

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

New Image Commercial Flooring, Inc.

Case No. 18-0414-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor New Image Commercial Flooring, Inc. (New Image) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued on November 20, 2018, by the Division of Labor Standards Enforcement (DLSE) with respect to work performed by New Image on the Lab/College Services Building (Project) for the Glendale Community College District (College District) in Los Angeles County. The prime contractor on the Project was Mallcraft, Inc. (Mallcraft).¹ After the Assessment was issued, DLSE revised the underlying audit.² The second revised audit asserted that the following amounts were due: \$33,514.98 in unpaid prevailing wages, \$852.96 in training fund contributions, \$33,450.00 in penalties under Labor Code section 1775,³ \$1,100.00 in penalties under section 1813 and \$34,500.00 in penalties under section 1777.7.

¹ Mallcraft did not file a request for review.

² Pursuant to California Code of Regulations, title 8, section 17726, subdivision (a)(1), during the November 12, 2019 Hearing on the Merits, DLSE moved to amend the Assessment downward based on letters received from certain workers who stated they were paid at prevailing wage rates. With no objection from New Image, the Hearing Officer granted the motion, which reduced the amount of unpaid wages. The amendment also reduced the unpaid training fund contributions found in the Assessment.

³ All subsequent section references are to the California Labor Code, unless otherwise specified.

On November 12, 2019, a Hearing on the Merits was held in Los Angeles, California, before Hearing Officer Mirna Solís. Sotivear Sim appeared as counsel for the DLSE and Hernando Delgado, a non-attorney representative and President of New Image, appeared on behalf of New Image. DLSE Deputy Labor Commissioner Deisy Dvorak and two New Image workers, Manuel Partida and Daniel Garcia, testified in support of the Assessment. New Image President Delgado and Leslie Elizabeth Hansen, President of Mallcraft, testified on behalf of New Image. The parties submitted the matter for decision on November 12, 2019.

The issues for decision are:

- Did the Labor Commissioner timely serve the Assessment?
- Did the Assessment correctly find that New Image failed to pay the required prevailing wages for all time worked on the Project by its workers?
- Did New Image pay the required overtime rate for all work performed on the Project?
- Did the Assessment correctly find that New Image failed to make the required training fund contributions to an approved apprenticeship program or the California Apprenticeship Council?
- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1775?
- Did New Image submit a request for dispatch to all applicable apprenticeship committees in a timely and factually sufficient manner?
- Did New Image submit contract award information to all applicable apprenticeship committees in a timely and factually sufficient manner?
- Did New Image employ apprentices in the required minimum ratio of apprentices to journeypersons on the Project?

- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1777.7?
- Does evidence provided by DLSE provide prima facie support for the Assessment?
- Is New Image liable for liquidated damages on wages found due and owing?

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the amended Assessment, and with the exception of overtime hours claimed by one worker, New Image failed to carry its burden of proving that the basis of the amended Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming and modifying the amended Assessment.

FACTS

The parties stipulated to the following facts:

1. The work subject to the Assessment was performed on a public work and required the employment of apprentices and the payment of prevailing wages under the California Prevailing Wage Law.
2. The request for review was filed timely.
3. The enforcement file was requested and produced in a timely fashion.
4. No back wages have been paid or deposited with the Department of Industrial Relations as a result of the Assessment.
5. The applicable Prevailing Wage Determination for the Project is LOS-2013-1, which contains the prevailing wage rates for the

Carpet, Linoleum, Resilient Tile Layer; Tile Finisher; and Tile Layer crafts.⁴

6. The sole applicable apprenticeship committee for the geographic area of the public work site for the classification of Carpet, Linoleum, Resilient Tile Layer is the Southern California Resilient Floor & Decorative Covering Crafts J.A.T.C. (Resilient Floor JATC).⁵
7. Division of Apprenticeship Standards forms DAS 140 and DAS 142 were not submitted to the Southern California Resilient Floor & Decorative Covering Crafts J.A.T.C.

The Project.

