its unsupported representations on the amended CPRs can be trusted.

It is noteworthy that all of the changes on the amended CPRs emanate from one person, Napolitano. Micon did not attempt to corroborate his claims with any of the supervisor daily reports, other documents or witnesses. Micon could have, but did not, call employee Sue Patel as a witness. The alleged "compliance company" that works as a third party reviewer for the State of California was not identified, and the claim that it allegedly would not "allow" him to disclose its name or location seems unlikely. Napolitano did not state why disclosure was prohibited and did not explain what methodology it used, apart from accepting the CPR changes that Napolitano made.

Further, as objected to by DLSE, the amended CPRs are unreliable hearsay. Section 17244 of title 8 of the California Code of Regulations, subdivision (d), provides that in prevailing wage hearings, while hearsay evidence is admissible, it is not sufficient in itself to support a finding unless it either would be admissible over objection in a civil

action. In a civil action, hearsay is excludable, subject to exceptions. Evidence Code section 1271 creates the business records exception, but to qualify the writing at issue must meet certain specified conditions, including that it "was made at or near the time of the act, condition, or event;....[and] [t]he sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271, subds. (b) and (d).) The amended CPRs fail both of those specified conditions. The amended CPRs were not made at or near the time of the actual work on the project. Rather, they were prepared long after the individual employees performed specific work on the project, and long after the employees were paid their wages. Also, the amended CPRs were created from sources of information and by a method and a time of preparation which indicate they cannot be trusted. They were prepared only after DLSE had notified Micon that it had opened an investigation of a complaint, requested copies of the CPRs, and threatened Micon with debarment for failure to comply with the request for CPRs.

The Evidence Code encourages fact finders to view with distrust the type of second-hand evidence offered by Micon as to the content and purported service of the amended CPRs. Evidence Code section 412 states, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Napolitano testified that in reviewing the amended CPRs, he relied upon the supervisor's daily reports. He also said that the hours used in the amended CPRs were from the hours of work for each employee that the superintendent turned in each day, and payroll checks were created based on review of the daily reports. Yet, Micon failed to offer into evidence any of the original records such as supervisor's daily reports, hours of work or time sheets, payroll checks, or testimony from a Micon employee as to the October 2014 service of the amended CPRs, even though it must have known that the case turned on which set of CPRs should be accepted as the most accurate and reliable. As such, it cannot be concluded that the amended CPRs accurately reflected what had occurred.

The Evidence Code likewise provides that the fact finder may draw negative inferences from failure of a party to explain or deny evidence. Evidence Code section 413 states, "In determining what inferences to draw from the evidence or facts in the case

against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by his testimony such evidence or facts in the case against him...." DLSE accused Micon of misclassifying workers as modular installers when they should have been classified and paid as laborers. In doing so, DLSE relied upon Micon's original CPRs, the Contract and Project Specifications, and the wording in the PWD scopes of work for both modular furniture installer and laborer. Micon did not deny, nor did it explain, why it used the non-existent classification of "modular installer" in the original CPRs. This failure to explain stands out by virtue of Napolitano's testimony explaining the use of craft or trade classifications on the Project in response to a question from Micon's own counsel. Asked about the trades that he thought would be required on the Project for purposes of the bid, Napolitano testified that based on the plans designed by a landscape architect and the understanding that the work would involve landscape irrigation, grading, and paving, Micon used the landscape, laborer, and cement mason classifications. Yet, his answer did not mention, much less explain, the use of a modular installer classification. The inference that can be drawn by the failure to explain the use of the modular installer classification is that Micon misclassified the workers as modular installer so that it could pay them the lower modular furniture installer prevailing wage rate of $25.41 an hour rather than the higher laborer rate of $45.54 an hour, despite the manifest inapplicability of the modular furniture installer PWD. Thus, the failure to explain the inclusion of the modular installer classification on the original CPRs, coupled with the elimination of the classification in the amended CPRs, leads to the conclusion that the amended CPRs by themselves are unreliable. The amended CPRs are cleaned-up.

Further evidence that the amended CPRs are unreliable is the extent to which the data in the original CPRs were changed in creating the amended CPRs, including the removal of the modular installer classification from the amended CPRs. Not only was the suspect classification modular installer changed, other classifications were changed, and some employees' days of work and hours of work were changed and in some instances reduced when they were assigned a classification with a higher rate of pay or the ratio of journeymen landscape irrigation laborers to tenders could not be met. As set

out below, these changes had the effect of (1) eliminating the instances of ratio violation where there were not enough journeymen landscape irrigation laborers to tenders in the landscape classification, and (2) eliminating the misclassification of employees as modular installers and at the same time avoiding underpayments when reclassifying a worker to a classification with a higher rate of pay by reducing hours of work. Thus, the amended CPRs purported to eliminate each violation DLSE alleged.

