

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Shahram Elihu, an individual doing
business as Blue Pacific Engineering &
Construction**

Case No. 19-0193-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Shahram Elihu, an individual doing business as Blue Pacific Engineering & Construction (Blue Pacific) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on April 15, 2019, with respect to work performed on Bid No. K-16-1363-DBB-3, Tecolote Canyon 8-inch Sewer Main Replacement (Project) for the City of San Diego (Awarding Body or City) in San Diego County. The Assessment determined that \$25,917.44 was due in unpaid prevailing wages, training fund contributions, and statutory penalties. These included penalties against Blue Pacific under Labor Code sections 1775 and 1813,¹ as well as penalties assessed under section 1777.7 for apprenticeship violations.

A Hearing on the Merits occurred in San Diego, California, on March 11, 2020, before Hearing Officer Ann Wu. Attorney James C. Danaher appeared as counsel for Blue Pacific, and Luong Chau appeared as counsel for DLSE. Deputy Labor Commissioner Norbert Flores and Arkadis North America Senior Construction Manager Allen Day testified in support of the Assessment. Shahram Elihu testified for Blue Pacific. The parties filed simultaneous closing briefs on April 10, 2020. The matter was submitted for decision on April 10, 2020.

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

Prior to the Hearing on the Merits, DLSE presented an amended audit that lowered the unpaid prevailing wages from \$4,729.72 to \$4,275.56, lowered the training fund contributions from \$162.72 to \$147.60, lowered the section 1775 penalties from \$4,080.00 to \$3,720.00, and made no changes in the section 1813 penalty amount of \$25.00 and the section 1777.7 penalty amount of \$16,920.00. At the Hearing, DLSE moved to amend the Assessment accordingly. There being no objection or prejudice to Blue Pacific, the Hearing Officer granted the motion.

On the day of Hearing, the parties stipulated to the following:

- The work subject to the Civil Wage and Penalty Assessment was subject to the prevailing wage and apprenticeship requirements.
- The Labor Commissioner timely served the Civil Wage and Penalty Assessment.
- The Request for Review was timely filed.
- The Labor Commissioner timely made its investigative file available to the contractor.
- No back wages have been paid nor deposit made with the Department of Industrial Relations as a result of the Assessment.

The issues for decision are as follows:

- Did Blue Pacific correctly pay workers based on the work performed?
- Did the Labor Commissioner provide prima facie support for the Civil Wage and Penalty Assessment?
- Did the Labor Commissioner abuse her discretion in assessing Labor Code section 1775 penalties?
- Is Blue Pacific liable for section 1813 penalties?
- Is Blue Pacific liable for liquidated damages?
- Did Blue Pacific submit the required contract award information to all applicable apprenticeship committees for the classification of Iron Worker in a timely and factually sufficient manner?

- Did Blue Pacific employ apprentices in the classifications of Laborer and Iron Worker in the required minimum ratio of apprentices to journeypersons on the Project?
- Did the Labor Commissioner abuse her discretion in setting penalties under section 1777.7?

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence that provided prima facie support for the Assessment, and that Blue Pacific failed to carry its burden of proving that the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this decision affirming and modifying the Assessment.

FACTS

The Project.

The Awarding Body advertised the Project for bid on March 24, 2016. (DLSE Exhibit No. 3, pp. 0020-0021.) The notice inviting bids summarized the work as follows:

This is the City of San Diego's (City) solicitation process to acquire Construction services for installation of approximately 250 linear feet (LF) of 8-inch ductile iron (DI) and PVC sewer main pipe to replace the existing vitrified clay (VC) and cast iron (CI) sewer main in Tecolote Canyon. In addition, a prefabricated single span truss bridge with two (2) abutment supports on each side of Tecolote Creek is to be installed to support the new sewer main across Tecolote Creek. The existing pillar supports to the existing CI sewer main are to be removed during construction.

(DLSE Exhibit No. 4, pp. 0025, 0038-0039.)

The notice inviting bids specified that prevailing wage rates applied to the contract. (DLSE Exhibit No. 4, pp. 0025, 0048-0051.) The successful bidder was Blue Pacific, which entered into a contract with the Awarding Body on or about October 27, 2016. (DLSE Exhibit No. 4, pp. 0216-0218.) Blue Pacific had workers on the Project from January 17, 2017, to May 9, 2018. (DLSE Exhibit No. 5, pp. 0235-0374.) The

Awarding Body accepted the completion of the Project on September 13, 2018. (DLSE Exhibit No. 6, p. 0375.)

The Public Works Complaint.

On May 30, 2018, DLSE received a complaint from Jamie Roberts of the Center for Contract Compliance alleging nonpayment and underpayment of wages, unpaid overtime, worker misclassification, failure to provide contract award information for all trades, failure to request dispatch of apprentices, and failure to employ registered apprentices in the correct ratio or at all. (DLSE Exhibit No. 13, p. 0532.)

The Prevailing Wage Rate Determinations.

DLSE contends that Blue Pacific misclassified workers who performed reinforcing steel (rebar) work on the Project as Cement Masons, such that these workers should be reclassified as Iron Workers.^{2, 3} Accordingly, one prevailing wage determination (PWD) at issue in this matter is that of Iron Worker, C-20-X-1-2016-1 (Iron Worker). (DLSE Exhibit No. 7, pp. 0376-0377.) The applicable scope of work for the Iron Worker craft provides, in relevant part:

- A. This Agreement shall cover all work in connection with field fabrication and/or erection of structural, ornamental and reinforcing steel work coming within the jurisdiction of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers recognized by the Building and Construction Trades Department of the American Federation of Labor – Congress of Industrial Organizations.

...

² According to the CPRs, Blue Pacific classified three of the workers at issue as Cement Masons and one of the workers as Laborer Group 1. (DLSE Exhibit No. 5, pp. 0258, 0260, 0262, 0265, 0267.)

³ Flores testified that he emailed the Office of Policy, Research and Legislation (OPRL) of the Department of Industrial Relations on August 12, 2019, seeking guidance on “whether Cement Masons in San Diego County may place reinforcing steel for the abutment supports to the bridge,” and “which classifications may perform this type of work in San Diego County.” (DLSE Exhibit No. 16, pp. 0540-0541.) Flores testified that he received a response from OPRL on September 18, 2019, advising that “[f]or work involving the installation of steel of abutment supports, the scope of work provisions for the craft(s)/classification(s) of the Iron Worker may include similar types of work.” (DLSE Exhibit No. 16, pp. 0539-0540.) Flores testified that OPRL did not respond to his question as to whether Cement Masons in San Diego County may place reinforcing steel for the abutment supports to the bridge. (*Ibid.*)

- C. The Iron Workers jurisdictional claims for its journey[persons] and apprentice Iron Workers . . . shall include but not be limited to the following:

All work in connection with field fabrication and/or erection or deconstruction of structural, ornamental and reinforcing steel, including but not limited to the fabrication, erection and construction of all iron and steel, ornamental lead, bronze, brass, copper and aluminum, plastics and all other substitute materials, including, but not limited to, composites, carbon fiber and fiberglass, all barrier railings, handrail, aluminum, steel, glass and plastic, reinforced concrete structures or parts thereof; bridges, viaducts . . .; metal forms and false work pertaining to concrete construction . . .; unloading, racking, sorting, cutting, bending, hoisting, placing and tying including the use of any and all mechanical tying devices . . .

