

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

**Pars Industries, Inc. dba Woodcraft Company
and P.H. Hagopian Contractor, Inc.**

Case Nos.: **19-0176-PWH
19-0182-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Pars Industries, Inc. (Pars) and affected prime contractor P.H. Hagopian Contractor, Inc. (Hagopian) submitted requests for review of a Civil Wage and Penalty Assessment (CWPA or Assessment) served by the Division of Labor Standards Enforcement (DLSE) on March 22, 2019, with respect to work performed by Pars on the Moreno Valley High School (MVHS) New 2 Story Classroom Building (Project) in Riverside County. The Assessment determined that \$25,058.89 was due in unpaid prevailing wages, and \$51,300.00 was due in statutory penalties.

A Hearing on the Merits occurred in Los Angeles, California over two dates, January 14 and 15, 2020, before Hearing Officer Steven A. McGinty. Matt Blum appeared as counsel for Pars, and Sotivear Sim appeared as counsel for DLSE. There was no appearance for Hagopian. Industrial Relations Representative Michael Barraquio and Pars workers Luis Avila and Jose A. Malvaez testified in support of the Assessment. Mehdi Govari, President of Pars, testified for Pars. The matter was submitted for decision on January 15, 2020.

On the first day of hearing, the parties stipulated to the following:

- The bid date for the Project was April 4, 2016.
- DLSE's Assessment used the correct classification of Carpenter and Carpenter Apprentice based on the work performed by the workers on the Project.

- DLSE's Assessment used the correct prevailing wage determination for Carpenter and Carpenter Apprentice, SC-23-31-2-2015-1.
- The straight time total hourly rate that was due and owing to the workers on the Project was \$55.77.
- The CWPA was timely under Labor Code section 1741.¹

The issues for decision are as follows:

- Did the DLSE Assessment correctly find that Pars failed to report all hours worked on the Project by its workers.
- Did the DLSE Assessment correctly find that Pars failed to pay the required prevailing wages for all time worked on the Project by its workers.
- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1775.
- Did Pars comply with the DLSE's request for Certified Payroll Records within 10 days of receipt of written request for the Certified Payroll Records.
- Is Pars liable for penalties pursuant to section 1776, subdivision (h), in the amount of \$20,400.00.
- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1776, subdivision (h)).
- Did Pars comply with California law in an effort to meet the minimum ratio of journeyman and apprentices for the Carpenter classification on the Project.
- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1777.7.

¹ All further section references are to the California Labor Code, unless otherwise specified.

- Does Requesting Party P.H. Hagopian meet the general contractor safe harbor provisions of section 1775, subdivision (b), with respect to waiting time penalties.
- Does Requesting Party P.H. Hagopian meet the general contractor safe harbor provisions of section 1777.7, subdivision (e), with respect to apprenticeship violations.

At the beginning of the hearing, DLSE made a motion under California Code of Regulations, title 8, section 17226, subdivision (a), to amend the Assessment downward. As a result of the amendment, DLSE asserted that \$8,356.33 was due in unpaid prevailing wages, and \$38,300.00 was due in statutory penalties. Pars did not object to the motion; thus, it was granted.

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 some of the Assessment, but that Pars thereafter carried its burden of proving the basis for the Assessment was incorrect in part. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming but modifying the Assessment.

FACTS

The public entity Awarding Body advertised the Project for bid on April 4, 2016. The bid advertisement specified that the successful bidder, and all subcontractors under it, were to comply with the requirements of Labor Code provisions concerning public works, which include requiring the payment of not less than the prevailing wage to all workers they employed in the execution of the contract and the employment of apprentices. (DLSE Exhibit No. 6, p. 62.) The bid advertisement also specified that the contractor and all subcontractors were to furnish certified payroll records (CPRs) directly to the Labor Commissioner on at least a monthly basis as required by section 1776, in accordance with section 1771.4. (*Ibid.*)

Hagopian entered into a contract for the Project that included a specific provision labeled "PREVAILING WAGES" that required the payment of prevailing wages in accordance with the Labor Code. (DLSE Exhibit No. 7, Article 8, p. 66.) The contract Hagopian signed for the Project included a specific provision incorporating the entire set of prevailing wage laws found at Chapter 1 of Part 7 of Division 2 of the Labor Code (section 1720 et seq.), and the prevailing wage regulations found at subchapters 3 through 6 (section 16000 et seq.) of title 8 of the California Code of Regulations. (*Ibid.*)

Pars entered into a Subcontract Agreement with Hagopian to perform work on the Project on or about August 24, 2016. (DLSE Exhibit No. 8, pp. 69-71.) The subcontract included specific provisions requiring the payment of prevailing wages, the responsibility to comply with all apprenticeship requirements, and the preparation and submission of CPRs. (DLSE Exhibit No. 8, Attachment B, pp. 89 and Attachment D, pp. 93-100.)

Pars had workers on the Project from September 19, 2017, to December 26, 2017. (DLSE Exhibit No. 16, pp. 237-250 (CPRs).) The prevailing wage determination for the craft of Carpenter indicates that it is an apprenticeable craft. (DLSE Exhibit No. 17, p. 251.)

DLSE opened an investigation of Pars' compliance with prevailing wage laws on the Project based on two complaints received on or about June 15, 2018. (DLSE Exhibit No. 21, p. 469, No. 22, p. 476, and No. 32, p. 603.) The alleged violations were nonpayment and / or underpayment of wages, and underreporting of hours. (*Ibid.*) Barraquio conducted the investigation.

Barraquio interviewed three workers, Malvaez, Avila, and Scott Pfeifer. Malvaez and Avila filed the initial complaints. When interviewing the workers Barraquio used a Prevailing Wage Interview form asking, among other things, the Projects they worked on, the work they performed, the hours they worked, the rate of pay they received, whether timecards were used and how hours of work were tracked, how they were

paid, including whether earnings statements were issued to them, whether they had co-workers, and their co-workers' names. (DLSE Exhibit Nos. 23-25.) Another question on the form asked if they kept a calendar with their hours of work. Malvaez and Avila each provided a list of days with hours worked to Barraquio. (DLSE Exhibit No. 23, pp. 492-501 (Malvaez), and DLSE Exhibit No. 24, pp. 510-523 (Avila).)² Pfeifer did not provide a calendar or list of days and hours. All three workers indicated to Barraquio that they worked more hours than they were paid.

