STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Doug Parks, individually dba Doug Parks and Son Plumbing — Case No. 15-0184-PWH

From Civil Wage and Penalty Assessments issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Doug Parks, individually dba Doug Parks and Son Plumbing (Parks) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the Kings County Jail Tunnel, Holding Cell and Building Site (Project) in Kings County. The Assessment determined that $185,469.45 in unpaid prevailing wages and statutory penalties was due. BMY Construction Group, Inc. (BMY Construction), the general contractor, paid $36,969.46 for the wages owed to workers, including unpaid training fund contributions.

Hearing Officer Ed Kunnes conducted a Hearing on the Merits on November 6, 2015, in Bakersfield, California. Doug Parks appeared in pro per, and David Cross appeared for DLSE. The parties submitted the matter for decision on November 6, 2015. Pursuant to California Code of Regulations, title 8, section 232.53, subdivision (b), the Hearing Officer vacated the submission and reopened the hearing to receive additional evidence in support or in opposition of DLSE's contention that Parks misclassified workers as Underground Utility Tradesmen. The parties resubmitted the matter on November 23, 2015.

The issues for decision are:

- Whether the Assessment correctly reclassified the affected workers from the Pipe

Tradesman prevailing wage rate to the Plumber prevailing wage rate;

- Whether the Assessment correctly reclassified the affected workers from the Underground Utility Tradesman prevailing wage rate to the Laborer prevailing wage rate;
- Whether the DLSE abused its discretion in assessing penalties under Labor Code section 1775[1] at the maximum rate of $200.00 per violation;
- Whether Parks failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813;
- Whether Parks failed to hire apprentices and/or failed to contribute to the apprenticeship training fund and is therefore liable for penalties under section 1777.7; and,
- Whether Parks failed to file certified copies of payroll records within ten days, after receipt of a written request from DLSE and is therefore liable for penalties under section 1776.

The Director finds that Parks has failed to carry his burden of proving that the basis of the Assessment was incorrect. Therefore, the Director issues this Decision affirming the Assessment.

FACTS

Kings County advertised the Project for bid on March 21, 2014, and awarded the contract to BMY Construction on June 3, 2014. BMY Construction subcontracted with Parks on June 24, 2014, to supply plumbing services for the construction of a transfer tunnel from the existing jail to the adjacent courthouse and holding cells, including a cafeteria and two bathrooms. Parks' employees worked on the Project from approximately July 16, 2014, through December 18, 2014. Parks presently continues to work on the Project.

Applicable Prevailing Wage Determinations (PWDs): The following applicable PWDs and scopes of work were in effect on the bid advertisement date: March 21, 2014.

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

Plumber for Kings County (KIN-2014-1): This is the rate used in the Assessment for all plumbing work. The Plumber PWD contains a predetermined pay rate increase that went into effect before the beginning of work on the Project.[2]

Laborer (NC-23-102-1-2014-1): This is the rate used in the Assessment for all laborer work. The Laborer PWD classified location of work by Area and construction specialization by Group. DLSE identified the laborers on the Project as working in Area 2 and performing Group 3 type construction. The Laborer PWD contains a predetermined pay rate increase that went into effect before the beginning of work on the Project. [3]

DLSE demonstrated that Parks had misclassified his workers as pipe tradesmen and underground utility tradesmen. Scope of Work Provisions for Pipe Tradesman for 2014-1[4] states under Definition of Work Jurisdiction Between U.A. Pipe Tradesman and U.A. Plumber/Pipefitter that "All piping under, inside or on a building or structure is the work of the U.A. Plumber/Pipefitter." Parks conceded that his employees worked inside the structures.

Additionally, the Scope of Work Provisions for Underground Utility Tradesman for 2014-1 includes utility and utility pipeline construction work outside and appurtenant to the structure but does not include interior work. Furthermore, Underground Utility Tradesman may dig ditches by manual methods but the applicable scope of work does not provide for them to dig ditches using machines. DLSE elicited testimony that the two workers reclassified as laborers worked inside the structures at the jail and used jackhammers with spade bits to dig trenches.