On May 29, 2013, the College District published its notice of invitation for bids for the Project. On August 27, 2013, Mallcraft and the College District executed the prime contract (Contract). At a cost of \$34,678,000.00, Mallcraft was to construct a three-story building containing 94,000 square feet. In turn, at a cost of \$39,000.00, on December 4, 2013, Mallcraft subcontracted with New Image for flooring work in the elevator cabs, standard floor preparation and moisture testing (Subcontract). Delgado, President of New Image, testified that this Project was not New Image's first public works project. Further, the Subcontract stated New Image was required to comply with "State prevailing wages and/or Davis Bacon if required by the prime contract." (DLSE Exhibit No. 9.) Also attached to the Subcontract was the text of sections 1771, 1775, 1776,

⁴ Carpet, Linoleum, Resilient Tile Layer under the LOS-2013-1 PWD is a distinct craft from the other two crafts involved in this case, as listed in the LOS-2013-1 PWD: Tile Finisher and Tile Layer.

⁵ While the parties stipulated that the Resilient Floor JATC was the applicable apprenticeship program for the craft of Carpet, Linoleum, Resilient Tile Layer, the assessed section 1777.7 penalties are not based on apprenticeship violations concerning the Carpet, Linoleum, Resilient Tile Layer craft. Instead, the penalties are based on violations concerning the distinct crafts of Tile Finisher and Tile Layer.

1777.5, 1813 and 1815. New Image employees worked on the Project from January 11, 2016, to December 1, 2017.

The Applicable Prevailing Wage Determination.

The applicable prevailing wage determination (PWD) for the Tile Layer and Tile Finisher crafts in Los Angeles County in 2013 is LOS-2013-1 (Tiling PWD). Pursuant to the Tiling PWD, the Tile Finisher craft requires a total hourly prevailing wage rate of \$32.02, while the Tile Layer craft requires a total hourly prevailing wage rate of \$47.72. The Carpet, Linoleum, Resilient Tile Layer craft requires a total hourly prevailing wage rate of \$41.61.

The Assessment.

Deputy Labor Commissioner Dvorak testified that on May 16, 2016, DLSE received a complaint from New Image worker Manuel Partida that alleged underreporting of work hours, unpaid prevailing wages, and misclassification of workers. On June 27, 2016, DLSE sent New Image a Notice of Investigation and Notice of Apprenticeship Compliance.⁶ Dvorak was assigned to investigate the complaint and sent requests for certified payroll records (CPRs) to New Image and to Mallcraft's surety. Dvorak sent the requests to the surety because during the Project, a legal dispute arose between the College District and Mallcraft, which led the College District to terminate the Contract in April 2016 and the surety to take over and complete Mallcraft's work.⁷

⁶ Dvorak made a December 5, 2016 entry in DLSE's "900" notes stating that she spoke to New Image representatives who confirmed the Project had not been completed. Dvorak also noted that New Image would revise their CPRs to reflect the apprentices they employed. On March 2, 2017, DLSE spoke to Delgado directly and notified him that the case was still under investigation.

⁷ By the date on which DLSE served the Assessment, the College District had not filed a Notice of Completion with the County of Los Angeles. Dvorak testified that the litigation between the College District and Mallcraft resulted in the absence of a Notice of Completion.

During her investigation Dvorak also requested and obtained from New Image cancelled checks, paystubs, and timesheets for workers; daily Project sign-in sheets (Daily Sign-Ins) prepared by Mallcraft; and Daily Job Reports (Daily Reports) prepared by Mallcraft. The Daily Sign-Ins were attendance sheets for safety meetings conducted by Mallcraft for workers of its various subcontractors. The Daily Sign-Ins identified the day of the week, date, and project name. Also listed were the names of the workers' subcontractor employer. The Daily Reports listed the day, weather condition, identity of each subcontractor for that day, the number of workers present for each subcontractor, and a brief description of the work being performed that day by each subcontractor.

