STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Aghapy Group, Inc.,
dba Aghapy Construction, Inc. **Case No. 17-0118-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Aghapy Group, Inc., dba Aghapy Construction, Inc. (Aghapy) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on January 25, 2017, with respect to work of improvement known as the Arrowhead Regional Medical Center Coding and Reception Remodel (Project) performed for County of San Bernardino Architecture and Engineering Department (County). The Assessment determined that the following amounts were due: $18,956.33 in unpaid prevailing wages, $141.39 in training funds, $15,000.00 in Labor Code section 1775 statutory penalties,[1] $625.00 in section 1813 statutory penalties, and $11,100.00 in section 1777.7 statutory penalties. Aghapy timely filed its Request for Review of the Assessment on March 24, 2017.

A Hearing on the Merits was held in Santa Ana, California on February 14, 2018, before Hearing Officer Howard Wien. Lance A. Grucela appeared for DLSE. There was no appearance for Aghapy. Three witnesses testified at the hearing for DLSE: Deputy Labor Commissioner Lori Rivera and workers Orlando Garcia and Hugo Hernandez.

After Garcia concluded his testimony, DLSE moved to amend the Assessment downward. This motion was based on Garcia's testimony that he had worked fewer hours than DLSE had determined in preparing the Assessment. The Hearing Officer

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

granted the motion, whereupon DLSE's final assessment of amounts due were as follows: $17,297.38 in unpaid prevailing wages, $103.69 in training funds, $13,200.00 in section 1775 statutory penalties, and $600.00 in section 1813 statutory penalties. The section 1777.7 statutory penalties of $11,100.00 remained unchanged. The case stood submitted on February 14, 2018.

The issues for decision are:

- Whether the Assessment was timely.
- Whether DLSE timely made its enforcement file available to Aghapy.
- Whether the Assessment correctly found that Aghapy had failed to report and pay the required prevailing wages for all hours worked on the Project by the affected workers.
- Whether Aghapy is liable for liquidated damages under section 1742.1, subdivision (a), and if so, in what amount.
- Whether Aghapy is liable for nonpayment of training funds, and if so, in what amount.
- Whether the Labor Commissioner abused her discretion in assessing statutory penalties under section 1775 at the rate of $200.00 per violation for 66 violations, totaling $13,200.00.
- Whether the Assessment correctly found that Aghapy failed to pay the overtime prevailing wage rate for all overtime hours worked, thereby making Aghapy liable for a section 1813 statutory penalty of $25.00 per violation for 24 violations, totaling $600.00.
- Whether Aghapy knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230, subdivision (a), by not issuing public works contract award information in a DAS Form 140 or its equivalent to the applicable apprenticeship committees in the geographic area of the Project for the apprenticeable crafts of Electrician, Laborer, Carpenter, Drywall Installer, Drywall Finisher, and Painter.
- Whether Aghapy knowingly violated section 1777.5 and California Code

of Regulations, title 8, section 230.1, subdivision (a), by not issuing valid requests for dispatch of apprentices in a DAS Form 142 or its equivalent to the applicable apprenticeship committees in the geographic area of the Project for the crafts of Electrician, Laborer, Carpenter, Drywall Installer, Drywall Finisher, and Painter.

- Whether Aghapy knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), by not employing apprentices on the Project in the ratio of one hour of apprentice work for every five hours of journeyman work in the crafts of Electrician, Laborer, Carpenter, Drywall Installer, Drywall Finisher, and Painter.
- Whether Aghapy is liable for section 1777.7 statutory penalties, and if so, in what amount.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, with one limited exception. (See Cal. Code Regs., tit. 8, § 17250, subd. (a).) Accordingly, the Director issues this Decision affirming and modifying in part the Assessment.

FACTS

Aghapy Did Not Appear at the Hearing on the Merits.

On August 21, 2017, Aghapy's representative, President and CEO Michael Mourice Michael, appeared for Aghapy in a telephonic prehearing conference conducted by the Hearing Officer. Grucela appeared for DLSE. In this conference, the Hearing on the Merits was set for February 14, 2018, in Los Angeles, California.