After completing the interviews, Barraquio performed an audit of Pars' payroll for the workers on the Projects. He testified that he relied on the information provided to him by Malvaez, Avila, and Pfeifer to determine the number of hours worked on a given day for them and for a fourth worker, Brian Meacham. Barraquio testified that Pfeifer told him that Meacham, his roommate, normally worked with him on all projects. For the remaining workers, Melinda Gonzalez and Raymond Frias, Barraquio relied on the number of hours from the CPRs (created by Pars) because he lacked other documentation. Barraquio took the number of hours and pay rates from the CPRs and verified the information by comparing the CPRs with cancelled checks provided by Pars. He gave credit to Pars for what was paid to each worker. He then added to the audit what he called the under/non-reported hours for four of the workers (Malvaez, Avila, Pfeifer, and Meacham). Before doing so, he subtracted 30 minutes for a lunch period each day from the total hours worked each day, because the workers he interviewed mentioned they took a lunch break each day. Barraquio got the non-reported hours for Malvaez and Avila from their lists of days with hours. He got the non-reported hours for Pfeifer and Meacham from Pfeifer's interview statements.

After DLSE served the Assessment, Pars provided DLSE with a copy of Hagopian's daily attendance logs (Daily Logs). (DLSE Exhibit No. 15.) The logs for the

² Avila also provided DLSE with two lists recording his work hours, one a list he claimed to have made contemporaneous with his work (DLSE Exhibit No. 24), and the other (DLSE Exhibit No. 22), a list of only the hours worked on the MVHS Project which, he testified, he transcribed verbatim from the other list.

Project have the day's date and columns for Name, Trade, Foreman, Journey[person], Apprentice, Company, Time In, and Time Out. Barraquio testified that in reviewing the Daily Logs, he determined that the logs showed that the CPRs underreported hours for Malvaez and Avila. He testified to two specific examples for Malvaez: the weeks ending October 1 and October 22, 2017. For the week ending October 1, the CPRs showed Malvaez worked four days, Monday, September 25 through Thursday, September 28, 5.5 hours each day. The Daily Logs, however, showed Malvaez started work at 6:00 a.m. each day, and ended at 2:30 p.m. on Wednesday, September 27 and Thursday, September 28, for a total of 8.5 hours each day. There was no sign-out time listed on the September 25 and 26 logs.

For the week ending October 22, the CPRs showed Malvaez worked five days, Monday through Friday, 4.5 hours each day. The Daily Logs, however, showed Malvaez started work at 6:00 a.m. each day, and ended at 2:30 p.m. on four days in that week and ended at 2:00 p.m. on one day, Tuesday, October 17. Thus, the logs listed Malvaez as working 8.5 on four days and eight hours on one day in the week ending October 22.

Barraquio testified that the majority of the Daily Log entries for the Project showed Malvaez working from 6:00 a.m. to 2:30 p.m., but according to the CPRs, Malvaez never worked a full eight-hour day. Barraquio testified the same was true for Avila. For the first couple of weeks there was no discrepancy between the CPRs and the Daily Logs for Avila. However, when the CPRs started to show Avila worked 5.5 hours a day, the Daily Logs showed more hours worked per day.

There were other anomalies that Barraquio noticed. First, the dates Malvaez claimed on his list of days with hours worked did not always match the Daily Logs. Barraquio testified to a specific example, the week ending October 8, 2017. For that week, Malvaez wrote on his list that he worked each day, Monday through Friday. However, his name did not appear on the Daily Logs Wednesday, October 4 and Friday, October 6. Second, the hours on the list of days with hours Malvaez claimed to have

worked did not always match the Daily Logs. For the week ending October 22, 2017, Malvaez's list indicated he worked 6:00 a.m. to 2:00 p.m. each day that week. But the Daily Log indicated 8.5 hours, 6:00 a.m. to 2:30 p.m. on four days that week.

Barraquio testified that he consulted the Senior Deputy regarding the anomalies. It was decided that the audit would include only the dates from Malvaez's list of days worked that matched the dates his name appeared on the Daily Logs, and that the audit would include only the hours shown on Malvaez's list of days but not the hours listed on the Daily Logs.

Barraquio prepared a revised audit removing all days from the individual audit sheet for Malvaez that did not appear on the Daily Logs. In doing so he eliminated 157 hours that were originally considered not reported. He also removed all hours alleged for Meacham because there was no evidence of underreporting of hours.

On cross-examination, Barraquio admitted that there were "inaccuracies across the board" in the worker lists of days with hours and the Daily Logs. Despite those inaccuracies, DLSE decided to use the days from the Daily Logs where the workers' names appeared and the hours the workers reported on their lists for those days, subject to a 30-minute deduction each day for lunch. According to Barraquio, DLSE decided not to use the hours written in the Daily Logs because the workers could not verify them. Barraquio testified the hours written in the Daily Logs were "irrelevant" because DLSE decided to use the hours listed by the workers.

Malvaez testified that he worked for Pars on the Project. He regularly worked eight hours a day, 40 hours a week. The work day typically began at 6:00 a.m. and ended at 2:30 p.m., with a one-hour lunch. He testified that he would regularly sign in in the morning and sign out when he left the work site. It was a requirement to do so. Malvaez was shown the Daily Logs (DLSE Exhibit No. 15), and testified that he recognized them. He was asked to look at multiple different individual pages. He testified that he recognized his name on the individual pages, and that the writing in the various columns of the log was his writing. Malvaez testified he took a one-hour

lunch period usually around 10:00 a.m. He claimed that for two days when no sign-out time was noted, Edgar Rojas, the foreman, had sent him to the Home Depot to obtain materials for the next day.

Malvaez claimed he kept track of the time that he worked on the Project. He testified that he sometimes would write down the hours regularly and other times he would forget to write them down. In those instances, he asked Avila what days they had worked together. Malvaez was shown portions of DLSE Exhibit Number 23 starting at page 492, and testified that he recognized the pages as where he wrote down his hours. He would write down the hours when he got home or would ask his wife to help him. Sometimes he wrote the hours down every day, sometimes not. Of the ten pages of entries, eight pages were in his wife's handwriting, and two – pages 500 and 501 – were in his handwriting. Malvaez testified that he had another notebook that got wet, and that he had asked his wife to transfer everything in the wet notebook onto separate paper. He had not written in the notebook daily but just what he could remember. When the notebook got wet, he had asked Avila to lend him his record of the hours that they had worked together. When Malvaez was asked on direct examination to explain why his list of days with hours (DLSE Exhibit No. 23, pp. 492-501) showed that he worked 305.5 hours on the Project whereas, according to the Daily Log, DLSE determined he worked 148.5 hours on the Project, he answered that he wrote down more or less what he remembered, that it would be impossible for him to remember everything, and that maybe he made a mistake on some of the entries.