Dvorak also met with workers Partida and Daniel Garcia, who filled out blank calendars with the hours they worked on the Project each day. Partida testified that as the Project progressed and on a daily basis, he notated his work hours in his personal calendar. Partida used that personal calendar when filling out the calendar he gave to DLSE.

Dvorak testified that when the Daily Reports stated that it was raining, but the workers' calendars showed they had work hours, Dvorak did not count those hours as being worked on the Project because the tiling work done by New Image was performed outdoors.

Dvorak further testified that she noted contradictions between the CPRs, workers calendars, and Mallcraft's Daily Sign-Ins and Daily Reports. For example, New Image's CPRs included a Statement of Non-Performance for a particular workweek during which, according to the Daily Sign-Ins, New Image's workers were on site. For example, for the week ending April 10, 2016, the CPR included a Statement of Non-Performance, indicating New Image had not performed work during that week, yet the Daily Reports for that work period showed New Image workers installing quarry tile outside the building.

In addition, New Image's paystubs at times contradicted its own CPRs, such as instances where one paystub showed a worker receiving no payment of wages after deductions, but the CPR for that day showed that the worker was paid wages.

In light of the contradictions between the CPRs, paystubs, the Daily Reports and the Daily Sign-Ins, Dvorak relied on the workers' calendars to add hours of unpaid wages for days that the Daily Sign-Ins showed the workers were present.

In DLSE's second revised audit, Dvorak listed a worker, identified as "Edgar," as having worked for New Image on April 5, 2016. The Daily Sign-Ins for that day showed the presence of five New Image employees, including Edgar, working in the trade of "rubber base/carpet tile." These five New Image employees are also noted in the Daily Reports for that day. Dvorak testified that while Edgar did not appear on the CPR for April 5, three of the five New Image employees were listed on the CPR as having worked for 7.5 hours. On that basis, Dvorak included Edgar as also having worked 7.5 hours as well. Delgado testified that Edgar could have been a person that was hired to help out that day.

Dvorak testified that New Image also failed to pay required training fund contributions. She checked the California Apprenticeship Council's (CAC) website and found no record of any payment of training funds by New Image for this Project.

DLSE's second revised audit worksheets show that Partida worked nine hours on a daily basis, except Fridays, when he worked only eight hours, and Saturdays, when he worked seven hours. Partida is the only worker on the audit worksheet who is shown to have worked overtime. Partida testified that he took two other workers to the job site and would give them a ride back home, yet these two workers do not claim the same overtime hours that Partida claims to have worked.

At the Hearing, New Image argued the DLSE should not have relied on the Daily Sign-Ins because they did not indicate number of hours worked. Further, Mallcraft President Hansen testified that at times she saw Jay Rivas, the Mallcraft Safety Officer who completed the Daily Sign-Ins, simply copy names onto the Daily Sign-Ins from the previous day's Daily Sign-Ins. But, when questioned concerning the different order of names on each sign-in sheet, Hansen conceded that each sheet was different. Also, in some instances, workers themselves personally signed-in.⁸

New Image argued the workers' calendars were unreliable because they were completed many years after the date the work was actually performed. Hansen also testified that regular work hours for New Image were from 6:30 a.m. to 2:30 p.m. Monday through Friday. Any work conducted outside these hours would have required permission from the College District and notice to campus security. Hansen recalled that while another subcontractor, Newport Tiling, was onsite after hours, New Image was not, and Mallcraft never requested permission for weekend or afterhours access to the job site for New Image.

New Image also argued the workers' calendars were incorrect because, as some of the claimed days of work were rainy days, according to the Daily Reports, and since New Image only performed work outdoors, New Image workers would be off those days.