Neither Michael nor anyone else appeared for Aghapy at the Hearing, and Aghapy did not present any exhibits to the Hearing Officer. The Hearing was set to commence at 10:00 a.m. and at 10:33 a.m. the Hearing Officer called Michael to determine if he was on his way to the hearing room. The call diverted to a recorded message stating that Michael was not available. The Hearing Officer left a voicemail message stating that it was over one-half hour after the Hearing was set to commence and

no one had appeared for Aghapy; the Hearing Officer would proceed to commence the Hearing without Michael; and if Michael arrived at the Hearing, he could attend from that point forward, but none of the proceedings in the Hearing would be repeated for him. In this voicemail message, the Hearing Officer also reiterated the location of the Hearing (including the specific conference room) that was indicated on the Hearing notice, and the Hearing Officer gave his cell phone number and asked Michael to call back. Michael never called back.

The Hearing Officer proceeded to conduct the Hearing on the Merits in Aghapy's absence to formulate a recommended decision as warranted by the evidence, pursuant to California Code of Regulations, title 8, section 17246, subdivision (a). DLSE's exhibits were admitted into evidence without objection and the matter was submitted on the evidentiary record. Aghapy filed no motion seeking relief from its non-appearance, as is permitted under California Code of Regulations, title 8, section 17246, subdivision (b).

The Project.

The County advertised the Project for bid on July 10, 2014. Aghapy entered into its contract with the County for the Project (Contract) on October 20, 2014. The work Aghapy agreed to perform was to remodel the coding and reception facility of the County's Health Information Management Department. This work consisted of building demolition, and construction and installation of ceiling suspension systems, cold formed metal framing, custom casework, lath and plaster, flooring, and painting.

The Contract provides that Aghapy agrees to comply with the apprenticeship requirements of section 1777.5. The bid documents issued by the County state that wage rates on the Project must comply with the prevailing wage rate determinations from the Director of Industrial Relations.

Aghapy's Workers on the Project, and the Assessment of Unpaid Prevailing Wages.

Aghapy employees worked on the Project in San Bernardino County on 37 days during the period November 12, 2014, to January 14, 2015. Aghapy prepared the Certified Payroll Records (CPRs) for its work on the Project that list 14 workers. Ten of

those workers were the subject of the Assessment: Demetrio Arrelano, Jose Calderoe, Juan Casula, Orlando Garcia, Hugo Hernandez, Hany Mousa, Nashed Mathuo, Gustavo Navaro, Jaime Rodriguez and Remon Takla. The other four workers – Ishraf Abashi, Eduardo Arellano, Osama Beshay, and Jorge Vasquez – were not the subject of Assessment. DLSE decided not to include them when it learned that they had retained private counsel to pursue their claims against Aghapy in a civil action.

The CPRs classified the work performed by the ten workers as Laborer Groups 1 and 3, Drywall Installer, Drywall Finisher, Painter, Inside Wireman (i.e., Electrician), and Light Fixture Maintenance. For these classifications, the following are the applicable Prevailing Wage Determinations (PWDs) applicable to the Project in San Bernardino County, based upon the bid advertisement date of July 10, 2014:

- Inside Wireman (Electrician), SBR-2014-1;
- Laborer and Related Trades, Laborer Groups 1 and 3, SC-23-102-2-2013-1;
- Drywall Installer, SC-31-X-41-2013-1;
- Drywall Finisher, SBR-2014-1;
- Painter, SBR-2014-1; and
- Light Fixture Maintenance, SC-830-61-1-2000-1.

For many of the hours for which the CPRs reported as Laborer work, DLSE reclassified the hours as Carpenter work based on the evidence of the work actually performed by workers compared to the Carpenter scope of work. The applicable PWD for Carpenter is SC-23-31-2-2013-2.

The Assessment found that Aghapy failed to pay prevailing wages due the ten workers, because the CPRs misclassified the workers and underreported their hours, and the cancelled paychecks that Aghapy produced to DLSE as Aghapy's sole evidence of payment to the workers disclosed amounts less than the prevailing wages due.[2]

As to misclassification, the chief issue found by DLSE was that Garcia, Hernandez, Rodriguez and Calderoe were classified for many hours as Laborers, while the correct classification was Carpenter. The CPRs reported no carpentry work

[2] As addressed, *post*, for one of the ten workers, Mathuo, there was no evidence supporting DLSE's determination he had worked on the Project.

whatsoever. Based on interviews of Garcia and Hernandez and the Carpenter and Laborer PWD scopes of work, however, DLSE's investigation revealed that the work of installing of ceiling suspension systems and metal framing fell within the scope of work of the Carpenter PWD, which specifically included the work of ". . . installation of metal studs, metal frames, shingles, roofing, and plastics used in the performance of carpentry work, ..."