All reinforcing work in connection with field fabrication, handling, racking, sorting, cutting, bending, hoisting, intermittent use of forklifts, placing, burning, welding and tying of all materials including the use of any and all mechanical tying devices, or substitute materials, including but not limited to, composites, carbon fiber and fiberglass, stainless steel, used to reinforce concrete construction shall be done by Iron Workers. A working Iron Worker shall be employed for maintenance on jobs of substantial size while concrete is being poured on reinforcing steel, wire mesh and paper back steeltex but will not be required as a stand-by man.

(DLSE Exhibit No. 7, pp. 0378-0386.)⁴

A second PWD relevant to this case is that of Cement Mason (Engineering Construction) craft, SD-203-23-3-2015-1. The applicable scope of work provisions for that craft provides, in relevant part:

- A. This Agreement shall apply only to construction jobsite work performed by the signatory Employer with his own forces in conjunction with the construction, alteration, modification, improvement, or repair, in whole or in part of a building, structure, or other jobsite construction work within the recognized jurisdiction of the union and shall not include any other job construction industry work. Jobsite is defined as an area within which construction is being

⁴ The basic hourly rate for Iron Worker is \$34.75, with hourly fringe benefit payments of \$30.265, including a predetermined wage increase but not including training fund contributions of \$0.72, for a total hourly rate of \$65.015.

performed, the boundaries for which are the same as those boundaries delineated in the specifications for the job or project which may include such references as right-of-way, parcel, subdivision map, dedicated street or lot . . .

B. . . . At the discretion of the Employer, employees covered by this Agreement shall perform work traditionally accomplished by other trades, where necessary for the practicable completion of the work.

(Blue Pacific Exhibit C.) ⁵

The Assessment.

The Assessment found that Blue Pacific misclassified and underpaid workers for reinforcing steel work performed on the Project. It found that Blue Pacific failed to submit contract award information to the applicable apprenticeship committees for the classification of Iron Worker, and failed to submit requests for dispatch of apprentices in the Laborer and Iron Worker classifications. It further found that Blue Pacific failed to employ apprentices in the classifications of Laborer and Iron Worker in the required minimum ratio of apprentices to journeypersons on the Project. Altogether, the Assessment, as amended, found that Blue Pacific underpaid the required prevailing wages in the amount of \$4,275.56, underpaid training fund contributions of \$147.60, and imposed section 1775 penalties of \$3,720.00, section 1813 penalties of \$25.00, and section 1777.7 penalties of \$16,920.00, for a total amount of \$25,088.16.

Testimony of Inspector Allen Day.

Allen Day testified that he is a Senior Construction Manager for Arkadis North America (Arkadis). Day testified that Arkadis contracted with the City of San Diego to act as the single point of contact between the contractor, the community, and the City as inspector on the Project, reporting to Liborio "Lee" Ruiz, an Associate Engineer with the City. Day testified that the Project involved the replacement of an active 8-inch sewer line that spanned Tecolote Creek and the placement of a prefabricated truss

⁵ The basic hourly rate for Cement Mason (Engineering Construction) is \$26.57, with hourly fringe benefit payments of \$21.08, including a predetermined wage increase but not including training fund contributions of \$.50, for a total hourly rate of \$47.65.

bridge ⁶ across the creek. Day testified that he was on site at the Project every day for the duration of each work day, which was restricted to the hours of 8:30 a.m. to 3:30 p.m. due to the environmental regulations in the Project area. Day testified that he recorded his daily observations of the work performed by Blue Pacific in his inspection reports, which he submitted to Ruiz weekly (Daily Reports). His Daily Reports described the work functions performed during each day, the location on the site where work took place, and the work performed, such as placement of reinforcing steel and the pouring of concrete mix. No issues were noted with the placement of reinforcing steel, but the Daily Reports noted the use of "nonconforming" concrete mix. (See, e.g., DLSE Exhibit No. 10, pp. 0431-0432.) Day also testified that he took photographs of the work site, some of which he emailed to Ruiz and later provided to Flores.

Day testified that the reinforcing steel used on the Project was placed in four structures, which were the north side abutment, north side headwalls, south side abutment, and south side headwalls. Day explained that this Project required the contractor to back fill around three sides of the headwalls to make the structure look more natural, since the Project was located in an environmentally sensitive area with adjacent hiking trails.

Day explained that placing reinforcing steel involves taking it out of the bundles they come in by cutting the wire tie that bundles the steel together, moving the reinforcing steel by hand, and tying it to comply with the project specifications before placing it into the area that is going to be poured with concrete. Day further explained that the reinforcing steel sometimes needs to be trimmed to maintain proper clearances, and that the plan specifications indicate the specific clearances for reinforcing steel to earth and air.

Day testified that Blue Pacific formed up the abutments, placed reinforcing steel within the wooden abutment forms, and then poured concrete into the forms.

⁶ The prefabricated truss bridge was over 100 feet long and was delivered in two sections.

Testimony of Deputy Labor Commissioner Flores.

Flores testified that he conducted an investigation of the Project and issued the Assessment against Blue Pacific on April 15, 2019. (DLSE Exhibit No. 1, pp. 1-12.) According to Flores, the Assessment found that Blue Pacific failed to pay prevailing wages to Iron Workers, failed to submit contract award information for the Iron Worker craft, and failed to employ apprentices in the required one to five ratio of apprentice hours worked to journey level hours worked.

Using the Daily Reports prepared by Day that indicated the days when workers performed reinforcing steel work, the photographs taken by Day of the reinforcing steel work, and the scope of work provisions for the Iron Worker classification, Flores determined that Blue Pacific misclassified five workers as Cement Masons when they should have been classified and paid as Iron Workers. To calculate the amount of underpayment, Flores utilized the rates required by the Iron Worker PWD, gave credit for wage payments made by Blue Pacific as recorded on the certified payroll records (CPRs), and placed the amount of total wages due each worker on the Amended Public Works Audit Worksheet (Audit Worksheet) he prepared. (DLSE Exhibit No. 17, pp. 00547, 00549-00553.) Specifically, Flores determined that the total unpaid wages owed by Blue Pacific to Alexis Martinez, Edgar Vargas, Fernando Iniguez, Ismael Avila Casanora, and Jose Pacheco totaled \$4,275.56. (*Ibid.*)

DLSE's Calculation of Unpaid Wages.