New Image also submitted signed timecards for Partida and Tile Layer Otoniel Salamanca-Garza as constituting the better proof of the hours they actually worked, compared to Partida's calendar submitted to DLSE. Timecards

⁸ DLSE objected to the entirety of Hansen's testimony as New Image failed to file and serve its witness list pursuant to the Hearing Officer's pre-hearing order. DLSE argued it had no notice that New Image would have any witnesses and therefore was unable to prepare for witness examination. New Image responded that while it did not file a witness list, it emailed a DLSE investigator and advised them that New Image would bring Hansen to the Hearing as a witness. DLSE's objection is overruled in that DLSE had at least some notice that Hansen would testify. Also, DLSE could have, but did not, request a continuance of the Hearing in order to prepare for witness cross-examination.

showed that work typically occurred six hours a day, Monday through Friday. Partida, however, testified that just before receiving his paycheck at the end of the week, he signed a blank timecard. New Image disputed that the timecards were blank, arguing a reasonable person would not have signed a blank document.

Also, Hansen testified that the workers' hours as represented on the calendars were over-inflated, because New Image was contracted to perform less than 2,000 square feet of tiling. However, New Image presented no evidence of the hours that would be required for a job of this size.

Assessment of Penalties under Section 1775.

Dvorak testified that the section 1775 penalties under the Assessment were set by the Senior Deputy Labor Commissioner at \$150.00 per violation for 223 violations, amounting to a total of \$33,450.00. Based on the CPRs, cancelled checks and workers' calendars, DLSE found a violation for each day of work on which a worker was not paid prevailing wages.

Apprentice Requirements.

There are three applicable apprenticeship committees for the crafts of Tile Layer and Tile Finisher in the geographic area of the Project. Those committees are: the Bricklayers & Allied Craftworkers Local #4 California J.A.C., the Joint Apprenticeship Committee - Tile & Terrazzo Industry, and the Southwest Terrazzo Installers and Finishers J.A.T.C.⁹ After starting work on the Project in January 2016, New Image sent the DAS 140 notice of contract information on March 1, 2016, only to the Joint Apprenticeship Committee - Tile & Terrazzo Industry.

⁹ These three entities were the applicable apprenticeship committees for Tile Layer and Tile Finisher crafts.

New Image failed to send a request for dispatch to any of the applicable apprenticeship committees.

According to the DLSE Penalty Review, New Image's journeypersons in the Tile Layer and Tile Finisher crafts worked on the Project for 71 days. New Image employed no apprentices on any of these 71 days. According to DLSE's second revised audit, New Image used a total of 908.5 Tile Layer journeyperson hours on the Project. The sole Tile Finisher worked 166.50 hours on the Project.

DLSE assessed penalties under section 1777.7 based on New Image's failure to send the DAS 140 form to the three applicable apprenticeship committees for the crafts of Tile Layer and Tile Finisher. DLSE selected the penalty rate of \$50.00 per violation for 690 calendar days, for a total of \$34,500.00.¹⁰ DLSE chose the \$50.00 rate based, in part, on the lack of prior violations by New Image.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

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

(Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987, citations omitted)

¹⁰ New Image's first day of work on the Project was January 11, 2016, and according to the CPRs, its last day of work on the Project was December 1, 2017.

(*Lusardi*.) DLSE enforces prevailing wage requirements not only for the benefit of workers, but also “to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” (§ 90.5, subd. (a); see also *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers paid less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. 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 those 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 burden of producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that initial burden is met, the contractor or subcontractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (a); 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).)

The Assessment was Timely Served on New Image.

The limitations period for DLSE to serve an assessment is stated in section 1741, subdivision (a), which has been in effect without amendment since January 1, 2014. (Stats. 2013, ch. 792, § 1, eff. Jan. 1, 2014 [Assem. Bill 1336].)¹¹ It states in relevant part:

The assessment shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last.

The Assessment was issued on November 20, 2018. Prior to that date, the College District had neither filed a Notice of Completion nor accepted the work performed on the Project. Since the later of those two conditions must exist before the 18-month limitations period commences to run, the Assessment was timely.

New Image Owes \$28,107.48 in Unpaid Prevailing Wages.