On cross-examination, Malvaez admitted that his list of entries for the week ending September 24 (DLSE Exhibit No. 23, p. 492), indicated that he worked four days, Tuesday through Friday, from 6:00 a.m. to 2:30 p.m. on the Project, but that the Daily Logs (DLSE Exhibit No. 15, pp. 178-183), showed that he worked only on Friday, September 22, for three hours from 6:00 a.m. to 9:00 a.m.³ He did not know why

³ The CPRs indicate payment of 5.5 hours for September 22. (DLSE Exhibit No. 16, p. 236.)

there was a discrepancy or whether he was sent to another place. He also admitted that it was his word that the hours listed on the Daily Logs were correct. Malvaez was reminded that his testimony on direct examination was that he worked daily 6:00 a.m. to 2:30 p.m. When shown his list entries for three days, October 4 through October 6, where it was written down that he worked from 6:00 a.m. to 11:30 a.m.,⁴ (DLSE Exhibit No. 23, p. 492), he did not know why those entries showed fewer hours. He testified that he could have made a mistake. Malvaez also indicated that the discrepancies could be because his wife made a mistake in copying the list entries.

Malvaez was also shown Daily Sign-in and Time Sheets (Time Sheets) used by Pars and signed by workers for each day of work. (Pars Exhibit U.) He indicated that he recognized them. He testified that the Time Sheets showed less hours than he had worked, but that Edgar Rojas, the foreman, told him what hours to write down on the Time Sheets. When asked to explain why if, he worked eight hours, he wrote down less, Malvaez said that he was asked "do you want to work or not," and Rojas told him what hours to write down and that he could not be paid for more. Malvaez was also shown Time Sheets for September 22 (net total hours 5.5), September 26 (net total hours 5.5), and October 2 (net total hours 5.5). (Pars Exhibit U.) He acknowledged filling out the sheets and signing them. He reiterated that Rojas, his supervisor and the Project superintendent, told him what hours to write down. Malvaez agreed that the hours listed on the Time Sheets, which he filled out, were too low and that the hours on the list he prepared were too high.

Avila testified that he worked for Pars on the Project. He denied working on any other Project at the same time as the Moreno Valley High School Project. He regularly worked eight hours a day, five days a week, 40 hours a week. The work day typically began at 6:00 a.m. and ended at 2:30 p.m. He had 30 minutes for lunch. Avila said he

⁴ The Daily Logs for those days indicate that on October 4 Malvaez did not work, on October 5 he worked from 7:40 a.m. to 2:30 p.m., and on October 6 he did not work. (DLSE Exhibit No. 15, pp. 193-197.)

was not paid for all hours he worked on the Project. The first three weeks he was paid correctly. After that, at first he was shorted two hours per day, then later four hours.

Avila claimed he kept track of the time that he worked on the Project. He said that he kept a separate record of hours for each Project he worked on. He testified initially that DLSE Exhibit Number 22, pages 480-483, a list of days with hours, was the record that he kept of the hours that he worked on the Project. He said that he wrote down the hours that he worked daily as soon as he got home from work. Later, Avila changed his testimony and said that the list of days with hours he gave DLSE, DLSE Exhibit Number 24, pages 510-523, was the original record of his daily work hours. He testified that the list of days with hours found at DLSE Exhibit Number 22 were solely for the Project; that he had separated them out from the other projects he worked on. That separate list was attached to his complaint.

Counsel for DLSE showed Avila entries from the Daily Logs (DLSE Exhibit No. 15). Avila testified that the logs were the sign-in / sign-out sheets he remembered. The logs were kept in the general contractor's office. He was asked to look at seven different individual pages. He testified that the writing in entries on five of the seven pages was his, but not the writing in two entries.

Avila was asked to explain why his record of hours for each of the two dates, October 10 and October 17, 2017, showed more hours worked (eight) than the Daily Logs (six and five hours, respectively). He testified that on the first occasion, he had left early at the request of the supervisor, Rojas, to pick up materials to bring back to the work site the following day, and that the hours listed were not in his handwriting. On the second occasion, where the handwriting was his, it was because the supervisor Rojas asked them to write on the Daily Logs what was listed. When asked whether anyone questioned why he was signing out early, he testified that the general contractor, Paul Hagopian, and his assistant did so.

On cross-examination, Avila testified that the Daily Logs were reliable for the days he worked, but not for the hours he worked. He agreed that for every day he

worked, there should have been an entry in the logs. Avila was shown his list of days with hours for October 3 (DLSE Exhibit No. 24, p. 511), and agreed that it showed he claimed to have worked from 6:00 a.m. to 2:30 p.m., but that when he was shown the Daily Log for that day (Pars Exhibit I and DLSE Exhibit No. 15, p 192), it did not have his name. He agreed that he was not at the job site that day. When asked why he included that day in his daily list, he testified that maybe he made a mistake. Avila was shown his list for December 13 (DLSE Exhibit No. 22, p. 483 [also No. 24, p. 515]), and agreed that it showed he claimed to have worked from 6:00 a.m. to 2:30 p.m., but that when he was shown the Daily Log for that day (Pars Exhibit I and DLSE Exhibit No. 15, p. 232), he did not see his name. When asked why he claimed that Pars failed to pay him for that day, Avila testified that he might have made a mistake.

Avila agreed that the Daily Log for October 16 (DLSE Exhibit No. 15, p. 205) contained his handwriting, and that he had written down that he worked from 6:00 a.m. to 11:00 a.m. When challenged that he did not work every day from 6:00 a.m. to 2:30 p.m., Avila asserted that all of the time he worked 6:00 a.m. to 2:30 p.m. When asked why he wrote in his own handwriting that he worked 6:00 a.m. to 11:00 a.m., Avila testified he did so because they were told to do it. When Avila was shown his list of days with hours for the period November 6 through November 24 (DLSE Exhibit No. 24, p. 514) he agreed that the list showed that he did not work every day from 6:00 a.m. to 2:30 p.m. and that there were days that he worked only from 6:00 a.m. to 1:00 p.m. on the Project. Avila agreed that on November 7, his list showed that he worked from 6:00 a.m. to 1:00 p.m. He was then shown the Daily Log for November 7 (DLSE Exhibit No. 15, p. 219), and he agreed that he had written down that he worked from 6:00 a.m. to 2:30 p.m. He then agreed that he was overpaid for that day. Avila was also shown his list for October 4, 5, and 6 (DLSE Exhibit 24, p. 511), and agreed that he had written down that he worked only 6:00 a.m. to 11:30 a.m. When challenged again to verify that he did not work every day from 6:00 a.m. to 2:30 p.m., Avila testified that he could not remember.