According to the Audit Worksheet for Alexis Martinez, and consistent with the CPRs, Martinez performed reinforcing steel work for a total of 53 hours on March 30, April 4-6, and April 11-14, 2107.⁷ (DLSE Exhibit No. 17, pp. 00547, 00549; DLSE Exhibit No. 5, pp. 0262, 0265, 0267.) Martinez was paid at an hourly rate of \$37.02, and he was paid a total of \$1,962.06 for that work. For the duration of the Project, the total hourly rate for Iron Worker, including predetermined increases but less training fund contributions, was \$65.735. (DLSE Exhibit No. 7, pp. 0376-0377; DLSE Exhibit No.

⁷ Martinez is identified on the CPRs as an apprentice Cement Mason. (DLSE Exhibit No. 5, pp. 0262, 0265, 0267.)

17, p. 00548.) After giving credit to Blue Pacific for payments made as shown in the CPRs, Flores determined that Martinez is owed \$1,521.91 in wages, calculated as follows:

1. Underpayment of \$201.01, based on the Iron Worker PWD rate of \$65.735 for seven hours on one day in the week ending April 2, 2017;
2. Underpayment of \$603.02, based on the Iron Worker PWD rate of \$65.735 for 21 hours over three days in the week ending April 9, 2017; and
3. Underpayment of \$717.88, based on the Iron Worker PWD rate of \$65.735 for 25 hours over four days in the week ending April 16, 2017.

(DLSE Exhibit No. 17, p. 00549.)

Although Edgar Vargas is listed on the Audit Worksheet (DLSE Exhibit No. 17, pp. 00547, 00550) as working a total of nine hours on April 14, 2017, he is not listed in the CPR for that week. (DLSE Exhibit No. 5, p. 0267.) In fact, Vargas is not listed on any of the CPRs, nor does any other evidence show he worked on the Project. (DLSE Exhibit No. 5, pp. 0235-0374.) Nonetheless, the Audit Worksheet shows that he was paid at a standard hourly rate of \$47.65 and at an overtime hourly rate of \$60.94, and that he was paid a total of \$442.14 for the time he performed reinforcing steel work on the Project. (DLSE Exhibit No. 17, pp. 00547, 00550.) Based on the Iron Worker PWD standard rate of \$65.735 and overtime rate of \$83.735 (DLSE Exhibit No. 7, pp. 0376-0377; DLSE Exhibit No. 17, p. 00548), the Audit Worksheet shows that Vargas is owed \$167.48 in wages, calculated as the underpayment of eight hours of standard time and one hour of overtime on one day in the week ending April 16, 2017. (DLSE Exhibit No. 17, p. 00550.)

According to the Audit Worksheet for Fernando Iniguez, and consistent with the CPRs, Iniguez worked a total of 14 hours on March 23 and March 24, 2107, for the time he performed reinforcing steel work.⁸ (DLSE Exhibit No. 17, pp. 00547, 00551; DLSE Exhibit No. 5, p. 0258, 0260.) Flores determined on the Audit Worksheet that Iniguez

⁸ Iniguez is identified on the CPRs as an apprentice Cement Mason. (DLSE Exhibit No. 5, pp. 0258, 0260.)

was paid at an hourly rate of \$47.65, for a total of \$667.10 for the time he performed reinforcing steel work on the Project. After giving credit to Blue Pacific for the payments reflected on the Audit Worksheet, Flores determined that Iniguez is owed \$253.19 in wages, calculated as underpayment based on the Iron Worker PWD rate of \$65.735 for the 14 hours. (DLSE Exhibit No. 17, pp. 00547, 00551.)⁹

According to the Audit Worksheet for Ismael Avila Casanora, and consistent with the CPRs, Casanora worked a total of 60 hours on March 23-24, March 30, April 4-6, and April 12-14.¹⁰ (DLSE Exhibit No. 17, pp. 00547, 00552; DLSE Exhibit No. 5, pp. 0258, 0260, 0262, 0265, 0267.) Casanora was paid at an hourly rate of \$47.65, and he was paid a total of \$2,859.00 for the 9 days on which he performed reinforcing steel work on the Project. (*Ibid.*) After giving credit to Blue Pacific for payments made as shown in the CPRs, Flores determined that Casanora is owed \$1,085.11 in wages, calculated as follows:

1. Underpayment of \$253.19, based on the Iron Worker PWD rate of \$65.735 for 14 hours over two days in the week ending March 26, 2017;
2. Underpayment of \$126.60, based on the Iron Worker PWD rate of \$65.735 for seven hours on one day in the week ending April 2, 2017;
3. Underpayment of \$379.79, based on the Iron Worker PWD rate of \$65.735 for 21 hours over three days in the week ending April 9, 2017; and
4. Underpayment of \$325.53, based on the Iron Worker PWD rate of \$65.735 for 18 hours over three days in the week ending April 16, 2017.

(DLSE Exhibit No. 17, p. 00552.)

The Audit Worksheet shows Jose Pacheco as working a total of 69 hours on March 23-24, March 29-30, April 4-6 and April 11-14, 2017. (DLSE Exhibit No. 17, pp.

⁹ Although Flores determined on the Audit Worksheet that Iniguez was paid at an hourly rate of \$47.65, the CPRs show that Iniguez was paid at the hourly rate of \$23.74. The CPRs also show that he was paid \$332.36 for this work, whereas the Audit Worksheet indicates he was paid \$667.10.

¹⁰ Casanora is identified on the CPRs as a journey level Cement Mason. (DLSE Exhibit No. 5, pp. 0258, 0260, 0262, 0265, 0267.)

00547, 00553.)¹¹ After giving credit to Blue Pacific for the payments reflected on the Audit Worksheet, Flores determined that Pacheco is owed \$1,247.87 in wages, calculated as follows:

1. Underpayment of \$253.19, based on the Iron Worker PWD rate of \$65.735 for 14 hours over two days in the week ending March 26, 2017;
2. Underpayment of \$217.02, based on the Iron Worker PWD rate of \$65.735 for 12 hours over two days in the week ending April 2, 2017;
3. Underpayment of \$325.53, based on the Iron Worker PWD rate of \$65.735 for 18 hours over three days in the week ending April 9, 2017; and
4. Underpayment of \$452.13, based on the Iron Worker PWD rate of \$65.735 for 25 hours over four days in the week ending April 16, 2017.

(DLSE Exhibit No. 17, p. 00553.)

DLSE's Calculation of Unpaid Training Fund Contributions.

Flores testified that the Iron Worker PWD requires the payment of training fund contributions in the amount of \$0.72 for every hour of work. (DLSE Exhibit No. 7, pp. 0376-0377.) Flores determined that Blue Pacific owed a total of \$147.60 in training fund contributions based on the 205 hours that the workers performed reinforcing steel work as reflected on the Audit Worksheet. (DLSE Exhibit No. 17, pp. 00547, 00549-00553.)

