

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Michael Marlon Bandy, an Individual dba
MB Plumbing Services**

Case No. 18-0188-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Michael Marlon Bandy, an individual doing business as MB Plumbing Services (MB Plumbing) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued on May 7, 2018, by the Division of Labor Standards Enforcement (DLSE) with respect to work performed by MB Plumbing on the Building 2 Restroom Renovation Project (Project) for The Trustees of the California State University (CSU), in Los Angeles County at the Cal Poly Pomona campus. The prime contractor on the Project was Vincor Construction, Inc. (Vincor Construction).¹ The Assessment asserted that the following amounts were due: \$3,891.68 in unpaid prevailing wages, \$780.00 in penalties under Labor Code section 1775,² and \$3,280.00 in penalties under section 1777.7.

On June 18, 2019, a Hearing on the Merits was held in Los Angeles, California, before Hearing Officer Mirna Solis. Lance Grucela appeared as

¹ Vincor Construction did not file a request for review.

² All subsequent section references are to the California Labor Code, unless otherwise specified.

counsel for DLSE; Eula Cisneros, a non-attorney representative, appeared on behalf of MB Plumbing. DLSE Auditor I Susan Babirye testified in support of the Assessment. Michael Marlon Bandy, owner of MB Plumbing, and Joanne Cisneros-Baker, payroll specialist for MB Plumbing, testified on behalf of MB Plumbing. The parties submitted the matter for decision on June 18, 2019.

The issues for decision are:

- Whether MB Plumbing properly classified workers for all work performed on the Project.
- Whether MB Plumbing is liable for penalties for unpaid wages pursuant to section 1775.
- Whether MB Plumbing has established that the Labor Commissioner abused her discretion in assessing penalties pursuant to section 1775.
- Whether MB Plumbing is liable for liquidated damages on wages found due and owing.
- Whether MB Plumbing submitted contract award information to all applicable apprenticeship committees in a timely and factually sufficient manner.
- Whether MB Plumbing employed apprentices in the required minimum ratio of apprentices to journeypersons on this Project.
- Whether MB Plumbing is liable for penalties assessed for apprentice violations pursuant to section 1777.7.
- Whether the Labor Commissioner abused her discretion in assessing penalties for apprentice violations pursuant to section 1777. 7.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, and that MB Plumbing failed to carry its burden of proving that the basis of the Assessment was incorrect. (See

Cal. Code Regs., tit. 8, § 17250, subd. (a), (b).) Accordingly, the Director issues this Decision affirming the 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 correct classification of the workers on the Building 2 Restroom Renovation Project was the classification of Plumber Industrial General Pipefitter.
6. For the Building 2 Restroom Renovation Project, the applicable prevailing wage determination for Los Angeles County for the classification of Plumber Industrial General Pipefitter was LOS-2015-1.
7. The amount of \$3,891.88 in DLSE's audit (as unpaid wages) was correctly calculated.

On April 7, 2015, and on April 16, 2015, the CSU published its notice of invitation for bids for the Project. In addition to the invitation for bids, the CSU issued a "Notice to Contractors," which provided additional details about the job and the bidding process, as well as notification that this Project was a public works project and was subject to prevailing wages. On May 15, 2015, Vincor Construction and the CSU executed the prime contract (Contract). Work under

the Contract was for renovation of the men's and women's bathroom in Building 2 at the Cal Poly Pomona campus. CSU's Purchase Order stated the cost of the Project was \$213,161.70 and that "payment of the current general prevailing rate is required on all public works projects..." In turn, Vincor Construction subcontracted with MB Plumbing for plumbing aspects of the Project. MB Plumbing's employees worked on the Project from June 20, 2016, to September 10, 2016.

The Applicable Prevailing Wage Determination.

As stipulated by the parties, the correct classification for the Project is the Plumber Industrial General Pipefitter (General Pipefitter), which is a sub-classification under the Plumber craft. The applicable prevailing wage determination for the sub-classification of General Pipefitter in Los Angeles County in 2015 is LOS-2015-1 (Plumber PWD). Pursuant to the Plumber PWD, the General Pipefitter sub-classification required a total hourly rate of pay of \$66.02.

The Plumber PWD also encompasses a small number of other sub-classifications. One, the Sewer and Storm Drain Pipe Trades[person] (Pipe Tradesperson) sub-classification, requires a total hourly wage of \$26.34.

The Assessment.

