STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Micon Construction, Inc. Case No. 14-0623-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Micon Construction, Inc. (Micon) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards and Enforcement (DLSE) with respect to work Micon performed for the City of Riverside Parks and Recreation (Awarding Body) in connection with the Bobby Bonds Park Playground Improvements #7203 project (Project) located in Riverside County. The Assessment determined that Micon owed $36,363.88 in unpaid prevailing wages, training fund contributions, and statutory penalties. A Hearing on the Merits was conducted in Los Angeles, California, before Hearing Officer Jessica L. Pirrone. Kimberly Manning appeared for Micon and David Cross appeared for DLSE.

The parties stipulated as follows:

1. The work subject to the Assessment was performed on a public work and required the payment of prevailing wages under the California Prevailing Wage Law, Labor Code sections 1720 – 1861.[1]
2. The Assessment was timely.
3. The Request for Review was timely.
4. The enforcement file was timely made available.

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

5. No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment under section 1742.1.

6. Micon is entitled to a credit for $673.44 in training funds and $54.00 in wages.

The issues for decision are:

1. Whether the Assessment correctly found that Micon incorrectly classified and paid ten of its workers as "Modular Installers"?

2. If the answer to no. 1 is yes, whether the Assessment correctly found that Micon should have classified and paid those ten workers at the Laborer Group 1 rate, *or* whether Micon could have classified and paid those workers at the lower Landscape/Irrigation Laborer/Tender rate?

3. Whether DLSE abused its discretion in assessing penalties under section 1775 at the mitigated rate of $120.00 per violation?

4. Whether Micon is liable for section 1813 penalties?

5. Whether Micon has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages?

The Director finds that Micon failed to pay the affected workers the correct prevailing wage rate for their work on the Project by paying the Modular Furniture Installer (Carpenter) rate[2] rather than the higher Laborer Group 1 rate that applies to the work performed. The Director further finds that the Labor Commissioner did not abuse her discretion in assessing penalties and that Micon did not establish that it had substantial grounds for requesting review of the Assessment such that liquidated damages should be waived. Therefore, the Director issues this Decision affirming the Assessment, with the exception of a credit for $673.44 in training funds, and $54.00 in wages.

[2] DLSE questioned whether the rate Micon used for Modular Furniture Installer (Carpenter) was correct, but since it was the wrong classification, whether the rate was correct is moot.

FACTS

The Awarding Body advertised the Project for bid on October 28, 2013. The Project involved the installation of playground equipment at Bobby Bonds Park. Micon was awarded the Project and entered into a contract to perform the work on December 19, 2013 (the Contract). The Contract directs Micon to pay the applicable prevailing wage, cites the Labor Code sections containing the applicable prevailing wage provisions, advises that the Director's determinations of prevailing wage rates are open to inspection at the Awarding Body, and sets forth the requirements for submitting certified payroll records (CPRs).

Between December 2013, and March 2014, Micon employees, along with a landscape subcontractor and turf subcontractor, performed the work required by the Contract, which included: demolition of existing sidewalks, fencing and vegetation; grading; setting forms and rebar; pouring concrete; drilling; trenching; and assembling and installing the playground equipment.

The Assessment. DLSE served the Assessment on October 10, 2014. The Assessment found that Micon misclassified and paid ten workers at the Modular Furniture Installer (Carpenter) rate for work that should have been classified and paid at the higher Laborer Group 1 rate. As a result, the Assessment found that Micon underpaid the required prevailing wages and training funds in the amount of $21,098.88. Penalties were assessed under section 1775 in the mitigated amount of $120.00 per violation for 127 violations, totaling $15,240.00, and under section 1813 in the amount of $25.00 per violation for one violation, totaling $25.00.

Applicable Prevailing Wage Determinations (PWDs). Set forth below are the three relevant PWDs and scopes of work that were in effect on the bid advertisement date.