[2] Throughout the relevant period, the prevailing hourly wage due under the Plumber PWD was $65.31 comprised of a base rate of $37.65, fringe benefits totaling $26.31 and a training fund contribution of $1.35. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

[3] Throughout the relevant period, the prevailing hourly wage due under the Laborer PWD Area 2, Group 3 was $47.27 comprised of a base rate of $27.14, fringe benefits totaling $19.72 and a training fund contribution of $0.41. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

[4] The Director takes official notice of 2014-1 Scope of Work Provisions for Plumber in Northern California and Scope of Work Provisions for Underground Utility Tradesman.

The misclassification resulted in a failure to pay the plumbers and the laborers the required prevailing wage rates. For straight time wages, the plumbers were shorted $40.36 an hour and the laborers were shorted $25.11.

DLSE assessed penalties under section 1775 at the maximum rate of $200.00 per violation for 228 violations. The total penalty under section 1775 is $45,600.00. In assessing the penalties under 1775, DLSE had considered: (1) 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; and, (2) whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

On December 9, 2014, BMY Construction contacted Parks by email recommending that Parks resolve the issue of Parks paying the workers the required prevailing wage. Failing to resolve the issue, on or about December 22, 2014, three workers filed complaints against Parks. The Deputy Labor Commissioner assigned to the case, Lori Rivera (Rivera), testified that Parks refused to rectify the underpayment despite Rivera presenting DLSE's concerns about the workers' classification to Parks. Additionally, Rivera testified to Parks having suffered a revocation of his Nevada contractor's license due to previous malfeasance.

Rivera's review of Parks' CPRs, payroll checks and timesheets revealed that Parks reported paying more money to workers on the Certified Payroll Records (CPRs) than he actually paid. For example, the CPR for one employee for the week ending July 22, 2014, shows net wages paid as $612.42, whereas Parks wrote the corresponding check for only $517.41. Additionally, the CPRs reported fewer hours worked than those hours stated by the workers on their timecards. For example, the CPR, for one week during the Project, showed 37 hours paid to a particular employee whereas the timecard showed that the employee worked 43 hours in the same week.

Furthermore, DLSE assessed penalties under section 1813 for Parks' failure to pay overtime to two workers reclassified as laborers and one worker reclassified as a plumber, all of whom performed work on several Saturdays. DLSE also assessed penalties under section 1776 for Parks' failure to provide CPRs and to provide a worker's

contact information within ten days after receipt of a request from DLSE. Finally, Parks never provided the CPR for week number thirty-four of the Project to DLSE.

DLSE also found that Parks violated section 1777.5, which requires the employment of apprentices to work one hour for every five hours of journeyman work. Parks did not employ a single apprentice on the Project. DLSE assessed the violation for the full number of contract days because Parks did not submit contract award information to an applicable apprenticeship program. Parks committed two types of violation under 1777.5: 1) a failure to submit the contract award information for the craft; and 2) a failure to employ apprentices within the minimum required ratio for the craft. Parks employed both laborers and plumbers on the Project.

DLSE assessed penalties under section 1777.7 for two violations per day at 251 days for plumbers and at 245 days for laborers. DLSE did not mitigate the penalty from $100.00 because BMY Construction attached the applicable apprenticeship statutes and a checklist of Labor Law requirements. Furthermore, Parks did nothing to correct the ratio violations after Rivera brought the matter to his attention.

In his defense, Parks testified that the Project was his first public works job and that he did not intentionally violate the prevailing wage law. Parks stated that he relied upon BMY Construction's advice to determine the wages for his workers. Notwithstanding, Parks failed to address DLSE's contention that Rivera and BMY Construction brought to his attention the numerous violations prior to DLSE issuing the Assessment. Parks stipulated that the Assessment was timely.

Additionally, Parks testified that Keith Evans, an employee, had erroneously calculated his hours on his timecards. Parks identified September 8, 2014, as a date on which Evans had miscalculated his work hours by an additional half-hour. A review of Evans' timecards disclosed four dates on which Evans miscalculated his work hours. Evans added two hours that he had not worked over a period of three dates whereas he failed to account for half an hour that he had worked on one date. A review of DLSE's Public Works Audit Worksheet showed that DLSE corrected two dates to conform to actual hours Evans had worked on those dates. As for the other two dates, they comprised half an hour of over accounting by Evans and half an hour of under accounting

by Evans, and consequently made no difference in the total amount of wages owed by Parks.

