

**STATE OF CALIFORNIA**  
**DEPARTMENT OF INDUSTRIAL RELATIONS**

In the Matter of the Request for Review of:

**Anton's Service, Inc.**

Case Nos. 20-0289-PWH  
20-0397-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected contractor Anton's Service, Inc. (Anton's) submitted requests for review of two Civil Wage and Penalty Assessments (Assessments) issued by the Division of Labor Standards Enforcement (DLSE). One Assessment was issued on June 23, 2020, with respect to work performed on the Torrey Pines Road Improvements Phase 2 and Torrey Pines Road Slope Restoration Project (Torrey Pines Road Project) for the City of San Diego (Awarding Body or City) in San Diego County, Case No. 20-0289-PWH. The Assessment for the Torrey Pines Project determined that the following amounts were due: \$22,526.30 in unpaid prevailing wages,<sup>1</sup> \$12,720.00 in Labor Code section 1775 statutory penalties,<sup>2</sup> and \$1,380.00 in section 1777.7 statutory penalties. The second Assessment was issued on September 29, 2020, with respect to work performed on the Voltaire Street Bridge Over Nimitz Blvd Bridge Rehabilitation Project (Voltaire Street Project) for the City of San Diego in San Diego County, Case No. 20-0397-PWH. The Assessment for the Voltaire Street Project determined that the following amounts were due: \$1,653.88 in unpaid prevailing wages,<sup>3</sup> and \$9,000.00 in section 1775 statutory penalties.

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<sup>1</sup> Which consisted of \$22,032.26 in unpaid wages and \$494.04 in unpaid training fund contributions, for a total of \$22,526.30 in unpaid prevailing wages.

<sup>2</sup> All subsequent section references are to the California Labor Code, unless specified otherwise.

<sup>3</sup> Which consisted of \$1,615.24 in unpaid wages and \$38.64 in unpaid training fund contributions, for a total of \$1,653.30.88 in unpaid prevailing wages.

Kristin Kameen appeared as counsel for Anton's, and Lance Grucela appeared as counsel for DLSE.<sup>4</sup> The parties agreed to submit the matters on stipulated facts and documentary evidence with the opportunity for closing argument.

Prior to the submission of the matters, the parties stipulated to the following:

- The work subject to the Assessments was performed on public works and required the employment of apprentices and the payment of prevailing wages under the California Prevailing Wage Law, sections 1720 through 1861.
- The Assessments were served timely.
- The Requests for Review were filed timely.
- The enforcement files were requested and produced in a timely fashion.
- No back wages were paid or deposit made with the Department of Industrial Relations as a result of the Assessments.

Thereafter, the parties filed respectively DLSE Exhibits 1 through 43, and Requesting Party's Exhibits A through Z and AA through II. The parties' exhibits were admitted into evidence. On January 28, 2022, the parties submitted Amended Stipulated Facts. The parties filed simultaneous closing briefs on January 31, 2022, as well as optional reply briefs on February 4, 2022. The matters were submitted for decision on February 4, 2022.

The issues for decision for the Torrey Pines Road Project are as follows:

- Whether Anton's timely paid its employees the correct prevailing wage rates for all hours worked on the Project.
- Whether Anton's is liable for penalties assessed pursuant to section 1775.
- Whether Anton's is liable for liquidated damages on wages found due and owing.
- Whether Anton's submitted contract award information to all applicable apprenticeship committees in a timely and factually sufficient manner for the Laborer and Operating Engineer classifications.

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<sup>4</sup> Paul Tyson appeared as counsel for Interested Person Hazard Construction Company doing business as Hazard Construction on Case No. 20-0397-PWH. (See Cal. Code. Regs., tit. 8, § 17208, subd. (d).)

- Whether Anton’s employed Laborer apprentices in the required minimum ratio of apprentices to journeyman on the Project.
- Whether Anton’s is liable for penalties assessed pursuant to section 1777.7.

For the Voltaire Street Project, the issues for decision are as follows:

- Whether Anton’s timely paid its employees the correct prevailing wage rates for all hours worked on the Project.
- Whether Anton’s is liable for penalties assessed pursuant to section 1775.
- Whether Anton’s is liable for liquidated damages on wages found due and owing.

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 Assessments, and that Anton’s failed to carry its burden of proving the bases for the Assessments were incorrect. (See Cal. Code Regs., tit. 8, § 17250, subs. (a), (b).) Accordingly, the Director issues this Decision affirming and amending the Torrey Pines Road Project Assessment,<sup>5</sup> and affirming the Voltaire Street Project Assessment.

## **FACTS**

### The Torrey Pines Road Project.

The Awarding Body advertised the Torrey Pines Road Project for bid on September 26, 2017. (DLSE Exhibit No. 1, p. 4; DLSE Exhibit No. 7, pp. 72-73.) The successful bidder was Hazard Construction Company (Hazard), which entered into a contract with the Awarding Body on or about January 12, 2018. (DLSE Exhibit No. 1, p. 4; DLSE Exhibit No. 8, pp. 449-450, 500-505; DLSE Exhibit No. 19, pp. 855-856; Anton’s Exhibit A, pp. 376-377, 427-432.) The contract specified that prevailing wage rates applied to the Project. (DLSE Exhibit No. 8, pp. 74, 77, 102-107; Anton’s Exhibit A, pp. 1, 4, 29-34.)

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<sup>5</sup> DLSE stipulated to give Anton’s credit for \$2.00. (See fn. 20 at p. 20, *post*.)

Hazard's bid listed Anton's as a subcontractor, with Anton's scope of work described as "Clearing/Demolition Constructor." (DLSE Exhibit No. 8, p. 505; Anton's Exhibit A, p. 432.) The contract scope of work included the following:

**1.1 Torrey Pines Road Improvements Phase 2** scope of work includes the following: 1) Installation of new sidewalk, retaining curb, and walls on the south side of Torrey Pines Road between Hillside Drive and Amalfi Street. 2) Installation of a pedestrian crossing on Torrey Pines Road just west of Princess Drive utilizing a HAWK (Hybrid Actuated Walk Beacon) with street lighting and crosswalk systems. 3) Asphalt concrete overlay with striping of buffered bike lanes along Torrey Pines Road from La Jolla Shores Drive to Princess Drive. 4) Installation of a flush stamped and painted asphalt median between Roseland Drive and Hillside Drive.

. . .

**1.2 Torrey Pines Road Slope Restoration** scope of work will include an excavation at the toe of the slope to achieve the required space for the sidewalk, removal of sloughing soil and debris off of slope face, and installation of permanent soil-nails wall with an outer boulderscape or rock carve surface. The soil-nails, up to 40 feet in length, will be installed into the slope at an angle of approximately 15 degrees below horizontal. Horizontal and vertical spacing of the soil-nail wall be approximately 6 feet. Roughly 265 soil-nails will be installed to construct the permanent wall.

(DLSE Exhibit No. 8, p. 97; Anton's Exhibit A, p. 24.) Anton's had workers on the Torrey Pines Road Project from March 5, 2018 to April 11, 2019.<sup>6</sup> (DLSE Exhibit No. 10, pp. 517-549; DLSE Exhibit No. 10.1, pp. 550-593; DLSE Exhibit No. 14, pp. 599-687; DLSE Exhibit No. 14.1, pp. 688-746; DLSE Exhibit No. 14.2, pp. 747-817; Anton's Exhibit L, pp. 466-684.) The Torrey Pines Road Project was completed on August 29, 2019.<sup>7</sup> (DLSE Exhibit No. 6, p. 71.)

