STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Qiana Marshall Riley individually and dba Astro Construction Case No. 16-0155-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Qiana Marshall Riley dba Astro Construction (Astro) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued on February 17, 2016, by the Division of Labor Standards Enforcement (DLSE) with respect to the work known as Urban Runoff Treatment Retrofits Project (Project) performed for the City of Richmond (City), County of Contra Costa. The Assessment determined that $11,500.00 was due in statutory penalties under Labor Code section 1776.[1]

DLSE filed a motion to amend the Assessment on June 24, 2016. After finding good cause, the Hearing Officer granted the motion on August 2, 2016. Thereafter, DLSE filed a Revised Motion to Amend Assessment Upward dated September 30, 2016. DLSE provided a showing of good cause in support of the motion and Astro did not respond. During the Hearing on the Merits on February 14, 2017, the Hearing Officer found good cause and approved the revised motion. Under the revised Assessment, DLSE determined the following amounts were owed: $15,421.20 in unpaid prevailing wages; $194.78 in unpaid training fund contributions; $9,120.00 in section 1775 penalties; $4,080.00 in section 1777.7 penalties; and $11,500.00 in section 1776 penalties, for a total amount owing of $40,315.98.

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

Pursuant to written notice, a Hearing on the Merits was held in Oakland, California on February 14, 2017, April 12, 2017, June 21, 2017, and August 16, 2017, before Hearing Officer Gayle Oshima. Galina Velikovich appeared as counsel for DLSE. Vernon Goins II, Esq. appeared as counsel for Astro.

DLSE Deputy Labor Commissioner II Ying Wu and Jesse Jimenez, Director of Field Operations for the Foundation for Fair Contracting (FFC), testified in support of the Assessment. John Riley, Astro's Project Manager, testified for Astro. The Hearing Officer requested testimony from the City of Richmond, whereupon Tawfic Halaby, Senior Civil Engineer for the City, and Gina M. Baker, Contract Compliance Officer for the City, testified on behalf of the City. After post-trial briefing, the matter was deemed submitted for decision on October 23, 2017.

The issues presented for decision are:

- Whether Astro correctly paid prevailing wages;
- Whether all of the workers employed by Astro on the Project were reported on certified payroll records (CPRs);
- Whether all workers were correctly classified on CPRs;
- Whether Astro is liable for penalties under section 1775;
- Whether penalties under section 1776 are due for failure to provide CPRs;
- Whether Astro violated apprentice requirements under section 1777.5;
- Whether penalties under section 1777.7 for apprentice violations are due; and
- Whether Astro is liable for liquidated damages under section 1742.1.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, in part, and except as specified below, and that Astro failed to carry its burden of proving the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subd. (a), (b).) Accordingly, the Director issues this Decision affirming the Assessment, except as modified in part, as specified.

FACTS

The Public Works Contract.

The City advertised the Project for bid on October 28, 2013. (DLSE Exhibit No. 6.) The City awarded the prime contract (Contract) to Malachi Paving & Grading, Inc. (Malachi) on May 1, 2014. The Contract at section 1.5(c) expressly notifies the prime contractor to comply with the Labor Code, including the payment of prevailing wages and provision of CPRs, and directs it to notify its subcontractors of the same requirements. The Contract at section 1.5(d) requires Malachi and all subcontractors to maintain accurate payroll records that show "actual per diem wages" paid to each worker and that contain declarations under penalty of perjury that the information is true and correct and that the employer has complied with section 1771 in the payment of prevailing wages. Malachi and its subcontractors are also required under section 1.5(d) to submit CPRs to the City on a weekly basis and to maintain such records in compliance with section 1776.[2]

John Riley testified on behalf of subcontractor Astro that the prime Contract amount was approximately $280,000, and that Malachi orally contracted with Astro to be one of its subcontractors on the Project. Riley further testified that Astro was originally tasked to install a culvert, install new drain pipe, bring in top and sandy soil, and install the landscape. Riley testified that the City later issued change orders that eliminated certain culvert and electrical portions of work such that Astro was not able to perform all of the bid items. Riley testified that Malachi did not enter into any written subcontract with Astro because of the change orders, but that Malachi's oral subcontract with Astro covered the landscape work. Astro proceeded to perform the landscape work, including by purchasing and installing the plants, trees, and ground cover. The subcontract amount for the landscape portion of the job was approximately $18,000. Riley also testified that after some period of time, Astro stopped doing work

[2] Section 1.1 of the Contract refers to Exhibit A, Malachi's bid proposal, which may have included the list of subcontractors Malachi proposed to the City. DLSE Exhibit Number 6, however, shows Exhibit A as a blank document.

after the City put a stop on the job for two to three weeks. After the work stoppage, the City re-started the job, and Astro came back to plant the trees.