An examination of just the first six weeks of amended CPRs show the breath of changes that were made. In comparing the original CPRs with the amended CPRs, the following changes were noted:

> **Week 1**. Micon added employee G. Zazuetta to the amended CPRs as a landscape irrigation laborer for all three days that Talamantes worked as a landscape irrigation tender. Employee G. Zazuetta did not appear on the original CPRs. On the original CPRs, there was only one journeyman landscape irrigation laborer, Oscar Zazuetta. Thus, by adding a second landscape irrigation laborer on the same days that Talamantes worked as a tender, the ratio violation was eliminated and there would be no underpayment of wages.
>
> **Week 2**. On the amended CPRs, Micon changed Talamantes from a modular installer to a landscape irrigation tender on Monday, Tuesday, and Wednesday. Micon also eliminated the three hours Talamantes was written down for working on Friday. Thus, Talamantes' total hours of work were reduced from 27 to 24. Micon changed the days that employee Rodriguez worked on the Project as a landscape irrigation laborer from Monday and Thursday to Monday, Tuesday, and Wednesday, the same three days that Talamantes was now classified as a landscape irrigation tender, thus, the ratio violation would be eliminated, and there would be no underpayment of wages. On the original CPRs there was only one journeyman landscape irrigation laborer on the Tuesday and Wednesday that Talamantes was now listed as a tender; with the addition of Rodriguez there were now two journeymen. In changing the days that Rodriguez worked as a landscape irrigation laborer, Micon also changed Rodriquez from a modular installer to landscape irrigation laborer on Tuesday and Wednesday, reclassified him from modular installer to an operating engineer on Friday, eliminated the 8 hours of work on Thursday as an landscape irrigation laborer, and changed the number of hours worked on Friday from three to two. Thus, Rodriguez's total hours of work that week were reduced from 35 to 26. All ratio violations were eliminated and there was no underpayment of wages when Rodriguez was paid at the higher rate of pay for landscape irrigation laborer and operating engineer. Indeed, according to the amended CPRs he was overpaid: on the original CPRs, his total wages had been $1,197.10; on the amended CPRs his total wages were listed as $1,197.10 but when added up equaled only $1,175.22.

Week 3. On the amended CPRs, Micon changed the classification for Talamantes from modular installer to landscape irrigation tender on all four days he worked, Monday through Thursday. Micon also changed the days that employees O. Zazuetta and Rodriguez worked as landscape irrigation laborers: on the original CPRs, Zazuetta worked the four days Tuesday through Friday, and Rodriguez worked the three days Monday through Wednesday. On the amended CPRs, Zazuetta was changed to Monday through Thursday - which matched Talamantes days of work, and Rodriguez was listed as working a fourth day, Thursday, so Monday through Thursday – which matched Talamantes days of work. Thus, the amended CPRs eliminated the misclassification of Talamantes as a modular installer, and eliminated any potential ratio violation by perfectly aligning the days of work among the two journeymen and the tender, and there was no underpayment of wages. However, Micon did not adjust the rate of pay for Talamantes. Indeed, by changing the classification of Talamantes from modular installer to landscape irrigation tender, and not changing the rate of pay, Micon overpaid Talamantes, as the modular furniture installer rate of $25.41 an hour is higher than the tender rate of $16.46 an hour. Micon claimed to have bumped up Talamantes to $25.41, however that happens to be the rate for modular installer, and Talamantes was not bumped up the week before when he was listed on the original CPRs as a modular installer and was re-classified as a tender making $16.06 on the amended CPRs.

Week 5. On the amended CPRs, Micon changed the classification of work for employees Rodriguez, Jose De Luna, Talamantes, and Ismael Flores. On the original CPRs, Flores was listed as a landscape irrigation tender for each day Monday through Friday. There was a ratio violation on Tuesday and Thursday of the week because there was only one journeyman, O. Zazuetta. On the amended CPRs, Micon changed Flores's classification to landscape maintenance for the entire week; thus, the ratio violation was eliminated. On the amended CPRs, Micon likewise changed Jose De Luna from a landscape irrigation tender to landscape maintenance. Talamantes was changed from a landscape irrigation laborer to a laborer and his work day was changed from Friday to Thursday. Employee Rodriguez once again saw his days of work and hours of work changed on the amended CPRs. On the original payrolls Rodriguez was listed as a landscape irrigation laborer on Monday and Wednesday of the week, and as a modular installer on Tuesday, Thursday, and Friday, working a total of eight hours each day for a total of 40 hours. His gross pay was $1,324.24. On the amended CPRs, his classification as a modular installer was changed to a laborer, and his hours of work were reduced to the 24 hours on the days he had been listed as a modular installer, Tuesday, Thursday, and Friday; his hours of work as a landscape irrigation laborer on Monday and Wednesday were eliminated. These changes eliminated the misclassification violation for Tuesday, Thursday, and Friday, and prevented an underpayment of wages when Rodriguez was bumped up from modular installer at $25.41 an hour to laborer at $46.54 an hour.

Working only 24 hours at the rate of $46.54 an hour, his gross pay was $1,116.96, below the gross pay originally listed of $1,324.24 for 40 hours of work. If Rodriguez was left on the payroll for Monday and Wednesday when he earned $714.40 as a landscape irrigation laborer working 16 hours, he would have been owed $1,831.36 in total gross wages for the 40 hour week and thus underpaid $507.12.