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<sup>6</sup> Anton's first employed workers it classified as Tree Maintenance on the Torrey Pines Road Project on March 5, 2018. (Amended Stipulated Fact No. 11.) Anton's first employed a worker it classified as Laborer on the Torrey Pines Road Project on March 20, 2018. (Amended Stipulated Fact No. 12.)

<sup>7</sup> The Awarding Body provided the Project completion date to Deputy Labor Commissioner Kari Grayson (Grayson) in response to her request for information for the Torrey Pines Road Project. (DLSE Exhibit No. 6, p. 71.) The parties did not submit into evidence any documented acceptance of the Project or recorded notice of completion.

The Public Works Complaint for the Torrey Pines Road Project.

On November 21, 2019, DLSE received a complaint from Sean Lopez with the Center for Contract Compliance. The complaint alleged underpayment of wages and apprenticeship violations arising from worker misclassification on the Torrey Pines Road Project. (DLSE Exhibit No. 4, pp. 51-56.)

The Prevailing Wage Rate Determinations for the Torrey Pines Road Project.

DLSE contends that Anton's misclassified workers on the Torrey Pines Road Project as Tree Maintenance (Laborer) when those workers should have been classified as Laborer (Engineering Construction). (Amended Stipulated Fact Nos. 1, 6, 8.)

Accordingly, one prevailing wage determination (PWD) at issue in these matters is that of "Tree Maintenance (Laborer)" (Tree Maintenance), SC-102-X-20-2017-1, and the second is that of "Laborer (Engineering Construction)" (Laborer), SD-23-102-3-2017-1 (Laborer).<sup>8</sup> (Amended Stipulated Fact Nos. 1, 4; DLSE Exhibit No. 35, pp. 1341-1342; Anton's Exhibit Z, pp. 1093-1094.) DLSE also contends that Anton's underpaid workers classified as Laborers and Operating Engineers on the Torrey Pines Road Project. The underpayment occurred because Anton's shorted the workers their basic hourly rate pay and used that money to pay a portion of the training fund contributions to the Associated General Contractors of America, San Diego Chapter, Inc., Training and Apprenticeship Trust Fund (AGC Trust Fund), who they overpaid.<sup>9</sup> (DLSE Exhibit No. 1,

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<sup>8</sup> DLSE Exhibit No. 36 and Anton's Exhibit No. BB (the same document) was the prior PWD for Laborer, SD-23-102-3-2016-2, with an issue date of August 22, 2016 and an expiration date of June 30, 2017. (DLSE Exhibit No. 3, p. 27; DLSE Exhibit No. 36, pp. 1347-1348; Anton's Exhibit BB, pp. 1113-1114.) Given the bid advertisement date of September 26, 2017, the applicable Laborer PWD for the Torrey Pines Road Project was SD-23-102-3-2017-1, issued August 22, 2017. (DLSE Exhibit No. 1, p. 4; DLSE Exhibit No. 7, pp. 72-73; Anton's Exhibit Z, pp. 1093-1094.) The total hourly rates for work performed after June 30, 2017 under SD-23-102-3-2016-2 was subject to predetermined increases, such that the total hourly rates plus the predetermined increases were the same as the total hourly rates under SD-23-102-3-2017-1, the applicable Laborer PWD. (DLSE Exhibit No. 3, p. 27; DLSE Exhibit No. 36, pp. 1347-1348; Anton's Exhibit Z, pp. 1093-1094; Anton's Exhibit BB, pp. 1113-1114.) Therefore, the total hourly rates in DLSE's audit were derived using the correct rates. (DLSE Exhibit No. 3, p. 25-50; DLSE Exhibit No. 36, pp. 1347-1348; Anton's Exhibit Z, pp. 1093-1094.) The Laborer classification was apprenticeable. (DLSE Exhibit No. 36, p. 1347; Anton's Exhibit Z, p. 1093; Anton's Exhibit BB, p. 1113.)

<sup>9</sup> For the workers Anton's classified as Tree Maintenance workers, DLSE found that those workers should have been classified as Laborers based on the scope of work of the Project. DLSE found that Anton's misclassification of Laborers as Tree Maintenance workers resulted in underpayment of prevailing wages

pp. 6-7.) Thus, the third PWD at issue is that of "Operating Engineer" (Operating Engineer), SD-23-63-3-2017-1.<sup>10</sup>

The Assessment for the Torrey Pines Road Project.

DLSE found that Anton's misclassified and underpaid workers as Tree Maintenance on the Torrey Pines Road Project, failed to pay training fund contributions for workers reclassified as Laborers, and underpaid workers classified as Laborers and Operating Engineers. (DLSE Exhibit No. 1, pp. 6-7, 9; DLSE Exhibit No. 2, p. 10; DLSE Exhibit No. 3, pp. 25-26.) It also found that Anton's failed to timely submit contract award information for the Laborer classification to the applicable apprenticeship committees in the geographic area of the Project, failed to request dispatch of Laborer apprentices from the applicable apprenticeship committees, and did not employ Laborer apprentices in the required ratio on the Project. (DLSE Exhibit No. 1, pp. 7-9; DLSE Exhibit No. 2, pp. 11-12.) The Assessment stated that Anton's underpaid the required prevailing wages in the amount of \$22,032.26 and underpaid training fund contributions in the amount of \$494.04, and the Assessment imposed section 1775 penalties of \$12,720.00, and section 1777.7 penalties of \$1,380.00. (DLSE Exhibit No. 2, pp. 10-18.)

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as well as a failure to pay training fund contributions, since the applicable prevailing wage rates for Tree Maintenance is lower than that for Laborer, and because the Tree Maintenance classification does not require payment of training fund contributions, while Laborer classification does require such payments.

<sup>10</sup> DLSE Exhibit No. 37 was the prior PWD for Operating Engineer, SD-23-63-3-2016-1, with an issue date of August 22, 2016 and an expiration date of June 30, 2017. (DLSE Exhibit No. 23, p. 881; DLSE Exhibit No. 37, pp. 1368-1371.) Given the bid advertisement date of September 26, 2017, the applicable Operating Engineer PWD for the Torrey Pines Road Project was SD-23-63-3-2017-1, which had an issue date of August 22, 2017. (DLSE Exhibit No. 1, p. 4; DLSE Exhibit No. 7, pp. 72-73; Operating Engineer PWD, SD-23-63-3-2017-1, pp. 1-6, of which the Director takes official notice and is available at <https://www.dir.ca.gov/oprl/2017-2/PWD/Determinations/SanDiego/SD-023-63-3.pdf>.) The required training fund contributions for work performed after June 30, 2017 under SD-23-63-3-2016-1 was subject to predetermined increases, such that the required training fund contributions plus the predetermined increases were the same as the required training fund contributions under SD-23-63-3-2017-1, the applicable Operating Engineer PWD. (DLSE Exhibit No. 23, p. 881; DLSE Exhibit No. 37, pp. 1368-1371; Operating Engineer PWD, SD-23-63-3-2017-1, p. 1.) Therefore, the total hourly rates in DLSE's audit were derived using the correct rates. (DLSE Exhibit No. 23, p. 880-898; DLSE Exhibit No. 37, pp. 1368-1371; Operating Engineer PWD, SD-23-63-3-2017-1, p. 1.) The Operating Engineer classification was apprenticeable. (DLSE Exhibit No. 37, p. 1368; Operating Engineer PWD, SD-23-63-3-2017-1, p. 1.)