The Complaint.

On October 16, 2014, on behalf of the FFC, Jimenez filed a complaint with DLSE alleging non-payment and/or underpayment of prevailing wages, unpaid fringe benefits, misclassification of workers, and underreporting of hours. (DLSE Exhibit No. 17.) The FFC also alleged Astro had incomplete CPRs, which Jimenez had obtained from the City through a Public Records Act request. Attached to the complaint were approximately 55 photographs Jimenez had taken at the job site. The photos depicted workers operating a backhoe and mini excavator, performing cement masonry work, and installing pipe. The photos also depicted a truck bearing the name "Astro" and another truck bearing the name "J.W. Riley & Son."

Jimenez testified that he had visited the job site several times to observe the Project. Two inspectors on the site told him that they had observed more workers on the job site than were reported in the CPRs.[3] Jimenez also testified that he had spoken with workers who told him that they were not paid the full hourly rate and they did not know if payments for fringe benefits had been made for them. Jimenez stated that he had agreed to keep their identities confidential, and because of that, he had made a Public Records Act request to the City for the CPRs. He testified that his complaint was based on discrepancies between the CPRs and the number of workers he had observed and photographed on the job site.

Work Classifications and Prevailing Wage Determinations.

DLSE based its revised Assessment on the prevailing wage rate determinations (PWDs) for the classifications of Laborer Group 3, number NC-23-102-1-2013-2A (Laborer PWD), Operating Engineer Group 3, number NC 23-63-1-2013-2 (Operating

[3] Jimenez used the term "CPRs" in his testimony, notwithstanding the fact that Astro's payroll records were not certified; nor did they contain complete information, as contemplated by section 1776, subdivision (a).

Engineer 3 PWD), and Operating Engineer Group 6, number NC 23-63-1-2013-2 (Operating Engineer 6 PWD) (DLSE Exhibit Nos. 8, 10.)

The general per diem prevailing wage rate for the Laborer PWD totals $47.86 per hour, which includes a basic hourly rate of $28.40, $6.84 for health and welfare, $10.10 for pension, $2.63 for vacation and holiday, $0.41 for training, and $0.15 for "other."

The general per diem prevailing wage rate for the Operating Engineer 3 PWD totals $65.22 per hour, which includes a basic hourly rate of $36.84, $27.71 per hour in combined fringe benefits (for health and welfare, pension, vacation and holiday, and other), and $0.67 for training.

The general per diem prevailing wage rate for the Operating Engineer 6 PWD totals $60.42 per hour, which includes a basic hourly rate of $32.04, $27.71 in combined fringe benefits (for health and welfare, pension, vacation and holiday, and other), and $0.67 for training.

The Assessment and DLSE's Evidence.

On December 31, 2014, DLSE requested CPRs from Astro with respect to the Project. Receiving no response from Astro to the first request, on October 9, 2015, DLSE submitted a second request for CPRs. The second request stated that DLSE's records showed that Astro had received the first request on January 2, 2015. DLSE received no response from Astro to the second request.

On February 17, 2016, DLSE issued an Assessment solely for section 1776 penalties (for failure to timely produce CPRs) in the amount of $11,500.00, reflecting penalties set at the rate of $100 per day for 115 days.[4] The Assessment was served on the City, Malachi, and Astro. On March 28, 2016, Astro timely filed a request for review.

Deputy Labor Commissioner II Wu testified at the Hearing that she issued the Assessment because the certified payroll records were not received in a timely manner

[4] Section 1776, subdivision (h), provides for a penalty of $100 per day per worker for a failure to comply within 10 days to a request for CPRs. DLSE did not explain its basis for calculating the 115 days. The lapse of time between ten days after Astro's receipt of DLSE's first request for CPRs to the date of the Assessment is 401 days.

following receipt of DLSE's request. She later received from the City a copy of Astro's payroll records presented on U.S. Department of Labor (federal) forms. Based on those records, Wu prepared an amended audit in order to assess unpaid wages, unpaid training fund contributions, and penalties under section 1775.

On September 30, 2016, DLSE submitted a motion to amend the Assessment upward based on Astro's payroll records. At the Hearing on February 14, 2017, the motion was granted, whereby DLSE asserted unpaid wages, penalties, and unpaid training fund contributions were due for a total of $40,315.98, as stated *ante*. Astro made no deposit of the full amount of the Assessment with the Department of Industrial Relations pursuant to section 1742.1.