The Assessment: The DLSE served the Assessment on April 8, 2015. The Assessment found that Parks violated prevailing wage law, including a failure to classify employees properly, a failure to make the required training fund contributions for any of the affected workers, a failure to pay the required prevailing wage rates for overtime, a failure to timely submit CPRs, and a failure to request and employ apprentices. The Assessment found a total of $36,969.46 in underpaid wages, including $2,015.83 in unpaid training fund contributions. DLSE assessed penalties under section 1775 of $200.00 per violation for 228 violations, totaling $45,600.00. DLSE determined that Parks' violations were willful and intentional, and thereby warranted the maximum penalty. DLSE assessed penalties under section 1813 for four overtime violations, at the statutory rate of $25.00 per violation, totaling $200.00. In addition, DLSE assessed penalties under section 1776 for not submitting CPRs for five workers over seven days, at the statutory rate of $100.00 per day, totaling $3,500.

Further, DLSE found that Parks failed to request and hire apprentices. DLSE assessed penalties under section 1777.7 of $100.00 per violation for 992 violations, totaling $99,200.00. DLSE found that Parks' violations were willful and intentional, thereby warranting the maximum penalty.

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 for the benefit of not only 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.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. When DLSE determines that a violation of the prevailing wage laws has occurred, DLSE issues 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. 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."

<u>Parks Was Required To Pay The Prevailing Rate For Plumber and Laborer For The Work Performed On The Project.</u>

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.) The Director determines these rates and publishes general wage determinations (i.e. a PWD) 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.

In this case, the disputed work falls clearly within the Plumber and Laborer scopes of work. The question is whether the disputed work also falls clearly within the

Pipe Tradesman and Underground Utility Tradesman scopes of work entitling Parks to pay the lower Pipe Tradesman and Underground Utility Tradesman rates for the work. The Director finds that it does not and therefore she affirms the Assessment's reclassification of the affected workers from Pipe Tradesman to Plumber and Underground Utility Tradesman to Laborer.

The applicable prevailing wage rates are the ones in effect on the date the awarding body advertises the public works contract for bid. (See § 1773.2 and *Ericsson, supra.*) 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 section 1773.4].) Parks submitted no such petition 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*, at pp. 1084-1085.)

In the instant case, Parks designated two classifications, Pipes Tradesman and Underground Utility Tradesman, for setting his employees' wage rates. Neither designation was appropriate because the scope of work defining Pipes Tradesman and Underground Utility Tradesman were limited to outside work whereas the work on the Project included inside work. Accordingly, DLSE properly reclassified the workers as Plumbers and Laborers.

Therefore, the Director finds that there is no overlap between the Pipes Tradesman and Plumber classifications with regard to this Project and that the single prevailing rate applicable to the disputed work is the Plumber rate. Additionally, the Director finds that there is no overlap between the Underground Utility Tradesman and

the Laborer classifications with regard to this Project and that the single prevailing rate applicable to the disputed work is the Laborer rate. The misclassification by Parks resulted in a failure to compensate these workers properly for straight time, overtime (Saturdays) and for fringe benefits on the Project.

Consequently, because Parks did not pay the prevailing wages specified for Plumber and Laborer, and the scope of work provisions for those classifications encompassed the work in issue, Parks violated his statutory obligation to pay prevailing wages.

DLSE Did Not Abuse Its Discretion By Assessing Penalties Under Section 1775 At The Maximum Rate.

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

> (a)(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.
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> (2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
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> (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.
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> (B)(i) The penalty may not be less than forty dollars ($40) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, 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.
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> (ii) The penalty may not be less than eighty dollars ($80) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, 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 dollars ($120) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1. [5]
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> (C) If the amount due under this section is collected from the contractor or subcontractor, any outstanding wage claim under Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 against that contractor or subcontractor shall be satisfied before applying that amount to the penalty imposed on that contractor or subcontractor pursuant to this section.
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> (D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.
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> (E) The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

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. 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).)[6]

The Director's review of DLSE'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 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.)

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[5] Section 1777.1, subdivision (e) 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 deliberately refuses to comply with its provisions."

[6] All further regulatory references are to California Code of Regulations, title 8.