### The Voltaire Street Project.

The Awarding Body advertised the Voltaire Street Project for bid on August 3, 2017. (DLSE Exhibit No. 21, p. 862; DLSE Exhibit No. 26, p. 915; DLSE Exhibit No. 33, p. 1338-1339.) The successful bidder was Hazard, which entered into a contract with the Awarding Body on or about January 12, 2018. (DLSE Exhibit No. 21, p. 859; DLSE Exhibit No. 27, pp. 1007-1008, 1048-1051; DLSE Exhibit No. 33, pp. 1338-1339; Anton's Exhibit Q, pp. 813-814.) The contract specified that prevailing wage rates applied to the Project. (DLSE Exhibit No. 27, pp. 916, 919, 942-945; Anton's Exhibit Q, pp. 722, 725, 748-751.)

Hazard's bid listed Anton's as a subcontractor, with Anton's scope of work described as "[r]emoval of bridge sidewalk, railing, and edge concrete." (DLSE Exhibit No. 27, p. 1050; Anton's Exhibit Q, p. 856.) The contract scope of work is described as follows:

The project will remove and replace existing barrier rails and sidewalks, remove the entire existing raised median, repair the concrete bridge deck, reduce the number of through-lanes from four to two and provide left-turn lanes and bike lanes in both directions, restripe, modify existing traffic signals, remove and replace street lights, install ADA (Americans With Disabilities Act) accessible curb ramps, and modify existing storm drain inlets on and immediately adjacent to the bridge.

(DLSE Exhibit No. 27, p. 939; Anton's Exhibit Q, p. 745.) Anton's had workers on the Voltaire Street Project from February 1, 2018 to September 28, 2018. (DLSE Exhibit No. 28, pp. 1052-1085; DLSE Exhibit No. 28.1, pp. 1086-1106; DLSE Exhibit No. 30, pp. 1111-1188; DLSE Exhibit No. 31.1, pp. 1189-1310; Anton's Exhibit S, pp. 859-1058.) The Awarding Body accepted completion of the Voltaire Street Project on July 2, 2019, and a notice of completion was recorded on July 5, 2019.<sup>11</sup> (DLSE Exhibit No. 21, p. 862.)

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<sup>11</sup> The date of acceptance and the date of recording of the notice of completion was reflected in Grayson's Penalty Review (DLSE Exhibit No. 21, p. 862), but the record is unclear as to the underlying source of this information. The parties did not submit into evidence any document indicating acceptance of the Project or a recorded notice of completion.

The Public Works Complaint for the Voltaire Street Project.

On September 25, 2019, DLSE received a complaint from Sean Lopez with the Center for Contract Compliance alleging underpayment of wages and apprenticeship violations arising from worker misclassification on the Voltaire Street Project. (DLSE Exhibit No. 24, pp. 899-903.)

The Prevailing Wage Rate Determinations for the Voltaire Street Project.

DLSE contends that Anton's misclassified workers on the Voltaire Street Project as Tree Maintenance when these workers should have been classified as Laborer. (Amended Stipulated Fact Nos. 1, 6, 8.) Accordingly, one PWD at issue in this matter is that of Tree Maintenance, SC-102-X-20-2016-1, and the second is that of Laborer, SD-23-102-3-2016-2.<sup>12</sup> (Amended Stipulated Facts Nos. 1, 4; DLSE Exhibit No. 36, pp. 1347-1348; Anton's Exhibit BB, pp. 1113-1114.) DLSE also contends that Anton's underpaid workers classified as Operating Engineers on the Project because Anton's shorted the workers their basic hourly rate pay and used that money to pay a portion of the payment of training fund contributions to the AGC Trust Fund, who they overpaid. (DLSE Exhibit No. 21, pp. 864-866.) Thus, the third PWD at issue is that of Operating Engineer, SD-23-3-2016-1. (DLSE Exhibit No. 37, pp. 1368-1374.)

The Assessment for the Voltaire Street Project.

DLSE found that Anton's misclassified and underpaid workers classified as Tree Maintenance on the Project, failed to pay training fund contributions for workers reclassified as Laborers, and underpaid workers classified as Laborers and Operating Engineers due to overpayment of training fund contributions. (DLSE Exhibit No. 21, pp. 864-865; DLSE Exhibit No. 22, p. 869; DLSE Exhibit No. 23, p. 880.) The

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<sup>12</sup> Given the bid advertisement date of August 3, 2017, the applicable Tree Maintenance PWD for the Voltaire Street Project was SC-102-X-20-2016-1, which had an issue date of August 22, 2016. (DLSE Exhibit No. 21, p. 862; DLSE Exhibit No. 26, p. 915; Tree Maintenance PWD, SC-102-X-20-2016-1, p. 1, of which the Director takes official notice and is available at <https://www.dir.ca.gov/oprl/2016-2/PWD/Determinations/Southern/SC-102-X-20.pdf>; Tree Maintenance Scope of Work Provision, SC-102-X-20, pp. 1-4, of which the Director takes official notice and is available at <https://www.dir.ca.gov/oprl/2016-2/PWD/Scope/Southern/SC-102-X-20-SCO.pdf>.) The applicable Tree Maintenance PWDs for both projects did not require payment of training fund contributions. (DLSE Exhibit No. 35, p. 1341; Tree Maintenance PWD, SC-102-X-20-2016-1, p. 1.)

Assessment stated that Anton's underpaid the required prevailing wages in the amount of \$1,615.24, failed to pay training fund contributions in the amount of \$38.64, and the Assessment imposed section 1775 penalties of \$9,000.00. (DLSE Exhibit No. 22, pp. 869-876.)

Stipulated Facts and Parties' Exhibits.

Anton's certified payroll records (CPRs) accurately reflect the hours worked by, and the amounts paid to, its workers on both Projects.<sup>13</sup> (Amended Stipulated Fact No. 5.) For both Projects, Anton's paid its workers at the prevailing wage rate for the Tree Maintenance classification. (Amended Stipulated Fact No. 1.)

DLSE contends that the workers who performed demolition and tree removal work on the Projects were required to be paid the minimum prevailing wage rate of the Laborer classification. (Amended Stipulated Fact No. 8.) Anton's contends that it correctly classified its workers as Tree Maintenance based on the scope of work for this classification. (Amended Stipulated Fact No. 6.)

The calculations set forth in the Public Works Audits for both Projects (DLSE Exhibit Nos. 3 and 23) are mathematically correct. There is no dispute that the amounts listed in the Audit Summary columns headed "Total Wages Paid," "Prevailing Wage Requirements Total Wages," and "Amount Owing and Unpaid" accurately reflect the amounts paid by Anton's and the underpayments which exist if the required prevailing wage rate is found to be for the Laborer classification. (Amended Stipulated Fact No. 4.) The required prevailing wage rates used in the Public Works Audits (DLSE Exhibits Nos. 3 and 23) are correct, as is the amount of credit DLSE provided to Anton's for payment of the base hourly rate.<sup>14</sup> (Amended Stipulated Fact Nos. 2 and 3.)

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<sup>13</sup> For the Voltaire Street Project, Anton's contends that it was directed by the AGC Trust Fund to withhold training funds at a rate of \$0.79 per hour for the Laborer classification and \$1.05 per hour for the Operating Engineer classification. (Amended Stipulated Fact No. 7.) Anton's submitted no evidence in support of this contention.

<sup>14</sup> Anton's is entitled to additional credit in the amount of \$2.00 for restitution paid to two workers for the Torrey Pines Road Project on or about June 30, 2020. (Amended Stipulated Fact No. 10.)