As to the section 1776 penalties, Wu testified that Astro did not produce CPRs in response to DLSE's requests. On August 18, 2016, however, Wu did receive from Astro payroll records on the federal forms.[5] These payroll records, signed by Qiana Riley, did not disclose the full information required by section 1776, subdivision (a), including workers' addresses and full Social Security numbers. Astro's payroll records also did not identify any fringe benefits paid to or on behalf of the workers; nor did they contain a certification under penalty of perjury. However, in signing the federal form, Qiana Riley confirmed: "(1) That I pay or supervise the payment of the persons employed by Astro Construction on the Urban Runoff Treatment Retrofits Cutting Blvd." The federal forms also include the admonition that "[t]he willful falsification of any of the above statements may subject the Contractor or subcontractor to civil or criminal prosecution."

Wu testified that there were some differences between the Astro payroll records that she received from the City and those received from Astro. For example, in the payroll records received from Astro, there was an additional worker, Carlos Blanco, who was not recorded on Astro's payroll records submitted to the City. With the full complement of payroll records from Astro, DLSE's revised audit identified three workers

[5] Wu testified using the term "CPRs" when referring to Astro's payroll records, notwithstanding the fact that Astro never submitted actual CPRs to the City and DLSE. At the Hearing, Astro submitted as exhibits its payroll records using federal forms.

– Carlos Blanco, Ramont Johnson, and Michael Henderson – who worked for seven weeks on the Project, from the week ending August 9, 2014, through the week ending October 4, 2014. (DLSE Exhibit Nos. 15, 16.) For the week ending September 13, 2014, Astro reported to City and DLSE that it employed no persons on the Project. (DLSE Exhibit No. 15.)

Wu testified that to investigate whether Astro underpaid its workers, she utilized City inspector logs, photos submitted by FFC, and Astro's payroll records. Wu also utilized CPRs from Malachi, the prime contractor on the Project, which DLSE had obtained in connection with an investigation into whether Malachi's own workers were underpaid. Because the inspector logs showed the number of workers on the job site, Wu compared the number of workers listed on the logs with the number disclosed in Malachi's CPRs and Astro's payroll records. In the instances in which the photographs and the inspector logs indicated that there were more workers on the job site than recorded by Malachi and Astro, Wu added the workers to Astro's audit, which increased the number of workers alleged employed by Astro from three to five. Moreover, because the Malachi CPRs and Astro payroll records only classified the workers as Laborers, Wu classified any additional workers as Operating Engineers employed by Astro. She did so because the inspector logs and photographs showed that equipment used by the Operating Engineer craft (such as backhoes, bobcats, mini excavators, dump trucks, and pickup trucks), was used on the Project.

Wu also testified that during her investigation, Astro supplied DLSE with a chart of summarized fringe benefit payments made to its workers and copies of canceled checks made out to the workers and drawn on a Malachi bank account. (DLSE Exhibit No. 15.) Astro had offered Wu the chart and check copies as proof that it had overpaid the required hourly wage rate and fringe benefits due each worker.[6] Wu testified that

[6] At the Hearing, Astro submitted a second chart into evidence, Exhibit I-I, which purportedly shows a combined figure for the required fringe benefits in the amount of $19.72 for each worker-hour. Exhibit I-I also contains copies of 17 cancelled checks drawn on Malachi's account and written to the three workers, purportedly signed by each worker. The second chart and check copies show payments to the workers were made at or near the date the payments were due, in amounts in excess of the required total for the hourly wage rate and fringe benefit amounts.

while she credited Astro with the basic hourly wage amounts that were reflected in Astro's payroll records, she did not credit Astro as having paid the required fringe benefits because there was no way of knowing whether the checks covered work for only this Project or also for other work on private jobs.[7]

With respect to the required training fund contributions, Wu testified she searched the Department of Industrial Relations' Training Fund website to determine whether either Astro or Malachi paid them for Astro. The search disclosed no contributions. Also, at Wu's request, the California Apprenticeship Council sent a letter to her stating that as of February 9, 2017, neither Astro nor Malachi had made training fund contributions within the last four years.

The Hearing and Astro's Evidence.

At the Hearing, Riley initially testified that Astro workers did some of the landscape work on the Project, but he then contradicted himself and testified that Astro did not have any workers on the job, and that the workers were actually employees of Malachi, performing the work on behalf of Astro. He stated that Malachi, not Astro, paid the workers.

Astro's payroll records signed by Qiana Riley, however, list Astro as subcontractor, and as noted, also affirm Astro as the employer. When specifically asked by his own counsel as to why Astro submitted payroll records for the Project to the City, Riley testified that he instructed his daughter, Qiana Riley, to create them. As the Hearing record reflects, Riley himself at times emailed to DLSE the weekly payroll records using Astro's email account. (See, e.g., DLSE Exhibit No. 15, p. 2.) Riley further testified that Malachi was using Astro as a subcontractor because the City required that 80% to 90% of the Contract be done by local businesses and that Astro's part of the job satisfied that requirement.

