STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

M.V.C. Enterprises, Inc., a California Corporation Case No. **21-0173-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor, M.V.C. Enterprises, Inc., a California Corporation (MVC) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on August 25, 2021, with respect to modernization work at Sunnyside Elementary School (Project) for the Chula Vista Elementary School District (School District or Awarding Body) in San Diego County. The Assessment determined that MVC owed $14,014.68 in unpaid prevailing wages, and $90,360.00 in statutory penalties.

On July 13, 2022, Hearing Officer Mirna Solís held a Hearing on the Merits. Lance Arthur Grucela appeared as counsel for DLSE. Jessica Santiesteban, Deputy Labor Commissioner (DLSE Investigator), testified in support of the Assessment. The Requesting Party failed to appear. The Hearing Officer admitted into evidence DLSE's Exhibits 1–40. At the conclusion of the hearing, the Hearing Officer submitted the matter for decision.

The issues for decision are as follows:

- Whether the work subject to the Civil Wage and Penalty Assessment required the payment of prevailing wages and employment of apprenticeship.
- Whether DLSE served the Assessment timely.
- Whether MVC filed the Request for Review timely.
- Whether DLSE made its investigation file available to the contractor timely.
- Whether MVC paid back wages and/or made a deposit of the full amount of the Assessment with the Department of Industrial Relations.

- Whether MVC timely paid its employees the correct prevailing wage rates for all hours worked on Project.
- Whether MVC paid the required training fund contributions for all hours worked on the project.
- Whether MVC is liable for penalties assessed pursuant to Labor Code sections 1775 and 1813.[1]
- Whether MVC is liable for liquidated damages equal to the unpaid wages.
- Whether MVC submitted contract award information to all applicable apprenticeship committees in a timely and factually sufficient manner.
- Whether MVC employed apprentices in the required minimum ratio of apprentices to journeymen on this project.
- Whether MVC is liable for penalties assessed pursuant to section 1777.7.

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

FACTS

Failure to Appear at the Hearing on the Merits.

At a January 10, 2022, Prehearing Conference, MVC was represented by Michael McCoy, a non-attorney representative with the Public Works Compliance Advisors Incorporated. McCoy stated Public Works Compliance Advisors Incorporated intended to withdraw their representation.[2] The Prehearing Conference was continued to April 15,

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

[2] On January 24, 2022, Public Works Compliance Advisors Incorporated formally withdrew its representation. In the withdrawal letter, Marlene Erler was identified as MVC's point of contact.

2022. A Notice of the continued Prehearing Conference was sent by regular mail to Jay Anthony Zuppardo and Marlene Erler at 27250 Via Industria, Temecula, California 92590. That address was the mailing address where MVC accepted service of the Assessment.[3]

MVC failed to appear at the Prehearing Conference held April 15, 2022. The Prehearing Conference was continued to May 9, 2022, to provide MVC another opportunity to participate. The Minutes of Hearing for the April 15, 2022, Prehearing Conference notified MVC that pursuant to Rule 46 [Cal. Code Regs., tit. 8, § 17246, subd. (a)], the matter could proceed despite their absence and their rights could be adversely affected by their failure to appear to contest the matter.[4] On May 9, 2022, MVC failed to appear at the Prehearing Conference again. The Hearing Officer set the matter for a Hearing on the Merits on July 13, 2022. The Minutes of the May 9, 2022, Prehearing Conference were sent by regular mail to the Temecula address and by email to Marlene Erler at marlene@mvc-inc.com.

On July 13, 2022, MVC failed to appear at the Hearing on the Merits. The Hearing Officer proceeded with the duly noticed Hearing on the Merits to formulate a recommended decision as warranted by the evidence.

The Project.

On February 19, 2019, the School District published a bid advertisement describing the project as a "public work" for the full site modernization of the Sunnyside Elementary School. (Exhibit 9, p. 144.) The scope of work included "concrete, grading,

[3] The address was also MVC's service address on MVC's registration with the Department of Industrial Relations (Exhibit 36) and on the Secretary of State's website for service of process on MVC. (Exhibit 37).