Anton's is a signatory contractor with the San Diego Chapter of the Associated General Contractors of America Joint Apprenticeship Committee (AGC JAC) and is approved by the AGC JAC to train apprentices for the Laborer and Operating Engineer classifications. (DLSE Exhibit No. 1, p. 7; DLSE Exhibit No. 17, pp. 844-845; Anton's Exhibit O, pp. 711-712.) For the Torrey Pines Road Project, Anton's submitted a DAS 140 Form to the AGC JAC for the Laborer classification on March 23, 2018. (Amended Stipulated Fact No. 13; DLSE Exhibit No. 16, pp. 840, 842; Anton's Exhibit N, pp. 707, 709.) Anton's employed Laborer apprentices for a total of 48 hours on the Torrey Pines Road Project. (Amended Stipulated Fact No. 14.)

After issuance of the Assessment for the Torrey Pines Road Project, Hazard withheld \$36,626.30 from Anton's and transmitted those funds to the Awarding Body in accordance with the instructions on page six of the Assessment. (Stipulated Fact No. 9; DLSE Exhibit No. 2, p. 15.)

Scope of Work Provisions for Tree Maintenance and Laborer.

The applicable scope of work for the Tree Maintenance classification covered the following:

[T]ree maintenance, including trimming, pruning, topping, tree/stump removal, grinding of stumps, root pruning and root barrier installation; handling, piling, hauling and chipping of brush and limbs; removal and replacement of trees; [t]he operation of all vehicles, tools and equipment including but not limited to hand tools of any type, chainsaws, pole saws, pruners, stump grinders for trees, boom trucks, loaders and trucks for personnel, material, and equipment, debris removal and towing.

(Tree Maintenance Scope of Work Provision, SC-102-X-20, p. 3; DLSE Exhibit No. 35, p. 1345; Anton's Exhibit W, p. 1089.)<sup>15</sup> The Tree Maintenance scope of work expressly disclaimed coverage of construction or landscape construction work, and utility line clearance work:

This Agreement does not cover (a) any work of any employee performing construction or landscape construction work (including work incidental to

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<sup>15</sup> The Tree Maintenance scope of work provisions for SC-102-X-20-2016-1, issued August 22, 2016, and SC-102-X-20-2017-1, issued August 22, 2017, were identical. (Tree Maintenance Scope of Work Provision, SC-102-X-20; DLSE Exhibit No. 35, pp. 1343-1346.)

construction or post-construction maintenance during the plant installation and establishment period) and (b) tree trimmer utility line clearance work within in the scope of work in any pre-existing prevailing wage determinations for Tree Trimmer (High Voltage Line Clearance) and Tree Trimmer (Line Clearance), issued by the Director of Industrial Relations.

(*Ibid.*) The Tree Maintenance PWD echoed these exceptions: "This determination does not apply to the work of a landscape laborer employed on landscape construction (work incidental to construction or post-construction maintenance during the plant installation and establishment period) or to tree trimming work involving line clearance." (Tree Maintenance PWD, SC-102-X-20-2016-1, p. 1; DLSE Exhibit No. 35, p. 1341.)

The applicable scope of work for the Laborer classification includes, in relevant part, under Section 4B:

- (2) Street and highway work, grading and paving, excavation of earth and rock, including non-destructive utility line location (hydrovac operations), grade separations, elevated highways, viaducts, bridges, abutments, retaining walls, subways, airport grading, surfacing and drainage, electric transmission line and conduit projects, underground communication and conduit installation, fiberoptic installation, blowing, splicing, testing and related work for telephone, T.V. or other communication transmission through underground conduit, water supply, water, development, reclamation, irrigation, draining and flood control projects, water mains, pipe lines, sanitation and sewer projects, dams, aqueducts, canals, reservoirs, intakes, channels, levees, dikes, revetments, quarrying of breakwater or riprap stone, foundations, pile driving, piers, locks, river and harbor projects, breakwaters, jetties, dredging, tunnels.

...

- (11) All work in connection with excavation for incidental building or other construction including digging of trenches, piers, foundations and holes; digging, lagging, sheeting, cribbing and bracing of foundations, holes, caissons, cofferdams, manning, setting and moving all manually movable pumps.

...

- (14) All work in the excavation, grading, preparation, concreting, asphalt and mastic paving, paving, ramming, curbing, flagging, traffic control by any method, and laying of other stone materials, and

surfacing of streets, ways, courts, underpasses, overpasses and bridges.<sup>16</sup>

. . .

- (16) All work in connection with the 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.

(DLSE Exhibit No. 36, pp. 1359-1361; Anton's Exhibit AA, pp. 1104-1106.)<sup>17</sup>

## DISCUSSION

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 California Supreme Court as follows:

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

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

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<sup>16</sup> The Laborer classification differentiated between five groups of Laborers based on the scopes of work listed in the Laborer PWD. (DLSE Exhibit No. 36, pp. 1347-1349; Anton's Exhibit Z, pp. 1093-1094.) The Laborer classification was subject to predetermined rate increases, and it was apprenticeable. (*Ibid.*)

<sup>17</sup> The Laborer scope of work provisions for SD-23-102-3-2016-2, issued August 22, 2016, and SD-23-102-3-2017-1, issued August 22, 2017, were identical. (DLSE Exhibit No. 36, pp. 1350-1367; Anton's Exhibit AA, pp. 1095-1112.)

comply with minimum labor standards.” (§ 90.5, subd. (a); see also *Lusardi, supra*, at p. 985.) Section 1775, subdivision (a), requires 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 the unpaid wages are not paid within 60 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, 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 the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of 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 assessment. (§ 1742, subd. (b).)

#### DLSE Presented Prima Facie Evidence in Support of the Assessments.

The facts in these cases are undisputed. The underlying issue in both cases is the appropriate classification of the work that subcontractor Anton’s workers performed on the Projects. Anton’s contends that the workers were appropriately classified as Tree Maintenance, whereas DLSE contends that the workers should have been classified as Laborers.

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 the rate for each locality in which public work is performed (as defined in section 1724), and publishes a general prevailing wage determination (PWD) for a craft, such as Tree Maintenance or Laborer, to inform all interested parties and the public of the applicable prevailing wage rates. (§ 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 (*Ericsson*).

Ultimately, 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.

In this case, DLSE presented prima facie support for the underpayment of prevailing wages to workers on the Projects. With regard to DLSE's reclassification of Tree Maintenance to Laborer, DLSE relied on the scopes of work for the Projects, the scopes of work performed by Anton's on the Projects, and the scopes of work for the Tree Maintenance and Laborer classifications.

The nature of the work for the Torrey Pines Road Project was construction work. Specifically, the scope of work for the Torrey Pines Road Improvements Phase 2 portion of the Project included "[i]nstallation of new sidewalk, retaining curb, and walls on the south side of Torrey Pines Road," "[i]nstallation of a pedestrian crossing on Torrey Pines Road... with street lighting and crosswalk systems," "[a]sphalt concrete overly with striping of buffered bike lanes along Torrey Pines Road," and "[i]nstallation of a flush stamped and painted asphalt median." (DLSE Exhibit No. 8, p. 97; Anton's Exhibit A, p. 24.) The scope of work for the Torrey Pines Road Slope Restoration portion of the Project included "an excavation at the toe of the slope to achieve the required space for

the sidewalk, removal of sloughing soil and debris off of slope face, and installation of permanent soil-nail wall with an outer boulderscape or rock carve surface.” (*Ibid.*) Anton’s scope of work as a subcontractor on the Torrey Pines Road Project was “Clearing/Demolition Constructor.” (DLSE Exhibit No. 8, p. 505; Anton’s Exhibit A, p. 432.)