[7] Riley testified that the cancelled checks drawn on Malachi's bank account were issued to workers for their labor on this Project, but included amounts for work on other jobs "someplace else."

Riley further testified that the City had withheld progress payments to Malachi, which then could not pay Astro. As a result, Astro used three Malachi workers for its part of the Project. The three workers shown in the Astro payroll records, according to Riley, were listed because the City requested "some payroll" for Astro to provide "coverage" for a "local" contractor requirement on the Project. Astro's payroll records were intended to meet that requirement. On that basis Riley instructed his daughter to "do the payroll" under "her company," Astro. Riley also claimed that the City knew that Astro did not perform work on the Project and that Malachi had paid the workers.

Riley also testified that he was present at the Project site on a daily basis, supervising the Astro workers. He observed that only shovels and rakes were used for Astro's landscape work. The work did not involve a backhoe, a power jack, a bobcat, excavator, dump truck, or any other equipment that would require the hiring of an Operating Engineer. A truck on the Project site did bear a sign with the name of Astro on the door, as depicted in photographs submitted by the FCC to DLSE. Riley explained that the sign was placed there three years earlier at the insistence of an awarding body in another project on which Astro was a contractor. Riley did not clarify why the origin of the sign meant that Astro did not have a truck on the Project site. Riley testified that the City inspector visited the Project and made reports, but the inspector never asked Riley how many Astro workers were on site. Riley also testified that there were workers on the site employed by other subcontractors, including Concrete Eight, GW Trucking and PG&E.

As to apprentice requirements, Riley testified that Astro did not have any apprentices on the Project and did not submit required contract information to the applicable apprenticeship committee for the craft of Laborer. Nor did Astro request dispatch of apprentices from that committee or maintain the required 1:5 apprentice to journeyperson ratio for the Laborer craft. Riley first testified that Astro did not have apprentices because an apprentice is not required until a contractor has four journeypersons on the job and Astro did not have that many. Riley then testified (again in contradiction to himself) that Astro did not have apprentices because it did not have

any workers on the job.

Baker, the City's Contract Compliance Officer, testified that she interacted with Riley as to both Malachi as prime contractor, and Astro, Malachi's subcontractor. Payroll records from Astro and Malachi were often late, did not match daily inspector logs, and appeared to under-report hours or misclassify workers. She testified she was never told that Astro was not performing work on the Project and she did not ask Riley or anybody to create CPRs for Astro. Baker also stated that because the Project was a federally-funded project, the City did not require that local residents be hired or local businesses be used in the Project.

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 projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

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

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

A contractor or subcontractor who pays less than the established prevailing rate may be assessed civil penalties (§§ 1741, 1775, and 1777.7), may be suspended from

bidding or working on public works projects for up to three years (§§ 1777.1 and 1777.7), and is also subject to criminal prosecution for failing to maintain payroll records demonstrating compliance. (§§ 1776 and 1777; *State Bldg. and Const. Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 296.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who received less than the prevailing wage rate, and also prescribes penalties for failing to pay the prevailing wage rate. The prevailing rate of per diem wage includes amounts for fringe benefits and training fund contributions pursuant to section 1773.1.

Additionally, employers on public works must also keep accurate payroll records, recording, among other information, 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.) The format for reporting of payroll records requested pursuant to § 1776 is to be on a form provided by DLSE or on another form that contains all of the same information. (Cal. Code Regs., tit. 8, § 16401, subd. (a).) "Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776." (*Id.*) A failure to supply certified payroll records to DLSE within ten days from receipt of a request may result in a $100.00 penalty for each calendar day, or portion thereof, for each worker, "until strict compliance is effectuated." (§ 1776, subd. (h).)

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if unpaid prevailing wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the assessment,

the contractor deposits into escrow with Department of Industrial Relations the full amount of the assessment, including the statutory penalties.

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 that 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 initial burden is met, "the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment … is incorrect." (§ 1742, subd. (b); Cal. Code Regs., tit. 8, § 17250, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

Astro Failed to Pay the Required Prevailing Wages to Three Workers.

In this case, for the reasons detailed below and based on the totality of the evidence presented at the Hearing, DLSE failed to carry its initial burden of presenting prima facie evidence as to the total of unpaid prevailing wages in the revised Assessment. And in particular, DLSE failed to carry its burden of showing that the difference between number of workers listed on the inspector's logs, and as depicted in photographs of the Project site and listed in Malachi's and Astro's payroll records, should be attributed to Astro. DLSE did not rebut Riley's testimony that Malachi as the prime contractor had workers on the site, as did other subcontractors, including GW Trucking and Concrete Eight. The photographs may well depict unidentified workers on equipment properly associated with the Operating Engineer classification, but no evidence in the record established that those workers were actually employed by Astro. For that reason, DLSE's revised audit cannot be accepted to the extent it found that

Astro employed more than the three workers listed on its (federal) payroll records, or to the extent if found underpayment of prevailing wages for workers performing Operating Engineer work.