1. Modular Furniture Installer (Carpenter) for Riverside County (SC-23-31-16-2013-1) (Modular Furniture Installer (Carpenter) PWD).[3] This is the closest PWD to the classification listed on Micon's CPRs, which is "Modular Installer."[4] The scope of work for Modular Furniture Installer (Carpenter) PWD provides, in relevant part:

> This Agreement shall cover the detailing, handling assembly, installation, disassembly, removal and relocation of all types of manufactured office furniture systems and all accessories . . . This agreement does not apply to . . . the installation of any type of fixture which is not a pre-manufactured modular office system.

2. Landscape/Irrigation Laborer/Tender for Riverside County (SC-102-X-14-2013-2 and 2A) (Landscape/Irrigation Laborer PWD and Landscape/Irrigation Tender PWD).[5] Micon argues that, if the workers at issue were not properly classified and paid at the Modular Furniture Installer (Carpenter) rate, then they should have been classified and paid at the PWD rate for Landscape/Irrigation Laborer, or the related classification of Landscape/Irrigation Tender.

The scope of work for the Landscape/Irrigation Laborer portion of the PWD provides, in relevant part:

[3] The basic hourly rate for Modular Furniture Installer (Carpenter) was $17.00, the fringe benefits were $8.41, and there was no training fund contribution, totaling $25.41 straight-time.

[4] Micon did not show that a PWD called "Modular Installer" existed or applied. DLSE argues in its briefs that Micon used the term "Modular Installer," rather than Modular Furniture Installer (Carpenter) to obscure the fact that the classification is not applicable to playground equipment installation.

[5] The Landscape/Irrigation Laborer PWD and Landscape/Irrigation Tender PWD appear under one PWD, but different rates of pay and scopes of work apply. Landscape/Irrigation Tenders assist Landscape/Irrigation Laborers in a manner and ratio specified in the scope of work for Landscape/Irrigation Tenders. The basic hourly rate for Landscape/Irrigation Laborer was $27.13, the fringe benefits were $17.52, and the training fund contribution was $0.64, totaling $45.29 straight-time. The basic hourly rate for Landscape/Irrigation Tender was $11.64, the fringe benefits were $4.42, and there was no training fund contribution, totaling $16.06 straight-time.

> Work covered by this Agreement includes all work in the landscape industry . . .
>
> * * *
>
> All work involved in the distribution, laying, and installation of landscaping irrigation pipe, the installation of low voltage automatic irrigation and lawn sprinkler systems.
>
> * * *
>
> Installation of valve boxes, thrust blocks, both precast and poured in place, pipe hangers and supports incidental to the installation of the entire piping system.
>
> * * *
>
> Start-up testing, flushing, purging, water balancing, placing into operation all piping equipment, fixtures and appurtenances installed under this Agreement.
>
> * * *
>
> Any line inside a structure which provides water to work covered by this Agreement. . . .
>
> * * *
>
> All piping for ornamental stream beds, waterways and swimming pools.
>
> * * *
>
> All temporary irrigation and lawn sprinkler systems.
>
> * * *
>
> All plant establishment work . . .
>
> * * *

The scope of work for the Landscape/Irrigation Tender portion of the PWD provides, in relevant part:

> Assisting the Landscape Laborer with the wire installation, unloading of materials, distribution of pipe, stacking of sprinkler heads and risers, the setting of valve boxes and thrust block, both precast and poured in place, cleaning and backfilling trenches with a shovel, cleanup and watering during construction and all other landscaping, planting and all work involved in laying and installation of landscape irrigation systems.

* * *

> The first employee on the jobsite shall be a Landscape/Irrigation Laborer; the second employee must be an Apprentice or a Landscape/Irrigation Laborer; and the third and fourth employee may be Tenders. The fifth employee on the jobsite shall be a Landscape/Irrigation Laborer; the sixth employee must be an Apprentice or a Landscape/Irrigation Laborer; the seventh and eight [*sic*] employees may be Tenders. Thereafter, Tenders may be employed with Landscape/Irrigation Laborers in a 50/50 ratio on each jobsite, provided the Contractor uses an Apprentice in the place of a Tender for every fifth Tender permitted on the jobsite.