Avila was asked, and confirmed, that he had testified that DLSE Exhibit Number 22 was a verbatim transcription of his contemporaneous list of days with hours (DLSE Exhibit No. 24) and that he had prepared Exhibit 22 to simplify his complaint to file with DLSE. However, every entry in Exhibit 22 listed his work hours as 6:00 a.m. to 2:30 p.m., even on days when his contemporaneous list (DLSE Exhibit No. 24, pp. 511 and 514) showed less hours worked. Avila acknowledged there were discrepancies in the list that he prepared for DLSE. When asked by counsel for Pars whether he believed that he had been truthful in his testimony, Avila replied, "What do you mean by truthful?"

Avila was also shown Time Sheets used by Pars. (Pars Exhibit U.) He indicated that he was familiar with the forms used, that he completed a form every day after work, signed it, and understood that Pars was relying on them to determine what to pay him. Avila testified that it did not accurately reflect the hours that he had worked. He never went to anyone at Pars to complain that his pay was short. He did not have any contemporaneous evidence that he told anyone else that his hours were short.

Mehdi Govari, the Chief Executive Officer and owner of Pars, testified that for the last 20-25 years the company performed public works contracts. He estimated that Pars did ten to 20 public works projects per year. Pars had no other Assessments issued against it by DLSE, and he never was found liable for non-payment of wages or paid a settlement of unpaid wages in any forum.

Pars had closed its physical location in San Diego by the time the work on the Project began, but it was under contract with Hagopian. Govari's brother, who was the principal of another business, Architectural Casework, Inc. (ACI), managed the work on the Project. Pars had been in the business of cabinetry and millwork. The product was created in its shop, and Pars hired carpenters to do the installation at the site of the public works.

Govari testified that they reached out to a union local to find carpenters for a project, at the suggestion of one of the general contractors they were working with. A

union official, who was the brother of Edgar Rojas, said that he could introduce them to a group of workers, and introduced them to Rojas and his team. Govari met Rojas once in his brother's ACI offices in San Diego. Rojas was the lead installer.

Pars used time sheets created by Govari to generate payroll and create CPRs. Govari denied telling Rojas to misrepresent statements on the Daily Logs, and denied telling Rojas to manipulate hours of workers in any way. Govari never went to the Project site. He testified that he did not believe the workers who said they left the job site to go to Home Depot because everything that was needed for installation was provided by Pars; there was no need to go to Home Depot for materials.

Govari testified that Pars paid the workers for all hours submitted. He never heard from any employees that there were problems. It was Hagopian that called him and indicated there were alleged discrepancies.

Govari did not believe that there was any "hour-shaving" on the Project because the estimated hours of work to complete the installation was 300.5 hours, amounting to \$16,759.00 in labor costs, but the actual number of hours worked was 830.9 hours resulting in \$46,339.00 in labor costs. (Pars Exhibit R.)

Govari testified that he signed a subcontract agreement with Hagopian. He also testified that he signed an Affidavit of Compliance with California Prevailing Wage Law, and Verification of Apprentice and Journey[person] Hours (Pars Exhibit O) provided to him by Hagopian. According to Govari, Hagopian retained over \$100,000.00 owed to Pars. Hagopian wanted him to amend the CPRs to match Hagopian's Daily Logs, which he refused to do.

According to Govari, Hagopian did not ask for CPRs until almost the entire Project was done. Govari assumed the CPRs were not being created on a weekly basis because he believed there was no requirement to do so. When DLSE requested a copy of the CPRs in October 2018, Pars did not have an office. He had to dig up the records, borrow an office from ACI, and hire two staff to prepare an Excel sheet to see if Pars had failed anywhere. Govari said that he had a telephone conversation with Barraquio

in October 2018, when they also had an email exchange. During the telephone conversation Barraquio told Govari penalties for non-production of CPRs would apply after ten days. Govari responded that there was no way he could get the records together in that time, and Barraquio said that he sympathized but could not extend the time and to do his best. Govari testified that he had to check to see what was created, whether it was accurate, and whether the workers had been paid accurately or not; he could not take the chance to send something to DLSE that was not complete.

With respect to the employment of apprentices, Govari acknowledged that there was a typo on the DAS 142 form sent out to apprentice committees, wherein the date for reporting should have been inserted. He testified that no committee inquired about sending apprentices to work on the Project. He also testified that it was Pars' practice to send the DAS 142 request for dispatch 72 hours ahead of the need for an apprentice, and that Pars had never been assessed for apprentice violations.

Assessment of Statutory Penalties.

Barraquio testified that the penalties were assessed by the Senior Deputy Labor Commissioner, Tony Eguavoen. For each type of violation, Barraquio simply set forth the standard penalty rate found in the Labor Code. He did not recommend a penalty rate. He provided the evidence and the Senior Deputy determined the penalty rate based on his audit, the type of violations, and the history. Barraquio acknowledged that Pars had no history of wage or apprentice violations.

With respect to penalties for apprentice violations, Barraquio testified that there were two applicable apprentice committees, Pars submitted contract award information properly, Pars employed apprentices though not in the correct apprentice-to-journeyperson ratio, and the request for dispatch of apprentices, while submitted properly to the two applicable apprentice committees, was invalid because it had no reporting date. (DLSE Exhibit No. 9 at pp. 124 and 127.) The requests were sent on May 16, 2017, before the Project began. Barraquio testified he recommended against

mitigation of the apprentice penalty because of the entire picture developed by his investigation of the Project.

Barraquio also assessed penalties for Pars' failure to submit CPRs timely. After several attempts, Barraquio was able to serve Pars with a form request for CPRs by email on October 12, 2018. He finally received the CPRs by email on January 9, 2019. Barraquio testified the CPRs are vital to an investigation. He could not move forward with his investigation without them. The CPRs were late by 75 days, but the Senior Deputy mitigated the penalty down to 34 days at \$100.00 a day per worker, there being six workers on the Project, for a total penalty under section 1776 of \$20,400.00.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works construction projects. The purpose of the CPWL was summarized by the California Supreme Court 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, supra*, at p. 985.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1813 provides additional penalties for failure to pay the correct overtime rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if the unpaid wages are not paid within 60 days following service of a civil wage and penalty assessment under section 1741.