Even though DLSE did not carry its initial burden of presenting prima facie evidence that wages were owed for additional workers classified as Operating Engineers, DLSE did carry its burden as to the unpaid prevailing wages due to the three Laborers employed by Astro – Johnson, Blanco and Henderson. Astro argues it did not perform any work on the Project. However, Riley admitted that Astro *did* work on the Project, and the payroll records that Astro submitted to the City and DLSE constitute admissions that it performed work on the Project and was subject to the prevailing wage law. Similarly, Riley's statement that Astro could no longer perform work on the Project at some point impliedly admits that Astro previously had performed work on the Project. Further, Astro's "No Work Performed Report," signed by Qiana Riley, indicated that no work was performed during the period of September 7, 2014, to September 13, 2014, which directly implies that, in fact, Astro had performed work on the other days reported on the payroll records. Qiana Riley's signature on the federal forms, which stated "(1) That I pay or supervise the payment of the persons employed by Astro Construction…[,]" likewise constitutes an admission that Astro employed the workers listed on those forms. It may be that at some point during the Project, Astro "borrowed" a crew from Malachi. That circumstance, however, does not excuse Astro from its obligation to comply with the CPWL.

Riley's explanation that he instructed Qiana Riley to create payroll records because the City imposed the requirement to use local businesses cannot be accepted. Not only does this suggests a disavowal of Astro's own (federal) payroll records signed by owner Qiana Riles, but as Baker explained, because the Project was federally-funded, the City was *prohibited* from applying City ordinances, including those requiring local residents and local businesses on the Project, such that the issue was irrelevant.[8]

[8] The CPWL applies notwithstanding the use of federal funding because the Project was controlled by City, a California awarding body. (See Cal. Code Regs., tit. 8, § 16001, subd. (b).)

As for the amount of unpaid wages identified in the Assessment, DLSE properly gave Astro credit for hourly wages paid where it ascertained that actual payments for those wages had been made. As Riley testified, however, some of the amounts shown in the cancelled checks made out to the workers were for jobs other than the Project. Astro presented DLSE with no evidence to enable it to discern what amount for fringe benefits was paid for the Project and what amount was paid for other work. Therefore, the revised Assessment is affirmed insofar as it found Astro underpaid its three workers in the amount of the required fringe benefits: $2,160.96 for Michael Henderson, $2,120.72 for Ramont Johnson, and $523.12 for Carlos Blanco, for a total of $4,804.80.

Penalties under Section 1775 Are Due.

Section 1775, subdivision (a), as it read at the time the Project was bid (October 28, 2013), states in relevant part:

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

> (ii)The penalty may not be less than eighty dollars ($80) . . . if the contractor or subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
>
> (iii) The penalty may not be less than one hundred twenty ($120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[9]

((Former) § 1775, subd. (a).)

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

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

DLSE assessed section 1775 penalties in the total amount of $9,120.00, at the rate of $120.00 per violation, based on Astro's underpaying the five workers listed in the revised audit for a total of 76 instances. Astro did not demonstrate that the Labor

[9] The reference to section 1777.1, subdivision (c) is a typographical error in the statute. In the version of former section 1777.1 as it existed on October 28, 2013, the date of the bid advertisement for the Project, the correct reference is to subdivision (d), which defined 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."

Commissioner abused her discretion in setting the penalty rate at $120.00 per violation, and accordingly, that rate is affirmed.

According to the discussion *ante,* however, DLSE's reclassification of work from Laborer to Operating Engineer, and the addition of two workers imputed to Astro's employment as reflected in the revised audit, are not supported by evidence, and accordingly, the penalties imposed under section 1775 based on those factors will be reversed. The penalties imposed for the underpayment of wages (fringe benefits) for three workers and 43 instances is affirmed. Accordingly, the Director reduces the total penalty under section 1775 from $9,120.00 to $5,160.00.

Astro Failed to Timely Produce CPRs In Response to DLSE's Request.

Section 1776, subdivision (a), sets forth the information and statements that CPRs must contain to qualify as compliant records under the CPWL, as follows:

> (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.

In this case, Astro's defense to the section 1776 penalties assessed by DLSE was that it had no workers on the Project. That argument was not supported by the evidence. As addressed above, Astro listed three workers on payroll records for the Project, and Astro's Project Manager admitted that Astro had worked on the Project. In light of this evidence, Astro's defense is rejected.