Assessment of Penalties Under Section 1775.

Flores testified that the Senior Deputy Labor Commissioner assessed penalties under section 1775 of \$120.00 per day for underpayment of wages.¹² (DLSE Exhibit

¹¹ Pacheco is identified on the CPRs as a Laborer – Group 1. (DLSE Exhibit No. 5, pp. 0258, 0260, 0262.) Although Pacheco is listed on the Audit Worksheet as working a total of 69 hours, the CPRs indicate that Pacheco worked no hours on March 23-24, March 30, or April 4-6. (DLSE Exhibit No. 5, pp. 0258, 0260, 0262.) Instead, the CPRs show Pacheco worked a total of 30 hours on March 29, and April 11-14, 2017. (DLSE Exhibit No. 5, pp. 0262, 0267.) Also, while The Audit Worksheets show that Pacheco was paid at an hourly rate of \$47.65 and he was paid a total of \$3,287.85 for the time he performed reinforcing steel work, the CPRs show that Pacheco was paid an hourly rate of \$48.02 for the week ending April 2, 2017, and an hourly rate of \$47.65 for the week ending April 16, 2017, and that he was paid a total of \$1,431.35 for the time he performed reinforcing steel work.

¹² Flores testified that DLSE issued two prior assessments against Blue Pacific for underpayment of wages. (DLSE Exhibit No. 13, p. 0535.)

No. 17, p. 00547.) Flores identified 31 days where Blue Pacific underpaid its workers for performing reinforcing steel work; this includes eight days attributed to Martinez, one day attributed to Vargas, two days attributed to Iniguez, nine days attributed to Casanora, and 11 days attributed to Pacheco. (DLSE Exhibit No. 17, pp. 00547-00553.) Accordingly, Flores determined that the penalties under section 1775 at the \$120.00 rate totaled \$3,720.00. (DLSE Exhibit No. 17, p. 00547.)

Assessment of Penalties Under Section 1813.

Flores testified that he assessed penalties under section 1813 of \$25.00 per day for underpayment of overtime. (DLSE Exhibit No. 17, p. 00547.) Flores determined that in one instance, Blue Pacific failed to pay overtime rates to Edgar Vargas on April 14, 2017. (DLSE Exhibit No. 17, pp. 00547, 00550.)

Assessment of Penalties Under Section 1777.7.

Flores testified that the Senior Deputy Labor Commissioner assessed penalties under section 1777.7 of \$60.00 per day for apprenticeship violations.¹³ (DLSE Exhibit No. 13, p. 0534.) Flores testified that he summarized Blue Pacific's compliance with the apprenticeship requirements for the Project in the Penalty Review that he prepared during the course of his investigation. (DLSE Exhibit No. 13, pp. 0530, 0531, 0534, 0535.) Flores testified that Blue Pacific failed to submit the Public Works Contract Award Information form (DAS 140 Form) to the applicable apprenticeship committee for the Iron Worker classification.¹⁴ (DLSE Exhibit No. 13, p. 0530.) Flores testified that he calculated the penalty for the contract award information violation for the Iron Worker classification by counting the calendar days from the second day that reinforcing steel work was performed on the Project to the last day that a journey person was on the Project, not including Landscape Maintenance. (DLSE Exhibit No. 13, p. 0534.) In this

¹³ Flores testified that DLSE also issued one prior assessment against Blue Pacific for apprenticeship violations. (DLSE Exhibit No. 13, p. 0535.)

¹⁴ Blue Pacific admitted at hearing that it did not submit the form DAS 140 to the applicable apprenticeship committee for the Iron Worker classification.

regard, Flores counted 247 days between March 24, 2017, which was the second day that reinforcing steel work was performed on the Project according to the inspection reports, and November 26, 2017, which he testified was the last day that a journey person, not including Landscape Maintenance, was on the Project according to the CPRs. (*Ibid.*)¹⁵

Flores testified that he also found a ratio violation for the Laborer classification, as he determined that Blue Pacific failed to employ apprentices in the Laborer classification and failed to submit Requests for Dispatch of Apprentices (DAS 142 Form) or the equivalent to the applicable apprentice committees for the Laborer classification.¹⁶ (DLSE Exhibit No. 13, pp. 0530, 0531.) Flores explained that a contractor is required to employ apprentices at the ratio of one apprentice hour for every five journey person hours. Flores testified that based on the CPRs, he determined that Blue Pacific reported 805.5 Laborer journey person hours worked on the Project and no Laborer apprentice hours. (DLSE Exhibit No. 13, p. 0531.) Flores testified that he calculated the ratio violation for the Laborer classification by counting the calendar days from the first day that a journey person Laborer performed work on the Project to the first day that he assessed the penalties for the contract award information violation, because DLSE assesses only one section 1777.7 violation per day. (DLSE Exhibit No. 13, p. 0534.) In this regard, Flores counted 35 days on which journey level Laborers

¹⁵ The CPRs show the last work day for a Laborer journey person was April 2, 2018.

¹⁶ Flores testified that he reviewed the letters Blue Pacific sent to various apprenticeship committees requesting dispatch of apprentices. (Blue Pacific Exhibit G.) He did not consider these letters the equivalent of DAS 142 Forms because the letters did not indicate a specific time for Laborer apprentices to report, and because the letters did not provide a 72 hour notice before the date apprentices were needed, exclusive of weekends and holidays. (*Ibid.*) For example, the letter to the Laborers Southern California Joint Apprenticeship Committee requesting dispatch of apprentices on December 19, 2016, was sent by facsimile transmission on December 14, 2016, at 3:03 p.m. (*Ibid.*) Flores testified that 72 hours from December 14, 2016 at 3:03 p.m., excluding the weekend, was 3:03 p.m. on Monday, December 19, 2016. Flores testified that in that case, he could not find Blue Pacific in compliance without the specific reporting time for apprentices. The letters and facsimile transmission reports provided by Blue Pacific show that the letters to the applicable apprenticeship committees for the Laborer classification were sent by facsimile transmission on December 14, 2016, between 3:02 p.m. and 3:06 p.m. for a reporting date of December 19, 2016, with no specified reporting time. (*Ibid.*)

performed work on the Project between January 14, 2017, which was the first day that a journey level Laborer performed work on the Project according to the CPRs, and March 23, 2017, which was the first day that reinforcing steel work was performed on the Project. (*Ibid.*)

Flores assessed section 1777.7 penalties at \$60.00 per day for 247 days of contract award information violations and for 35 days of ratio violations, for a total of \$16,920.00 in section 1777.7 penalties.¹⁷

Testimony of Owner Shahram Elihu.