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 Number 16-2001, which applies to on-site occupations in the construction industry, provides as follows:

¹¹ For most purposes on a public works project, the bid advertisement date determines the applicable Labor Code sections and applicable sections of the California Code of Regulations, title 8. As stated *ante*, the bid advertisement date of this Project was May 29, 2013. Assembly Bill 1336 was not effective until January 1, 2014, and the prior statute provided a 180-day statute of limitations. (See Assem. Bill 1646, stats. 2000, ch. 954, § 9.) However, “[a]s long as the former limitations period has not expired, an enlarged limitations period ordinarily applies and is said to apply prospectively to govern cases that are pending when, or instituted after, the enactment took effect.” (*Quarry v. Doe I* (2012), 53 Cal.4th 945, 955-960.) Therefore, based on the 2018 date of the Assessment, in this case the 18-month limitations period applies.

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).)

When an employer fails to keep accurate and contemporaneous time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount owed by a just and reasonable inference from the evidence as a whole. In such cases, the employer has the burden to come forward, with evidence of the precise amount of work performed or with evidence to rebut the reasonable estimate. (See, e.g., *Furry v. E. Bay Publ'g, LLC* (2019) 30 Cal. App.5th 1072, 1079 [“[A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s

evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate”], citing *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727, and *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687-88 [66 S.Ct.1187].) This burden is consistent with an affected contractor’s burden under section 1742 to prove that the basis for an Assessment is incorrect.

In this case, DLSE presented evidence showing prima facie support for the finding in the amended Assessment that New Image underpaid its workers on the Project in the aggregate sum of \$33,514.98. The evidence showed that New Image failed to report all hours worked as stated in the workers’ calendars, as corroborated by the Daily Sign-Ins and Daily Reports. In turn, New Image met its burden of showing the amended Assessment was incorrect as to a limited issue, Partida’s overtime work during 10 regular workweeks and on nine Saturdays.

Hansen credibly testified that Mallcraft did not request permission for New Image to work after hours. Hansen stated that campus security would have contacted Mallcraft for unauthorized work after hours. Further, Partida was the only worker out of eight other Tile Layers and Tile Finishers to claim Saturday and overtime work. In light of these facts, it is unlikely that Partida worked overtime during the week or on Saturdays. On that basis the amount of unpaid wages found under the amended Assessment must be reduced by \$5,407.50, a reduction based on Partida’s claim of 100 hours of overtime at a rate of \$54.075 per hour.

With respect to the remaining hours of underpaid work listed in the Assessment, however, New Image failed to meet its burden of showing the Assessment was incorrect. New Image unpersuasively argued that it was unreasonable for workers to sign a blank timecard. That argument neglects the fact that the workers signed the timecards just before receiving their paycheck, a circumstance that reasonably could lead workers to sign blank timecards in order

to avoid delay in paycheck receipt. New Image also argued the hours were overinflated for a tiling job of less than 2,000 square feet. But, New Image failed to present any evidence of what would be a reasonable amount of time for Tile Layers and Tile Finishers to perform a job of this size and scope. Nor did New Image refute the existence of hours worked by Edgar, the Carpet, Linoleum worker that was identified in the Daily Reports and Daily Sign-Ins.

On the whole, the evidence shows that New Image used extraordinarily poor payroll and timekeeping practices, as detailed by Dvorak's testimony regarding paystubs showing no wages paid after deductions, and Statements of Non-Performance on days when the Daily Reports and Daily Sign-Ins show the presence of New Image workers. Based on the workers' and Dvorak's testimony, the CPRs, workers' calendars, Daily Sign-Ins and Daily Reports, DLSE presented evidence showing prima facie support for the Assessment finding that New Image underpaid its workers \$33,514.98. Accordingly, the burden shifted to New Image to produce evidence to prove the Assessment was incorrect. But, as noted above, New Image failed to carry that burden, with the sole exception of overtime pay for worker Partida in the amount of \$5,407.50. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

Accordingly, New Image is liable for payment of prevailing wages in the aggregate sum of \$28,107.48.

New Image Failed to Pay Required Training Fund Contributions.