As to compliance with DLSE's requests for CPRs, Astro made no showing that the request was improper in any way or that it made any timely response. Astro eventually submitted payroll records to DLSE, but the records were inadequate because they were on federal forms that did not provide material information required by section 1776, subdivision (a). The missing information – including worker addresses, full Social Security numbers, fringe benefit payments, a written declaration under penalty of perjury, and a statement that the employer complied with the requirements of sections 1771, 1811 and 1815 – are fundamental to DLSE's ability to enforce the CPWL.

Section 1776, subdivision (h), calls for a penalty of $100.00 per calendar day per worker for failure to comply with a request for CPRs until strict compliance is effectuated. The penalty period used by DLSE commenced October 9, 2015, the date DLSE sent its second request for payrolls (DLSE Exhibit No. 19) to February 1, 2016, the date DLSE received the CPRs from the City through the FFC, a period of 115 days. DLSE apparently chose to limit the assessed penalties to $100.00 per day for one worker for 115 days, although it could have assessed much higher penalties based on the evidence ultimately produced, including that there were three workers on the Project, rather than just one, and that Astro never produced its own compliant CPRs. Given that the record plainly supports the penalties assessed, the Director affirms the amended Assessment as to the penalties under section 1776 in the amount of $11,500.00.

Astro Violated Apprentice Requirements.

In general, and unless an exemption applies, former section 1777.5 as it existed on the Project bid advertisement date, 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. (Cal. Code Regs, tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. ((Former) § 1777.5, subd. (e).) The DAS has prepared

form DAS 140 that a contractor may use to submit contract award information to an applicable apprenticeship committee. (Cal. Code Regs, tit. 8, § 230, subd. (a).)

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio, however, if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).) DAS has prepared another form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees. Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

In this case, DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment as to Astro's failure to notify applicable apprenticeship committees as required by section 1777.5, subdivision (e). (Cal. Code Regs., tit. 8, §§ 17250, subd. (a) and 232.50, subd. (a).) Astro also failed to request dispatch of apprentices in the craft of Laborer as required by California Code of Regulations, title 8, section 230.1, subdivision (a), and failed to hire any apprentices in that craft as required by section 1777.5, subdivision (g). Astro argues that no apprentices were hired because Astro did not have workers on the job. However, that argument has been rejected, *ante.* Riley admitted that Astro did some work on the Project, and that on behalf of Astro, its sole owner, Qiana Riley, submitted and signed payroll records that attested that Astro employed Laborers on the Project.

Riley also testified that an apprentice is not required until four journeypersons appear on the job and Astro did not have four such workers on the Project. Riley's view of apprentice requirements is incorrect. As former section 1777.5 and the applicable regulations plainly state, the requirement is for 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. (Cal. Code Regs, tit. 8, § 230.1, subd. (a).) As stated in former section 1777.5, subdivision (h), the 1:5 "ratio of apprentice work to journey[person] work shall

apply during any day *or portion of a day* when *any* journey[person] is employed at the jobsite and shall be computed on the basis of the hours worked during the day by journey[persons] so employed." (Emphasis added.)

According to Astro's payroll records, journeyperson Laborers performed 360 hours of work on the Project. Astro's compliance with the apprentice requirements would have provided 72 apprentice hours. Accordingly, this Decision finds that Astro failed to carry its burden to prove the Assessment is incorrect with respect to the violation of section 1777.5. (Cal. Code Regs., tit. 8, §§ 232.50, subd. (b) and 17250, subd. (b).)

Penalties Under Section 1777.7 Are Due.

Former section 1777.7, as it existed on the October 28, 2013 bid advertisement date of the Project, states in relevant part:

> (a) (1) A contractor or subcontractor that is determined by the Chief of the Division of Apprenticeship Standards 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.[10] The amount of this penalty may be reduced by the Chief 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 of Section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance. . . .

The phrase quoted above — "knowingly violated Section 1777.5" — is defined by 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

[10] Senate Bill 1038 (stats. 2012, ch. 46, § 96) changed the duty to enforce sections 1777.5 and 1777.7 from the Chief of the Division of Apprenticeship Standards (DAS) to the Labor Commissioner as of June 27, 2012. This change in enforcement by the Chief of DAS to the Labor Commissioner does not alter the analysis in this case.

> irrebuttable presumption that a contractor knew or should have known of the requirements of Section 1777.5 if the contractor had previously been found to have violated that section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects, ...[11]

Under former section 1777.7, subdivision (f), the Director decides the appropriate penalty de novo. In setting the penalty de novo, the Director is to consider all of the following circumstances:

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

((Former) § 1777.7, subd. (f).)