Elihu testified that he is the owner of Blue Pacific, and that he is responsible for project management, bid estimates, project supervision, and project documentation. Elihu testified that he used the following classifications on the Project: Cement Masons, Laborers, Operating Engineers, Landscape Laborers, and Landscape Operating Engineers. Elihu testified that Blue Pacific employed Cement Masons on the Project to do form work, install reinforcing steel, place concrete, and finish concrete. Elihu testified that he understands the scope of work provisions for the Cement Mason classification to mean that he has the discretion to assign Cement Masons work that is traditionally performed by other trades, and that he exercised his discretion in this regard on the Project. Elihu admitted that he had never reviewed the scope of work provisions for the Iron Worker classification.

Elihu testified that Blue Pacific automatically sends out requests for dispatch of apprentices on each project. Elihu also testified that no Laborer apprentices were ever dispatched to Blue Pacific.

¹⁷ With regard to the section 1777.7 violations, the Penalty Review incorrectly calculated the subtotals of penalties under section 1777.7. The contract award information violation was calculated at \$14,760.00 and the ratio violation at \$2,040.00. (DLSE Exhibit No. 13, p. 0534.) However, 247 violations of contract award information requirements assessed at \$60.00 per day equals \$14,820.00, and 35 violations of the ratio requirements assessed at \$60.00 per day equals \$2,100.00, for a total amount of \$16,920.00, as provided in the Amended Assessment.

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 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 Properly Relied on the Inspection Reports and CPRs for Its Audit that Resulted in the Amended Assessment.

The documentary and testimonial evidence in this case is generally undisputed. DLSE based its Assessment that Blue Pacific underpaid wages on Day’s description of the nature of the work performed on the Project in the inspection reports he submitted weekly to the Awarding Body, the photographs Day took of the work site, and the CPRs provided by Blue Pacific, when compared to the scopes of work of the crafts in question.

Every employer in the on-site construction industry, whether the project is a public work or not, must keep accurate information with respect to each employee. Industrial Welfare Commission (IWC) Wage Order No. 16-2001, which applies to on-site occupations in the construction industry, provides as follows:

Every employer who has control over wages, hours, or working conditions, must keep accurate information with respect to each employee including . . . name, home address, occupation, and social security number . . . [t]ime records showing when the employee begins and ends each work period . . . [t]otal wages paid each payroll period . . . [and] [t]otal hours worked during the payroll period and applicable rates of pay . . .

(Cal. Code Regs., tit. 8, § 11160, subd. (6)(A).) Also, the employer must furnish each employee with an itemized statement in writing showing all deductions from wages at the time of each payment of wages. (Cal. Code Regs., tit. 8, § 11160, subd. (6)(B); see also Lab. Code, § 226.) Employers on public works have the additional requirement to keep accurate certified payroll records. (§ 1776; Cal. Code Regs., tit. 8, § 11160, subd. (6)(D).) Those records must reflect, among other information, “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 journey[person], apprentice, worker, or other employee employed by him or her in connection with the public work.” (§ 1776, subd. (a).)

In this case, for the most part DLSE presented prima facie support for the amended Assessment. DLSE relied on the Iron Worker scope of work that specifically identified work with reinforcing steel as falling within the Iron Workers craft (DLSE Exhibit No. 7, pp. 0378-0386), and the inspection reports prepared by Day along with the photographs he took to identify the dates on which reinforcing steel work was performed on the Project. Day’s Daily Reports showed that Blue Pacific workers placed reinforcing steel in the bridge abutments on several days from March 23, 2017, to April 6, 2017, prior to the concrete pour on April 7, 2017. (DLSE Exhibit No. 10, pp. 0430-0432.) The Daily Reports also showed that workers placed reinforcing steel in the supporting headwalls from April 11, 2017, to April 14, 2017, after which the concrete was poured on April 24, 2017. (DLSE Exhibit No. 10, pp. 0433-0435.) Hence, Blue Pacific workers performed the reinforcing steel work on 11 specific days distinct from the workdays during which they constructed forms and mixed, poured, and finished the concrete for the walls and abutments. DLSE also relied on the CPRs to identify the workers who performed reinforcing steel work according to the dates reinforcing steel work was performed on the Project as identified in the Daily Reports, and the hours they worked and the hourly rate they were paid. Based on these facts, the Assessment found underpaid prevailing wages in the amount of \$4,275.56. This evidence presents a prima facie support for the Assessment, except as noted, *post*. (Cal. Code Regs., tit. 8, § 17250, subd. (a).)

Blue Pacific Failed to Carry Its Burden of Proof to Show the Assessment Was Incorrect in Reclassifying Its Wrkers from Cement Mason to Iron Worker for the Reinforcing Steel Work Performed on the Project.

The single prevailing rate of pay for a given “craft, classification, or type of work” is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. (*Sheet Metal Workers Intern. Ass’n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1082) (*Sheet Metal Workers*). The Director

determines the rate for each locality in which public work is performed (as defined in section 1724), and publishes a general prevailing wage determination (PWD) for a craft, such as Iron Worker or Cement Mason, to inform all interested parties and the public of the applicable prevailing wage rates. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125 (*Ericsson*).)

Ultimately, the Director's PWDs determine the proper pay classification for a type of work. The nature of the work actually performed, not the title or classification of the worker, is determinative of the rate that must be paid. The Department publishes an advisory scope of work for each craft or worker classification for which it issues a PWD. The decision about which craft or classification is appropriate for the type of work requires comparison of the scope of work contained in the PWD with the actual work duties performed. In the unusual circumstance when the advisory scope of work for two prevailing rates overlap, a conflict is created because no single prevailing rate clearly applies to the work in issue. In this limited situation, a contractor may pay either of the applicable prevailing wage rates for the work. (*Sheet Metal Workers, supra*, 153 Cal.App.4th at p. 1082.)

In response to DLSE's prima facie showing that the reinforcing steel work was that of the Iron Worker craft, Blue Pacific contends that it properly employed Cement Masons to perform that work based on the scope of work provisions for the Cement Mason classification, which provide an employer the discretion to use Cement Masons to perform "work traditionally accomplished by other trades, where necessary for the practicable completion of the work." (Blue Pacific Exhibit C.)

Reinforcing steel work falls clearly within the Iron Worker scope of work. (See, e.g., DLSE Exhibit No. 7, pp. 0378-0386, ["all work in connection with field fabrication and/or erection of ... reinforcing steel work, ... construction of . . . reinforced concrete structures or parts thereof, [and] ...[a]ll reinforcing work in connection with field fabrication, handling, . . . cutting, . . . placing, . . . and tying of all materials ... used to

reinforce concrete construction . . .].)” That wording, however, does not end the analysis. The context of a project should be considered when determining which PWDs apply and whether an overlap in PWDs exists.