Week 6. On the amended CPRs, Micon changed the classification of work for employees Rodriguez, Jose De Luna, and Talamantes, and changed the days and hours of work for Rodriguez and H. Perez. On the original CPRs, Jose De Luna was listed as a landscape irrigation tender on Monday and Tuesday of the week. There was a ratio violation on Tuesday, because there was only one journeyman, O. Zazuetta. On the amended CPRs, Micon changed De Luna's classification from tender to landscape maintenance; thus, the ratio violation was eliminated. Talamantes's classification was changed from modular installer to landscape irrigation tender for the two days that he worked, Monday and Tuesday. This eliminated the misclassification violation, but would have created a ratio violation on Tuesday; however, Rodriguez who had been classified as modular installer on Tuesday, Wednesday and Thursday, was reclassified as a landscape irrigation laborer on Tuesday, thus eliminating the possibility of a ratio violation and eliminating the misclassification violation. On the original payrolls, Rodriguez was listed as a landscape irrigation laborer on Monday of the week, and as a modular installer on Tuesday, Wednesday, and Thursday, working a total of eight hours each Monday through Wednesday, and two hours on Thursday for a total of 26 hours. His gross pay was $814.58. On the amended CPRs, his hours were reduced to 16 hours as a landscape irrigation laborer Monday and Tuesday. This kept Rodriguez from being underpaid because 16 hours at $44.65 an hour equals $714.40, which is less than $814.58 which was listed as his total gross wages. If Rodriguez had been left on the payroll for the eight hours on Wednesday and two hours on Thursday as a landscape irrigation laborer at the rate of $44.54 an hour, he would have been owed an additional $445.40 or a total of $1,159.80 in wages and thus underpaid $345.22. Finally, on the original CPRs, Henry Perez was listed as a modular installer for eight hours on Monday and as a cement mason for five hours on Tuesday. On the amended CPRs, his classification on Monday when he worked eight hours was changed from modular installer to cement mason. His hours of work on Tuesday were eliminated. Thus, the misclassification was eliminated and there was no underpayment of wages.

On the amended CPRs, in each instance noted above where employee Rodriguez was reclassified from modular installer to landscape irrigation laborer or laborer, his hours of work at the higher rate of wages were cut. Also, on the amended CPRs, in each instance where there was a ratio violation on a particular day because there was only one employee classified as a landscape irrigation laborer and yet there were employees listed

as tenders, Micon purported to eliminate the ratio violation by taking one or more of the following actions singularly or in combination: (1) it added a new employee to the amended CPRs and classified the new employee as a landscape irrigation laborer; (2) it changed the dates of work for an employee classified as a landscape irrigation laborer on the amended CPRs so that the employee now worked on days there previously was a ratio violation providing the second landscape irrigation laborer; (3) it reclassified employees to the classification landscape irrigation laborer on the amended CPRs and reduced their hours; (4) it reduced the hours of the tender on the amended CPRs; and, (5) it reclassified tenders as landscape maintenance workers on the amended CPRs. With respect to the last action, changing the classification from tender to landscape maintenance worker, maintenance workers are paid less than tenders so there was no possibility of an underpayment; in fact, it is possible to simply change the classification without changing the rate of pay and appear to be generous in payment of salary. In the original CPRs, in the first six weeks of work on the Project, there were no employees classified as doing landscape maintenance. However, in the amended CPRs, in the fifth and sixth weeks of the Project, two employees were reclassified as landscape maintenance workers for a total of 64 hours. This reclassification itself was apparently improper, because the scope of work for landscape maintenance specifically states that it does not apply to landscape construction, which this Project entailed according to Napolitano's own testimony.

Given the unreliable nature of the amended CPRs and the negative inferences drawn from Micon's failure to explain his inclusion of the modular installer craft on the original CPRs, or otherwise introduce evidence to support the accuracy of the amended CPRs, the original CPRs (DLSE Exhibit 21) are admitted into evidence and accepted as proof of the hours and pay rates for Micon's employees on the Project. In light of the extended discussion, above, regarding the amended CPRs (Micon Exhibit A), those documents are hereby admitted into evidence over DLSE's objection, however, they are deemed not sufficient to support a finding of accuracy of the data the amended CPRs display. Since Micon has the burden of proof that the basis for the Assessment is incorrect (§ 1742, subd. (b)), acceptance of the original CPRs as proof of the hours and

pay rates for Micon's employees on the Project means that Micon has not met its burden.[6]

Micon Misclassified Workers and as a Result Failed to Pay the Proper Prevailing Wage Rate.

Under section 1742, subdivision (b), Micon had the burden of proving that the basis for the Assessment is incorrect. Rather than provide evidence or argument as to how the Assessment, based on the original CPRs, was incorrect, Micon's defense was that the original CPRs, in toto, were not the accurate, "final" payroll reports Micon offered as an exhibit. As addressed above, that defense cannot carry the day. Micon did produce evidence that the underpayment of training fund contributions was incorrect, and that evidence will be accepted. However, in all other respects, DLSE's Assessment stands unrebutted as Micon failed to carry its burden under section 1742, subdivision (b).