[4] California Code of Regulations, title 8, section 17246, subdivision (a) states: "[u]pon the failure of any Party to appear at a duly noticed hearing, the Hearing Officer may proceed in that Party's absence and may recommend whatever decision is warranted by the available evidence, including any lawful inferences that can be drawn from an absence of proof by the non-appearing Party."

CMU, structural steel, miscellaneous metals and fencing, rough carpentry and flooring." (*Ibid*.)

On April 18, 2019, the School District and MVC executed a construction contract (Contract) for the Project for $2,048,231.00. (Exhibit 10, p. 146.) Prevailing wage requirements were included at Part 12 of the Contract's General Provisions. (*Id.* at p. 172.) In accordance with section 12.2 of the Contract's General Provisions, prior to commencing work on the Project, MVC was required to obtain copies of prevailing wage rates from the School District's Construction Manager. (*Id*. at p. 173.)

According to Certified Payroll Records (CPRs) prepared by MVC, it had workers on the Project from June 6, 2019 through November 9, 2019. Subsequently, on January 30, 2020, the School District filed a Notice of Completion with the San Diego County Recorder. The Notice of Completion stated the School District accepted the Project as complete on January 22, 2020. (Exhibit 11.) On January 23, 2020, the Secretary to the Board of Education of the School District signed the Notice. (*Id*. at p. 178.)

Prevailing Wage Determinations.

The CPRs prepared by MVC indicated that it employed workers in the classification of Cement Mason on the Project. The applicable Prevailing Wage Determination (PWD) for the Cement Mason (Type III, IV, V) classification in San Diego County at the time of the bid advertisement was SD-23-203-3-2018-2 (CM PWD).[5] The total hourly rate of pay under the CM PWD was $52.92 which included $26.34 as a basic hourly rate, $8.02 for health and welfare, $12.55 for pension, $3.50 for vacation/holiday, $0.55 for training fund contribution, and $1.96 for other payments.

In addition, a worker on the Project complained that he only operated heavy equipment. (See Decision at p. 14 *post*.) The applicable PWD for the Operating Engineer, Group 3 classification in San Diego County at the time of the bid advertisement was SD-23-63-3-2018-1 (OE PWD). The total hourly rate of pay under

[5] MVC's January 13, 2020, memorandum stated its "Cement Masons are and have always been determined as Cement Mason Building Construction Type III, IV & IV." (Exhibit 17.)

the OE PWD was $73.41, which included $46.37 as the basic hourly rate, $11.45 for health and welfare, $10.65 for pension, $3.55 for vacation/holiday, $1.00 for training fund contribution, and $0.39 for other payments.

The Assessment.

On October 20, 2020, the Center for Contract Compliance filed a complaint with DLSE stating that MVC failed to timely submit a "Public Works Contract Award Information" form (DAS 140) to all the applicable apprenticeship committees.[6] (Exhibit 4, p. 84.) Two workers also filed complaints alleging fringe benefits deductions on their pay stubs did not match the amounts contributed to MVC's 'Contractors Plan' fringe benefit account. (Exhibit 4, pp. 103-107.)

On December 29, 2020, the DLSE Investigator sent MVC a "Request for Payroll Records" and a request for documents demonstrating compliance with apprenticeship requirements. (Exhibit 7.) MVC received the requests by registered certified mail on January 5, 2021. (*Ibid.*) MVC did not respond within 10 days of receipt of the request for payroll records as required in the request. On February 11, 2021, MVC submitted copies of payroll records, training fund contributions, fringe benefit statements, a DAS 140 and DAS 142. (Exhibits 39.)

The DLSE Investigator conducted an audit of MVC compliance with the public works laws based on documents she received including payroll records, itemized wage statements, supplemental/restitution checks, as well as MVC's memorandum concerning the classification of Cement Masons as Type III, IV, and V. (Exhibit 17.) She compared the paystubs hours and payment amounts to the corresponding payroll records and determined there were instances where MVC failed to pay the correct prevailing wage for straight-time and overtime hours. According to the Penalty Review, the DLSE Investigator determined the underpayment of wages mainly stemmed from MVC's failure to pay the portion of the employer payments under the category "Other Payments" of the CM PWD. She testified there were also instances of MVC's failure to pay overtime and double time, as well as a misclassification of an Operating Engineer

[6] The DAS 140 form is issued by Division of Apprenticeship Standards (DAS).