On this Project, the relevant work to be completed is construction of the concrete abutments and headwalls to support a new sewer line. The concrete structures were strengthened by use of reinforcing steel. While the placement of reinforcing steel is work traditionally accomplished by the Iron Worker craft, the mixing and pouring of concrete likewise can be called traditional Cement Mason work.

The Cement Mason scope of work, however, goes further to state “employees shall perform work traditionally accomplished by other trades, where necessary for the practicable completion of the work.” That wording stands in contrast to earlier wording in the scope of work that suggests the Cement Mason craft “shall not include any other job construction industry work.” (Blue Pacific Exhibit C.) Without addressing the disavowal in the scope of work as to other “job construction industry work,” Blue Pacific claims the reinforcing steel work as being “necessary for the practicable completion of the work.” Blue Pacific argues it could assign that work to Cement Masons because the walls and abutments, and hence the bridge holding the sewer line and the Project itself, could not be completed without the rebar being installed within the concrete structures.

While it is obvious that the reinforcing steel work itself was necessary to complete the Project, Blue Pacific’s interpretation of the scope of work language is incorrect. Such an expansive reading of the Cement Mason scope of work would eviscerate the craft distinctions inherent in most public work projects and this Project as well. The proposition would run afoul of the basic statutory scheme, whereby prevailing wage rates must be applied for “work of a similar character in the locality where the work is performed....” (§ 1771.) Nowhere in the record did Blue Pacific show that reinforcing steel work on this Project was of “similar character” to the concrete work performed.

Nor does the record show it was “necessary” within the meaning of the Cement Mason scope of work for Blue Pacific to use a Cement Mason crew or apply Cement

Mason rates for the reinforcing steel work. The Daily Reports disclose that the reinforcing steel work proceeded on days distinct from the days during which concrete work was performed, so that use of a separate crew or payment of Iron Worker rates could have been accomplished.

In this case, the reinforcing steel work clearly falls within the Iron Worker scope of work. Unlike the Iron Worker scope of work, the Cement Mason scope of work does not contain any specific references to processes, components, structures, or materials assembled in the course of performing reinforcing steel work. In that regard the scopes of work for Iron Worker and Cement Mason do not overlap. It would be disingenuous for Blue Pacific to argue otherwise, particularly since Elihu admitted that he has never reviewed the scope of work provisions for the Iron Worker classification.

For all these reasons, as to the reclassification issue, Blue Pacific failed its “burden of proving that the basis for the Civil Wage and Penalty Assessment . . . is incorrect.” (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

According to the amended Assessment, Blue Pacific owed \$4,275.56 in unpaid wages, based on the Audit Worksheets. However, DLSE made factual mistakes that cannot be accepted, and to that limited extent, DLSE failed in its burden to present evidence that “provides prima facie support for the Assessment” (Cal. Code Regs., tit. 8, § 17250, subd. (a).)

The Audit Worksheets show that, based on the \$65.735 hourly wage rate for the craft of Iron Worker, DLSE determined that Martinez is owed \$1,521.91 in wages; Vargas is owed \$167.48 in wages; Iniguez is owed \$253.19 in wages; Casanora is owed \$1,085.11 in wages; and Pacheco is owed \$1,247.87 in wages. As indicated, *ante*, in its investigation DLSE found a greater number of hours worked by Vargas and Pacheco than the number of hours represented for them on the CPRs. Further, DLSE found a lower wage rate having been paid to Iniguez, as compared to his wage rate as shown in the CPRs.¹⁸ In testimony, Flores did not identify any basis for not accepting the number

¹⁸ For its defense Blue Pacific is entitled to rely on the amended Assessment and Audit Worksheets as admitted into evidence at the Hearing, after rulings on DLSE motions to increase or decrease the claim for wages under the Assessment pursuant to California Code of Regulations, title 8, section 17226. In

of hours and wage rates as detailed in the CPRs. Due the discrepancies with regard to the hours worked by Vargas and Pacheco, and the discrepancies with the hourly rates for Iniguez and Pacheco, the total unpaid wages owed by Blue Pacific is \$3,400.92, calculated as follows:

1. Martinez was paid for 53 hours of reinforcing steel work over eight days on March 30, April 4-6, and April 11-17, 2017, at the hourly rate of \$37.02 instead of the hourly rate for Iron Workers of \$65.735, resulting in an underpayment of \$1,521.91.
2. Vargas is not listed in the CPRs nor does any other evidence show he performed work on the Project. Based on that lack of evidence, the Assessment's claim for unpaid wages for Vargas in the amount of \$167.48 is denied.
3. According to the Audit Worksheet, Iniguez was paid for 14 hours of reinforcing steel work over two days on March 23-24, 2017, at the hourly rate of \$47.65, instead of the required hourly rate of \$65.735. Accepting those figures, Iniguez was underpaid in the amount of \$253.19.
4. Casanora was paid for 60 hours of reinforcing steel work over nine days on March 23-24, March 30, April 4-6, and April 12-14, 2017, at the hourly rate of \$47.65 instead of the required hourly rate \$65.735, resulting in an underpayment of \$1,085.11.
5. According to the Audit Worksheet, Pacheco worked a total of 69 hours performing reinforcing steel work (see DLSE Exhibit No. 17, pp. 00547, 00553). But, according to the CPRs, Pacheco worked only 30 hours on those tasks over five days on March 29 and April 11-14, 2017 (see DLSE Exhibit No. 5, pp. 0258, 0260, 0262, 0267). Also, according to the Audit Worksheet, Pacheco was paid at the hourly rate of \$47.65 for the reinforcing steel work, but the CPRs show he was paid at the hourly rate of \$48.02 for five hours in one week and the hourly rate of \$47.65 for 25 hours in the second week, instead of the required hourly rate of \$65.735. Accepting the CPR figures as

those instances where DLSE's figures are mistaken and, using the correct figures from the CPRs, the underpayment amount should be greater than the amount DLSE found, as a matter of fairness this Decision will use the lower underpayment amounts found by DLSE. Hence, for Iniguez, the Audit Worksheet shows that he was paid at an hourly rate of \$47.65, whereas the CPRs show that he was actually paid at the lower hourly rate of \$23.74. While wage credit using the lower hourly rate shown in the CPRs would have increased the total underpayment to Iniguez, for the reasons stated, the figures as presented in the Audit Worksheet will be adopted.

proof of the 30 hours and proof of the hourly rates paid, the resulting underpayment is \$540.71.¹⁹

Based on the record as a whole, Blue Pacific failed to carry its burden to prove the reclassification from Cement Mason to Iron Worker for the reinforcing steel work performed over 11 days on March 23-24, March 29-30, April 4-6, and April 11-14, 2017, was incorrect. Accordingly, Blue Pacific underpaid prevailing wages in the amount of \$3,400.92.

Blue Pacific Failed to Prove That It Paid Adequate Training Fund Contributions.