DLSE Auditor Babirye was assigned to investigate a complaint of prevailing wage violations on the Project. Babirye testified that she contacted Cisneros-Baker, a payroll specialist who handles certified payroll records (CPRs) and compliance documents for MB Plumbing. Pursuant to Babirye's request, Cisneros-Baker provided a description of the work performed on the Project. The work consisted of plumbing, including pipe repairs, laying pipe and pipe installation. Babirye also reviewed the CPRs, which showed two "Plumbing Tradespersons" as having worked on the Project, and no other workers. Babirye

testified that no journeypersons or apprentices, as such, were listed on the initial CPRs.

Babirye further testified that she reviewed the scope of work for the Pipe Tradesperson sub-classification and concluded that, pursuant to the scope of work, a journeyperson in the General Pipefitter sub-classification must be employed on the job before the lower-paid Pipe Tradesperson could be employed. Further, Babirye testified that the scope of work for Pipe Tradesperson restricts the work that can be performed by that sub-classification. Specifically, a Pipe Tradesperson may not lay pipe—only a journeyperson can lay pipe. Significantly, the scope of work applicable to both Pipe Tradespersons and General Pipefitter states “Apprentices and Pipe Tradespersons shall not be permitted on any job that does not have a Journey[person] assigned there to by the Employer.” In light of these provisions, Babirye determined that since Pipe Tradespersons assisted journeypersons, Pipe Tradespersons cannot be on the job by themselves and the workers on the Project needed to be reclassified to the higher-paid journeyperson (General Pipefitter)³. Since no journeypersons were listed in the CPRs, Babirye determined that MB Plumbing, misclassified the two workers as Pipe Tradespersons. For purposes of her audit, she reclassified them to the sub-classification General Pipefitter for all hours worked on the Project, resulting in an underpayment of \$3,891.88.

Cisneros-Baker testified that before the work on the Project began, she called an unidentified number she found on the website of the Department of Industrial Relations (DIR) to find out what prevailing wage rates MB Plumbing

³ The scope of work for the two sub-classifications, General Pipefitter and Pipe Tradespersons, also states that the “work[er] in charge of laying the pipe shall be a Journey[person].” It further states “Pipe Trades[persons] ... will be limited to the following work processes: All digging and backfilling ... with the exception of motorized equipment ... [,]All cleanup and sweeping of the Contractor’s shop, yard, or job site ... [and] All pipe wrapping and water proofing where tar or similar material is applied for protection.” (DLSE Exhibit No. 7, §§ D.4.18, D.5.9.1 and D.5.9.3.)

should pay its workers. She could not recall the name of the person with whom she spoke, but testified that she gave the person the work tasks MB Plumbing's workers would be performing. Cisneros-Baker stated she was told that MB Plumbing could use "a plumbing trades[person]" classification for the work. The unidentified DIR personnel also advised Cisneros-Baker, according to her testimony, that the prevailing wage for Pipe Tradesperson was \$27.00 per hour. Cisneros-Baker also testified that she has been handling prevailing wage compliance for many years for various contractors, and that she reviewed the Plumber PWD before and after calling the DIR number.

Bandy testified that he is a licensed plumbing contractor and journeyman. On the Project, he met inspectors and procured plumbing material for the Project. Bandy further testified that he himself worked on the Project putting pipes together, welding, and installing toilets for five to ten percent of the time. For the other 90 to 95 percent of the time, according to his testimony, Bandy supervised the work and attended to other contracts, although he estimated he was physically on site at the Project 75 percent of the time. MB Plumbing contended that Bandy's presence on the Project met the requirement of the Plumber PWD that a journeyman be assigned in order for MB Plumbing to use Pipe Tradespersons on the job.

Assessment of Penalties under Section 1775.

Babirye testified that the section 1775 penalties under the Assessment were set at \$60.00 per violation for 13 violations, amounting to a total of \$780.00. Relying on the CPRs, Babirye found a violation for each day of work for which a worker was not paid prevailing wages.

Apprentice Requirements.

Babirye testified that there were four applicable apprenticeship committees for the Plumbing trade in the geographic area of the Project. Those committees were: the Glendale, Burbank, San Fernando Valley & Antelope Valley

Plumbers & Steamfitters Joint Apprenticeship and Training Committee; the Los Angeles Metropolitan Plumbers & Steamfitters JAC; the Pomona & San Gabriel Valleys Plumbers & Contractors, Inc. Plumbers UAC; and the Southern California Chapter of the Associated Builders & Contractors, Inc. Plumbers UAC. Babirye determined that MB Plumbing sent the required notice of public works contract award form, DAS 140, to just one of the four applicable committees, the Pomona & San Gabriel Valleys Plumbers & Contractors, Inc. Plumbers UAC (Pomona UAC). Babirye also testified that MB Plumbing sent the required request for dispatch of apprentices, the DAS 142 form, to just one committee, the Pomona UAC. Cisneros-Baker confirmed in her testimony that MB Plumbing sent the contract award information and a request for dispatch only to the Pomona UAC.