The facts show that DLSE considered the prescribed factors for mitigation and determined that this case warranted the maximum penalty of $200.00 per violation. The two statutory factors for mitigation of penalties are 1) a contractor's good faith error **and** prompt correction and 2) no history of prior violations. The Penalty Review approved by Rivera's supervisor documents that DLSE considered both of these factors. While Parks had no history of prior prevailing wage violations, DLSE found that Parks had knowledge of the prevailing wage violations early in the project and had ample time in which to rectify the violations. Parks offered no evidence or argument to show that DLSE abused its discretion in assessing penalties at the maximum rate.

The record does not establish that DLSE abused its discretion and, accordingly, the Director affirms 228 violations of penalties under section 1775 for $45,600.00 against Parks.

Parks Failed to Make Any Training Fund Contributions.

Moreover, the issue of willfulness arises in this situation due to Parks' failure to submit the training fund contribution. Section 1777.5, subdivision (m) (1) states that the contractor "shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site." Willfulness includes those matters in which the contractor "reasonably should have known of his or her obligations under the public works law." (§ 1777.1, subd. (e).) The omission to pay any of the required training funds supports a finding of willfulness as to DLSE's setting of the penalty under Section 1775.

Parks Owes Overtime Penalties For Underpaid Workers.

The PWDs for Plumbers for Kings County (KIN-2014-1) and Laborers (NC-23-102-1-2014-1) establish the required Saturday overtime-hourly rates.

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 notwithstanding 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 and not less than 1½ times the basic rate of pay."

The record establishes that Parks violated section 1815 by paying less than the required prevailing overtime wage rate to several workers who worked on Saturdays. 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 Director affirms the assessment of penalties under section 1813 for eight violations at $25.00 per violation, totaling $200.00.

Parks Owes Penalties For Failure to Submit CPRs Timely.

Additionally, employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.)

Section 1776, subdivision (h) provides that:

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on

the public works project.

> (b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:
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> (1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.
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> (2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.
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> * * *
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> (h) In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars ($100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated.

DLSE made two requests for CPRs from Parks. Parks does not deny receipt of the requests from DLSE. Rather, Parks argues that he timely sent the CPRs to DLSE. Regardless whether Parks timely delivered some CPRs, DLSE states that the information provided was insufficient and the record shows that Parks never delivered one set of CPRs at all (those for week thirty-four of the Project). Parks does not affirmatively contend that he delivered the missing CPR to DLSE and provides no explanation why DLSE never received the contact information for a certain worker. Accordingly, the Director does not need to weigh the veracity of the testimony to affirm the assessment because Parks did not meet his burden with regard to the missing CPR and the missing worker's contact information.

Accordingly, the Director affirms DLSE's assessed penalties under section 1776 for five workers over seven days, at the statutory rate of $100.00 per day, totaling $3,500.00.

<u>Parks Failed to Request Apprentices and Employ Apprentices.</u>

1. <u>Parks failed to request apprentices.</u>

With respect to the requirement to issue a DAS 140, notifying the applicable

apprenticeship programs of the contract award, Labor Code section 1777.5, subdivision (c) states in part:

> Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work.

The governing regulation for issuing DAS 140s is section 230, subdivision (a). Section 230, subdivision (a) specifies the requirement for contractors who are already approved to train by an apprenticeship program sponsor in the apprenticeable craft or trade, and the requirement for those contractors who are not so approved. Section 230, subdivision (a) states:

> (a) Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. This contract award information shall be in writing and may be a DAS Form 140, Public Works Contract Award Information. The information shall be provided to the applicable apprenticeship committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work.... The DAS Form 140 or written notice shall include the following information, but shall not require information not enumerated in Section 230:
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> (1) the contractor's name, address, telephone number and state license number;
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> (2) full name and address of the public work awarding body;
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> (3) the exact location of the public work site;
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> (4) date of the contract award;
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> (5) expected start date of the work;
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> (6) estimated journeyman hours;
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> (7) number of apprentices to be employed;
>
> (8) Approximate dates apprentices will be employed.

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

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

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

Parks provided no contract award information to the applicable apprenticeship program(s) and Parks requested no apprentices from the applicable apprenticeship program(s). Parks acknowledged that he failed to provide a DAS 140 and a DAS 142 to either the Fresno Area Plumbers, Pipe and Refrigeration Fitters Joint Apprenticeship and Training Sub-Committee or P.H.C.C. of the Greater Sacramento Area Plumbers U.A.C. Parks also acknowledged that he failed to provide a DAS 140 and a DAS 142 to the Northern California District Council of Laborers Construction Craft Laborers J.A.T.C.