Section 1777.5, subdivision (m)(1), requires contractors on public works projects who employ journeypersons or apprentices in any apprenticeable craft to pay training fund contributions to the California Apprenticeship Council or to an apprenticeship committee approved by the Department of Apprenticeship Standards. In this case, DLSE presented prima facie evidence that training fund contributions for the Iron Worker classification were owed. Blue Pacific does not dispute that it failed to pay training fund contributions for the Iron Worker classification. Therefore, Blue Pacific failed to carry its burden to prove the Assessment was incorrect as to training fund contributions found due and is liable for payment of those funds. Due the discrepancies described, *ante*, with regard to the hours worked by Vargas and Pacheco, the amount of hours for training fund contributions is reduced by 48 hours from 205 hours to 157 hours. Accordingly, the total unpaid training fund contributions owed by Blue Pacific at \$0.72 per hour is \$113.04.

Blue Pacific Failed to Prove the Labor Commissioner Abused Her Discretion in Assessing Penalties Under Section 1775.

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

¹⁹ Based on the CPRs, Pacheco was paid an hourly rate of \$48.02 for the week ending April 2, 2017, and an hourly rate of \$47.65 for the week ending April 16, 2017, for a total of \$1,431.35 for the time he performed reinforcing steel work on the Project. (DLSE Exhibit No. 5, pp. 0262, 0267.) After giving credit for the amount he was paid per the CPRs, the total underpayment of \$540.71 is calculated by adding the underpayment of \$88.58, based on the Iron Worker PWD rate of \$65.735 for five hours on one day, March 29, 2017, in the week ending April 2, 2017, with the underpayment of \$452.13 for 25 hours over four days on April 11-14, 2017, in the week ending April 16, 2017.

- (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
 - (2) (A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
 - (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
 - (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
 - (B) (i) The penalty may not be less than forty dollars (\$40) . . . unless the failure of the contractor . . . to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor . . .
 - (ii) The penalty may not be less than eighty dollars (\$80) . . . if the contractor . . . has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
 - (iii) The penalty may not be less than one hundred twenty dollars (\$120)... if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.²⁰
- ...
- (D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

²⁰ Section 1777.1 defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

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 \$120.00. DLSE determined that the failure to pay the correct prevailing wage was not a good faith mistake. The burden was on Blue Pacific to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of \$120.00 per violation. Although Blue Pacific disputed that it had misclassified workers for the reinforcing steel work or that it underpaid them, it provided no compelling or probative evidence establishing that the workers had not been misclassified, for the reasons addressed above. Blue Pacific provided no evidence of abuse of discretion by DLSE in its selection of the penalty rate.

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The Director is not free to substitute his or her own judgment. The maximum penalty the Labor Commissioner could have imposed was \$200.00 per violation. Blue Pacific has not shown an abuse of discretion in the rate selected by the Labor Commissioner and, accordingly, the assessment of section 1775 penalties at the rate of \$120.00 is affirmed. This Decision does, however, reduce the total number of assessed violations in order to correct for errors in DLSE's calculations, as discussed, *ante*. Accordingly, the amount assessed for section 1775 penalties is

reduced to the total amount of \$2,880.00, based on 24 days of underpayment of prevailing wages to four workers, as discussed, *ante*.

Blue Pacific Is Liable for Liquidated Damages

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

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

At the time the Assessment was issued, the statutory scheme regarding liquidated damages provided contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE agreeing to waive liquidated damages). Under section 1742.1, subdivision (a), the contractor has 60 days to decide whether to pay the workers all or a portion of the wages assessed in the civil wage penalty assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the civil wage penalty assessment, the contractor deposits with the Department of Industrial Relations the full amount of the assessment of unpaid wages, including all statutory penalties.

In this case Blue Pacific did not pay any back wages in response to the Assessment, nor did it deposit with the Department the assessed wages and statutory penalties. Accordingly, Blue Pacific is liable for liquidated damages under section 1742.1 in the amount of \$3,400.92.

DLSE's Assessment of Section 1813 Penalties for Failure to Pay Overtime Is Not Supported by the Evidence.

Section 1815 states:

[w]ork performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public

work upon compensation for all hours worked in excess of 8 hours per day at not less than 1½ times the basic rate of pay.

Section 1813 states:

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

Here, DLSE assessed \$25.00 in section 1813 penalties based on Blue Pacific's failure to pay one hour of overtime pay to Edgar Vargas on April 14, 2017. For purposes of determining underpayment of straight-time prevailing wages under the Iron Worker PWD, Flores accepted the CPRs for purposes of determining the workers' hours and wages paid. However, the CPRs do not show any work performed by Vargas on the Project. (DLSE Exhibit No. 5, pp. 0235-0374.) Nor does any other evidence in the record show a basis for finding Vargas worked overtime on the day in question. For that reason, DLSE failed to carry its burden to present a prima facie support for the section 1813 penalty. Accordingly, this Decision dismisses the section 1813 penalty assessed in the amount of \$25.00.

Blue Pacific Failed to Comply with the Apprenticeship Requirements of Section 1777.5.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. (Cal. Code Regs., tit. 8, §§ 227 to 231.)²¹

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

²¹ All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

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[person] 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. Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

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. All requests for

dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email. . . . [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. . . .

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

Prior to requesting the dispatch of apprentices, the regulations require contractors to alert apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed. The applicable regulation provides, in 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

(§ 230, subd. (a).) Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

"The determination of the Labor Commissioner as to the amount of the penalty imposed under subdivisions (a) and (b) shall be reviewable only for an abuse of

discretion.” (§ 1777.7, subd. (d).) A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment, namely, the affected contractor has the burden of proving that the basis for assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

In this matter, the record demonstrates that Blue Pacific violated the apprenticeship requirements. Iron Worker is an apprenticeable craft, but Blue Pacific employed no Iron Worker apprentices on the Project. Blue Pacific admits that it did not send contract award information or requests for dispatch of apprentices to any Iron Worker apprenticeship committee.

The Assessment also found, and the record supports, that Laborer is an apprenticeable craft, and Blue Pacific employed Laborer journeypersons but no Laborer apprentices on the Project, a violation of the 1:5 ratio requirement. Blue Pacific did send the required contract award information to the applicable apprenticeship committees,²² but it is less clear that it sent a timely dispatch request using the DAS 142 form or its equivalent. Although Blue Pacific sent letters to the applicable apprenticeship committees for Laborer requesting dispatch of apprentices, DLSE contends that the letters did not provide the requisite 72-hour notice, exclusive of weekends and holidays, before the date on which apprentices were needed. (Blue Pacific Exhibit G.) Blue Pacific contends its dispatch requests did provide the 72-hour notice.