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

DLSE’s Reliance on the Information from the Workers for Its Audit that Resulted in the Assessment Was Misplaced.

The resolution of the wage portion of this case is tied directly to the question of the accuracy and reliability of the documentary and testimonial evidence. DLSE primarily based its amended Assessment that Pars owed wages on the reporting and information from three workers, Malvaez, Avila, and Pfeifer, about the days and number of hours worked. At the Hearing, Pars attempted to discredit that evidence and to

negate the reasonableness of the inferences drawn from the employees' and DLSE's evidence. Pars succeeded.

In this case, for the following reasons, DLSE presented prima facie support for the Assessment but Pars carried its burden of proof to show the Assessment was incorrect. DLSE relied on the testimony of two workers, Malvaez and Avila, as to the time they worked on the Project.⁵ However, the two did not testify credibly at the Hearing on the Merits.

Malvaez originally claimed to DLSE that he worked 305.5 hours on the Project. DLSE later eliminated 157 hours (51%) from that claim because Malvaez's name was absent from the Daily Logs on many days he claimed to have worked. When asked to explain the discrepancy, Malvaez testified that he wrote down more or less what he remembered, that it would be impossible for him to remember everything, and that maybe he made a mistake on some of the entries. Given that 157 hours is approximately 21 work days (at 7.5 hours a day, if the employee is to be believed that he worked a full day each day he worked), that difference is not a small mistake on some entries. He also testified that he had another notebook that got wet, and that he asked his wife to transfer everything in the wet notebook onto paper. He had not written in the notebook on a daily basis, but just what he could remember. When the notebook got wet, he asked Avila to lend him his record of the hours that they had worked together. Thus, the record Malvaez gave to DLSE was not the original, and it incorporated information from Avila. It was not contemporaneous with the work dates.

On cross-examination, Malvaez admitted that while he testified that he worked every day from 6:00 a.m. to 2:30 p.m., several of his own entries in the calendar he submitted to DLSE were for only 5.5 hours and several different Daily Logs showed he only worked three hours. He did not know why those entries showed fewer hours. He testified that he could have made a mistake on his calendar, and also indicated that the

⁵ Pfeifer neither signed a declaration nor testified at the hearing.

discrepancies could be because his wife made a mistake in copying the entries. Whatever the cause of the discrepancies, these circumstances combine to render evidence presented by DLSE as to underpayment to Malvaez not creditable.

Avila likewise admitted on cross-examination that he made mistakes in his record-keeping. There were several days where he claimed to have worked from 6:00 a.m. to 2:30 p.m. but was not present on the job site on those days, according to the Daily Logs and CPRs. Other days when he claimed to work from 6:00 a.m. to 2:30 p.m., he worked fewer hours. He admitted that on another day that he was overpaid. He attributed these discrepancies to mistakes and failure of memory. He also admitted that he overstated the hours he worked in his original claim to DLSE. The list of days with hours that Avila provided to Barraquio for his interview differed from the list of days with hours that he had submitted with his initial complaint. The list provided with the initial complaint showed more hours worked than on the second list provided later to Barraquio. In explanation, Avila claimed he made mistakes in transcribing the hours he worked on the Project. But his testimony about the preparation of these lists was inconsistent as well. First, he testified that he worked solely at the Project during the time in question. Second, he testified that in keeping track of his time, he separated out projects that he worked on. The second list of days and hours provided to Barraquio included more than one project (the MVHS Project and projects in Riverside and Long Beach), contradicting both statements that he only worked at Moreno Valley High School and that he always kept separate records of days and hours worked for projects. Finally, while Avila testified to having provided DLSE with contemporaneous records, the records did not match the Daily Logs. For that reason, their value as evidence is questionable. This conclusion is buttressed by Avila's admission of numerous mistakes and his contradictory testimony about his manner and method of record-keeping.

Finally, the workers' signed Pars Time Sheets must be considered prior statements that are inconsistent with their testimony at trial. While the workers

testified Rojas told them what to write in the Time Sheets, they have no other contemporaneous evidence to establish the veracity of those statements - no other complaints to co-workers, spouses, union officials, or to Pars.

Given the unreliable record-keeping of the workers, lack of contemporaneous records for Malvaez and Pfeifer, previous inconsistent statements by Malvaez and Avila, and - at least in the case of Avila - his lack of credibility, it was incumbent upon DLSE to provide independent evidence corroborating the allegations. DLSE failed to list or produce any non-party witnesses, and it did not rely on independent evidence. One source for that type of evidence could have been the general contractor, Hagopian. But Barraquio testified that he did not review or rely on information provided to him by Hagopian.⁶

Both sides used Hagopian's Daily Logs to argue for the presence (in DLSE's case) or absence (in Pars' case) of workers on the site of the Project on particular dates. Barraquio testified there were inaccuracies across the board with respect to the Daily Logs and the workers' lists of days with hours. Without explaining a reasoned basis, DLSE appears to have assumed the Daily Logs were the only reliable source for the limited purpose of establishing the days on which the workers were on the site of the Project. Yet, that assumption of reliability is called into question where DLSE rejected the hours listed in the Daily Logs, which DLSE deemed "irrelevant," and instead assumed the number of hours listed by the workers were correct, albeit after subtracting 30 minutes for lunch. With little explanation, DLSE used the hours listed by the workers, despite the fact that there were inaccuracies in the workers' records, the records were not all contemporaneous with the work, and the workers' lists of hours at times contradicted the representation of hours of work made in the workers' statements. For example, Malvaez testified to an hour lunch period. But, in his audit Barraquio used 30 minutes for lunch across the board. DLSE's selective use of

⁶ See DLSE Exhibit Numbers 10, 11, 12, and 13, which include spreadsheets, emails, and affidavits.

evidence, and its reasoning – or lack thereof – for doing so, also undermined the case for failure to pay for all hours of work.

Neither side urged reliance on the work hours written on the Daily Logs, nor did either side establish the foundation for admission of the logs into evidence as business records. While Pars stipulated to the admission of the Daily Logs into evidence, it challenged their accuracy for determining payment of wages. In essence, Pars argued that the information contained in the logs, alone, was insufficient to support a finding on wage payments, and no other evidence adequately corroborates the logs.