According to a review of De Leon's audit and the CPRs, the following employees were misclassified and were underpaid wages:

1. **Alejandro Rodriguez** was misclassified as a modular installer. For the hours of work Rodriguez was classified as a modular installer, he was paid $25.41 an hour. When he was reclassified by DLSE from modular installer to laborer, the hourly rate was $45.54.[7] According to the CPRs, Rodriguez worked 235 hours as a modular installer. Thus, he was underpaid $4,730.55 (45.54-25.41=20.13 x 235=4730.55).

In calculating the penalty for this underpayment, De Leon erred in assigning a penalty for a day that Rodriguez worked eight hours as a landscape irrigation laborer on Monday, October 7 and was paid $44.65 an hour, the correct rate. (See, *post*, the discussion of the penalty rate.) Thus, the total penalty must be reduced by $120.00.

2. **Federico Talamantes** was misclassified as a modular installer. For the hours of work Talamantes was classified as a modular installer, he was paid $25.41. When

[6] In addition, Micon Exhibits C, D, E, and Q are excluded from evidence. The first three are prevailing wage determinations issued after the bid date for the Project. The last one, Exhibit Q, lacks foundation.

[7] The correct rate appears to have been $46.54. (*Ante*, fn. 4.) However, the deputy used the figure $45.54 in the Assessment, an error in favor of the contractor.

DLSE reclassified him from modular installer to laborer, the hourly rate was $45.54. According to the CPRs, Talamantes worked 249 hours as a modular installer. Thus, he was underpaid $5,012.37 (45.54-25.41=20.13 x 249 =5,012.37).

Federico Talamantes was also misclassified as a landscape irrigation tender. On the first week that Micon was on the Project, there were only two employees working according to the CPRs: Oscar Zazuetta and Talamantes. Zazuetta was listed as a landscape irrigation laborer and Talamantes was listed as a landscape irrigation tender. For the hours of work he was classified as a tender, Talamantes was paid $25.00 an hour. When he was reclassified from tender to laborer, the hourly rate was $44.65 an hour. According to the CPRs, Talamantes worked 24 hour as a tender when he should have been classified as a landscape irrigation laborer. Thus, he was also underpaid $471.60 (44.65- 25.00 = 19.65 x 24=471.60).

3. **Gabriel Alarcon** was misclassified as a landscape irrigation tender. On Friday, December 27, 2013, on the payroll for the seventeenth week ending December 28, 2013, that Micon was on the Project, there were five employees working according to the CPRs: O. Zazuetta, J. Perez, Talamantes, Alarcon, and Rodriguez. Zazuetta was listed as a landscape irrigation laborer, Perez, Talamantes, and Rodriguez were listed as modular installers; Alarcon was listed as a landscape irrigation tender. Thus, since there was only one landscape irrigation laborer on the job, Alarcon should have been classified as a landscape irrigation laborer. For the hours of work Alarcon was classified as an irrigation tender he was paid $21.25. When he was reclassified by DLSE from tender to laborer, the hourly rate was $44.65. According to the CPRs, Alarcon worked eight hour as a tender. Thus, he was underpaid $187.20 (44.65- 21.25 = 23.40 x 8=187.20).

4. **Henry Perez** was misclassified as a modular installer. For the hours of work Perez was classified as a modular installer, he was paid $25.41. When Perez was reclassified by DLSE from modular installer to laborer, the hourly rate was $45.54. According to the CPRs, Perez worked 34 hours as a modular installer. Thus, he was underpaid $684.42 (45.54-25.41=20.13 x 34=684.42).

In calculating the number of hours Perez was underpaid and the penalty for the underpayment, De Leon erred in assigning Perez 20 addition hours at the laborer rate and penalties for days that Henry Perez name does not appear on the CPRs as well as a day that he worked as a cement mason and was paid the appropriate wage. For the week ending December 14, 2013, Henry Perez was not listed on the CPRs as working on the Project. Yet, on the audit, De Leon listed Henry Perez as working four hours as a cement mason on Wednesday, December 11, and 4 hours as a laborer. De Leon also listed Henry Perez as working eight hours on Tuesday and eight hours on Thursday of that week as a laborer. Thus, the underpayment has to be adjusted as noted above, and the total penalty must be reduced by $360.00 for those three days. In addition, De Leon erred in assigning a penalty for a day, Tuesday, October 8, that Perez worked five hours as a cement mason and was paid $51.50 an hour, which was the correct rate. Thus, the total penalty must be reduced by an additional $120.00.

5. **Ismael Flores** was misclassified as a landscape irrigation tender. For the hours of work Flores was classified as a landscape irrigation tender, he was paid $16.06. The correct rate for a tender was $16.46. When Flores was reclassified by DLSE to a landscape irrigation laborer, the correct hourly rate was $44.65. According to the CPRs, Flores worked 120 hours as a tender and 16 of those hours he was classified as a tender but should have been classified as a landscape irrigation laborer, because on December 2 and December 6, there was only one landscape irrigation laborer on the project, O. Zazuetta. As the second irrigation worker on the project on those two days, Flores had to be classified as a landscape irrigation laborer not a tender to meet the ratio. Thus, he was underpaid $499.04 (16.46-16.06= 0.40 x 104 = 41.60 + 44.65-16.06 = 28.59 x 16 = 457.44).