3. Laborer and Related Classifications for Riverside County (SC-23-102-2-2013-1) (Laborer Group 1 PWD).[6] The Assessment reclassified ten workers from "Modular Installers" to Laborers Group 1. The scope of work for Laborer Group 1 is seven pages long and covers a broad range of work involving the construction, erection, alteration, repair, modification, demolition, salvage, addition or improvement of any building structure. The language of the PWD that is most relevant is at Section F (20) on page 7, which states the following is covered:

> . . . Installation of recreational game equipment including swings, slides, climbing structure [*sic*], basketball backstops, net post and bars.

Also relevant here are Section F (1) beginning on page 5 and Section F (7) beginning on page 6. Section F (1) states the following is covered:

> All work necessary to tend all other building trades craftsmen including . . . stripping of concrete forms . . . gardening . . . landscaping . . . clean up . . . unloading of trucks and moving of equipment, material . . .

Section F (7) states the following is covered:

[6] The basic hourly rate for Laborer Group 1 was $28.99, the fringe benefits were $17.55, and the training fund contribution was $0.64, totaling $47.18 straight-time.

> . . . cutting of streets and ways for all purposes, including aligning by any method, digging of trenches, manholes, etc., handling and conveying of all materials for same; concrete of same; and the backfilling, grading and resurfacing of same.

Evidence Presented by Micon. Micon called one witness, Don Napolitano. Napolitano is a co-founder, owner, General Manager and Vice President of Micon, where he has worked for about thirty years. Before founding Micon he worked for a landscape company. Napolitano testified that he advised the Awarding Body that Micon planned to utilize the following five different classifications: Laborer, Landscape/Irrigation, Modular Installer, Maintenance, and Equipment Operator. The Awarding Body did not reject any of the classifications or express any concerns. Napolitano testified that multiple classifications could have been used for much of the work on the Project. For example, he said the work in connection with the playground equipment, the trash can, handicap ramp, and umbrella could have been classified as Modular Installer, Laborer or Landscape/Irrigation Laborer/Tender.

Napolitano stated that Micon originally chose to use what it called the "Modular Installer" classification, even though other classifications had lower rates. Micon did not seek clarification from the Department regarding the applicable classifications.

Following the first day of Hearing, Napolitano prepared amended CPRs in which he replaced the "Modular Installer" classification with the Landscape/Irrigation Laborer/Tender classification. He did not submit the amended CPRs to the Awarding Body. He testified he determined that installation of playground[7] equipment could be classified as Landscape/Irrigation Laborer/Tender because landscape architects design playground equipment for parks and playgrounds are part of the landscape. He determined whether a worker should be classified as a Landscape/Irrigation Laborer or Landscape/Irrigation Tender based on his knowledge of the particular employees, the rate

[7] This Decision uses the term "playground equipment" throughout because the Project relates to a playground and that is the term Micon uses. The Laborer Group 1 PWD's scope of work refers to "recreational game equipment," which includes swings and slides as are found on playgrounds.

of pay reflected on the original CPRs, and the daily job reports. For example, in the amended CPRs, Micon reclassified Joey Perez, who had been an employee for about 15 years, from a Modular Installer to a Landscape/Irrigation Tender for menial tasks and to a Landscape/Irrigation Laborer for more advanced tasks.

Napolitano testified that he would visit the site about once a week. Every day, Napolitano would talk to the superintendent, Oscar Zazuetta, who had been with Micon over twenty years. Zazuetta knew what work was actually being performed at the site and was responsible for determining which of the five classifications applied to the work at any given time.

Napolitano testified that he did not have an independent recollection of what any worker was doing on any particular day. But, he provided a week-by-week summary of the work on the job based on the daily reports, pictures of the job site, custom and practice, and his experience with the particular employees on the job. His summary is as follows.

Week One. The journeymen were doing the site survey and figuring out how and where to lay out the equipment. The tenders were helping.

Week Two. The workers were demolishing trees, shrubs, curbs, rocks and old sidewalks. They were drilling holes for installing the playground equipment. They were also organizing the thousands of component pieces that made up the playground equipment. The operating engineer was loading the trash and locating the gas line. At that point, the water was shut-off and the valves were disconnected.