2. Parks employed no apprentices.

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

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

The governing regulation as to this 1:5 ratio of apprentice hours to journeyman

hours is section 230.1, subdivision (a), which, in pertinent part, states:

> Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with the required 1 hour of work performed by an a apprentice for every five hours of labor performed by a journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter.

When DLSE determines that a violation of the apprenticeship laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1777.7. In the review of a determination as to the 1:5 ratio requirement, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (§ 1777.7, subd. (c)(2)(B).)

Parks did not hire a single apprentice for the Project.

The Penalty for Noncompliance.

If a contractor "knowingly violated Section 1777.5" a civil penalty is imposed under section 1777.7. Here, DLSE assessed a penalty against Parks under the following portion of section 1777.7, subdivision (a)(1):

> A contractor or subcontractor that is determined by the Labor Commissioner to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars ($100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation.

The phrase quoted above -- "knowingly violated Section 1777.5" -- is defined by regulation 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.

Parks "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journeyman hours for plumber and laborer apprentices, and the record establishes that this violation was "knowingly committed." The substantial evidence proved that BMY Construction had provided to Parks from the beginning of the Project the requirement for

contacting the applicable apprenticeship programs and hiring apprentices from those programs. Additionally, Parks did not hire apprentices after Rivera brought the matter to his attention. Since Parks knowingly violated the law, a penalty should be imposed under section 1777.7 at $100.00 per violation. Thus, DLSE properly assessed penalties for 992 violations of section 1777.7 totaling $99,200.00.

FINDINGS AND ORDER

1. Affected subcontractor, Doug Parks dba Doug Parks and Son Plumbing, timely requested review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the Kings County Jail Tunnel, Holding Cell and Building Site project located in Kings County.

2. The Assessment was issued timely.

3. Doug Parks dba Doug Parks and Son Plumbing failed to pay his workers the required prevailing wages for the disputed work, as he paid some employees the Pipe Tradesman rate or the Underground Utility Tradesman rate rather than the applicable Plumber rate or Laborer rate, respectively. The portions of the Assessment reclassifying the affected workers from Pipe Tradesman to Plumber or from Underground Utility Tradesman to Laborer, for that work, as appropriate, and the associated penalties assessed under sections 1775 are therefore affirmed. The balance of the wage determination is undisputed and is therefore also affirmed in full. Doug Parks dba Doug Parks and Son Plumbing underpaid its workers for their work on the Project in the aggregate amount of $36,969.26, including unpaid training fund contributions.

4. DLSE did not abuse its discretion by setting the penalty for these violations under section 1775, subdivision (a) at the maximum rate of $200.00 per violation for 228 violations on the Project, totaling $45,600.00.

5. Penalties under section 1813 at the rate of $25.00 per violation are due for eight violations on the Project, totaling $200.00 in penalties.

6. Penalties under section 1776 at the rate of $100.00 per day for five workers over seven days, for a total of $3,500.00 in penalties, are due because Doug Parks dba Doug Parks and Son Plumbing failed to submit Certified Payroll Records

timely and provide worker contact information.

7. Doug Parks dba Doug Parks and Son Plumbing committed 992 violations under section 1777.5 both for his failure to submit contract award information to the applicable apprenticeship programs and for his failure to request and hire apprentices for the Project.

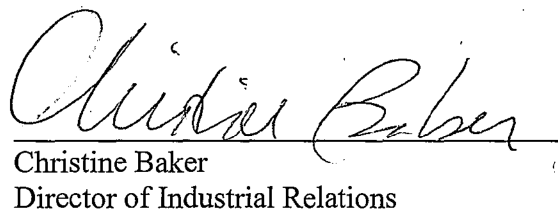
8. DLSE did not abuse its discretion by setting the penalty for these violations under section 1777.7, subdivision (a) at the maximum rate of $100.00 per violation for 992 violations on the Project, totaling $99,200.00.

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

Penalties under section 1775, subdivision (a):	$45,600.00
Penalties under section 1813:	$200.00
Penalties under section 1776:	$3,500.00
Penalties under section 1777.7:	$99,200.00
TOTAL:	**$148,500.00**

The Civil Wage and Penalty Assessment is affirmed in full 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: 2/18/2016



Christine Baker
Director of Industrial Relations