as a Cement Mason. As an example, the DLSE Investigator testified that for the two-week pay period of July 29, 2019, to August 11, 2019, Cement Mason Francisco Acosta's paystub showed he worked 80 hours, which corresponded to work on another project, i.e. "SC -Cmnt Msn" work. (Exhibit 31, pp. 538, 544.)[7] Also during that same pay period, Acosta worked an additional 8.5 overtime hours on Saturday, August 10, 2019, on the instant Project. (Exhibit 12, p. 197.) Those 8.5 overtime hours on the Project were not accounted for in the paystub, which only reported the 80 hours as "SC-Cmnt Msn" work. (Exhibit 14, p. 345.)

As another underpayment example, the DLSE Investigator testified the CPRs for the Project covering the period June 3, 2019 to June 16, 2019, showed Cement Mason Axel Bretado worked a total of 48 hours. The CPRs and corresponding paystub indicated Bretado was paid $15.75 an hour and a total of $8.02 in fringe benefits for the entire 48 hours. The DLSE Investigator determined that both the basic hourly rate and fringe benefits amounts were incorrect, resulting in Bertado's underpayment. The DLSE Investigator used this same methodology of cross-referencing CPRs and paystubs to determine MVC underpaid its workers on 662 occasions across numerous workers.

Levi Malnar Misclassification.

MVC's CPRs classified Levi Malnar as a Cement Mason. On April 15, 2021, Malnar filed a complaint with the DLSE. (Exhibit 5, pp. 106-107.) In Malnar's complaint to DLSE, as well as in conversations with the DLSE Investigator, Malnar stated he was not a Cement Mason and was underpaid as an Operating Engineer. He stated he did not do any Cement Mason work and only operated heavy equipment such as skid steer loaders

[7] The DLSE Investigator reviewed the Department of Industrial Relations' database and determined MVC was performing work on several public works projects at the same time as the instant Project. MVC's other public works projects were for Manhattan Beach Unified School District (MBUSD) (Exhibit 29), Grossmont Union High School District (Grossmont) (Exhibit 30), and Rio School District (Exhibit 31). Because of multiple projects, MVC's paystubs noted hours as either being for Southern California "SC-Cmnt Msn" or San Diego "SD-Cmnt Msn." The instant Project's CPRs referred to the Project as "SD-Cmnt Msn." From the paystubs, Santiesteban was only able to a provide credit and track hours for the "SD- Cmnt Msn" work.

and mini excavators. (Exhibit 3, p. 23.) The DLSE Investigator reclassified Malnar as an Operating Engineer, Group 3, resulting in the finding that MVC underpaid Malnar $2,698.68 in wages.

1775 Penalties.

DLSE set a penalty rate of $120 per violation for section 1775 penalties. According to the Penalty Review, there were 662 violations—one for each day MVC failed to pay prevailing wages for each worker. The Assessment indicated a total of $79,440 was owed in section 1775 penalties.

1813 Penalties.

The DLSE Investigator determined there were a total of 60 overtime violations. At the statutory rate of $25 per violation, DLSE assessed $1,500 for section 1813 penalties.

Apprenticeship Requirements.

The DLSE Investigator testified there were three applicable apprenticeship committees for Cement Masons in San Diego County: the San Diego Associated General Contractors J.A.C., the San Diego County Cement Masons J.A.C., and the Southern California Laborers Cement Mason Joint Apprenticeship Committee. The DLSE Investigator emailed all three apprenticeship committees, and each confirmed that they had not received a "Public Works Contract Award Information" form (DAS 140) or a "Request for Dispatch of An Apprentice" form (DAS 142) from MVC for the Project. (Exhibit 34.)

DLSE received a form DAS 140 dated June 7, 2019, addressed to San Diego County Local 500 Area 744. However, the DLSE Investigator testified that the Local was not an approved apprenticeship program.

The Project utilized a total of 7,028.5 Cement Mason journeyperson hours. But, the CPRs did not show any Cement Mason apprentices employed on the Project.[8]

[8] While the Project also utilized a total of 72 Operating Engineer journeyperson hours, no Operating Engineers apprentice was employed on the Project. However, DLSE

Apprenticeship Penalties.