Week Three. The workers were grading, unloading equipment, putting together modular pieces, installing header boards, forming curbs, and doing beginning carpentry work.

Week Four. The irrigation subcontractor was putting the sleeves in the curbs. The cement masons were doing finish work on cement. The landscape irrigation laborers were doing trenching and concrete formation. The operating engineer was doing grading.

Workers were also continuing to do playground assembly and getting ready to pour concrete. There was also clean-up work.

Weeks Five and Six. This was the "putting together the legos" stage of the process. Everyone was working on putting together the playground equipment. Workers were pouring concrete, grading, preparing for the landscape subcontractor, and cleaning up. The landscape subcontractor did the sprinkler heads, planting, water meter hook up, and pressure testing.

Week Seven. The work was slowing down. Workers were drilling holes and pouring concrete to support the structure. Grass was being planted.

Week Eight. The workers poured the last piece of sidewalk for the playgound equipment. The subcontractor installed the rubberized surface.

Week Nine. The workers were sweeping, cleaning, trimming trees, mowing, and doing maintenance. They were also setting up the trash cans, park bench and swing set.

Week Ten. The workers were touching up scratches, tightening up bolts, cleaning up, repairing curbs and sidewalks, loading forms on the truck, clearing out the storage container, and fixing work done by the landscape subcontractor.

Evidence Presented by DLSE. DLSE called two witnesses, Fred DeLeon, the Industrial Relations Representative who investigated this matter, and Miguel Rojas, one of the workers on the Project. DeLeon testified that the CPRs that were the subject of the Assessment had several classifications, including Landscape/Irrigation Laborers, Cement Masons, Operator Engineers and 'Modular Installers." For the Assessment, DeLeon only reclassified the workers who were identified on the CPRs as "Modular Installers." As to those workers, he reclassified them as Laborer Group 1 based on the scope of work section of the Contract, the bid advertisement, his conversations with the Laborers Southern California Joint Apprenticeship Training Committee, his conversation with one of the workers, and the Laborer Group 1 scope of work.

Rojas testified that he worked on several projects for Micon over about nine years. On the Project, he broke concrete sidewalks; unloaded, unwrapped and assembled

playground equipment; used a shovel and wheelbarrow to lay gravel underneath the swings; spread wood chips over the gravel; watered down the playground equipment and dried it with rags to make it look shiny; and on one day, he did some mowing. He did not do any watering, pruning, weeding or spraying of plants.

As to wages, Rojas testified that Micon paid him the same wages no matter what work he did. He was required to work overtime, but did not get paid overtime. Instead, he was told that his overtime hours were "banked." He testified that one of the other owners of Micon, "Mitch," fired him because he claimed that he was owed money.

DISCUSSION

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

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

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

The single prevailing rate of pay for a given "craft, classification, or type of work" is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. (*Sheet Metal Workers Intern. Ass'n, Local Union No.*

104 v. Rea (2007) 153 Cal.App.4th 1071, 1082) (*Sheet Metal Workers*). The Director determines these rates and publishes general wage determinations to inform all interested parties and the public of the applicable wage rates for each type of worker that might be employed in public works. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.) In the unusual circumstance when the advisory scopes of work for two prevailing rates overlap, a conflict is created because no single prevailing rate clearly applies to the work in issue. In this limited situation, a contractor may pay either of the applicable prevailing wage rates for the work.

The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (See § 1773.2.) Section 1773.2 requires the body that awards the contract to specify the prevailing wage rates in the call for bids or alternatively to inform prospective bidders that the rates are on file in the body's principal office and to post the determinations at each job site.

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (See *Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by § 1773.4].) There is no evidence that any such petition was submitted for this Project. In the absence of a timely petition under section 1773.4, the contractor and subcontractors are bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers, supra,* 153 Cal.App.4th at pp. 1084-1085.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling

of the unpaid wages, if those wages are not paid within sixty days following service of a civil wage and penalty assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1771. An affected contractor may appeal the assessment by filing a request for review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect."

1. The Assessment Correctly Found that Micon Is Required to Pay The Prevailing Rate For Laborer Group 1 For The Disputed Work.