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 the penalty determination was incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 232.50, subd. (b).)

In this case, the evidentiary record establishes that Astro "knowingly" violated section 1777.5 under the irrebuttable presumption of section 231, subdivision (h). The evidentiary record establishes that the Contract notified Malachi of the requirement to comply with the Prevailing Wage Law and obligated Malachi to notify its subcontractors of the same requirements. Malachi chose Astro as its subcontractor on the Project. Malachi's Project Manager and Astro's Project Manager is one and the same person -

[11] Astro argues that, accounting for City change orders, its subcontract amount was under $30,000.00, and for that reason it was exempt from apprentice requirements. While former section 1777.5, subdivision (o), does contain that threshold amount, the threshold applies to the prime contract, which in was for approximately $280,000.00, far over the threshold.

John Riley, father of the sole owner of Astro, Qiana Riley. Neither Riley nor his daughter testified to being unaware of the requirement for Astro to comply with section 1777.5. Under these circumstances, a reasonable inference is that the express contractual notification to Malachi of the obligation to comply with the Prevailing Wage Law is imputed to Astro, which knew or should have known of that obligation.

Given that Astro committed a "knowing" violation not due to circumstances beyond its control, the analysis turns to the five de novo review factors "A" through "E" listed above.

Factor "A" – whether the violation was intentional – favors a high penalty. The facts stated above on Astro's violations being "knowingly" made fully support a finding that its violations were intentional. Astro failed to carry its burden of proving that its violations were not intentional.

Factor "B" – whether Astro had committed other violations of section 1777.5 – favors a low penalty**.** Nothing in the record discloses any previous violations.

Factor "C" – whether, upon notice of the violation, Astro voluntarily took steps to remedy the violation – is not applicable here. There is no evidence that DLSE communicated with Astro regarding the Project prior to Astro's completion of its work.

Factors "D" and "E" – whether, and to what extent, the violation resulted in lost training opportunities for apprentices and otherwise harmed apprentices or apprenticeship programs – favors a low penalty. The total amount of journeyperson hours on the Project was 360 hours for the craft of Laborer. Based on the 1:5 required ratio, Astro's violations deprived apprentices and apprenticeship committees of a total of 72 apprentice hours, which is approximately two weeks of on-the-job training.[12]

As to the number of penalty days, under section 230, subdivision (a), the Labor Commissioner calculated the penalty commencing on August 5, 2014, the day following the first day Astro had journeypersons working on the Project, to the accepted date of

[12] While neither party submitted the name of the applicable apprentice committee for the Laborer craft, Astro does not deny such a committee existed and admits it did not sent the required notice of public work contract award to any committee.

the City's notice of completion, October 31, 2014, for a period of 51 days. On de novo review and based on the record, this Decision adopts that period as the appropriate penalty period.

Accordingly, this Decision affirms the amended Assessment's finding that Astro is liable for the section 1777.7 statutory penalty in the sum of $2,040.00, computed at the rate of $40.00 per day for 51 days.

Astro Is Liable for Liquidated Damages.

Section 1742.1 provides for the imposition of liquidated damages on a contractor under specified circumstances. The statute provides in part:

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

The statutory scheme regarding liquidated damages that was in effect on the date of the Assessment, provided contractors three alternatives to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These required Astro to make key decisions within 60 days of service of the Assessment.

First, the above-quoted portion of section 1742.1, subdivision (a), states that the contractor shall be liable for liquidated damages equal to the portion of the wages "that still remain unpaid" 60 days following service of the CWPA. Accordingly, the contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the CWPA, and thereby avoid liability for liquidated damages on the amount of wages so paid. Alternatively, under section 1742.1, subdivision (b), a contractor could avert liability for liquidated damages if, within 60 days from issuance of the CWPA, the contractor deposited into escrow with DIR the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775. Section 1742.1, subdivision (b), stated in this regard:

> There shall be no liability for liquidated damages if the full amount of the assessment…, including penalties, has been deposited with the Department of Industrial Relations, within 60 days of the service of the assessment…, for the department to hold in escrow pending administrative and judicial review.