DLSE's finding of underreporting of hours pertained solely to Garcia and Hernandez. DLSE obtained its information on the hours they performed by interviewing those workers.

DLSE requested Aghapy to produce cancelled checks and other documentation of its payments to the workers. Aghapy produced its cancelled checks only. However, the cancelled checks did not include all paychecks listed on the CPRs for the workers at issue, and did not show payment for all wages stated in the CPRs. Also, as to Garcia and Hernandez, Aghapy produced no cancelled checks or any other evidence of payment for the many unreported hours they reported to DLSE that they had worked.

Assessment of Unpaid Training Fund Contributions.

DLSE determined from the website of the California Apprenticeship Council (CAC) that Aghapy had timely paid a total of $339.70 in training fund contributions for the work performed on the Project. The final Assessment found that Aghapy had failed to pay $103.69 in additional training funds due.

Assessment of Apprenticeship Violations.

All of the crafts of the workers stated above were apprenticeable under the applicable PWDs, except for Light Fixture Maintenance. There were a total of 11 apprenticeship committees for the six apprenticeable trades in the geographic area of the Project site. DLSE's investigation revealed that Aghapy failed to issue a notice of contract award information in a DAS 140 form or its equivalent, and failed to issue requests for dispatch of apprentices in a DAS 142 form or its equivalent, to ten of the 11 apprenticeship committees. The single committee to which Aghapy sent DAS 140 and DAS 142 forms was Associated General Contractors of America, San Diego Chapter (AGC). Those forms stated that Aghapy was transmitting them for the trades of Laborer,

Painter and Drywall Finisher. As discussed, *post*, all of those forms were invalid.

In the six apprenticeable trades, Aghapy's journeymen worked the following number of hours on the Project:

- Inside Wireman (Electrician): 8
- Laborer Groups 1 and 3: 142
- Carpenter: 303.5
- Drywall Installer: 54
- Drywall Finisher: 81
- Painter: 104

Aghapy did not have any apprentices working on the Project, with one exception. Navaro, who was a Laborer apprentice, worked on the Project on two days, with seven hours of work per day. On those days, however, no journeyman Laborer was present to supervise Navaro's work. Consequently DLSE reclassified Navaro to journeyman from apprentice.

Assessment of Statutory Penalties.

Rivera testified as to the bases for the section 1775 and section 1777.7 statutory penalties assessed, including Aghapy's history of two previous assessments for prevailing wage violations, one previous assessment for both prevailing wage and apprenticeship violations, and two determinations of civil penalty for apprenticeship violations.

DISCUSSION

The Assessment Was Timely.

The limitations period for DLSE to serve an assessment is stated in section 1741, subdivision (a). Section 1741, subdivision (a), has been in effect without amendment since January 1, 2014 (stats. 2013, ch. 792, § 1, eff. Jan. 1, 2014) and states in relevant part:

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

occurs last.[3]

The County's Notice of Completion states that the Project was completed on October 1, 2015. The Notice of Completion was recorded on October 9, 2015. Having been recorded within 15 days from completion, the Notice of Completion was valid, and commenced the running of the 18-month limitations period on October 9, 2015. (See Civ. Code, § 9204.) DLSE served the Assessment on January 25, 2017, several months before the limitations period expired on April 9, 2017. Accordingly, the Assessment was timely.

DLSE Timely Made Its Enforcement File Available to Aghapy.

Section 1742, subdivision (b), states in relevant part:

> The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

Aghapy mailed its request for review of the Assessment on March 24, 2017, and DLSE received it on March 28, 2017. Fourteen days later – on April 11, 2017, DLSE provided Aghapy the opportunity to review the evidence to be utilized by DLSE at the Hearing. On that day, Grucela faxed and mailed a letter to attorney Jeffrey D. Hook, who at that time represented Aghapy in this matter, giving Hook the opportunity to review and copy the documents in DLSE's file in this matter. The Director finds that DLSE timely made its enforcement file available to Aghapy.[4]

Aghapy Failed to Pay the Required Prevailing Wages.

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

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[3] For most purposes the bid advertisement date determines the date of the applicable Labor Code sections and applicable sections of the California Code of Regulations, title 8. As stated, *ante*, the bid advertisement date of the Project is July 10, 2014.