Section 1771 requires that all workers on a public work receive at least the general prevailing wage. There are three components to the prevailing wage: (1) the basic hourly rate; (2) fringe benefit payments; and, (3) a contribution to the California Apprenticeship Council (CAC) or an approved apprenticeship program that can supply apprentices to the site of the public works project (the last are payments referred to as "training fund contributions"). The first two components (also known as part of the total

prevailing wage) must be paid to the worker or on the worker's behalf and for his benefit (in the case of the fringe benefit payments). An employer cannot pay a worker less than the required basis hourly rate.

Section 1773.1, subdivision (a), includes in the definition of per diem wages employer payments for among other things Health and Welfare, Pension, and Apprenticeship training programs authorized by section 3093. However, any payment by an employer on behalf of an employee for apprenticeship training authorized by section 3093 is separate and apart from the payment to the CAC or an approved apprenticeship program that is required by section 1777.5, subdivision (m).

Dvorak testified the CAC had no record of training funds paid by New Image for the Project either to the CAC or an approved apprenticeship program. New Image did not rebut that evidence. Therefore, training fund contributions in the amount of \$852.96 are due.

DLSE Did Not Abuse Its Discretion By Assessing Penalties Under Section 1775 at \$150.00 Per Violation.

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

(a)(I) 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) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, unless the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) The penalty may not be less than eighty dollars (\$80) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the contractor or subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty dollars (\$120) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^[12]

(C) If the amount due under this section is collected from the contractor or subcontractor, any outstanding wage claim under Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 against that contractor or subcontractor shall be satisfied before applying that amount to the penalty imposed on that contractor or subcontractor pursuant to this section.

¹² The reference in section 1775, subdivision (a)(2)(B)(iii), to section 1777.1, subdivision (c), is mistaken. The correct reference is to section 1777.1, subdivision (d). According to that subdivision, a willful violation is defined 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."

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. 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); § 1775, subd. (a)(2)(D).)

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

New Image failed to establish that the Labor Commissioner abused her discretion in setting the section 1775 penalty rate at \$150.00 per violation. Dvorak counted 223 separate violations—one violation per day for each worker. According to the Penalty Review, the Labor Commissioner assessed the penalties at a rate of \$150.00 per violation after considering New Image’s failure to voluntarily pay the wages owed and deciding that the error was not due to a good faith mistake.

New Image presented no evidence or argument that setting the section 1775 penalties at \$150.00 per violation was an abuse of discretion. In light of the finding that Partida did not work overtime hours, however, the number of violations must be reduced from 223 to 214. Accordingly, the amount assessed

for section 1775 penalties is reduced by \$1,350.00; the remaining total due in section 1775 penalties is \$32,100.00.

New Image is Liable for Liquidated Damages.

Section 1742.1, subdivision (a) provides in part:

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

The statutory scheme regarding liquidated damages, as applicable to this case, provides contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These two alternative means required the contractor to make key decisions within 60 days of the service of the civil wage penalty assessment upon the contractor.

Under section 1742.1, subdivision (a), the contractor has 60 days to decide whether to pay to 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 deposited with DIR the full amount of the assessment of unpaid wages, including all statutory penalties.

In this case, no evidence shows that New Image paid any back wages to the workers in response to the Assessment or deposited with DIR the assessed wages and statutory penalties. Accordingly, New Image is liable for liquidated damages in the amount of the unpaid prevailing wages, totaling \$28,107.48.

New Image Violated Apprenticeship Requirements.

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 232.70.)¹³

Former section 1777.5, as it existed on the May 29, 2013 bid advertisement date for the Project, 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, former 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 a 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.

¹³ All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

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.

The Division of Apprenticeship Standards (DAS) has prepared a form (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 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 contact 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.

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

When DLSE determines that a violation of the apprenticeship laws has occurred, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (Former § 1777.7, subdivision (c)(2)(B).)