The nature of the work for the Voltaire Street Project was also construction work. Specifically, the scope of work for the Project involved “remov[ing] and replac[ing] existing barrier rails and sidewalks, remov[ing] the entire existing raised median, repair[ing] the concrete bridge deck..., restrip[ing], modify[ing] existing traffic signals, remov[ing] and replac[ing] street lights, install[ing]... accessible curb ramps, and modify[ing] existing storm drain inlets on... the bridge.” (DLSE Exhibit No. 27, p. 939; Anton’s Exhibit Q, p. 745.) Anton’s scope of work as a subcontractor on the Project was the “[r]emoval of bridge sidewalk, railing, and edge concrete.” (DLSE Exhibit No. 27, p. 1050; Anton’s Exhibit Q, p. 856.) For these reasons, DLSE established prima facie support that both Projects consisted of construction work involving road and sidewalk improvements.

DLSE also established that the applicable scope of work for the Tree Maintenance classification for both Projects specifically excluded coverage of construction or landscape construction work, including work incidental to construction. (DLSE Exhibit No. 35, p. 1345; Anton’s Exhibit W, p. 1089; see also DLSE Exhibit No. 35, p. 1341; Tree Maintenance Scope of Work Provision, SC-102-X-20.) Moreover, DLSE established that the scope of work for the Laborer classification applied to Anton’s scope of work on the Projects. In this regard, the Laborer scope of work includes: “[s]treet and highway work, grading and paving, excavation of earth and rock...,” “[a]ll work in connection with excavation for incidental building or other construction including digging of trenches, piers, foundations and holes...,” “[a]ll work in the excavation, grading, preparation..., and surfacing of streets..., underpasses, overpasses and bridges,” and “[a]ll work in connection with the cutting of streets and ways for all purposes...” (DLSE Exhibit No. 36, pp. 1359-1361; Anton’s Exhibit AA, pp. 1104-1106.)

Therefore, based on the contract documents describing the scopes of work for the Projects and the scopes of work Anton's performed on the Projects, the scopes of work for the classifications of Tree Maintenance and Laborer, and the parties' stipulations concerning the accuracy of Anton's CPRs and DLSE's calculations in its audits of the Projects, DLSE met its burden to present evidence showing prima facie support for the findings in the Assessments that Anton's underpaid prevailing wages, including underpayment of training fund contributions, based on worker misclassification. (DLSE Exhibit No. 1, pp. 6-9; DLSE Exhibit No. 2, p. 10-18; DLSE Exhibit No. 3, pp. 25-26; DLSE Exhibit No. 8, pp. 97, 505; Anton's Exhibit A, pp. 24, 432; DLSE Exhibit No. 21, pp. 864-865; DLSE Exhibit No. 22, p. 869-876; DLSE Exhibit No. 23, p. 880; DLSE Exhibit No. 27, pp. 939, 1050; Anton's Exhibit Q, pp. 745, 856; Tree Maintenance Scope of Work Provision, SC-102-X-20; DLSE Exhibit No. 35, pp. 1343-1346; DLSE Exhibit No. 36, pp. 1350-1367; Anton's Exhibit AA, pp. 1095-1112; Amended Stipulated Fact Nos. 1-5.)

DLSE also established prima facie support for Anton's underpayment of wages to workers it classified as Laborers and Operating Engineers. This resulted from shorting the workers' wages and overpaying training fund contributions. The applicable PWDs for the Laborer classification require training fund contributions of \$0.69 per hour. (DLSE Exhibit No. 1, p. 5; DLSE Exhibit No. 3, p. 27; DLSE Exhibit No. 21, p. 863; DLSE Exhibit No. 23, p. 881; DLSE Exhibit No. 36, p. 1347; Anton's Exhibit Z, p. 1093; Anton's Exhibit BB, p. 1113.) However, as indicated by the audits for both Projects, Anton's paid training fund contributions for Laborers at a rate of \$0.79 per hour, which resulted in a \$0.10 per hour underpayment in total prevailing wages for the workers Anton's classified as Laborers. (DLSE Exhibit No. 3, pp. 29, 31, 46, 48, 49; DLSE Exhibit No. 23, pp. 884-885, 886, 890, 891, 894, 895, 898.) Likewise, the applicable PWDs for the Operating Engineer classification require training fund contributions of \$1.00 per hour. (DLSE Exhibit No. 1, p. 5; DLSE Exhibit No. 3, p. 27; DLSE Exhibit No. 21, p. 863; DLSE Exhibit No. 23, p. 881; DLSE Exhibit No. 37, pp. 1368, 1374; Operating Engineer PWD, SD-23-63-3-2017-1, p. 1.) The audits for both Projects showed that Anton's paid

training fund contributions for Operating Engineers at a rate of \$1.05 per hour, which resulted in a \$0.05 per hour underpayment in wages for the workers Anton's classified as Operating Engineers. (DLSE Exhibit No. 3, pp. 28, 49, DLSE Exhibit No. 23, pp. 882-883, 885.) Accordingly, these facts present prima facie support for DLSE's finding that Anton's underpaid the required wages for Laborers and Operating Engineers on both Projects.

Anton's Failed to Carry Its Burden of Proof to Show the Assessments Were Incorrect as to the Underpayment of Wages.

In response to DLSE's prima facie showing that the work Anton's workers performed on the Projects was in the scope of work for the Laborer classification rather than the Tree Maintenance classifications, Anton's advanced several arguments. First, Anton's argued that because it performed tree work on the projects, the projects should be classified as Tree Maintenance projects.<sup>18</sup> Anton's cites *Reliable Tree Experts v. Baker* (2011), 200 Cal.App.4th 785-798 (*Reliable Tree Experts*), for the proposition that "any kind of maintenance action lands the entire project in that category [of tree maintenance]." (Anton's Brief on the Merits, p. 2, lines 18-20.) In *Reliable Tree Experts*, the issue was whether a contract to perform tree pruning and removal of diseased trees along state highways constituted a public work for purposes of the Prevailing Wage Law requiring the payment of prevailing wages. (*Reliable Tree Experts, supra*, 200 Cal.App.4th at 788.) The Court of Appeal found that the contract at issue in *Reliable Tree Experts* constituted covered maintenance work under Labor Code section 1771 per the definition of "maintenance" found in California Code of Regulations, title 8, section 16000. (*Id.*, at pp. 795-798.) The *Reliable Tree Experts* case offers no legal support for Anton's contention that "any kind of maintenance action lands the entire project in that

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<sup>18</sup> Anton's argues that the work performed on the Torrey Pine Tree on the Torrey Pines Road Project was maintenance work that was not incidental to the construction project. According to Anton's the tree work should be considered separately from the Torrey Pines Road Project, because it was the subject of a Request for Information that expanded the contract to include additional work on the tree. On the contrary, the additional work on the Torrey Pine tree was part of the construction project, because the tree had to be trimmed before clearing work could continue on the soil nail wall. (Anton's Exhibit B, p. 433-434; Anton's Exhibit D, pp. 436-442; Anton's Exhibit G, pp. 456-458.)

category [of tree maintenance],” such that the work Anton’s performed on the Torrey Pines Road Project could only be properly classified as Tree Maintenance work.

To the extent that Anton’s makes the same argument with respect to the work its workers performed on the Voltaire Street Project for the “[r]emoval of bridge sidewalk, railing, and edge concrete,” the same reasoning applies. (DLSE Exhibit No. 27, p. 1050; Anton’s Exhibit Q, p. 856.) Anton’s contends that its workers performed tree trimming work only on the first day of the Voltaire Street Project, which is consistent with the CPRs. (DLSE Exhibit No. 28, pp. 1052-1085; DLSE Exhibit No. 29, pp. 1086-1106; DLSE Exhibit No. 30, pp. 1111-1188; DLSE Exhibit No. 30.1, pp. 1189-1310; Anton’s Exhibit S, pp. 859-1058.) Although Anton’s claims that it “received no compensation for this work because the City determined this was outside the original contract scope of work,” Anton’s cites no evidence to support this claim.