Due to the nature of the violations, DLSE imposed a penalty of $60 per violation for an aggregate amount of $9,420. (Exhibit 3, p. 15.) The section 1777.7 penalties were based primarily on MVC's failure to submit DAS 140s to all the applicable apprenticeship committees. The violations were based on each full calendar day of non-compliance from June 7, 2019, the day after the first journeyman worked on the Project—through November 9, 2019, the last day any journeyman worked on the Project. The total number of days was 156 days.

DLSE also determined MVC violated the apprenticeship minimum ratio requirement. DLSE counted only one day (June 6, 2019) for this violation.

Request for Review.

In response to the Assessment, MVC filed a Request for Review dated September 2, 2021, postmarked September 9, 2021, and received by DLSE on September 13, 2021. On September 22, 2021, DLSE advised MVC of its right to obtain a copy of its enforcement file/investigative file.[9] MVC scheduled with DLSE an appointment to obtain copies of the investigative file for October 5, 2021. (Exhibit 29.)

DISCUSSION

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

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

---

applied the Operating Engineer Exemption as the Project required less than five journeyperson Operating Engineers. (Exhibit 2, p. 24.)

[9] A copy of the Notice of Transmittal dated September 22, 2021 as well as the Notice of Opportunity to Review Evidence Pursuant to Labor Code Section 1742(b) dated September 22, 2021, are included in the Hearing Officer's file.

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

Contractors and subcontractor who fail to pay the correct prevailing wage to workers on public works projects, are required to pay the difference between the correct prevailing wage and the amount they paid to the workers. (§ 1775, subd. (a)(2)(E).) In addition, section 1775, subdivision (a) prescribes penalties for failing to pay the correct prevailing wage rate. Further, section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if the unpaid wages are not paid within 60 days following service of a civil wage and penalty assessment under section 1741.

When an enforcing agency such as DLSE determines that a violation of the prevailing wage laws occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal the assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of presenting evidence that "provides prima facie support for the Assessment . . ." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that burden is met, "the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment . . . is incorrect." (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the

hearing process, the Director issues a written decision affirming, modifying or dismissing the notice. (§ 1742, subd. (b).)

The Project Was a Public Work Subject to the Payment of Prevailing Wages and the Employment of Apprentices.

Section 1720, subdivision (a)(1) defines "public works" to mean, among other things: "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by a public utility company pursuant to order of the Public Utilities Commission or other public authority." Subdivision (b)(1) provides that "paid in whole or in part out of public funds" means, among other things: "The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer." Section 1721 in turn provides: "'Political subdivision' incudes any county, city, district, public housing authority, or public agency of the state, and assessment or improvement district." Thus, the School District is a political subdivision of the state for purposes of section 1720, subdivision (b)(1). According to the Contract, the School District paid MVC $2,048,231.00 for the Project. (Exhibit 10, p. 146.) Thus, the School District, a political subdivision of the state, directly paid MVC public funds within the meaning of section 1720, subdivision (b)(1). DLSE has provided prima facie support for a finding that the Project is a public work, and MVC has not carried its burden proving the contrary.

DLSE Issued the Assessment Timely.

Pursuant to section 1741, subdivision (a), the Assessment must be served "no[] later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last."

Under Civil Code section 9204, "[a] public entity may record a notice of completion on or within 15 days after the date of completion of a work of improvement," and the notice of completion "shall... include the date of completion."

There are two ways this statute makes clear that a notice of completion recorded more than 15 days after the date of completion is invalid. First, as quoted above, the statute expressly does not permit recordation of a notice of completion more than 15 days after the date of completion. Second, the statute states that if the notice of completion states an erroneous date of completion, the notice is still effective only if "the true date of completion is 15 days or less before the date of recordation of the notice." (*Ibid*.)

Here, the Notice of Completion was valid. The Secretary for the School District's Board of Education signed under penalty of perjury that the School District accepted the Project as complete on January 22, 2020. Within fifteen days of January 22, 2020, the School District filed the Notice of Completion on January 30, 2020.