The Daily Logs are hearsay that cannot, standing alone, support a finding about the number of hours worked and consequent amount of wages owed. (Cal. Code Regs., tit. 8, § 17244, subd. (d).) Neither party established the foundation for admission of the logs as business records. Evidence Code section 1271 creates the business records exemption to the hearsay rule. But to qualify for the exemption, the writing at issue must meet certain specified conditions, including that the custodian or other qualified witness testifies to its identity and mode of its preparation, the sources of information and the time of preparation such as to indicate its trustworthiness. The logs were allegedly prepared and maintained by Hagopian for workers to sign. But no one from Hagopian testified, and the workers who testified said the hours listed were unreliable because they were told what to write or someone else, Edgar Rojas, signed the logs. While the logs can be considered despite their hearsay nature, they cannot be used to support a finding regarding alleged wages owed.⁷

Pars specifically denied the allegation of hour-shaving. Govari denied telling Rojas to misrepresent statements on the Daily Logs, and denied telling Rojas to

⁷ California Code of Regulations, title 8, section 17244, allows the introduction of hearsay evidence. However, under subdivision (d) of that regulation, hearsay evidence is insufficient in itself to support a finding unless it would be admissible over objection in a civil action or no party raises an objection to such use. Pars objected to use of the reports to determine the amount of wages owed to employees. Without evidence to establish the business records exception to the hearsay rule, and in light of the fact that no party was willing to rely on the contents of the logs, the logs are deemed insufficient, standing alone, to support a finding about the amount of wages owed.

manipulate hours of workers in any way. Moreover, Govari did not believe that there was hour-shaving on the Project because the actual number of hours worked was almost three times as many than had been estimated necessary to complete the Project, and the labor cost was almost \$30,000.00 over the budget. (Pars Exhibit R.)

Govari testified that Pars paid the workers for all hours submitted. He never heard from any employees that there were problems.⁸ He denied that there ever would have been reason to leave the job site to go to Home Depot to pick up materials as all materials were manufactured offsite in a factory and delivered to the Project site. Given the factual contradictions that appear in the testimony from the two workers (*ante*, pp. 17-19), Govari's denials must be credited. Accordingly, this Decision finds no unpaid wages are due Malvaez and Avila, or Pfeifer, as found in the Assessment, as amended.

Pars Failed to Pay the Apprentices the Correct Rate of Pay.

Of the six workers listed on the CPRs, two were apprentices: Raymond Frias and Melinda Gonzalez. (DLSE Exhibit No. 19, pp. 255-256.) Despite having evidence that Gonzalez was an apprentice, Barraquio assumed she was a journey person because Pars listed her as a carpenter on the CPRs. Barraquio, using the CPRs, determined that Frias was underpaid by \$4.28 an hour for eight hours and is owed \$34.24. (DLSE Exhibit No. 16, p. 248, No.4, p. 48 and No. 5, p. 59.) This Decision accepts that determination. Gonzalez was underpaid as well, but not as much as Barraquio determined because in

⁸ Malvaez and Avila apparently told Hagopian that there were problems. Each signed a form affidavit on May 10, 2018 (DLSE Exhibit Nos. 12 and 13, pages 173-176), apparently prepared by Hagopian, that included allegations that they were not paid prevailing wages and that they were told to put only a specific amount of hours on their timesheet and not to put their actual time worked. DLSE did not rely upon the affidavits in preparing the Assessment. The affidavits' value as previous consistent statements is undercut by their form nature and the inclusion of the allegation that the workers were not paid prevailing wages, which is ambiguous given that DLSE concedes they were paid the correct hourly prevailing wage rate but the apparent issue was payment for all hours worked. In addition, no one from Hagopian was called to testify at the Hearing to explain the circumstances under which the affidavits were prepared (they were signed more than four months after the workers stopped working on the Project, and after they had been informed they would not be employed further), and to offer any independent corroboration for the allegations.

his audit he used the journeyman rate. Using the appropriate rate for Apprentice Level 3, as was used for Frias,⁹ Gonzalez should have been paid \$34.63 an hour. (*Ibid.*) Instead she was paid \$25.23. (DLSE Exhibit No. 16, p. 247.) Thus, she is owed the difference \$9.40 for the 16 hours she worked, or \$150.40.¹⁰ Taken together, the unpaid wages to the two apprentices as found in this Decision total \$184.64.

DLSE's Penalty Assessment Under Section 1775.

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

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

- (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
 - (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
- (B)(i) The penalty may not be less than forty dollars (\$40) . . . unless the failure of the contractor . . . to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to

⁹ Gonzalez started her apprenticeship nine months before Frias. (DLSE Exhibit No. 19 at pp. 255-256.)

¹⁰ According to Barraquio, the amount of wages owed would include fringe benefits. (DLSE Exhibit 5 at p. 54.)

the attention of the contractor...

- (ii) The penalty may not be less than eighty dollars (\$80) . . . if the contractor...has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
- (iii) The penalty may not be less than one hundred twenty dollars (\$120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^[11]

....

- (D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

Section 1775, subdivision (b), provides that:

If a worker employed by a subcontractor on a public works project is not paid the general prevailing rate of per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

- (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of this section and Sections 1771, 1776, 1777.5, 1813, and 1815.
- (2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.
- (3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on

¹¹ The statutory reference to section 1777.1, subdivision (c), is incorrect. 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 refuses to comply with its provisions."

- the public works project.
- (4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

Abuse of discretion by DLSE 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 at the rate of \$200.00 because Pars allegedly underreported hours and underpaid workers. However, DLSE failed to establish the vast majority of those violations. Further, Pars had no history of previous violations and had been performing public works for many years. Accordingly, this Decision finds that DLSE abused its discretion in determining penalties were due and setting the penalty amount under section 1775 at the rate of \$200.00 per violation. However, DLSE established that two apprentices were underpaid by \$34.24 and \$150.40 respectively over 3 days, for which section 1775 penalties are due. Because DLSE's main allegation of underreported hours and underpaid wages in the Assessment is not accepted by this Decision and because the discretion to set penalties under section 1775 is committed to the Labor Commissioner, the section 1775 part of the

Assessment must be vacated and remanded for a redetermination of the section 1775 penalties on account of the underpayment to the two apprentices, in light of the other findings in this Decision.