[4] California Code of Regulations, title 8, section 17224, subdivision (a) requires DLSE, within ten days after receipt of a request for review, to notify a contractor of the opportunity and procedures for reviewing evidence to be used by DLSE at a hearing. Aghapy made no showing of any prejudice from the timing of DLSE's notice of opportunity to review evidence in this case.

California Supreme Court in one case as follows:

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

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

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, under specified circumstances discussed below.

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. DLSE has the burden of producing evidence that "provides prima facie support for the Assessment . . . ." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that initial burden is met, "the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment . . . is incorrect." (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).)

Here, DLSE's prima facie case supported the determination in the final Assessment that Aghapy failed to pay the prevailing wages to nine of the ten workers that were the subject of the final Assessment (the sole exception was Mathuo). Aghapy failed to attend the Hearing and failed to present any evidence proving that the basis for the

final Assessment was incorrect as to the nine workers. Consequently, the Director affirms the final Assessment as to Garcia, Hernandez, Rodriguez, Calderoe, Arellano, Mousa, Takla, Casula and Navaro, finding that Aghapy failed to pay them prevailing wages in the aggregate sum of $16,550.20.

As to Mathuo, there was no prima facie evidence he worked on the Project. Thus the final Assessment is modified by reversing the $747.18 prevailing wages it asserts is due him. (Cal. Code Regs., tit. 8, § 17250, subd. (a).)

Aghapy Is Liable for Section 1775 Statutory Penalties.

Section 1775, subdivision (a) -- as it read in 2014 when the Project was advertised for bid -- states in relevant part:

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars ($200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
> (2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
> (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
> (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
> (B)(i) The penalty may not be less than forty dollars ($40) . . . unless the failure of the contractor . . . to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor . . . .
> (ii) The penalty may not be less than eighty dollars ($80) . . . if the contractor . . . has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
> (iii) The penalty may not be less than one hundred twenty dollars ($120) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that

the violation was willful, as defined in subdivision (c) of Section 1777.1.[5]

Section 1775, subdivision (a)(2)(D), states: "The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion." Abuse of discretion is established if the "agency's nonadjudicatory action . . . is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, the Director is not free to substitute his or her own judgment when "in [his/her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998), 67 Cal.App.4th 95, 107.) The contractor "shall have 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).)

Here, the Labor Commissioner imposed the maximum penalty rate of $200.00. Under the evidentiary record of this case, the Labor Commissioner did not abuse her discretion in doing so. In applying the provisions of section 1775, subdivision (a)(2)(A)(i) quoted above, the evidence showed that Aghapy's failure to pay the correct prevailing wage was not a good faith mistake.[6]

As to Aghapy's misclassification of workers as Laborers rather than Carpenters, the testimony of Garcia and Hernandez – and the scopes of work for the PWDs of Carpenter and Laborer -- made clear that Garcia, Hernandez, Rodriguez and Calderoe performed metal framing work that fell within the scope of work of Carpenter rather than Laborer. Garcia's and Hernandez's testimony also clearly established they worked all of the hours upon which the final Assessment was based. There is no basis for finding that

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[5] A typographical error in the statute refers to "subdivision (c)." The definition of "willful" in section 1777.1 is found in subdivision (d), which states: "A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

[6] The facts supporting this finding equally support a determination that Aghapy's violations of the prevailing wage requirements were "willful" under section 1775, subdivision (a)(2)(B)(3) and section 1777.1, subdivision (d) – i.e., Aghapy knew or reasonably should have known of its obligation to pay the prevailing wage but deliberately failed or refused to comply.

Aghapy did not know, or should not have reasonably known, of these facts. Further, as to Aghapy's payments to the workers, Aghapy provided no explanation to DLSE as to why the cancelled checks it produced in response to DLSE's request for proof of payment fail to state payment of all wages stated in the CPRs.

Moreover, in applying the provisions of section 1775, subdivision (a)(2)(A)(ii), quoted above, DLSE's evidence showed that Aghapy had a prior record of failing to meet its prevailing wage obligations; specifically, three prior assessments were issued against Aghapy for prevailing wage violations on three other projects.