The evidence of record shows that Blue Pacific sent its dispatch requests via facsimile to the Laborer apprenticeship committees between 3:00 p.m. and 3:05 p.m. on Wednesday, December 14, 2016, seeking dispatch of apprentices for work on Monday, December 19, 2016. According to testimony, work on the Project was restricted to the hours of 8:30 a.m. to 3:30 p.m. due to the environmental regulations in the Project area. The Daily Reports reflect that timing of work as well. With the work day on the Project commencing in at 8:30 a.m., because Blue Pacific sent its

²² While DLSE’s brief in a footnote called into question whether the contract award notice to one Laborer apprenticeship committee was actually provided, DLSE did not rebut Elihu’s testimony that Blue Pacific did provide the proper contract award notice.

dispatch requests at 3:00 p.m., the 72-hour notice period from December 14 to December 19, exclusive of the weekend, was not met. Blue Pacific submitted no evidence of its basis for selecting December 19 as a report date, and the CPRs reflect that no journey-level Laborers worked in December and therefore none were available to supervise had apprentices reported. For the apprentice dispatch system to operate properly, the requests should contain accurate report dates and times when journey level workers are present to supervise the dispatched apprentices.

Because Blue Pacific failed to meet its duty to send the dispatch request at least 72 hours before apprentices were required, it is not entitled to the regulatory exception from the 1:5 apprentice to journey person ratio. (See § 230.1, subd. (a).) Blue Pacific employed no Laborer apprentices on the Project. Accordingly, the record establishes that Blue Pacific violated the ratio requirement of section 1777.5, subdivision (g), the notice requirement of section 1777.5, subdivision (e), and the related regulations, sections 230 and 230.1, and Blue Pacific is therefore subject to penalties under section 1777.7.

Blue Pacific Failed to Prove the Labor Commissioner Abused Her Discretion in Assessing Penalties Under Section 1777.7.

If a contractor “knowingly violate[s] Section 1777.5” a civil penalty is imposed under section 1777.7. Section 1777.7 provides, in relevant part:

(a) (1) If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5, the contractor and any subcontractor responsible for the violation shall forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation. A contractor or subcontractor that knowingly commits a second or subsequent violation within a three-year period, if the noncompliance results in apprentice training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars (\$300) for each full calendar day of noncompliance.

(§ 1777.7, subd. (a)(1).) The phrase quoted above -- "knowingly violated Section 1777.5" -- is defined by the regulation, section 231, subdivision (h), as follows:

For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control. There is an irrebuttable presumption that a contractor knew or should have known of the requirement of Section 1777.5 if the contractor had previously been found to have violated that Section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects, or the contractor had previously employed apprentices on a public works project.

Failure to provide a contract award notice is a continuing violation for the duration of the work, starting no later than the first day in which the contractor has workers employed upon the public work, and ending when a Notice of Completion is filed by the awarding body. (§ 230, subd. (a).) Penalties for that failure, as well as failure to meet the required 1:5 ratio, can be assessed "for each full calendar day of noncompliance" (§ 1777.7, subd. (a)(1).) The determination of the Labor Commissioner as to the penalty is reviewable only for an abuse of discretion. (§ 1777.7, subd. (d).) DLSE calculates the calendar days of noncompliance with the ratio requirement based on the number of journeyperson calendar days of work on the Project in the craft at issue.

Blue Pacific "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journeyperson hours for Iron Workers. There is an irrebuttable presumption that Blue Pacific knew or should have known of the apprenticeship requirements of section 1777.5 because Blue Pacific was issued a prior assessment on April 10, 2017, and because the notice of bid advertisement and the contract notified Blue Pacific of its obligation to comply with the apprenticeship requirements. Since Blue Pacific was aware of its obligations under the law yet failed to submit contract award information and requests for dispatch to the applicable Iron Worker apprenticeship committees, Blue Pacific failed to meet its burden of proof by providing evidence of compliance with

section 1777.5. Since Blue Pacific knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a penalty rate of \$60.00 per violation for 282 calendar days of noncompliance based on two different periods of violations: Blue Pacific's failure to give notice of its contract award and send dispatch requests for the craft of Iron Workers over 247 calendar days from the second day that reinforcing steel work was performed on the Project to the last day that a journey person was on the Project, and its failure to meet the 1:5 ratio for the craft of Laborers for 35 days on which journey level Laborers performed work on the Project. Blue Pacific did not show an abuse of discretion under section 1777.7, subdivision (d), as to either the penalty rate or the number of days of violations found in the Assessment. Accordingly, penalties at the rate of \$60.00 for 282 days in the amount of \$16,920.00 is affirmed.

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

FINDINGS AND ORDER

1. The work subject to the Civil Wage and Penalty Assessment was subject to prevailing wage and apprenticeship requirements.
2. The Labor Commissioner timely served the Civil Wage and Penalty Assessment.
3. The Request for Review was timely filed.
4. The Labor Commissioner timely made its investigative file available to the contractor.
5. Shahram Elihu, an individual doing business as Blue Pacific Engineering & Construction, underpaid prevailing wages for workers performing reinforcing steel work in the craft of Iron Worker in the amount of \$3,400.92.
6. The Labor Commissioner's evidence provides prima facie support for penalties under Labor Code section 1775, and Shahram Elihu, an individual doing business as Blue Pacific Engineering & Construction, did not carry his

burden of proving that the basis for those penalties was an abuse of discretion.

7. In light of Finding number 6, penalties under Labor Code section 1775 are due in the amount of \$2,880.00.
8. Shahram Elihu, an individual doing business as Blue Pacific Engineering & Construction, is liable for unpaid training fund contributions in the amount of \$113.04.
9. Shahram Elihu, an individual doing business as Blue Pacific Engineering & Construction, is not liable for penalties under Labor Code section 1813.
10. Shahram Elihu, an individual doing business as Blue Pacific Engineering & Construction, is liable for liquidated damages in the amount of \$3,400.92.
11. Shahram Elihu, an individual doing business as Blue Pacific Engineering & Construction, failed to submit contract award information and failed to submit timely requests for dispatch of apprentices to the applicable apprenticeship committees for the craft of Iron Worker.
12. Shahram Elihu, an individual doing business as Blue Pacific Engineering & Construction, failed to request apprentices in timely fashion from applicable apprenticeship committees for the craft of Laborer.
13. The Labor Commissioner did not abuse her discretion in setting penalties under section 1777.7 at the rate of \$60.00 per violation for 282 calendar days, resulting in the total penalty amount of \$16,920.00.
14. The amount found due in the Assessment, as amended, is modified by this Decision, as follows:

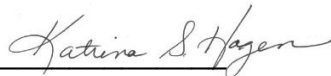
Basis of the Assessment	Amount
Wages due:	\$3,400.92
Training fund contributions due:	\$113.04
Penalties under section 1775:	\$2,880.00

Penalties under section 1813:	\$-0-
Liquidated damages :	\$3,400.92
Penalties under section 1777.7:	\$16,920.00
TOTAL:	\$26,714.88

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

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

Dated: 3/16/21

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