Second, Anton’s contends that the scope of work for the Tree Maintenance classification covered the work performed by Anton’s on both Projects. It cites the portion of the Tree Maintenance scope of work provisions that indicates the types of covered work. However, Anton’s ignores the language immediately following that portion of the Tree Maintenance scope of work provisions which expressly disclaims coverage of construction or landscape construction work. (Tree Maintenance Scope of Work Provision, SC-102-X-20, p. 3; DLSE Exhibit No. 35, p. 1345.) As described in the contract documents, both the Torrey Pines Road Project and the Voltaire Street Project were construction projects involving improvements to the road and sidewalk, not tree maintenance projects. (DLSE Exhibit No. 8, p. 97; Anton’s Exhibit A, p. 24; DLSE Exhibit No. 27, p. 939; Anton’s Exhibit Q, p. 745.) In addition, Anton’s was hired to perform clearing and demolition work on the Torrey Pines Road Project and demolition work on the Voltaire Street Project, not tree maintenance work. (DLSE Exhibit No. 8, p. 505; Anton’s Exhibit A, p. 432; DLSE Exhibit No. 27, p. 1050; Anton’s Exhibit Q, p. 856.)

Third, Anton’s attempts to draw a distinction between the Tree Maintenance PWD before and after February 22, 2018. Anton’s notes that the subsequent Tree Maintenance PWD issued on February 22, 2018, SC-102-X-20-2018-1, adds the

following language that was not present in prior Tree Maintenance PWDs: "This determination does not apply to tree trimming, removal, or planting work performed on construction or landscape construction contracts."<sup>19</sup> (Anton's Exhibit X, p. 1091.) However, DLSE did not rely on this language in issuing its Assessments. Rather, DLSE relied on the language in the applicable Tree Maintenance scope of work provisions which excluded coverage of "any work of any employee performing construction or landscape construction work (including work incidental to construction or post-construction maintenance during the plant installation and establishment period)..." (Tree Maintenance Scope of Work Provision, SC-102-X-20, p. 3; DLSE Exhibit No. 35, p. 1345; Anton's Exhibit W, p. 1089.)

Fourth, Anton's contends that the Laborer classification cannot cover tree work because the Tree Maintenance classification came in to existence after the Laborer classification. On the contrary, the Tree Maintenance classification specifically excludes coverage of the construction-related work described in the Laborer classification. (Tree Maintenance Scope of Work Provision, SC-102-X-20, p. 3; DLSE Exhibit No. 35, p. 1345; DLSE Exhibit No. 36, pp. 1359-1361; Anton's Exhibit W, p. 1089; Anton's Exhibit AA, pp. 1104-1106.)

Fifth, Anton's argued that instead of Tree Maintenance, it could have classified those workers as "Tree Trimmer (High Voltage Line Clearance)" (Tree Trimmer) at a lower rate of pay. (Anton's Exhibit DD, pp. 1116-1119; Anton's Exhibit EE, pp. 1120-1123.) The Tree Trimmer scope of work provisions do not support Anton's position, as it contains the following definition of "Tree Trimmer" from the Dictionary of Occupational Titles (4th Ed., Rev. 1991):

Trims trees to clear right-of-way for communications lines and electric power lines to minimize storm and short-circuit hazards: Climbs trees to reach branches interfering with wires and transmission towers, using climbing equipment. Prunes tree tops, using saws or pruning shears. Repairs trees damaged by storms or lightening by trimming jagged stumps and painting them to prevent bleeding of sap. Removes broken

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<sup>19</sup> Anton's appears to concede that this language would preclude the type of work it performed on the projects, had it been included in the Tree Maintenance PWD prior to February 22, 2018.

limbs from wires, using hooked extension pole. Fells trees interfering with power service, using chain saw (portable power saw). May work from bucket or extended truck boom to reach limbs.

(Anton's Exhibit EE, p. 1122.) Neither scope of work for either Project contains any reference to line clearance for communications lines or electric power lines, nor is there evidence that Anton's workers performed such line clearance work. (See DLSE Exhibit No. 8, p. 97; Anton's Exhibit No. A, p. 24; DLSE Exhibit No. 27, p. 939; Anton's Exhibit Q, p. 745.)

Finally, Anton's asserted that former worker Cody Cousins "signed a release with acknowledgement that he had been fully paid for all work performed at Anton's and waived his right to any future action, individual or group, including wage claims." (Anton's Brief on the Merits, p. 15, lines 4-6.) Cousins worked a total of 40 hours on the Torrey Pines Road Project during the week ending March 11, 2018. (DLSE Exhibit No. 3, pp. 25, 32; DLSE Exhibit No. 10, pp. 517-518; DLSE Exhibit No. 14, p. 607; Anton's Exhibit L, p. 466.) Because Anton's did not provide any evidence documenting this purported release of Cousin's wage claims, there is no reason to remove Cousins from the Assessment for the Torrey Pines Road Project.

For these reasons, with regard to the underpayment of wages, Anton's failed to satisfy its "burden of proving that the basis for the Civil Wage and Penalty Assessment . . . is incorrect." (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, the Assessments with regard to unpaid prevailing wages are affirmed, such that Anton's is liable for \$22,030.26 in unpaid wages on the Torrey Pines Road Project, and \$1,615.24 in unpaid wages on the Voltaire Street Project.<sup>20</sup>

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<sup>20</sup> Based on the parties' stipulation that Anton's is entitled to credit in the amount of \$2.00 for restitution paid to two workers on the Torrey Pines Road Project, \$2.00 was deducted from the \$22,032.26 amount of unpaid wages on the Torrey Pines Road Project, for a total of \$22,030.26 in unpaid wages. (Amended Stipulated Fact No. 10.)

Anton's Failed to Carry Its Burden of Proof to Show the Assessments Were Incorrect as to Failure to Pay Training Fund Contributions.

Section 1777.5, subdivision (m)(1), requires contractors on public works projects who employ journeypersons or apprentices in any apprenticeable craft to pay training fund contributions to the California Apprenticeship Council or to an apprenticeship committee approved by the Department of Apprenticeship Standards. DLSE stated a prima facie case of underpayment of training fund contributions for those workers reclassified as Laborers. Anton's contends that it correctly paid training fund contributions based on its classification of Tree Maintenance. However, for the reasons stated previously, Anton's has not met its burden of proving that DLSE's reclassification of workers was incorrect. Therefore, Anton's failed to satisfy its burden of showing that the Assessments are incorrect as to its failure to pay training fund contributions, and Anton's is therefore liable for underpaid training fund contributions in the amount of \$494.04 on the Torrey Pines Road Project, and \$38.64 on the Voltaire Street Project. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

Anton's Failed to Prove the Labor Commissioner Abused Her 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.<sup>21</sup>

. . .