According to the DLSE penalty review document, penalties under section 1777.7 were assessed at the rate of \$40.00 per violation for 82 days, for a total of \$3,280.00. DLSE chose the \$40.00 rate based on MB Plumbing's lack of prior violations. The penalty was imposed due to MB Plumbing's failure to send the DAS 140 form to all four plumbing apprenticeship committees. According to the CPRs, MB Plumbing's first day of work on the Project was June 20, 2016, and MB Plumbing's last day of work on the Project was September 10, 2016. The total number of calendar days between those dates was 82 days.

MB Plumbing asserted the DLSE did not correctly calculate the penalties under section 1777.7 because it was not on the job for 82 days, but instead worked on and off the job during the Project period. MB Plumbing also contended that the Assessment is incorrect because it did not take into account MB Plumbing's revised CPRs, which it sent DLSE after issuance of the Assessment. Cisneros-Baker testified that she revised two of the CPRs because the original CPRs sent to DLSE did not include the apprentices who were used. However, the parties' Joint Exhibit Number 1 only includes one revised CPR—payroll number 7, which is for the workweek ending August 7, 2016. That

revised CPR shows two apprentices on the job for 18 hours. Cisneros-Baker testified that the two revised CPRs showed that the apprentices worked 36 hours. MB Plumbing argued that with the evidence of the two apprentices, it met the required 1:5 apprentice to journeyman ratio based on the 36 hours that apprentices worked according to the revised CPRs, compared to the 152 combined hours the revised CPRs show as being worked by Pipe Trades[persons].

Babirye testified that the Assessment did not take into account the revised CPR (Joint Exh. No. 1) because it was not presented to DLSE until after the Assessment was issued. Notwithstanding, Babirye testified that had it been considered, the revised CPR would have resulted in an upward amendment of the Assessment for the hours the alleged apprentices worked because MB Plumbing could not employ apprentices without a journeyman on the job.⁴ Further, according to Babirye, the revised CPR would not have made a difference with respect to section 1777.7 penalties, because these penalties were based on the failure to submit contract award information to all the applicable apprenticeship committees, not MB Plumbing's failure to employ apprentices in the proper 1:5 apprentice to journeyman ratio.

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 California Supreme Court has summarized the purpose of the CPWL 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

⁴ During the pay period for which the revised CPR (Joint Exh. No. 1) showed 18 hours of apprentice work, the only other worker employed by MB Plumbing was a Pipe Tradesperson.

employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

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

Section 1775, subdivision (a), requires, among other provisions, 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 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 burden of producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs. tit. 8, § 17250, subd. (a).)⁵ 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).)

In this case, the parties stipulated that the Assessment correctly calculated the amount of wages due under the Plumber PWD if reclassification of the Pipe Tradesperson work was required as \$3,891.88. Babirye calculated the unpaid prevailing wages owed by reclassifying to General Pipefitters the two workers listed in the CPRs as Pipe Tradespersons. Babirye reasoned that the scope of work for a Pipe Tradesperson prohibits a worker in that classification, as well as apprentices, from working on a job when the employer has not assigned a journeyman to the job site.⁶ Indeed, the scope of work for Pipe Tradesperson and General Pipefitter states clearly: “Apprentices and Pipe Tradespersons shall not be permitted on any job that does not have a Journey[person] assigned thereto by the Employer.” (DLSE Exhibit No. 7, § D.5.9.3.) Further, the scope of work for Pipe Tradespersons restricts that sub-classification to digging, backfilling, cleanup, sweeping, and pipe wrapping and water proofing where tar or similar material is applied. (DLSE Exhibit No. 7, § D.4.18.)

⁵ All further regulatory references are to California Code of Regulations, title 8.

⁶ In addition to the wording in the scope of work for Pipe Tradesperson that requires a journeyman be on the job before a Pipe Tradesperson is used, footnote “AS” of the Plumber PWD reiterates that a “Pipe Tradesperson shall not be permitted on the job without a journey[person].” (DLSE Exhibit No. 6.)