While Pars' liability for section 1775 is being remanded, the issue of Hagopian's eligibility for the prime contractor's safe harbor from liability for those penalties need not be remanded. Based on the record of the Hearing, Pars did not produce CPRs pursuant to DLSE's request until Pars found the payroll documents, re-created CPRs, and sent them to DLSE after Pars' work on the Project was concluded. Govari testified that Hagopian did not ask for CPRs until almost the entire Project was done, and that he assumed CPRs were not being created on a weekly basis because he believed there was no requirement to do so. The inference to be drawn from those facts is that Hagopian did not monitor Pars' payment of prevailing wages by periodic review of the CPRs, within the meaning of section 1775, subdivision (b)(2). Hagopian did not appear at the Hearing and, therefore, failed to present evidence to avail itself of the safe harbor protection for prime contractor under section 1775, subdivision (b). Nor did evidence from Pars prove Hagopian's eligibility for the safe harbor. Accordingly, as prime contractor, Hagopian is liable for the penalties under section 1775, subdivision (a). If and to the extent that, after remand, Pars is found liable for section 1775 penalties, Hagopian likewise will be liable for those penalties.

Apprenticeship Violations.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. California Code of Regulations, title 8, sections 227 to 232.70.¹²

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 journey level

¹² All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

workers 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 journey[persons] 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 journey[person] work.

The governing regulation as to this 1:5 ratio of apprentice hours to journey level worker hours is section 230.1, subdivision (a), which 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 apprentice for every five hours of labor performed by a journey[person], unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter.

However, a contractor shall not be considered in violation of the regulation 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).)

According to that 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 dispatch(es) from each such committee in the geographic area. ...

. . . [I]f in response to a written request no apprenticeship committee dispatches or agrees to dispatch during the period of the public works project any apprentice to a contractor who has agreed to employ and train apprentices in accordance with either the apprenticeship committee's standards or these regulations within 72 hours of such request (excluding Saturdays, Sundays and holidays) the contractor shall not be considered in violation of this section as a result of failure to employ apprentices for the remainder of the project, provided that the contractor made the request in enough time to meet the above-stated ratio. If an apprenticeship committee dispatches fewer apprentices than the contractor requested, the contractor shall be considered in compliance if the contractor employs those apprentices who are dispatched, provided that, where there is more than one apprenticeship committee able and willing to unconditionally dispatch apprentices, the contractor has requested dispatch from all committees providing training in the applicable craft or trade whose geographic area of operation includes the site of the public work.

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

Prior to requesting the dispatch of apprentices, the regulation, section 230, subdivision (a), provides that contractors should alert apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed. It provides its relevant part as follows

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. The 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 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. Failure to provide contract award information, which is known by the awarded contractor, shall be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed by the awarding body, for the purpose of determining the accrual of penalties under Labor Code section 1777.7....

Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

Pars Employed Carpenter Apprentices But Not in the Correct Ratio.

Carpenter was the apprenticeable craft at issue in this matter. Pars employed two apprentices for 24 total hours over three days but that was far below the ratio required under the law for the Project. Journeypersons were on the Project for 661 hours over 53 days. (DLSE Exhibit No. 16 and No. 5 at p. 60.) At the 1:5 ratio, Pars was required to employ apprentices for 132 hours under section 230.1, subdivision (a), and would be found in violation unless its compliance was excused under the terms of the regulation.

There Were Two Applicable Committees in the Geographic Area, and Pars Properly Notified Them of the Contract Information and Properly Requested Dispatch of Apprentices.

DLSE established that there were two applicable apprenticeship committee for Carpenter in the geographic area of the Projects: San Diego Associated General Contractors J.A.C. and Southern California Carpenters J.A.T.C. (DLSE Exhibit No. 5 at p. 60.) Pars did not dispute that the committees listed were the applicable committees for the Carpenter craft.

Pars established that it properly sent out contract award information (the DAS 140 or equivalent) and requests for dispatch of apprentices (the DAS 142 or equivalent) to the two applicable committees. DLSE concedes that the DAS 140 was submitted to

the applicable committees on May 16, 2017, which was timely. (DLSE Exhibit No. 5 at p 60.)

DLSE acknowledges that Pars submitted the requests for dispatch of apprentices to the applicable committees on May 16, 2017, which was more than the required 72 hours before the date on which the apprentices were required. DLSE maintains, however, that the dispatch requests were invalid because the exact the date to report was not included on the forms. Pars conceded that there was a typographical error on the date-to-report line of the forms, wherein Pars listed "42863," instead of an actual report date. Govari testified, however, that no committee inquired about sending apprentices to work on the Project.

While there was a typographical mistake on the "Date Apprentice(s) to Report" line on the dispatch request forms, no evidence shows that information was deliberately omitted. Further, neither the statute nor the regulation contain a requirement that an exact date to report be included in the request. Section 230.1, subdivision (a), states that to comply with the 1:5 apprentice to journeyman ratio, (1) the contractor must request the required apprentices from the applicable apprenticeship committee for the applicable craft or trade in the geographic area of operation that includes the public work site; (2) the request must be in writing; and (3) the request must be sent to the committee at least 72 hours before the date on which the apprentice is needed. Pars complied with these requirements. It sent the requests for dispatch on May 16, 2017, three months before the date an apprentice would be needed, which in this case was September 19, 2017, the date Pars first had journeymen on the Project. As a consequence, the requests for dispatch were timely and, in relevant respects, valid under the regulation. (§ 230.1, subd. (a).)

As stated, *ante*, Pars did not employ apprentices on the Project in sufficient hours to meet the 1:5 apprentice to journeyman ratio. However, after Pars sent the required dispatch requests, neither of the two applicable apprentice committees dispatched apprentices in response. Consequently, under the terms of section 230.1,

subdivision (a), Pars cannot be considered in violation as a result of failure to employ apprentices in the proper ratio because Pars made the request in enough time to meet the ratio. Therefore, Pars was not in violation of section 1777.5, and, for that reason, it has shown an abuse of discretion in the imposition of the section 1777.7 penalty. Because Pars is not shown to be in violation of section 1777.5, the prime contractor, Hagopian, is likewise not liable for penalties under the terms of section 1777.7, subdivision (c) (“*If a subcontractor is found to have violated Section 1777.5, the prime contractor ... is not liable for any penalties ... unless the prime contractor had knowledge of the subcontractor’s failure...*” or failed to comply with specific requirements) (emphasis added).

DLSE’s Penalty Assessment Under Section 1776 Was Appropriate.