Accordingly, Aghapy failed to establish that the Labor Commissioner abused her discretion in setting the penalty rate at $200.00. As to the number of violations, the section 1775 penalty is imposed "for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates . . . . " (§ 1775, subdivision (a)(1).) The final Assessment determined there were 66 violations. This Decision reduces the violations to 64 by finding that Mathuo did not work on the Project for the two days included in the final Assessment. Accordingly, this Decision modifies the final Assessment by finding that Aghapy is liable for the section 1775 statutory penalty in the sum of $12,800.00.

Aghapy 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.

As of DLSE's issuance of the Assessment on January 25, 2017, the statutory scheme regarding liquidated damages provided contractors three alternative ways 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 DLSE's service of the assessment.

First, under section 1742.1, subdivision (a), the contractor could pay to the workers all or a portion of the wages stated in the assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Second, under section 1742.1, subdivision (b), a contractor could avert liability for liquidated damages if, within 60 days from issuance of the assessment, "full amount of the assessment or notice, including penalties has been deposited with the Department of Industrial Relations . . . ."

Third, the contractor could choose to rely upon the Director's discretion to waive liquidated damages under (former) section 1742.1, subdivision (a), which stated:

> Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment … with respect to a portion of the unpaid wages covered by the assessment …, the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.[7]

(§ 1742.1, subd. (a).)

Here, there was no evidence that Aghapy paid any of the back wages to any of its workers within 60 days following service of the Assessment, or that Aghapy deposited any monies into escrow with the Department of Industrial Relations. Further, Aghapy presented no evidence or argument that it had substantial grounds for appealing the Assessment. Accordingly, the Director does not waive payment of the liquidated damages, and Aghapy is liable for liquidated damages in the sum of $16,550.20.

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[7] On June 27, 2017, the Director's discretionary waiver power was deleted from section 1742.1 by Senate Bill 96 (stats. 2017, ch. 28, § 16 (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.) Further, "[a] statute is retroactive if it substantially changes the legal effect of past events." (*Kizer v. Hannah* (1989) 48 Cal.3d 1, 7.) Here, the law in effect at the time the Assessment was issued (January 25, 2017) allowed a waiver of liquidated damages in the Director's discretion, as specified, which could have influenced Aghapy's decision as to how to respond to the Assessment. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what Aghapy elected to do in response to the Assessment). Accordingly, this Decision finds that the Director's discretion to waive liquidated damages in this case under section 1742.1, subdivision (a) is unaffected by SB 96.

Aghapy Is Liable for Failure to Pay Training Funds.

Section 1777.5, subdivision (m)(l), requires contractors on public works projects who employ journeyman or apprentices in any apprenticeable craft to pay training fund contributions to the CAC or to an approved apprenticeship program approved by the Division of Apprenticeship Standards (DAS). Here, DLSE determined from the CAC website that Aghapy had timely paid a total of $339.70 in training fund contributions for the work performed on the Project. The Assessment found that Aghapy owed an additional $141.39 in training funds. After the amendment downward in Garcia's hours on the Project resulting from his testimony in the Hearing, the revised Assessment found that the unpaid training funds totaled $103.69. As stated, *ante*, the Director finds no support for the Assessment's determination that Mathuo had worked 14 hours on the Project. This conclusion further reduces the training funds due by $7.28. Therefore, based on the record, the Director finds that Aghapy is liable for $96.41 in unpaid training funds.

The Overtime Penalty Amount of $600.00 Is Affirmed.

Section 1813 requires that workers are compensated for overtime pay pursuant to section 1815 when they work in excess of eight hours per day or more than 40 hours during a calendar week, and imposes a penalty of $25.00 per day per worker for any violation. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty.

The Assessment imposed a statutory penalty of $625.00 under section 1813 based on Aghapy's having failed to pay the required overtime rate of pay to Garcia for 12 days, and to Hernandez for 13 days. Garcia's testimony in the Hearing, however, supported a reduction in Garcia's hours on the Project, including elimination of one day of overtime work. The revised Assessment thus stated a statutory penalty of $600.00 under section 1813. This $600.00 penalty was supported by the evidentiary record, and Aghapy did not present any evidence proving that the basis for this final Assessment was incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) Accordingly, the section 1813 statutory penalty of $600.00 is affirmed.

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 CAC. (Cal. Code Regs, tit. 8, §§ 227 to 232.70.) In review of an assessment asserting violation of apprentice requirements, "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); accord, Cal. Code Regs., tit. 8, § 232.50, subd. (b).)