The disputed work – playground equipment installation – expressly falls within the Laborer Group 1 scope of work. Micon argues that the disputed work also falls within the Modular Furniture Installer (Carpenter) and Landscape/Irrigation Laborer/Tender scopes of work. But, the scopes of work for those classifications do not support that argument. In fact, the scope of work for the Modular Furniture Installer (Carpenter) classification makes clear that it is limited to the installation of office furniture only. Accordingly, the Modular Furniture Installer (Carpenter) classification is inapplicable to the disputed work.

Likewise, the Landscape/Irrigation Laborer/Tender scopes of work do not include playground equipment installation and therefore do not overlap with the Laborer Group I scope of work in that respect.[8] In order to prevail, Micon would have to carry its burden

[8] In an attempt to show that the Landscape/Irrigation Laborer/Tender scopes of work include installation of playground equipment, Micon offered as Exhibit X a copy of the Landscape Agreement between the Southern California District Council of Laborers and its affiliated Local Unions and Southern California Contractor's Association, which includes at page 4, paragraph 11, the installation of playground equipment. But the Landscape Agreement is not incorporated in whole by the prevailing wage determination published by the Director; only portions of it are incorporated. The fact that the scope of work for Landscape/Irrigation Laborer/Tender PWDs end at paragraph 10 of the Landscape Agreement, and do not include paragraph 11, discloses a specific intent to exclude installation of playground equipment from the scope of work. Thus, Exhibit X confirms that installation of playground equipment is *not* included in the scopes of work for the Landscape/Irrigation Laborer/Tender classification.

of proving that the disputed work was landscaping and irrigation, rather than playground equipment installation. But, Micon did not call any witnesses who had personal knowledge of the particular work at issue. Further, Napolitano's own testimony illustrates that the workers were primarily engaged in tasks incidental to the installation of playground equipment, which is expressly Laborer Group 1 work.

Although Napolitano testified that there was landscape irrigation work on the job, he did not establish that such work, as done by workers he classified as "Modular Installers," exceeded the landscape and irrigation work already accounted for in the CPRs and performed by the landscape subcontractor. The original CPRs included hundreds of hours of Landscape/Irrigation Laborer/Tender work that were not challenged in the Assessment. Additionally, Napolitano testified that there was a landscape irrigation subcontractor on the job who put the sleeves in the curbs, installed the sprinkler heads, planted, hooked up the water meter, and pressure tested. Accordingly, Micon did not carry its burden of showing the disputed work was landscape irrigation.

As to the disputed work at issue, the Director finds that the Modular Furniture Installer (Carpenter) classification is facially inapplicable to any work on the Project, there is no relevant overlap between the scopes of work for the Laborer Group 1 and Landscape/Irrigation Laborer/Tender classifications because only the Laborer Group 1 scope of work encompasses "[i]nstallation of recreational game equipment," and Micon failed to carry its burden of showing that the disputed work was landscape irrigation work rather than installation of recreational game equipment and work incidental thereto. Accordingly, the single prevailing rate is the Laborer Group 1 rate.

2. DLSE's Penalty Assessment Under Section 1775 Does Not Constitute an Abuse of Discretion.

Section 1775, subdivision (a), as it read at the time the Project was 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 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) The penalty may not be less than eighty dollars ($80) . . . if the contractor or subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty ($120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[9]

The Director's review of the Labor Commissioner's determination is limited to an inquiry into whether the action was "arbitrary, capricious or entirely lacking in evidentiary support ...." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the Director is

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[9] The reference to section1777.1, subdivision (c) is a typographical error in the statute. The correct subdivision of section 1777.1 is subdivision (e), which defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

not free to substitute her own judgment "because in [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." (Rule 50(c) [Cal. Code Regs., tit. 8, § 17250, subd. (c)].)

Here, DLSE mitigated the penalty from $200 to $120.00 per violation. This penalty rate was not an abuse of discretion given that the original classification Micon used was inapplicable on its face, and the classification DLSE used expressly included the work at issue. These circumstances show Micon's non-compliance was willful within the meaning of the statute in that it knew or reasonably should have known of its obligations under the Prevailing Wage Law, yet used a classification that was manifestly incorrect and thereby deliberately failed or refused to comply with its legal obligations.