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.) The payroll records must be certified and available for inspection or furnished upon request to a representative of DLSE. (§ 1776, subd. (b)(2).) The contractor must file a certified copy of the payroll records within ten days after receipt of a written request. (§ 1776, subd. (d).) “In the event the that the contractor...fails to comply within the 10-day period, he...shall, as a penalty to the state..., forfeit one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated.” (§ 1776, subd. (h).)

DLSE established that it served the request for payroll records (form PW 9) by email from Barraquio to Govari on October 12, 2018. (DLSE Exhibit No. 27 at p. 552; Exhibit No. 32 at p. 603; Exhibit No. 5 at pp. 54 and 56.) Govari testified to the email exchange with Barraquio, as well as a telephone

conversation with Barraquio around October 12 during which Barraquio told Govari that penalties would apply after ten days. The request for payroll records includes a written warning as follows:

Failure to provide the certified payroll information to the Division within 10 working days from the date of receipt of this request will subject the contractor... to a forfeiture of a penalty of \$100.00 for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated, in accordance with Labor Code section 1776(h).

(DLSE Exhibit No. 27 at p. 552.)

Barraquio testified that at the beginning of December 2018, when he had not received the CPRs, he wrote another email to Govari on December 4, 2018, letting Govari know that he still had not received the CPRs. (See DLSE Exhibit No. 32 at p. 604 and Exhibit No. 5 at p. 56.) Govari testified that to comply with DLSE's request, he had to dig up the records, borrow an office and hire two staff to prepare an Excel sheet to see if Pars had failed anywhere. He had to check to see what was created, whether it was accurate, and whether the workers had been paid accurately or not; he could not take the chance to send something that was not complete.

DLSE received the records that it had requested on January 9, 2019. This was 75 days after the ten-day period had expired. Barraquio proposed a penalty consistent with the statute, \$100.00 a day for each of the six workers on the Project for 75 days, for a total of \$45,000.00. He testified that the Senior Deputy mitigated the penalty to 34 days for a total of \$20,400.00.

None of the reasons advanced by Pars for failing to comply with the request – having to dig up the records, see what was created, hire administrative staff to review the records, and not wanting to provide incomplete records - justify the failure to respond for 75 days past the deadline. Nor is there any authority holding that good faith efforts to comply with the prevailing wage law or lack of willfulness in violating its statutory obligations are relevant to DLSE's assessment of penalties for failure to produce payroll records.

As for the amount of the penalty, DLSE lacks discretion in setting penalties under section 1776. In fact, section 1776 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. Instead, the Legislature has clearly provided that if a contractor fails to provide CPRs when requested, a penalty is mandatory until the payroll records are forthcoming, i.e., until there is "strict compliance" with DLSE's request that the records be furnished to it. (§ 1776, subd. (h).) For these reasons, the Assessment finding of \$20,400.00 in penalties under section 1776 must be confirmed.

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

FINDINGS AND ORDER

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. The Civil Wage and Penalty Assessment was timely served by DLSE in accordance with section 1741.
3. Affected contractor Pars Industries Inc., d/b/a Woodcraft Company filed a timely Request for Review of each of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. DLSE timely made available its enforcement files.
5. The Assessment used the correct classification of Carpenter based on the work performed by the workers on the Projects.
6. The Assessment used the correct prevailing wage rate for Carpenter and Carpenter Apprentice
7. Melinda Gonzales and Raymond Frias performed work in Riverside County during the pendency of the Project, and were entitled to be paid the rate for Carpenter Apprentice Level 3 for that work.

8. In light of findings 5 through 7 above, Pars Industries Inc., d/b/a Woodcraft Company underpaid its employees on the Projects in the aggregate amount of \$184.64.
9. DLSE abused its discretion in setting section 1775 penalties at the rate of \$200.00 per violation. However, in light of finding 8, above, this matter must be remanded to DLSE to re-determine the section 1775 penalties, in light of the other findings in this Decision and pursuant to the Order, *post*.
10. P.H. Hagopian Contractor, Inc. is liable under section 1775, subdivision (b), for the section 1775 penalties determined after remand.
11. Pars Industries Inc., d/b/a Woodcraft Company properly requested dispatch of Carpenter apprentices from the apprenticeship committees in the geographic area of the Projects, and was thereby excused from the requirement to employ apprentices under Labor Code section 1777.7.
12. DLSE abused its discretion in setting section 1777.7 penalties at the rate of \$100.00 per violation, and no penalties are due.
13. On October 12, 2018, DLSE served Pars Industries Inc., d/b/a Woodcraft Company with a request for certified payroll records to be produced within 10 days or be subject to penalties under section 1776, subdivision (h), of \$100.00 a day per worker on the Project until the records were received. Pars Industries Inc., d/b/a Woodcraft Company received the request on October 12, 2018.
14. Pars Industries Inc., d/b/a Woodcraft Company failed to timely submit certified payroll records to DLSE as required by section 1776. The records were not received by DLSE until January 9, 2019.
15. DLSE properly assessed penalties against Pars Industries Inc., d/b/a Woodcraft Company under section 1776, subdivision (h), of \$100.00 a day

for each of six workers for 34 calendar days for the failure to provide certified payroll records within ten days of October 12, 2018.

16. In light of findings 13-15 above, Pars Industries Inc., d/b/a Woodcraft Company is liable for penalties under section 1776, subdivision (h), in the total amount of \$20,400.00.
17. The amounts found remaining due in the Assessment is modified and affirmed by this Decision are as follows:

Basis of the Assessment	Amount
Wages Due:	\$184.64
Penalties under section 1776:	\$20,400.00
TOTAL:	\$20,584.64

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

As to all issues decided here, the Decision is final. With respect to the remanded portion of this Decision only, DLSE shall have 60 days from the date of service of this Decision within which to issue a new penalty assessment under section 1775, subdivision (a), in light of the other findings in this Decision. Should DLSE issue a new penalty assessment, Pars Industries Inc., d/b/a Woodcraft Company shall have the right to request review in accordance with section 1742, subdivision (a), within 60 days of the new assessment, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for that purpose.

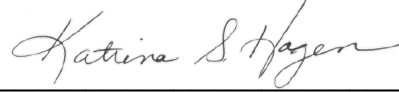
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The Civil Wage and Penalty Assessment, as amended, is affirmed in part and modified in part as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 11/18/2020



Katrina S. Hagen
Katrina S. Hagen
Director of Industrial Relations