Section 1777.5, subdivision (d), establishes that every contractor awarded a public works contract by the state or any political subdivision who employs workers in any apprenticeable craft or trade "shall employ apprentices in at least the ratio set forth in this section . . . ." Section 1777.5, subdivision (g), specifies the ratio as not 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 California Code of Regulations, title 8, section 230.1, subdivision (a).

The regulatory scheme establishes a two-step process by which the contractor obtains apprentices to satisfy the 1:5 ratio: (1) the contractor is required to notify the applicable apprenticeship committees of upcoming apprentice work opportunities; and (2) the contractor is required to request the applicable apprenticeship committees to dispatch apprentices to work on the project. (§ 1777.5, subd. (e); Cal. Code Regs., tit. 8, §§ 230, subd. (a) and 230.1, subd. (a).)

As to notification to apprenticeship committees of upcoming work opportunities, California Code of Regulations, title 8, section 230, subdivision (a) states in relevant part:

> Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. This contract award information shall be in writing and may be a DAS Form 140, Public Works Contract Award Information. The information shall be provided to the applicable apprenticeship committee within ten (10) days of the date of

> the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work. Failure to provide contract award information, which is known by the awarded contractor, shall be deemed to be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed by the awarding body for the purpose of determining the accrual of penalties under Labor Code Section 1777.7.

As to the request to the applicable apprenticeship committees to dispatch apprentices to the project job site, California Code of Regulations, title 8, section 230.1, subdivision (a) states in relevant part:

> Contractors who are not already employing sufficient registered apprentices (as defined by Labor Code Section 3077) to comply with the one-to-five ratio must request the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays and holidays) before the date on which one or more apprentices are required. 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) from each such committee in the geographic area. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.

(Cal. Code Regs, tit. 8, § 230.1, subd. (a).) DAS provides a form – DAS 142 – that contractors may use to request dispatch of apprentices from apprenticeship committees.

Further, California Code of Regulations, title 8, section 230.1, subdivision (a) provides in relevant part:

> . . . [I]f in response to a written request no apprenticeship committee dispatches or agrees to dispatch during the period of the public works project any apprentice to a contractor who has agreed to employ and train apprentices in accordance with either the apprenticeship committee's standards or these regulations within 72 hours of such request (excluding Saturdays, Sundays and holidays) the contractor shall not be considered in

violation of this section as a result of failure to employ apprentices for the remainder of the project, provided that the contractor made the request in enough time to meet the above-stated ratio.

Aghapy Failed to Notify Applicable Apprenticeship Committees, Request the Dispatch of Apprentices, and Employ Apprentices in the Required Ratio.

Aghapy violated the requirement of section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), that it employ apprentices in the ratio of one hour of apprentice work for five hours of journeyman work, and Aghapy also violated California Code of Regulations, title 8, section 230, subdivision (a), and section 230.1, subdivision (a), by failing to timely and properly issue DAS 140 and DAS 142 forms or their equivalents.

As to the DAS 140 and DAS 142 forms, Aghapy failed to issue those forms, or their equivalents, to ten of the 11 apprenticeship committees to which it was required to issue those forms for the crafts of Electrician, Laborer, Carpenter, Drywall Installer, Drywall Finisher and Painter. Even as to the eleventh applicable apprenticeship committee – the AGC – Aghapy's DAS 140 forms and DAS 142 forms were invalid. The DAS 140 forms were invalid because they were untimely. Aghapy issued them approximately two weeks after Aghapy's workers had commenced work on the Project. The DAS 142 forms were invalid because they, too, were untimely. They requested that apprentices report to the jobsite less than 72 hours after Aghapy transmitted the form to the AGC. Moreover, the DAS 140 and 142 forms for the crafts of Painter and Drywall Finisher were invalid because they stated that Aghapy was approved by AGC to train apprentices in those crafts, whereas DLSE confirmed with AGC during its investigation that AGC had not approved Aghapy to train those crafts.

On De Novo Review, Aghapy Is Liable for a Statutory Penalty of $300.00 per Violation Under Section 1777.7.

If a contractor knowingly violates section 1777.5, a civil penalty is imposed under section 1777.7 in an amount not exceeding $100.00 for each full calendar day of noncompliance. (§ 1777.7, subd. (a)(1).) A violation "knowingly" committed is defined by California Code of Regulations, title 8, section 231, subdivision (h) as follows:

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

(Cal. Code Regs., tit. 8, § 231, subd. (h).