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

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

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<sup>21</sup> Section 1777.1 defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

DLSE assessed section 1775 penalties at the rate of \$120.00, which is less than the statutory maximum, for 106 prevailing wage violations on the Torrey Pines Road Project and 75 prevailing wage violations on the Voltaire Street Project. (DLSE Exhibit No. 1, pp. 1-2; DLSE Exhibit No. 3, pp. 25-26; DLSE Exhibit No. 21, pp. 859-860; DLSE Exhibit No. 23, p. 880.) The burden was on Anton's to prove that DLSE abused its discretion in setting the penalty amount under section 1775. Although Anton's disputed that it had misclassified workers for the clearing and demolition work it performed on the projects, or that it had underpaid wages or training fund contributions, it provided no compelling or probative evidence establishing that the workers had not been misclassified or underpaid, for the reasons addressed above. While Anton's argued that it classified its workers as Tree Maintenance in good faith, there is no evidence that Anton's made a good faith mistake, or that it promptly and voluntarily corrected its misclassification error and the consequent failure to pay the correct prevailing wage when these issues were brought to its attention. Indeed, Anton's lacks any reasonable defense to worker misclassification, which supports a finding that the violations were willful.

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. Further, the Director is not free to substitute her own judgment. The Labor Commissioner mitigated the penalty rate from \$200.00 per violation to \$120.00 per violation. Anton's has not shown an abuse of discretion in the rate selected by the Labor Commissioner. Accordingly, the assessment of section 1775 penalties at the rate of \$120.00 is affirmed. Anton's is liable for section 1775 penalties in the amount of \$12,720.00 for 106 violations for the Torrey Pines Road Project, and \$9,000.00 for 75 violations for the Voltaire Road Project.

Anton's Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, as follows:

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 . . .

At the time the Assessments were issued, the statutory scheme regarding liquidated damages provided contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case 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 liability for 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 penalty assessment, the contractor deposits with the Department of Industrial Relations the full amount of the assessment of unpaid wages, including all statutory penalties.

In this case, Anton's neither paid any back wages in response to the Assessments, nor deposited with the Department the assessed wages and statutory penalties. Accordingly, Anton's is liable for liquidated damages under section 1742.1 for the unpaid prevailing wages found in this Decision in the amount of \$22,030.26 on the Torrey Pines Road Project, and \$1,615.24 on the Voltaire Street Project.

Anton's Failed to Comply with the Apprenticeship Requirements of Section 1777.5 on the Torrey Pines Road Project.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. (Cal. Code Regs., tit. 8, §§ 227 to 231.)<sup>22</sup>

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<sup>22</sup> All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

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. (§ 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).) "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." (§ 230, subd. (a).) "The information shall be provided to the applicable committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed . . ." (*Ibid.*) The Division of Apprenticeship Standards (DAS) has prepared a form, the DAS 140 Form, that a contractor may use for that purpose.

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 and Sundays and holidays) before the date on which one or more apprentices are required.

(§ 230.1, subd.(a).) DAS has prepared another form, the DAS 142 Form, that a contractor may use to request dispatch of apprentices from apprenticeship committees.

In this matter, the record demonstrates that Anton's violated the apprenticeship requirements. Both the Laborer and Operating Engineer classifications are apprenticeable crafts. (DLSE Exhibit No. 36, pp. 1347; Anton's Exhibit Z, pp. 1093; Anton's Exhibit BB, p. 1113; DLSE Exhibit No. 37, p. 1368; Operating Engineer PWD, SD-23-63-3-2017-1, p. 1.) As a signatory contractor with AGC JAC, Anton's was required to submit contract award information to the AGC JAC prior to the commencement of work on the Torrey Pines Road Project. Anton's first employed

workers on the Torrey Pines Road Project on March 5, 2018.<sup>23</sup> (Amended Stipulated Fact No. 11; DLSE Exhibit No. 10, pp. 517-521; DLSE Exhibit No. 14, pp. 599-606.) However, Anton's did not submit contract award information for either craft to the AGC JAC until March 23, 2018. (Amended Stipulated Fact No. 13; DLSE Exhibit No. 1, p. 8; DLSE Exhibit No. 16, pp. 840-843; Anton's Exhibit N, pp. 707-710.) Therefore, Anton's submission of contract award information was untimely.

It is undisputed that Anton's did not employ sufficient Laborer apprentices in the required ratio based on Anton's misclassification of workers as Tree Maintenance rather than Laborer. (DLSE Exhibit No. 1, p. 8; DLSE Exhibit No. 10, pp. 517-549; DLSE Exhibit No. 10.1, pp. 550-593; DLSE Exhibit No. 14, pp. 599-687; DLSE Exhibit No. 14.1, pp. 688-746; DLSE Exhibit No. 14.2, pp. 747-817; Anton's Exhibit L, pp. 466-684; DLSE Exhibit No. 16, pp. 840, 842; Anton's Exhibit N, pp. 707, 709; Amended Stipulated Fact No. 13.) Anton's employed 812 hours of journey level Laborer work between March 5, 2018, the first day a journey level worker performed Laborer work, and December 29, 2018, the last day a journeyperson Laborer worked on the Torrey Pines Road Project. (DLSE Exhibit No. 1, p. 8; DLSE Exhibit No. 10, pp. 517-549; DLSE Exhibit No. 10.1, pp. 550-593; DLSE Exhibit No. 14, pp. 599-687; DLSE Exhibit No. 14.1, pp. 688-746; DLSE Exhibit No. 14.2, pp. 747-817; Anton's Exhibit No. 466-684.) Therefore, Anton's was required to employ Laborer apprentices on the Project for a total of 162.4 hours, but Anton's only employed Laborer apprentices on the Project for a total of 48 hours. (DLSE Exhibit No. 1, p. 8; Amended Stipulated Fact No. 14.)

For the reasons discussed above, there is no merit to Anton's argument that it employed the minimum ratio of Laborer apprentices because it did not improperly classify workers as Tree Maintenance rather than Laborer. Anton's argued that it was not required to request dispatch of Laborer apprentices because it had the approval of the AGC JAC to train apprentices. However, because Anton's did not employ the

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<sup>23</sup> Anton's first employed workers it classified as Laborer on the Torrey Pines Road Project on March 20, 2018, and first employed workers it classified as Operating Engineer on March 26, 2018. (Amended Stipulated Fact No. 12; DLSE Exhibit No. 10, pp. 523-524; DLSE Exhibit No. 14, pp. 615-624; Anton's Exhibit L, pp. 466-489.)

sufficient number of Laborer apprentices, Anton's was required to request dispatch of apprentices from the apprenticeship committees providing training in the Labor craft in the geographic area of the public works project. There is no evidence that Anton's requested dispatch of apprentices from any applicable apprenticeship committees for the Laborer classification. The basis for DLSE's assessment of apprenticeship violations was Anton's failure to timely submit contract award information and its failure to submit requests for dispatch to the applicable apprenticeship committees for the Laborer classification. Accordingly, the record establishes that Anton's violated the ratio requirement of section 1777.5 subdivision (g), the notice requirement of section 1777.5, subdivision (e), and the related regulations, sections 230 and 230.1, and is therefore subject to penalties under section 1777.7.

Anton's 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" -- is defined by the regulation, section 231, subdivision (h), as follows:

For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control. There is an irrebuttable presumption that a contractor knew or

should have known of the 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. (§ 230, subd. (a).) Penalties for that failure, as well as failure to meet the required 1:5 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).)

Anton’s did not timely submit contract award information. Although Anton’s started work on the Torrey Pines Road Project on March 5, 2018, Anton’s did not submit contract award information to the AGC JAC for the Laborer classification until March 23, 2018. (Amended Stipulated Fact No. 11; DLSE Exhibit No. 10, pp. 517-521; DLSE Exhibit No. 14, pp. 599-606; Anton’s Exhibit No. L, pp. 466-478; Amended Stipulated Fact No. 13; DLSE Exhibit No. 1, p. 8; DLSE Exhibit No. 16, pp. 840, 842; Anton’s Exhibit N, pp. 707, 709.) DLSE calculated penalties for the 17 calendar days between March 5, 2018 and March 23, 2018. (DLSE Exhibit No. 1, p. 8.)