MB Plumbing stipulated that the correct classification for workers on the Project was the General Pipefitter. Normally, that would end the inquiry. MB Plumbing nonetheless argued that DLSE was incorrect in upgrading the Pipe Tradesperson to journeyperson level because Bandy himself worked on the Project as a journeyperson in the sub-classification General Pipefitter. In that connection, Bandy asserts that he supervised the Pipe Tradespersons' work 75 percent of the time.

MB Plumbing has the burden to show the Assessment was incorrect in reclassifying the two Pipe Tradespersons to General Pipefitter. (Cal. Code Regs. tit. 8, § 17250, subd. (b).) MB Plumbing argues that Bandy could serve as the journeyperson mentioned in the scope of work. Yet, Bandy admitted that he only actually worked on the Project for 5 to 10 percent of the time, and he did not rebut DLSE's evidence that the plumbing work done by the Pipe Tradespersons involved pipe repairs, laying pipe and pipe installation. In particular, MB Plumbing failed to present evidence showing that the Pipe Tradespersons restricted their work to the tasks allowed in that scope of work (i.e., digging, backfilling, cleanup, sweeping, pipe wrapping, and water proofing). Without evidence that the two workers paid as Pipe Tradespersons limited their work to the tasks allotted to them in the scope of work, it is concluded that DLSE properly reclassified them to the sub-classification of General Pipefitter.

Further, Bandy's presence on the Project does not satisfy the provision in the scope of work that "Apprentices and Pipe Trades[persons] shall not be permitted on any job that does not have a Journey[person] assigned thereto by the Employer" to the Project. (DLSE Exhibit No. 7, § D.5.9.3.) That Bandy was not listed on the CPRs undermines the argument that Bandy himself fulfilled the requirement that a journeyperson be assigned to the Project when Pipe Tradespersons are used. While Bandy testified he supervised the work 75 percent of the time, he admitted he spent just 5 to 10 percent of his time

physically working alongside the Pipe Tradespersons. The rest of his time was spent performing other duties such as meeting with inspectors. On balance, and given the totality of the evidence, it is concluded that Bandy was not a "Journey[person] assigned ... by the Employer" as contemplated by the Plumber PWD scope of work.

Nor can the alleged telephone call between an unidentified person at DIR and Cisneros-Baker serve to excuse MB Plumbing's use of Pipe Tradespersons in lieu of General Pipefitters on the Project. In essence, MB Plumbing's defense is that DLSE should be equitably estopped from enforcing the terms of the Plumber PWD by virtue of the fact it was induced to rely on an apparent mistake by an unidentified person at DIR who counselled use of the Pipe Tradesperson sub-classification.

"The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. [Citation.]" (*1041 20th Street, LLC v. Santa Monica Rent Control Bd.* (2019) 38 Cal.App.5th 27, 40, quoting *City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 279.)

Here, Cisneros-Baker did not testify as to the date of her call, the title of the person at DIR, or the precise work tasks or other circumstances that she described in order to elicit guidance from DIR. Nor did she testify that she told the person that Bandy would be the journeyperson assigned to the Project. While the Hearing Officer found no reason to doubt that a call between Cisneros-

Baker and a representative at DIR had occurred, the lack of detail and context for any advice that may have been given precludes a finding that either the DIR representative was fully apprised and had actual knowledge of the facts, or that the representative intended MB Plumbing to rely on the guidance to the exclusion of its own assessment based on the facts and applicable prevailing wage determination. Contractors have an obligation to inform themselves with respect to prevailing wage requirements, and while inquiries to DIR are certainly permissible, they do not substitute for the necessary review of prevailing wage determinations and scopes of work. Accordingly, the evidence fails to establish grounds for equitable estoppel.

For the foregoing reasons, this Decision affirms the Assessment's finding of unpaid prevailing wages in the amount of \$3,891.88.

DLSE Did Not Abuse Its Discretion By Assessing \$780.00 in Penalties Under Section 1775.

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

(a)(l) 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. [7]

(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.

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of

⁷ 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 (e). 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."

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.)

MB Plumbing did not establish that the Labor Commissioner abused her discretion in setting the section 1775 penalty rate at \$60.00 per violation. Babirye counted 13 separate violations—one violation per day worked for each of the two workers. The Labor Commissioner assessed the penalties at a rate of \$60.00 per violation by considering that MB Plumbing had not paid the owed wages, despite knowing of the DLSE’s investigation as early as December 1, 2016. On the day of the Hearing, MB Plumbing conceded it had yet to pay the workers the amount owed per the Assessment.