The Assessment was served on MVC on August 25, 2021, which was 18 months and 26 days after the Notice of Completion's filing on January 20, 2020. While DLSE served the Assessment 26 days beyond the 18-month deadline, the Assessment was served timely pursuant to the Executive Order N-08-21, paragraph 24, subdivision (d) promulgated to address the COVID-19 crises. (Exhibit 40.) Executive Order N-08-21 addressed the Labor Commissioner's deadline to issue a civil wage and penalty assessment. Assessments which would have had to have been issued between May 7, 2020 and September 29, 2021, were timely if served by September 30, 2021. (*Ibid*.) Here, DLSE's deadline to serve the Assessment was July 30, 2021, but pursuant to Executive Order N-08-21, the deadline was extended to September 30, 2021. Since DLSE served the Assessment on August 25, 2021, the Assessment was served timely.

The Investigative File was Timely Made Available to MVC.

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

> (a) Within ten (10) days following its receipt of a Request for Review, the Enforcing Agency shall also notify the Affected Contractor or Subcontractor of its opportunity and the procedures for reviewing

evidence to be utilized by the Enforcing Agency at the hearing on the Request for Review.

(b) An Enforcing Agency shall be deemed to have provided the opportunity to review evidence required by this Rule if it (1) gives the Affected Contractor or Subcontractor the option, at the Affected Contractor or Subcontractor's own expense, to either (A) obtain copies of all such evidence through a commercial copying service or (B) inspect and copy such evidence at the office of the Enforcing Agency during normal business hours; or if (2) the Enforcing Agency at its own expense forwards copies of all such evidence to the Affected Contractor or Subcontractor.

On September 13, 2021, DLSE received the Request for Review, dated September 2, 2021. On September 22, 2021, nine days later, DLSE served the then-counsel for MVC with the Notice of Opportunity to Review Evidence pursuant to Labor Code Section 1742, subdivision (b). Accordingly, in the absence of any evidence to the contrary, it must be concluded that DLSE satisfied its obligations under section 1742 and the above regulation by making the investigative file available for MVC to review and copy.

DLSE Provided Prima Facie Evidence that MVC Failed to Pay Wages.

Every employer in the on-site construction industry, whether the project is a public work or not, must keep accurate information with respect to each employee. Industrial Welfare Commission (IWC) Wage Order No. 16-2001, which applies to on-site occupations in the construction industry, provides as follows:

> Every employer who has control over wages, hours, or working conditions, must keep accurate information with respect to each employee including . . . name, home address, occupation, and social security number . . . [t]ime records showing when the employee begins and ends each work period . . . [t]otal wages paid each payroll period . . . [and] [t]otal hours worked during the payroll period and applicable rates of pay . . .

(Cal. Code Regs., tit. 8, § 11160, subd. (6)(A).) Also, the employer must furnish each employee with an itemized statement in writing showing all deductions from wages at the time of each payment of wages. (Cal. Code Regs., tit. 8, § 11160, subd. (6)(B); see also Lab. Code, § 226.) Employers on public works have the additional requirement to keep accurate certified payroll records. (§ 1776; Cal. Code Regs., tit. 8, § 11160, subd. (6)(D).) Those records must reflect, among other information, "the name, address,

social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journey[person], apprentice, worker, or other employee employed by him or her in connection with the public work." (§ 1776, subd. (a).)

Based on the CPRs and paystubs prepared by MVC, DLSE provided prima facie evidence proving that MVC failed to pay the correct prevailing wage rate. Many of the underpayments to workers stemmed from MVC's failure to include the "other payment" under employer payments. According to the CPRs, MVC paid $52.06 an hour for Cement Masons, Type III, IV, but the correct prevailing wage rate was $52.37 an hour. DLSE showed in its audit that this error occurred repeatedly. Further, MVC failed to pay the correct overtime and double time amounts on at least 60 occasions.

A significant portion of the $13,905.66 of unpaid wages stemmed from MVC's misclassification of Levi Malnar. The DLSE Investigator reclassified Malnar from a Cement Mason to an Operating Engineer, Group 3, which resulted in $2,698.68 in owed wages. The Director's PWDs determine the proper pay classification for a type of work. The nature of the work actually performed, not the title or classification of the worker, is determinative of the rate that must be paid. The Department publishes an advisory scope of work for each craft or worker classification for which it issues a PWD. The decision about which craft or classification is appropriate for the type of work requires comparison of the scope of work contained in the PWD with the actual work duties performed. Under the Operating Engineering scope of work, operating skid steer loaders and mini excavators is listed as Group 3 work. Here, Malnar stated he did not perform Cement Mason work, but rather operated skid steer loaders and mini excavators on the Project. MVC did not present evidence or argument to counter DLSE's evidence.