The penalty may be increased up to $300.00 for each full day of noncompliance under the following facts:

> . . . 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.

(§ 1777.7, subd. (a)(1).)

The final Assessment determined that Aghapy violated section 1777.5 (and the implementing regulations) for 37 days and imposed a penalty of $300.00 per day, totaling $11,100.00. Under the former version of section 1777.7 applicable in this case (i.e., the version in effect in 2014), the Director decides the appropriate penalty de novo. (§ 1777.7, subd. (f)(2).) In setting the penalty de novo, the Director is to consider all of the following circumstances:

> (A) Whether the violation was intentional.
> (B) Whether the party has committed other violations of Section 1777.5.
> (C) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.
> (D) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.
> (E) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

(§ 1777.7, subd. (f)(1) and (2).)

Here, the evidentiary record establishes that Aghapy "knowingly" violated section 1777.5 and the implementing regulations under the irrebuttable presumption of California Code of Regulations, title 8, section 231, subdivision (h). The Contract stated in paragraph 7.14: "The Contractor acknowledges that he will be held responsible for compliance with the provisions of Sections 1777.5 and 1776 of the State Labor Code." Further, the evidence that Aghapy failed to issue DAS 140 and DAS 142 forms to ten applicable apprenticeship committees, and issued invalid DAS 140 and DAS 142 forms to the eleventh committee, establishes that Aghapy's violations were knowingly made.

As stated in California Code of Regulations, title 8, section 231, subdivision (h), quoted above, a violation is not deemed to be "knowingly" made if "the failure to comply was due to circumstances beyond the contractor's control." (Cal. Code Regs., tit. 8, § 231, subd. (h).) Here, there was no evidence that Aghapy's violations were due to any matter beyond its control. Given that Aghapy committed a "knowing" violation, the analysis turns to the five de novo review factors "A" through "E" listed above.

Factor "A" – whether the violation was intentional – strongly favors the maximum penalty rate allowed by section 1777.7. The facts showing that Aghapy "knowingly" violated the apprenticeship requirements equally support the determination that Aghapy's violations were intentional.

Factor "B" – whether Aghapy had committed other violations of section 1777.5 – also favors setting the penalty at the maximum rate permitted by section 1777.7. The evidentiary record supports a finding that prior to the issuance of the Assessment on January 25, 2017, Aghapy had committed other violations of section 1777.5 on three separate public works projects for which DLSE issued one assessment and two determinations of civil penalty against Aghapy. Specifically: (1) DLSE issued an assessment on June 29, 2015, for apprenticeship violations in the sum of $35,100.00; (2) DLSE issued a determination of civil penalty on December 17, 2013, for apprenticeship violations in the sum of $5,200.00; and (3) DLSE issued a determination of civil penalty on September 15, 2014, for apprenticeship violations in the sum of $7,300.00. Since Aghapy did not appear and produce evidence in the present case, no evidence counters DLSE's determinations in those three cases that Aghapy had committed the violations

stated therein. Accordingly, in this de novo review of the Labor Commissioner's penalty rate, this Decision finds that the record supports a finding of prior violations under de novo factor "B". Factor "B" therefore favors the maximum penalty rate allowed by section 1777.7.

Factor "C" – whether, upon notice of the violation, Aghapy took steps to voluntarily remedy the violation – is not applicable here. DLSE did not commence its investigation and initiate communication with Aghapy until after Aghapy's work on the Project had ceased.

Factors "D" and "E" – whether, and to what extent, the violation resulted in lost training opportunities for apprentices and otherwise harmed apprentices or apprenticeship programs – support a high penalty rate. Aghapy's journeyman in six apprenticeable trades worked a total of 692.5 hours on the Project. The 1:5 ratio for each craft required a total of 135 apprentice hours. Aghapy's apprenticeship violations resulted in 135 hours of lost training opportunity for apprentices and related harm to the 11 apprenticeship committees.