In calculating the number of hours Flores was underpaid and the penalty for the underpayment, De Leon erred in assigning additional hours of work to Flores and reclassifying Flores on a day the ratio was met. For Monday, October 7, 2013, Flores is not listed on the CPRs; yet, De Leon included Flores in the audit for that day. In addition, De Leon reclassified Flores on Tuesday, December 3, 2013, when he should not have been reclassified because the ratio was met as there were two landscape irrigation

laborers working on the Project that day, O. Zazuetta and Joey Perez. Thus, the underpayment of wages must be adjusted as noted above, and the penalty must be reduced by $240.00 for those two days.

6. **Ismael Flores, Jr.** was misclassified as a landscape irrigation tender. For the hours of work Flores, Jr. was classified as a landscape irrigation tender, he was paid $16.06. The correct rate for a tender was $16.46. When DLSE reclassified Flores, Jr. to a landscape irrigation laborer, the correct hourly rate was $44.65. According to the CPRs, Flores Jr. worked 48 hours as a tender and 16 of those hours that he was classified as a tender he should have been classified as a landscape irrigation laborer. On December 23 and December 26, there was only one landscape irrigation laborer on the project, O. Zazuetta. As the second irrigation worker on the project on those two days, Flores, Jr. had to be classified as a landscape irrigation laborer not a tender to meet the ratio. In addition, on two days, December 30 and 31, he was classified as landscape maintenance but should not have been. The landscape maintenance PWD does not apply to work of a landscape laborer employed on landscape construction (work incidental to construction or post-construction maintenance during the plant installation and establishment period). As Flores, Jr. was the only worker doing landscape work that day, he should have been classified as a laborer. Thus, he was underpaid 927.68 (16.46-16.06= 0.40 x 32 = 12.80 + 44.65-16.06 = 28.59 x 32 = 914.88).

In calculating the number of hours Flores, Jr. was underpaid and the penalty for the underpayment, De Leon erred in assigning additional hours of work to Flores, Jr. one week, and not including Flores, Jr. in the audit for a second week when he should have been included. For Wednesday, December 11, 2013, Flores, Jr. is not listed on the CPRs; yet, De Leon included Flores, Jr. in the audit for that day and issued a penalty. In addition, while Flores, Jr. is listed as working for three days on Monday, Tuesday, and Thursday, December 23-24 and 26, there is no information inputted for the week ending December 28, 2013, in the audit prepared by De Leon. Flores, Jr. worked three days and was underpaid in both respects on those days. Thus, the underpayment of wages must be adjusted as noted above, and three additional penalties of $120.00 for each day should be added, for a total of $360.00.

7. **Joey Perez** was misclassified as a modular installer. For the hours of work Perez was classified as a modular installer he was paid $25.41. When DLSE reclassified him from modular installer to laborer, the hourly rate was $45.54. According to the CPRs, Perez worked 70 hours as a modular installer. Thus, he was underpaid $1,409.10 (45.54-25.41=20.13 x 70=1,409.10).

8. **Jose De Luna** was misclassified as a landscape irrigation tender. For the hours of work De Luna was classified as a landscape irrigation tender, he was paid $17.00 an hour. The correct rate for a tender was $16.46. When DLSE reclassified him to a landscape irrigation laborer, the correct hourly rate was $44.65. According to the CPRs, De Luna worked 24 hours as a tender and eight of those hours he was classified as a tender but should have been classified as a landscape irrigation laborer. On October 8, there was only one landscape irrigation laborer on the project, O. Zazuetta. As the second irrigation worker on the project on that day, De Luna had to be classified as a landscape irrigation laborer not a tender to meet the ratio. Thus, De Luna was underpaid 212.56 (44.65- 17.00 = 27.65 x 8=221.20-8.64 (17.00-16.46=0.54 x 16 =8.64 credit for overpayment)).

In calculating the number of hours De Luna was underpaid and the penalty for the underpayment, De Leon erred in reclassifying De Luna on two days when the ratio was met. Thus, the amount of the underpayment of wages has to be reduced as noted above, and the number of penalties reduced as well by $240.00.

9. **Marcelino Roldan** was misclassified as a landscape irrigation tender. For the hours of work Roldan was classified as a landscape irrigation tender, he was paid $17.00 an hour. The correct rate for a tender was $16.46. When DLSE reclassified him to a landscape irrigation laborer, the correct hourly rate was $44.65. According to the CPRs, Roldan worked 40 hours as a tender and 16 of those hours he was classified as a tender but should have been classified as a landscape irrigation laborer. On November 19 and 20, there was only one landscape irrigation laborer on the project, O. Zazuetta. As the second irrigation worker on the project on that day, Roldan had to be classified as a landscape irrigation laborer not a tender to meet the ratio. Thus, he was underpaid

$429.44 (44.65- 17.00 = 27.65 x 16=442.40-12.96 (17.00-16.46=0.54 x 24 =12.96 credit for overpayment)).

In calculating the number of hours Roldan was underpaid and the penalty for the underpayment, De Leon erred in finding that Roldan was underpaid on three days during the week ending November 16, 2013, when he was actually overpaid at $17.00 an hour. Thus, the amount of the underpayment of wages has to be reduced as noted above, and the number of penalties reduced as well by $360.00.