Accordingly, MVC did not carry its burden of proving that the bases for the Assessment were incorrect. (Cal. Code Regs. tit. 8, § 17250, subd. (b).) MVC is liable for $13,905.66 in unpaid prevailing wages.

MVC is Liable for Liquidated Damages for the Unpaid Wages.

Section 1742.1, subdivision (a) provides in part:

> After 60 days following the service of a civil wage and penalty assessment under Section 1741 . . ., the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof that still remain unpaid. If the assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

The statutory scheme regarding liquidated damages, as applicable to this case, provides contractors with two means to avert liability for liquidated damages (in addition to prevailing on the case, or settling with DLSE agreeing to waive liquidated damages). Under section 1742.1, subdivision (a), the contractor has 60 days to decide whether to pay the workers all or a portion of the wages assessed in the civil wage penalty assessment and thereby avoid liquidated damages on the amount of wages so paid. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the civil wage and penalty assessment, the contractor deposits with the Department the full amount of the assessment of unpaid wages, including all statutory penalties.

In this case, the DLSE Investigator testified she was not aware of MVC having paid back wages or of any deposit with the Department of Industrial Relations as a result of the Assessment. Accordingly, MVC is liable for liquidated damages in the amount of the unpaid prevailing wages, totaling $13,905.66.

MVC is Liable for Training Fund Contributions.

Section 1777.5, subdivision (m)(1) requires contractors who employ journeypersons or apprentices in any apprenticeable craft to contribute to the California Apprenticeship Council the amount reflected as the hourly "training" rate that appears on the Director's PWD for each hour worked. The contractor is entitled to take credit for such contributions made to a DAS-approved apprenticeship program that can supply apprentices to the site of the public work.

The Assessment stated MVC owes $109 in training fund contributions. That amount is associated with Malnar's reclassification to the Operating Engineer classification. Because of the misclassification of Manar, MVC did not pay training funds to a DAS-approved apprenticeship program for Operating Engineers as MVC had misclassified him as a Cement Mason. MVC did not appear to present evidence that it subsequently made the required training fund contributions for the Operating Engineer classification. Accordingly, MVC did not carry its burden of proving the basis of the Assessment was incorrect with respect to the $109 in training fund contributions.

MVC Failed to Prove the Labor Commissioner Abused their Discretion in Assessing Penalties Under Section 1775.

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

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars ($200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
>
> (2) (A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
>
> (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
>
> (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
>
> (B) (i) The penalty may not be less than forty dollars ($40) . . . unless the failure of the 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) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1. [10]

. . .

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

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

DLSE imposed a penalty rate of $120 per day per worker for MVC's failure to pay correct prevailing wages. Section 1775, subdivision (a)2(B)iii states "[t]he 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 777.1." MVC knew of its prevailing wage obligations because the bid advertisement

[10] The reference in section 1775, subdivision (a)(2)(B)(iii) to section 1777.1, subdivision (c), is mistaken. The correct reference is to section 1777.1, subdivision (e). According to that subdivision, a willful violation is defined 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."

unambiguously stated the Project was a public work. The Contract also required the payment of prevailing wages. Despite this knowledge, MVC failed to pay prevailing wages on 662 occasions. Since MVC failed to appear to present any evidence or argument, it failed to carry its burden to establish abuse of discretion by the Labor Commissioner in setting the penalty rate at $120 per day per worker. 662 violations at the rate of $120 per violation amounts to $79,440.00. This Decision affirms the Assessment's section 1775 penalties amounting to $79,440.00.

MVC is Liable for Section 1813 Penalties.

Section 1815 states:

> [w]ork performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1½ times the basic rate of pay.

Section 1813 states:

> The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the . . . contractor . . . for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article.

Section 1813 prescribes a penalty of $25 per calendar day for each worker found to have worked overtime without having been paid at the applicable hourly overtime wage rate.

DLSE determined MVC failed to pay overtime to workers on 60 occasions for 13 workers. At the statutory rate of $25 per violation, the total amount of section 1813 penalties amounts to $1,500. For these reasons, MVC is liable for the $1,500 penalty assessed under section 1813.