The weighing of the five de novo review factors, particularly the heavy weight given to Aghapy's intentional violations in this case, supports the maximum penalty rate permitted by section 1777.7, which is $300.00 per violation. Any penalty rate from $101.00 to $300.00 requires a determination that the contractor knowingly committed a second or subsequent violation of section 1777.5 within a three-year period, and that such violation resulted in apprenticeship training not being provided. (§ 1777.7, subd. (a)(1).) As stated above regarding de novo factors "D" and "E," Aghapy's apprenticeship violations resulted in a loss of 135 hours in apprentice training opportunities and consequent harm to the 11 apprenticeship programs. The evidence supports a finding that these violations occurred subsequent to the prior three violations addressed above in relation to de novo factor "B." Accordingly, this Decision sets the penalty rate at $300.00 per violation.

Aghapy is liable for a section 1777.7 statutory penalty in the sum of $11,100.00, computed at the rate of $300.00 per day for the 37 days that Aghapy had journeymen

working on the Project. [8]

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

FINDINGS

1. Affected contractor Aghapy Group, Inc. timely filed a Request for Review of the Civil Wage and Penalty Assessment timely issued by the Division of Labor Standards Enforcement (DLSE).

2. DLSE timely made its enforcement file available to Aghapy Group, Inc.

3. Aghapy Group, Inc. underpaid the prevailing wages owed to nine workers on the Project in the aggregate sum of $16,550.20: Demetrio Arrelano, Jose Calderoe, Juan Casula, Orlando Garcia, Hugh Hernandez, Hany Mousa, Gustavo Navaro, Jaime Rodriguez and Remon Takla. Accordingly, Aghapy Group, Inc. is liable for payment of prevailing wages in the sum of $16,550.20.

4. Aghapy Group, Inc. did not prove any basis for waiver of liquidated damages. Accordingly, under section 1742.1, subdivision (a), Aghapy Group, Inc. is liable for liquidated damages in the sum of $16,550.20.

5. The Labor Commissioner did not abuse her discretion in assessing penalties under section 1775, subdivision (a), at the rate of $200.00 per violation. Aghapy Group Inc. is liable for section 1775 statutory penalties in the aggregate sum of $12,800.00, computed as $200.00 per violation for 64 violations.

6. Aghapy Group, Inc. failed to pay the overtime prevailing wage rate for the overtime hours worked on 11 days of work performed by Garcia and 13 days of work performed by Hernandez. Therefore, Aghapy Group, Inc. is liable for section 1813 statutory penalties in the sum of $600.00.

[8] As stated, *ante*, this Decision modifies the final Assessment by finding that journeyman Mathuo did not perform any work on the Project. This does not affect the calculation of the number of violations of section 1777.5. The record establishes that Aghapy had other journeymen working on the Project on the two days that DLSE asserted Mathuo had worked, November 19 and 20, 2014. So each of those two days are properly included in 37 days to which the penalty applies.

7. Aghapy Group, Inc. did not make required training fund contributions in the aggregate amount of $96.41 for work performed on the Project. Accordingly, Aghapy Group Inc. is liable for payment of training funds in the sum of $96.41.

8. Aghapy Group, Inc. knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230, subdivision (a), by not issuing public works contract award information in a DAS 140 form or its equivalent to the applicable apprenticeship committees for the apprenticeable crafts of Electrician, Laborer, Carpenter, Drywall Installer, Drywall Finisher, and Painter in the geographic area of the Project site.

9. Aghapy Group Inc. knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), by: (a) not issuing valid requests for dispatch of apprentices in a DAS 142 form or its equivalent to the applicable apprenticeship committees in the geographic area of the Project for any of the 37 days that Aghapy Group, Inc. had journeymen working on the Project; and (b) not employing on the Project apprentices in the crafts of Electrician, Laborer, Carpenter, Drywall Installer, Drywall Finisher, and Painter in the ratio of one hour of apprentice work for every five hours of journeyman work.

10. Aghapy Group Inc. is liable for an aggregate statutory penalty under section 1777.7 in the sum of $11,100.00, computed at $300.00 per day for the 37 days that it had journeymen working on the Project in the crafts of Electrician, Laborer, Carpenter, Drywall Installer, Drywall Finisher, and Painter.

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

Wages:	$16,550.20
Liquidated damages under section 1742.1:	$16,550.20
Training fund contribution:	$ 96.41
Penalties under section 1813:	$ 600.00
Penalties under section 1775, subdivision (a):	$12,800.00

Penalties under section 1777.7:	$11,100.00
TOTAL:	**$57,696.81**

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

Dated: March 14, 2019

Victoria Hassid
Chief Deputy Director[9]
Department of Industrial Relations

[9] (See Gov. Code, § 7, 11200.4.)