In this case, DLSE carried its initial burden of providing prima facie support that New Image failed to notify all applicable apprenticeship committees of contract award information, as well as failed to send requests for dispatch. (Cal. Code Regs., tit. 8, § 17250, subd. (a).) Three applicable apprenticeship committees existed in the geographic area of the Project covering the crafts of Tile Layer and Tile Finisher. DLSE presented evidence that of those three committees, New Image provided contract award information by sending a DAS 140 form to only one committee. Moreover, the DAS 140 form was not sent before New Image started work on the Project. New Image presented no evidence to the contrary or otherwise carry its burden to prove the basis of the amended Assessment was incorrect with regard to the DAS 140. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

Additionally, according to the DLSE Penalty Review, New Image failed to request dispatch of apprentices from any applicable apprenticeship committee. No evidence was presented by New Image showing that it had, in fact, sent a DAS 142 form or its equivalent. Further, based on the CPRs, no apprentices

worked on the Project, a violation of the requirement to employ apprentices to journeypersons in the 1:5 ratio.

DLSE determined in its second revised audit that New Image’s Tile Layer journeypersons worked 908.5 hours on the Project. The sole Tile Finisher worked 166.50 hours. Applying the 1:5 ratio, the loss of apprenticeship training opportunity for the Tile Layer craft is 181.7 hours, just over 4 weeks of lost training opportunities for apprentices and apprenticeship committees. For the Tile Finisher craft the loss of apprenticeship training opportunity is 33.3 hours. (Former § 1777.7, subd. (b).)

Accordingly, it is concluded that New Image violated former section 1777.5, subdivisions (e) and (g), and the applicable regulations, sections 230 and 230.1, subdivision (a).

Penalty for Noncompliance with Section 1777.5.

If a contractor knowingly violates section 1777.5, a civil penalty is imposed under section 1777.7. Here, DLSE assessed a penalty against New Image under the following portion of section 1777.7, subdivision (a)(1):

A contractor or subcontractor that is determined by the Labor Commissioner to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation.... A contractor or subcontractor that knowingly commits a second or subsequent violation of section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars (\$300) for each full calendar day of noncompliance....

The phrase quoted above—“knowingly violated Section 1777.5”—is defined by, section 231, subdivision (h), as follows:

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

New Image hired no apprentices for the Project. Nor did New Image attempt to obtain apprentices by sending a timely DAS 140 form to all three apprenticeship committees or a DAS 142 form to any of the applicable apprenticeship committees. DLSE imposed a penalty rate of \$50.00 for each of 690 days of violations. Dvorak testified that the 1777.7 penalties were based on New Image's failure to submit contract award information to all applicable apprenticeship committees. The applicable regulation, section 230, subdivision (a), details the manner of calculating 1777.7 penalties for a violation based on failure to submit contract award. The regulation states:

Failure to provide contract award information, which is known by the awarded contractor, shall be deemed to 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.

(Cal. Code. Regs., tit. 8, § 230, subd. (a).) Thus, per the regulation, a failure to provide contract award information is a violation that runs throughout the duration of a contract. For purposes of the penalty, the violation is not limited solely to the days on which journeypersons were present on the Project. As set forth in the DLSE penalty review, New Image's violation results in a penalty period of 690 days, running from January 11, 2016, the first day New Image had

workers on the job, until December 1, 2017, the last day of work that New Image's workers were on the Project.¹⁴

Under the version of section 1777.7 applicable to this case, the Director decides the appropriate penalty de novo.

In setting the penalty, the Director considers all of the following factors:

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

(Former § 1777.7, subd. (f)(1), (2).)

New Image's violations were "knowing" under the irrebuttable presumption quoted above in that New Image signed the Subcontract. By reference to the prime contract, the State prevailing wage laws, and the attachments to the Subcontract, New Image was notified of its obligation to comply with requirements under section 1777.5 to employ registered apprentices on the Project. Delgado testified that the Project was not New Image's first public works project. Further, New Image's actions demonstrated that it was aware of the requirement to provide notice of its public works contract when it notified, albeit in an untimely manner, only one of the three applicable apprentice committees. There was no evidence that New Image could not have sent contract award information to all the applicable committees in timely fashion and could not have requested dispatch of apprentices from those same committees.