Anton’s also did not employ Laborer apprentices in the required ratio, and it cannot be excused from liability for the ratio violation because it did not request dispatch of apprentices from all applicable apprenticeship committees for the Laborer classification. (DLSE Exhibit No. 1, p. 8; DLSE Exhibit No. 10, pp. 517-549; DLSE Exhibit No. 10.1, pp. 550-593; DLSE Exhibit No. 14, pp. 599-687; DLSE Exhibit No. 14.1, pp. 688-746; DLSE Exhibit No. 14.2, pp. 747-817; Anton’s Exhibit No. L, pp. 466-684; DLSE

Exhibit No. 16, pp. 840, 842; Anton's Exhibit N, pp. 707, 709; Amended Stipulated Fact No. 13.) Anton's employed 812 hours of journey level Laborer work on the Torrey Pines Road Project. (DLSE Exhibit No. 1, p. 8; DLSE Exhibit No. 10, pp. 517-549; DLSE Exhibit No. 10.1, pp. 550-593; Anton's Exhibit L, pp. 466-684; DLSE Exhibit No. 14, pp. 599-687; DLSE Exhibit No. 14.1, pp. 688-746; DLSE Exhibit No. 14.2, pp. 747-817.) Based on the 812 hours of journey level Laborer work, Anton's was required to employ Laborer apprentices on the project for a total of 162.4 hours. (DLSE Exhibit No. 1, p. 8.) Because Anton's only employed Laborer apprentices on the project for a total of 48 hours, DLSE calculated additional penalties for the five calendar days that journey level Laborers were on the project between March 24, 2018 and December 29, 2018. (DLSE Exhibit No. 1, p. 8; Amended Stipulated Fact No. 14.)

Anton's "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journey person hours because it employed insufficient Laborer apprentices. The irrebuttable presumption that Anton's knew or should have known of the apprenticeship requirements of section 1777.5 applies because Anton's was issued prior assessments for apprenticeship violations and because the contract for the Torrey Pines Road Project notified Anton's of its obligation to comply with prevailing wage requirements. (DLSE Exhibit No. 1, pp. 8-9; DLSE Exhibit No. 8, pp. 74, 77, 102-107; Anton's Exhibit A, pp. 1, 4, 29-34.) Since Anton's was aware of its obligations under the law yet failed to timely submit contract award information or request dispatch of apprentices to the applicable apprenticeship committees, Anton's failed to meet its burden of proof by providing evidence of compliance with section 1777.5. Since Anton's knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a penalty rate of \$60.00 per violation for Anton's apprenticeship violations, which is less than the statutory maximum. DLSE calculated 23 calendar days of noncompliance, based on the 17 calendar days between March 5, 2018 to March 23, 2018, the first day Anton's employed workers on the Torrey Pines Road Project and when Anton's submitted contract award information to the AGC JAC for the Laborer classification, and based on the five calendar days between March 24, 2018 and

December 29, 2018 that Anton's employed Laborers on the project. (DLSE Exhibit No. 1, p. 8.) Anton's did not show an abuse of discretion under section 1777.7, subdivision (d), as to either the penalty rate or those number of days of violations as found in the Assessment. Accordingly, penalties at the rate of \$60.00 for 23 days in the amount of \$1,380.00 is affirmed.

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

### **FINDINGS AND ORDER**

1. The work subject to the Civil Wage and Penalty Assessments 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 Assessments timely.
3. The Requests for Review were timely filed.
4. The Labor Commissioner's enforcement files were requested and produced in a timely fashion.
5. Anton's Service, Inc. did not timely pay its employees the correct prevailing wage rates for all hours worked on the Torrey Pines Road Improvements Phase 2 and Torrey Pines Road Slope Restoration Project in the amount of \$22,030.26, and Anton's Service, Inc. did not timely pay its employees the correct prevailing wage rates for all hours worked on the Voltaire Street Bridge Over Nimitz Blvd Bridge Rehabilitation Project in the amount of \$1,615.24.
6. Anton's Service, Inc. did not properly pay the required training fund contributions for all hours worked on the Torrey Pines Road Improvements Phase 2 and Torrey Pines Road Slope Restoration Project in the amount of \$494.04, and Anton's Service, Inc. did not properly pay the required training fund contributions for all hours worked on the

Voltaire Street Bridge Over Nimitz Blvd Bridge Rehabilitation Project in the amount of \$38.64.

7. Anton's Service, Inc. is liable for penalties assessed pursuant to Labor Code section 1775 on the Torrey Pines Road Improvements Phase 2 and Torrey Pines Road Slope Restoration Project in the amount of \$12,720.00; and Anton's Service, Inc. is liable for penalties assessed pursuant to Labor Code section 1775 on the Voltaire Street Bridge Over Nimitz Blvd Bridge Rehabilitation Project in the amount of \$9,000.00.
8. Anton's Service, Inc. is liable for liquidated damages on wages found due and owing on the Torrey Pines Road Improvements Phase 2 and Torrey Pines Road Slope Restoration Project in the amount of \$22,030.26; Anton's Service, Inc. is liable for liquidated damages on wages found due and owing on the Voltaire Street Bridge Over Nimitz Blvd Bridge Rehabilitation Project in the amount of \$1,653.88.
9. Anton's Service, Inc. failed to submit contract award information to all applicable apprenticeship committees for the crafts of Laborer and Operating Engineer on the Torrey Pines Road Improvements Phase 2 and Torrey Pines Road Slope Restoration Project in a timely and factually sufficient manner.
10. Anton's Service, Inc. failed to employ apprentices in the required minimum ratio of apprentices to journeypersons on the Torrey Pines Road Improvements Phase 2 and Torrey Pines Road Slope Restoration Project for the craft of Laborer.
11. Anton's Service, Inc. is liable for penalties assessed pursuant to Labor Code section 1777.7 on the Torrey Pines Road Improvements Phase 2 and Torrey Pines Road Slope Restoration Project in the amount of \$1,380.00.

12. The amounts found due under the Assessments are as follows:

**Torrey Pines Road Improvements Phase 2 and Torrey Pines Road Slope Restoration Project (Case No. 20-0289-PWH):**

<b>Basis of the Assessment</b>	<b>Amount</b>
Wages Due:	\$22,030.26
Training Fund Contributions Due:	\$494.04
Penalties under section 1775:	\$12,720.00
Liquidated damages:	\$22,030.26
Penalties under section 1777.7	\$1,380.00
<b>SUBTOTAL:</b>	<b>\$58,654.56</b>

**Voltaire Street Bridge Over Nimitz Blvd Bridge Rehabilitation Project (Case No. 20-0397-PWH):**

<b>Basis of the Assessment</b>	<b>Amount</b>
Wages Due:	\$1,615.24
Training Fund Contributions Due:	\$38.64
Penalties under section 1775:	\$9,000.00
Liquidated damages:	\$1,615.24
<b>SUBTOTAL:</b>	<b>\$12,269.12</b>

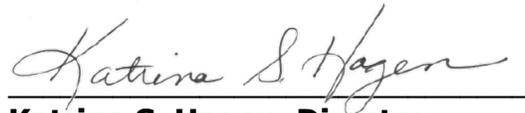
**TOTAL for the two Projects: \$70,923.68**

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 for the Torrey Pines Road Project is affirmed and modified as set forth in the above Findings, and the Civil Wage and Penalty Assessment for the Voltaire Street Project is 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: 4/3/23



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**Katrina S. Hagen, Director**  
California Department of Industrial Relations