10. **Nick Perez** was misclassified as a modular installer. For the hours of work N. Perez was classified as a modular installer, he was paid $25.41. When DLSE reclassified him from modular installer to laborer, the hourly rate was $45.54. According to the CPRs, N. Perez worked 34 hours as a modular installer. Thus, he was underpaid $684.42 (45.54-25.41=20.13 x 34=684.42).

Micon Paid Training Fund Contributions.

Micon provided evidence that it paid the proper amount of training fund contributions for this Project. Thus, Micon met its burden to disprove the basis for the Assessment with respect to training fund contributions.

DLSE's Penalty Assessment Under Section 1775.

Section 1775, subdivision (a), as it read at the time the City advertised for bids on the Project, 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.[8]

Abuse of discretion by DLSE is established if the "agency's nonadjudicatory action ... is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment "because in [his] 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 section 1775 penalties at the rate of $120.00 because Micon misclassified workers and underpaid workers in a significant amount comprising over

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

100 violations. In addition, Micon had a history of four previous assessments for wage violations and one of the four previous assessments also involved the misclassification of laborers as modular installers.

The burden was on Micon to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of $120.00 per violation. Micon essentially disputed that it had misclassified workers and underpaid them. However, Micon provided no relevant evidence that would have established the workers had not been misclassified. Nor did Micon introduce evidence of abuse of discretion by DLSE. The number and variety of prevailing wage violations committed by Micon, and Micon's lack of reasonable defense to the vast majority of violations, support a finding that Micon's violations were willful.

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The Director is not free to substitute his own judgment. Here the Labor Commissioner reduced the penalty proposed by the deputy from $200.00 per violation to $120.00 per violation. Micon has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of $120.00 is affirmed. The Decision reduces the total assessed violations to take into account the reduction in violations due to errors in DLSE's calculations. Ten instances of penalty assessment are removed, thus, the total penalty assessment is reduced by $1,200.00.

Micon 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.

During the pendency of the present case through the conclusion of the Hearing on the Merits and the submission of the case for decision on March 13, 2017, the statutory scheme regarding liquidated damages provided contractors three alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These required the contractor to make key decisions within 60 days of the service of the CWPA upon the contractor.

First, the above-quoted portion of section 1742.1, subdivision (a) states that the contractor shall be liable for liquidated damages equal to the portion of the wages "that still remain unpaid" 60 days following service of the CWPA. Accordingly, the contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the CWPA, and thereby avoid liability for liquidated damages on the amount of wages so paid.

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

> There 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.

Also, within the 60-day period, the contractor could choose not to pay any of the assessed wages to the workers, and not to deposit with DIR the full amount of assessed wages and penalties. Instead, the contractor could choose to rely on the potential of the Director's discretion to waive liquidated damages under the following portion of section 1742.1:

> Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment ..., the director may exercise his or her

discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Here, Micon did not pay any back wages to the workers in response to the Assessment or deposit with the Department the assessed wages and section 1775 and section 1777.7 statutory penalties. That leaves the question whether Micon has demonstrated to the Director's satisfaction it had substantial grounds for appealing the Assessment as a basis for the Director's discretionary waiver of liquidated damages.[9] The Director finds no such grounds for a discretionary waiver.

Napolitano testified, seemingly in search of corroboration of his amended CPRs, as to an audit done within 30 days before the second day of hearing. It would be questionable at best to accept the audit results at face value, in that the record strongly suggests the audit was based on Micon's amended CPRs and no more. Napolitano testified he had the amended CPRs color coded, yellow for landscape irrigation laborer and orange brown for landscape irrigation tender, to show that the correct ratios had allegedly been met and gave the color coded CPRs to the compliance company. What the color coding added other than to make the work of the auditor easier, and what if anything else the auditor considered, remains a mystery. Further, the identity of the auditor and its methodology went unexplained. Sue Patel was said to have found the audit was correct, but nothing shows the basis for her opinion. If the audit was offered as independent verification of the amended CPRs, it failed in that respect. Based on the record, the audit appears wholly based on one source, the amended CPRs. This type of bootstrapping cannot be accepted as persuasive.

In addition, and as addressed at length above, the evidence at hearing demonstrated that the amended CPRs were created after-the-fact, in an apparent attempt

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[9] On June 27, 2017 (after the conclusion of the Hearing on the Merits and the submission of this case for decision), the Director's discretionary waiver ability was deleted from section 1742.1 by statutes 2017, chapter 28, section 16 (Senate Bill No. 96) (SB 96). Legislative enactments, 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. (Accord, *Kizer v. Hannah* (1989) 48 Cal.3d 1, 7, "A statute is retroactive if it substantially changes the legal effect of past events.")

to eliminate all bases of liability for prevailing wage violations, and were not credible. As such, Micon failed to present even a colorable argument that the amended CPRs were bona fide, leading to the conclusion that liquidated damages should not be waived. It is not plausible that Micon had an objective factual basis for claiming the Assessment was erroneous. For these reasons, Micon cannot persuade that it had substantial grounds for appealing the Assessment as to wages and penalties this Decision finds were owed under the Assessment.