MVC Failed to Comply with Section 1777.5 Apprenticeship Requirements.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. The apprenticeship

requirements apply to public works contracts of $30,000.00 or more. (§ 1777.5, subd. (o).) These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. (Cal. Code Regs., tit. 8, §§ 227 to 230.2.)

In general, and unless an exemption applies, section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeypersons in the applicable craft or trade. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. (§ 1777.5, subd. (e).) "The information shall be provided to the applicable committees "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 . . ." (Cal. Code Regs., tit. 8, § 230, subd. (a).) DAS has prepared the DAS 140 form that a contractor may use for that purpose. Once a contractor commences work, if they "are not already employing sufficient registered apprentices…to comply with the one-to-five ratio [they] must request the dispatch of required apprentices from the apprenticeship committees…" (Cal. Code Regs, tit. 8, § 230.1, subd. (a).) DAS has also prepared the DAS 142 form that a contractor may use to request dispatch of apprentices. To ensure compliance with the law, the regulations provide for a method of first informing applicable apprenticeship committees of the anticipated need for apprentices for a project, and second—separately—to request from applicable apprenticeship committees the dispatch of the number of requested apprentices when they are actually needed on the project. Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices for specified dates and with sufficient notice.

DLSE carried its initial burden of presenting prima facie evidence of MVC's failure to notify the appropriate apprenticeship committees of a public works contract award and the failure to hire Cement Mason apprentices in accordance with the one-to-five ratio employment requirement. The DLSE Investigator testified that based on her email

communications with the applicable apprenticeship committees, DAS 140s were not sent to the applicable apprenticeship committees for Cement Masons.[11] Further, The DLSE Investigator testified that journeyperson Cement Masons spent 7,028.5 hours on the job, but the CPRs did not show that a Cement Mason apprentice was employed on the Project. Accordingly, MVC violated the ratio requirement of section 1777.5 subdivision (g), and the notice requirements of section 1777.5, subdivision (e), and the related regulation, section 230.

MVC Failed to Prove the Labor Commissioner Abused Her Discretion in Assessing Penalties Under Section 1777.7.

If a contractor "knowingly violate[s] Section 1777.5" a civil penalty is imposed under section 1777.7. Section 1777.7 provides, in relevant part:

> (a) (1) If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5, the contractor and any subcontractor responsible for the violation shall forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than 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 within a three-year period, if the noncompliance results in apprentice 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 phrase quoted above — "knowingly violated Section 1777.5"—was defined by the regulation, section 231, subdivision (h), in effect at the time of the Project and the issuance of the Assessment, 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

[11] MVC provided a completed DAS 140 addressed to an apprenticeship committee not approved by the Department.

> control. There is an irrebuttable presumption that a contractor knew or should have known of the requirement 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, or the contractor had previously employed apprentices on a public works project.

Failure to provide a contract award notice is a continuing violation for the duration of the work, starting no later than the first day in which the contractor has workers employed upon the public work, and ending when a notice of completion is filed by the awarding body. (Cal. Code Regs., tit. 8, § 230, subd. (a).) Penalties for that failure, as well as failure to meet the required one-to-five ratio, can be assessed "for each full calendar day of noncompliance . . ." (§ 1777.7, subd. (a)(1).) The determination of the Labor Commissioner as to the penalty is reviewable only for an abuse of discretion. (§ 1777.7, subd. (d).) A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment, namely, the affected contractor has the burden of proving that the basis for assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

DLSE established that MVC "knowingly" violated the one-to-five requirement. The irrebuttable presumption that MVC knew or should have known of the apprenticeship requirements of section 1777.5 applies because MVC acknowledged its obligation to comply with the prevailing wage and apprenticeship requirements by sending a DAS 140 (albeit to the wrong apprenticeship committee). Further, the bid advertisement notified MVC that the Project was a public work and the general provisions of the Contract required compliance with prevailing wage law. MVC failed to meet its burden of proof by providing evidence of compliance with section 1777.5. Since MVC knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a penalty rate of $60 per violation for 157 calendar days of non-compliance with the DAS 140 requirement, as well as the one-to-ratio requirement. The penalty period is calculated from "the first day in which the contractor has workers employed upon the public work," to the last day the contractor had a worker on site. (Cal. Code Regs., tit. 8, § 230, subd. (a).) The violations were based on each full

calendar day of non-compliance from June 7, 2019, which is the day after the first journeyman worked on the Project, through November 9, 2019, the last day any journeyman worked on the Project. The total number of days was 156 days for the DAS 140 violation.