And thirdly, within the 60-day period, the contractor could choose not to pay any of the assessed wages to the workers, or deposit the funds with DIR, and instead rely on the Director's discretion to waive liquidated damages under the following portion of section 1742.1:

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

((Former) §1742.1, subd. (a).)[13]

In this case, Astro did not pay any back wages to the workers in response to the Assessment and did not deposit the funds with the Department. That leaves the question of whether Astro has demonstrated that it had substantial grounds for appealing the Assessment such that a discretionary waiver of liquidated damages is warranted. Astro has not done so. Its argument that it had no workers on the Project is plainly contradicted by its own payroll records and Riley's admission that Astro performed work on the Project, as well as evidence submitted by DLSE in support of the Assessment. Nor were there any other substantial grounds demonstrated for appealing

[13] On June 27, 2017, the Director's discretionary waiver power was deleted from section 1742.1 by Senate Bill 96 (stats. 2017, ch. 28, §16 (SB 96)). Legislative enactments are to be construed prospectively rather than retroactively, unless the Legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Further, "[a] statute is retroactive if it substantially changes the legal effect of past events." (*Kizer v. Hannah* (1989) 48 Cal.3d 1, 7.) Here, the law in effect at the time the Assessment was issued and at the time the Request for Review was filed allowed a waiver of liquidated damages in the Director's discretion, as specified. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what Astro elected to do in response to the Assessment). Accordingly, this Decision finds that the Director's discretion to waive liquidated damages in this case under section 1742.1, subdivision (a) is unaffected by SB 96.

the Assessment. Accordingly, the Director finds that no waiver is warranted, and that Astro is liable for $4,804.80 in liquidated damages, which is equivalent to the amount of underpaid prevailing wages.

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

FINDINGS

1. The Affected Contractor, Qiana Marshall Riley dba Astro Construction, filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
2. Affected subcontractor, Qiana Marshall Riley dba Astro Construction, underpaid prevailing wages owed to three workers on the City of Richmond's Urban Runoff Treatment Retrofits Project. Accordingly, prevailing wages in the sum of $4,804.80 are due.
3. Qiana Marshall Riley dba Astro Construction did not pay these wages or deposit the funds with DIR within 60 days after the amended Assessment issued, and had no substantial grounds to appeal the amended Assessment as to wages found due and unpaid. Accordingly, under Labor Code section 1742.1, subdivision (a), liquidated damages in the sum of $4,804.80 are due.
4. Qiana Marshall Riley dba Astro Construction failed to pay required training fund contributions for three workers in the amount of $98.40.
5. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code section 1775, subdivision (a), at the rate of $120.00 per violation; however, the penalties are modified to reflect the number violations found under this Decision, for a total sum of $5,160.00.
6. Qiana Marshall Riley dba Astro Construction employed workers on the Project such that it was required to keep accurate payroll records and to produce them on request to DLSE. On December 31, 2014, DLSE requested certified payroll records from Qiana Marshall Riley dba Astro Construction in regards to

work performed by employees of Qiana Marshall Riley dba Astro Construction on the City of Richmond's Urban Runoff Treatment Retrofits Project.

7. On October 9, 2015, DLSE submitted a second request for certified payroll records to Qiana Marshall Riley dba Astro Construction on the City of Richmond's Urban Runoff Treatment Retrofits Project.
8. Qiana Marshall Riley dba Astro Construction failed to produce the requested payroll records.
9. DLSE properly assessed penalties against Qiana Marshall Riley dba Astro Construction pursuant to Labor Code section 1776, subdivision (h), for its failure to provide the requested payroll records to DLSE.
10. In light of the findings above, Qiana Marshall Riley dba Astro Construction is liable for penalties under Labor Code section 1776, subdivision (h), in the total assessed amount of $11,500.00.
11. Qiana Marshall Riley dba Astro Construction knowingly violated Labor Code section 1777.5 and California Code of Regulations, title 8, sections 230, subdivision (a) 230.1, subdivision (a), by: (1) not providing contract award information in a DAS 140 form or its equivalent to the applicable apprentice committee(s) for the craft of Laborer in the area of the Project site; (2) not issuing a request for dispatch of apprentices in a DAS 142 form or its equivalent to the applicable apprenticeship committee for the craft of Laborer in the geographic area of the Project site; and (3) not employing on the Project apprentices in the applicable craft of Laborer in the ratio of one hour of apprentice work for every five hours of journeyman work.
12. Qiana Marshall Riley dba Astro Construction is liable for an aggregate penalty under Labor Code section 1777.7 the sum of $2,040.00 computed at $40.00 per day for 51 days.
13. The amounts found due in the Assessment, as modified and affirmed by this Decision, are as follows:

Category	Amount Due
Wages due:	$4,804.80
Penalties under section 1775, subdivision (a):	$5,160.00
Training funds contributions:	$98.40
Liquidated damages	$4,804.80
Penalties under section 1777.7:	$2,040.00
Penalties under section 1776:	$11,500.00
TOTAL:	**$28,408.00**

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

ORDER

The amended Civil Wage and Penalty Assessment, is affirmed in part and modified in part, 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: 7/9/20

/s/ Katrina S. Hagen
Katrina S. Hagen, Director
Department of Industrial Relations