Apprenticeship Violations.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. California Code of Regulations, title 8, sections 227 to 232.70.[10]

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

> The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

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

> Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with the required 1 hour of work performed by an a apprentice for every five hours of labor performed by a journeyman, unless covered by one of the exemptions enumerated in Labor Code

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

> Section 1777.5 or this subchapter. Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

However, a contractor shall not be considered in violation of the regulation if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).)

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

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

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

Prior to requesting the dispatch of apprentices, the regulation, section 230, subdivision (a), provides that contractors should alert apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed. It provides it relevant part as follows:

> Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an

> apprenticeship program sponsor shall provide contact award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. The contract award information shall be in writing and may be a DAS Form 140 Public Works Contract Award Information. The information shall be provided to the applicable committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work. Failure to provide contract award information, which is known by the awarded contractor, shall be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed by the awarding body, for the purpose of determining the accrual of penalties under Labor Code section 1777.7....

Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

When DLSE determines that a violation of the apprenticeship laws has occurred, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (§ 1777.7, subd. (c)(2)(B).)

Micon Failed to Employ Cement Mason, Landscape Irrigation Laborers, and Laborer Apprentices.

Cement mason, landscape irrigation laborer, and laborer were the apprenticeable crafts at issue in this matter. Micon employed no apprentices on the Project. Accordingly, the record establishes that Micon violated section 1777.5 and the related regulations, sections 230 and 230.1.

There Were Five Applicable Committees in the Geographic Area.

DLSE established that there were two applicable apprenticeship committees for cement mason in the geographic area of the Project: (1) Southern California Cement Masons J.A.C.; and, (2) San Diego Associated General Contractors J.A.C. There were three applicable apprenticeship committees for laborers – including landscape irrigation laborers - in the geographic area of the Project: (1) Laborers Southern California Landscape and Irrigation Fitters J.A.C.; (2) Associated General Contractors of America, San Diego Chapter; and, (3) Laborers Southern California Joint Apprenticeship

Committee. Napolitano admitted that Micon was not approved for training by any committee. Micon did not dispute that the five committees listed were the applicable committees for the Project.

Micon Failed to Properly Notify the Five Applicable Committees of Contract Award Information.

Micon provided proof of sending contract award information to just one committee: the Laborers Southern California JAC. However, the notice was not timely. It was sent two weeks after Micon had workers employed on the Project. Thus, Micon violated section 1777.5, subdivision (e) and the applicable regulation, section 230.

Micon Failed To Properly Request The Dispatch Of Cement Mason, Landscape Irrigation Laborers, and Laborer Apprentices.

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. (§ 230.1, subd. (a).) Micon failed to introduce any documentary evidence that showed it complied with the regulation with respect to the dispatch of apprentices for the Project. Micon produced to DLSE one request for dispatch of apprentices sent to the Southern California Cement Masons J.A.C. in Arcadia. (DLSE Exhibit No. 19.) However, there was no date listed for the apprentice to report, as is required by the regulation. Micon produced as Exhibit G the same request for dispatch except that the words "& Laborer Landscape" were added next to the name Southern California Cement Masons J.A.C. Thus, Micon's exhibit seemed to imply that a request for landscape irrigation laborers was also made, but the request, in that it was sent to the committee for cement masons, was not directed to the applicable apprenticeship committee. Napolitano did not know why the additional language was added to the form, and he admitted that the Request for Dispatch was sent to the cement mason apprenticeship committee. Thus, there was no evidence produced by Micon to demonstrate actual compliance with the law as to requesting applicable apprenticeship committees to dispatch apprentices.

The Penalty for Noncompliance.

If a contractor "knowingly violated Section 1777.5" a civil penalty is imposed under section 1777.7. Here, DLSE assessed a penalty against Micon under the following

portion of section 1777.7, subdivision (a)(1):[11]

> A contractor or subcontractor that is determined by the Labor Commissioner 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 Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation.... A contractor or subcontractor that knowingly commits a second or subsequent violation of section 1777.5 within a three-year period, 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 the regulations, 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.

Micon "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journeyman hours for cement mason, landscape irrigation laborer, and laborer apprentices, and the record establishes that this violation was "knowingly committed." Napolitano did not testify that he was unfamiliar with the requirement for the employment of apprentices on the Project, or unfamiliar with the need to contact apprentice committees and request the dispatch of apprentices. Indeed, there was evidence that Micon made an insufficient attempt to request dispatch. In addition, Napolitano signed contract documents acknowledging that he was aware of and would comply with laws requiring the employment of registered apprentices on the Project. (DLSE Exhibit Nos. 16 and 20.) He testified that Micon was a public works contractor. Micon's only defense was that the apprenticeship programs did not dispatch apprentices

[11] Section 1777.7 was amended, effective January1, 2015. (See Stats. 2014, ch. 297, § 3 (AB 2744).) For purposes of this Decision, the Director has applied the language of Section 1777.7 that was in effect at the time the Project was advertised for bid (in 2013).