¹⁴ Since the College District did not file a Notice of Completion before the Assessment, the last journeyman work day adequately marks the "duration of the contract" for purposes of the penalty period.

Applying the de novo standard for this case, factor "A" under section 1777.7 would suggest a penalty rate on the higher end. The Contract put New Image on notice that it was required to employ apprentices, and the company is experienced in public works projects.

Factor "B" favors a lower penalty because New Image does not have a history of prior violations.

As to the de novo review factors "D" and "E," DLSE's second revised audit established that New Image's Tile Layer journeypersons worked 908.5 total hours on the Project, but no apprentices were employed. Applying the five-to-one ratio for Tile Layers, New Image's violations of the ratio requirement deprived apprentices of over four weeks of paid on-the-job training and also deprived the relevant apprenticeship committees of the opportunity to provide that training to the apprentices in their programs. For the Tile Finisher craft the loss is measured at 33.3 apprenticeship hours. Altogether, the loss of training opportunities suggests a higher penalty.

The facts in this case that are relevant to factor "C" also do not favor New Image. DLSE's evidence shows that DLSE requested payroll records from New Image on June 27, 2016. As of that date, New Image was on notice that DLSE was investigating potential violations of the CPWL, including apprentice requirements. New Image presented no facts showing any subsequent attempt to send apprenticeship committees the contract award information, send the committees requests for dispatch of apprentices, or hire apprentices. Instead, New Image continued its work on the Project to December 1, 2017, without voluntarily remedying its apprentice violations.

Overall, based on a de novo review of the five factors above and in light of the evidence as a whole in this case, the Director finds that a penalty rate of \$50.00 for each of 690 days of noncompliance is appropriate, and accordingly the Assessment is affirmed in this respect, for a total amount of \$34,500.00 due under section 1777.7.

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

FINDINGS AND ORDER

1. The Labor Commissioner timely served the Assessment on New Image Commercial Flooring, Inc.
2. New Image Commercial Flooring, Inc. failed to pay its workers \$28,107.48 in prevailing wages.
3. The Assessment, as amended, correctly found that New Image Commercial Flooring, Inc. failed to make the required training fund contributions to an approved apprenticeship program or the California Apprenticeship Council in the amount of \$852.96.
4. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code section 1775 at the rate of \$150.00 per violation for 214 violations in the aggregate sum of \$32,100.00.
5. New Image Commercial Flooring, Inc. is liable for liquidated damages based on unpaid wages found in this Decision in the amount of \$28,107.48.
6. New Image Commercial Flooring, Inc. did not submit contact award information (using the DAS 140 form or its equivalent) in timely fashion to all of the applicable apprenticeship committees
7. New Image Commercial Flooring, Inc. did not submit requests for dispatch (using the DAS 142 form or its equivalent) to the applicable apprenticeship committees.
8. New Image Commercial Flooring, Inc. violated Labor Code section 1777.5 by failing to employ apprentices in the required minimum ratio of apprentices to journey person on the Project for the Tile Layer and Tile Finisher crafts.

9. New Image Commercial Flooring, Inc. is liable for penalties under Labor Code Section 1777.7 at the rate of \$50.00 per violation for 690 violations, for an aggregate sum of \$34,500.00.
10. The amounts found due in the amended Assessment, as affirmed and modified by this Decision, are as follows:

Wages Due:	\$28,107.48
Training Fund Contributions:	\$852.96
Penalties under section 1775, subdivision (a):	\$32,100.00
Liquidated damages:	\$28,107.48
Penalties under section 1777.7:	\$34,500.00
TOTAL:	\$123,667.92

In addition, interest is due from New Image Commercial Flooring, Inc. and shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

The Civil Wage and Penalty Assessment, as amended, is modified and 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: 5/11/20



Katrina S. Hagen
 Director, Department of Industrial Relations