DLSE added another day of non-compliance for MVC's violation of the apprenticeship minimum ratio requirement. Since 7,028.5 Cement Mason Journeyman hours were used on the Project, the minimum apprentice hours required was 1405.7. However, MVC failed to employ Cement Mason apprentices on the job. DLSE counted only one day (June 6, 2019) for this violation and did not overlap the minimum ratio violation period with the DAS 140 violation period. In total, DLSE counted 157 calendar days of non-compliance.

MVC failed to appear to present evidence or argument, therefore, it did not carry its burden of proving the basis of the Assessment was incorrect with respect to the penalty rate under section 1777.7. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, as determined by DLSE and as specified in the Assessment, MVC is liable for section 1777.7 penalties at $60 per violation for 157 calendar days, totaling $9,420.00.

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

FINDINGS AND ORDER

1. The work subject to the Civil Wage and Penalty Assessment was performed on a public work and required the employment of apprentices and the payment of prevailing wages under the California Prevailing Wage Law, Labor Code sections 1720 through 1861.
2. The Labor Commissioner served the Civil Wage and Penalty Assessment timely.
3. M.V.C. Enterprises, Inc. filed the Request for Review timely.
4. The Labor Commissioner produced its enforcement/investigative file in a timely fashion.

5. No back wages were paid and no deposit made with the Department of Industrial Relations as a result of the Civil Wage and Penalty Assessment.
6. M.V.C. Enterprises, Inc. did not pay the correct prevailing wages for all hours worked on the Project.
7. M.V.C. Enterprises, Inc. did not pay the required overtime rates to its employees on the Project.
8. M.V.C. Enterprises, Inc. misclassified Levi Malnar as a Cement Mason, instead of correctly classifying him as an Operating Engineer, Group 3.
9. As a result of finding numbers 6, 7, and 8, M.V.C. underpaid prevailing wages in the sum of $13,905.66.
10. M.V.C. Enterprises, Inc. failed to pay $109 in required training fund contributions for the Operating Engineer classification.
11. The Labor Commissioner did not abuse their discretion in assessing penalties under Labor Code section 1775 at the rate of $120 per violation for 662 violations, resulting in an aggregate sum of $79,440.00.
12. M.V.C. Enterprises, Inc. is liable for penalties assessed pursuant to section 1813 in the amount of $1,500.
13. M.V.C. Enterprises, Inc. is liable for liquidated damages on wages found due and owing in the amount of $13,905.66.
14. There were three applicable apprenticeship committees in the geographic area of the Project in the craft of Cement Mason: the San Diego Associated General Contractors J.A.C., the San Diego County Cement Masons J.A.C., and the Southern California Laborers Cement Mason Joint Apprenticeship Committee.
15. M.V.C. Enterprises, Inc. did not submit contract award information (DAS 140 Form) to all the applicable apprenticeship committees for the Cement Mason classification.

16. M.V.C. Enterprises, Inc. violated section 1777.5 by failing to employ apprentices in the craft of Cement Mason on the Project in the minimum ratio required by the law.

17. The Labor Commissioner did not abuse her discretion in setting section 1777.7 `1 penalties at the rate of $60 per violation for 157 violations, and M.V.C. Enterprises, Inc. is liable for penalties assessed pursuant to section 1777.7 in the aggregate amount of $9,420.

The amount found due under the Assessment is as follows:

Basis of the Assessment	**Amount**
Wages Due:	$ 13,905.66
Training Fund Contributions Due:	$ 109.00
Penalties under section 1775:	$ 79,440.00
Liquidated damages:	$ 13,905.66
Penalties under section 1813:	$ 1,500.00
Penalties under section 1777.7:	$ 9,420.00
TOTAL:	**$118,280.34**

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

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

Dated: 3/16/26

Jennifer Osborn, Director
California Department of Industrial Relations