to Micon because Micon did not follow specifically the training that the unions wanted to be done. Thus, there was no evidence that Micon could not have sent contract award information to the applicable committees and could not have requested dispatch of apprentices from those same committees. Since Micon was aware of its obligations under the law, and provided no evidence of why it could not have complied with the law, Micon failed to meet its burden of proof by providing evidence of compliance with section 1777.5. Since Micon knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a penalty of $120.00 for 119 days of violations, based in part on the fact that Micon had been issued three previous determinations of civil penalty for apprenticeship violations within 14 months of the issuance of the Assessment. In addition, there had been significant loss of apprenticeship training opportunity for local apprentices. Here the Labor Commissioner even reduced the penalty proposed by the deputy from $300.00 per violation to $120.00 per violation. On review of the penalty under the considerations listed in section 1777.7, (former) subdivision (f), the penalty rate of $120.00 as selected by DLSE is appropriate and, therefore, that rate is affirmed.[12]

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

FINDINGS

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.

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[12] As noted, Section 1777.7 was amended effective January 1, 2015. One provision within the amendments provided for review of penalties imposed under the section only under an abuse of discretion standard. (See (current) Section 1777.7, subd. (d).) Prior to this amendment, the Section provided for de novo review by the Director. (See (former) § 1777.7, subd. (f)(2).) Here, the Director has applied the standard as in effect at the time the Project was advertised for bid (in 2013), i.e., de novo review. The factors listed in former subdivision (f) (subdivision (b) in current Section 1777.7, as amended), which have been considered and addressed in his Decision, include *inter alia* whether the violation was intentional; whether the party has committed other violations of Section 1777.5; whether, upon notice of the violation, the party took steps to voluntarily remedy the violation; and whether the violation resulted in lost training opportunities.

3. Affected contractor Micon, 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 available its enforcement file.
5. No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment.
6. A. Rodriguez, F. Talamantes, H. Perez, J. Perez, and N. Perez performed work in Riverside County during the pendency of the Project, were misclassified as modular installers when they should have been classified as laborers, and were entitled to be paid the journeyman rate for laborer for that work.
7. F. Talamantes, G. Alarcon, I. Flores, I Flores, Jr., J. de Luna, and M. Roldan performed work in Riverside County during the pendency of the Project, were misclassified as landscape irrigation tenders and/or landscape maintenance when they should have been classified as landscape irrigation laborers, and were entitled to be paid the journeyman rate for landscape irrigation laborer for that work.
8. In light of findings 6 through 7 above, Micon underpaid its employees on the Project in the aggregate amount of $15,248.28.
9. Micon paid training fund contributions of more than $510.44 for its employees on the Project, so the assessment of $510.44 is reduced to $0.00.
10. DLSE did not abuse its discretion in setting section 1775 penalties at the rate of $120.00 per violation, and the resulting total penalty of $13,200.00 as modified for 110 violations, is affirmed.
11. The unpaid wages found in Finding No. 8 remained due and owing more than 60 days following issuance of the Assessment. Accordingly, Micon is liable for an additional amount of liquidated damages under section 1742.1 and there are insufficient grounds to waive payment of these damages.
12. There were two applicable apprenticeship committees in the geographic area of the Project in the craft of cement mason: (1) Southern California Cement Masons J.A.C.; (2) San Diego Associated

General Contractors J.A.C.

13. There were three applicable apprentice committees in the geographic area of the Project in the craft of laborers – including landscape irrigation laborers, (1) Laborers Southern California Landscape and Irrigation Fitters J.A.C.; (2) Associated General Contractors of America, San Diego Chapter; and (3) Laborers Southern California Joint Apprenticeship Committee.

14. Micon failed to issue a Notice of Contract Award Information to all applicable apprenticeship committees for the crafts of cement masons, landscape irrigation laborers, and laborers

15. Micon failed to properly request dispatch of cement mason apprentices from the two applicable apprenticeship committees in the geographic area of the Project, so it was not excused from the requirement to employ apprentices under Labor Code section 1777.7.

16. Micon failed to properly request dispatch of landscape irrigation laborers from the three applicable apprenticeship committees in the geographic area of the Project, so it was not excused from the requirement to employ apprentices under Labor Code section 1777.7.

17. Micon failed to properly request dispatch of laborer apprentices from the three applicable apprenticeship committees in the geographic area of the Project, so it was not excused from the requirement to employ apprentices under Labor Code section 1777.7.

18. Micon violated Labor Code section 1777.5 by failing to employ apprentices in the crafts of cement mason, landscape irrigation laborer, and laborer on the Project in the minimum ratio required by the law.

19. Section 1777.7 penalties at the rate of $120.00 per violation are appropriate, and the resulting total penalty of $14,280.00 is affirmed.

20. The amount found due in the Assessment is modified and affirmed by this Decision are as follows:

Wages due:	$15,248.28

Penalties under section 1775(a):	$13,200.00
Training Fund Contributions:	$0.00
Liquidated damages:	$15,248.28
Penalties under section 1777.7	$14,280.00
TOTAL	**$57,976.56**

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

ORDER

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

Dated: 5/17/18

André Schoorl
Acting Director of Industrial Relations