3. Overtime Penalties Are Due For The Worker Who Was Underpaid for Overtime Worked On The Project.

Section 1813 states, in pertinent part, as follows:

> The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25.00) for each worker employed in the execution of the contract by the . . . contractor . . . for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article.

Section 1815 states in full as follows:

> Notwithstanding the provisions of Sections 1810 to 1814 inclusive, of this code, and nothwithstanding any stipulation inserted in any contract pursuant to

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

Micon did not carry its burden of proving that it did not violate section 1815 by paying less than the required prevailing overtime wage rate on one occasion. 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. Accordingly, the assessment of penalties under section 1813 is affirmed in the amount of $25.00 for one violation.

4. Micon Has Not Demonstrated A Basis For Waiver Of Liquidated Damages.

Section 1742.1, subdivision (a) provides in pertinent part as follows:

> After 60 days following the service of a . . . a Notice of Withholding under subdivision (a) of Section 1771.6, 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 . . . notice 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.
>
> Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the . . . notice with respect to a portion of the unpaid wages covered by the . . . notice, the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Absent waiver by the Director, Micon is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Notice. Micon's entitlement to a waiver of liquidated damages depends on whether it had "substantial grounds for appealing the . . . notice with respect to a portion of the unpaid wages covered by the . . . notice." Up until the first day of hearing, Micon was

arguing that the proper classification for installation of playground equipment was a classification that is expressly limited to installation of office furniture, Modular Furniture Installer (Carpenter), rather than a classification that expressly includes play structures, Laborer Group 1. That argument was manifestly unsupportable and, therefore, insubstantial.

In the alternative, Micon argued all of the work at issue was landscape irrigation work because landscape architects design playground equipment and therefore Landscape/Irrigation Laborer/Tender should be the proper classification to install it. But, the task of designing playground equipment bears no relationship to the installation of landscape irrigation, so Micon's reasoning is faulty at best. Further, the language of the applicable scopes of work Micon promoted—Modular Installer and Landscape/Irrigation Laborer/Tender--do not facially support its argument that playground equipment installation is landscape irrigation work. While there was landscape irrigation work on the job done by Micon workers not at issue under the Assessment, Micon did not come near to carrying its burden of showing that any of the disputed work was in fact landscape irrigation work.

Given the clear inapplicability of the Modular Furniture Installer (Carpenter) PWD to playground equipment installation, and the lack of evidence that the work at issue was Landscape/Irrigation Laborer/Tender work, Micon's argument constitutes an insubstantial challenge to the Assessment. Accordingly, under section 1742.1, subdivision (a), Micon has not demonstrated a basis for waiver of liquidated damages.

FINDINGS

1. Affected contractor Micon Construction, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Micon failed to pay the affected workers the required Labor Group 1 prevailing wage rate for the work in issue resulting in underpayment of prevailing wages and training funds in the aggregate amount of $21,098.88, less a credit in the amount of

$673.44 for unpaid training fund contributions and $54.00 in wages.[10]

3. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the mitigated rate of $120.00 per violation. Penalties under section 1775 are due for 127 violations on the Project, for a total of $15,240.00 in penalties.

4. Section 1813 penalties are due for 1 violation on the project, for a total of $25.00.

5. The unpaid wages found due in Finding No. 2 remained due and owing more than 60 days following issuance of the Assessment, and Micon has not demonstrated substantial grounds for appealing the assessment. Accordingly, liquidated damages are due in the amount of $19,931.49.

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

Wages Due:	$19,931.49
Training Funds:	$ 439.95
Penalties under section 1775, subdivision (a):	$15,240.00
Penalties under section 1813:	$ 25.00
Liquidated damages:	$19,931.49
TOTAL:	**$55,567.93**

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

[10] Training Funds in the Assessment of $1113.39, were reduced by a credit of $673.44.

ORDER

The Civil Wage and Penalty Assessment is affirmed and modified 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: 7-14-17

Christine Baker
Director of Industrial Relations