MB Plumbing presented no evidence or argument that the section 1775 penalties were an abuse of discretion. Accordingly, this Decision affirms the Assessment’s finding of 13 violations and penalties at a rate of \$60 per violation, for a total of \$780.00 in penalties under section 1775.

MB Plumbing 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). Pursuant to 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. Pursuant to 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 DIR the full amount of the assessment of unpaid wages, including all statutory penalties.

In this case, the unpaid wages and penalties have not been paid or deposited with the Department of Industrial Relations. Accordingly, MB Plumbing is liable for liquidated damages in the amount of the unpaid prevailing wages, totaling \$3,891.88.

MB Plumbing 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. (See Cal. Code Regs., tit. 8, §§ 227 to 232.70.)⁸ California Code of Regulations, title 8, section 227 provides that the regulations “shall govern all actions pursuant to . . . Labor Code sections 1777.5 and 1777.7.” DLSE enforces the apprenticeship requirements not only for the benefit of apprentices, but to encourage and support apprenticeship programs, which the Legislature has recognized as “a vital part of the educational system in California.” (Stats. 1999, ch. 903, § 1 [Assem. Bill 921].)

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). (§ 1777.5, subd. (g); § 230.1, subd. (a).) 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).) 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.

Contractors are also required to notify apprenticeship committees when a public works contract has been awarded. DAS has prepared a form for this purpose (DAS 140), which a contractor may use to notify all apprenticeship committees for each apprenticeable craft in the geographic area of the project. The required information must be provided to the applicable committees within ten days of the date of the execution of the prime contract or subcontract, “but

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

in no event later than the first day in which the contractor has workers employed upon the public work.” (§ 230, subd. (a).) The regulation specifically provides that “[c]ontractors 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.” (*Ibid.*, emphasis added.) Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices for specified dates and with sufficient notice.

In the present case, DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment as to MB Plumbing’s failure to notify all applicable apprenticeship committees. (Cal. Code Regs., tit. 8, § 17250, subd. (a).) Four applicable apprenticeship committees existed in the geographic area of the Project covering the Plumbing craft used on the job. DLSE also presented evidence that of those four committees, three were not properly notified of MB Plumbing’s public works contract. MB Plumbing did not rebut that evidence or otherwise carry its burden to prove that the basis of the amended Assessment was incorrect on this issue. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) In fact, Cisneros-Baker conceded that she sent the DAS 140 form to only one apprenticeship committee.

Accordingly, it is concluded that MB Plumbing violated section 1777.5, subdivision (e), and the applicable regulation, section 230, as to the notice requirement.⁹

⁹ MB Plumbing also violated the requirement to maintain the required 1:5 apprentice to journeyman ratio. MB Plumbing argues otherwise, asserting that its Pipe Tradespersons booked enough hours compared to the 36 hours allegedly booked by the apprentices, which exceeded the 1:5 ratio. However, Pipe Tradespersons are not journeymen according to the Plumber PWD. Further, the issue of whether MB Plumbing met the 1:5 ratio is ultimately immaterial to the amounts owed because DLSE based its assessment for the section 1777.7 penalty on the separate notice violation, which it may properly elect to do.

The Labor Commissioner Did Not Abuse Her Discretion in Assessing Penalties under Section 1777.7.

If a contractor knowingly violates section 1777.5, a civil penalty is imposed under section 1777.7 in an amount not exceeding \$100.00 for each full calendar day of noncompliance. (§ 1777.7, subd. (a)(1).) The phrase “knowingly violated Section 1777.5” is defined by California Code of Regulations, title 8, 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,

In setting the penalty, the Labor Commissioner is to consider all of the following circumstances:

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

(§ 1777.7, subd. (b).)

The Labor Commissioner’s determination of the amount of the penalty is 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 case, the Assessment set the section 1777.7 penalty at the relatively low rate of \$40.00 per violation. DLSE provided prima facie evidence that MB Plumbing's violation of the apprenticeship requirement of providing notice of the contract award was made knowingly, as defined in the regulations. The fact that MB Plumbing notified one of the four applicable apprentice committees demonstrates that it was aware of the requirement. 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 regulation does not limit the violation solely to the days on which workers were present on the Project. As set forth in the DLSE penalty review, applying this regulation to MB Plumbing's violation results in a penalty period of 82 days, running from June 20, 2016, the first day MB Plumbing had workers on the job, until September 10, 2016, the last day of work that MB Plumbing's workers were on the Project.

Babirye testified the penalties were assessed at the low rate of \$40.00 per calendar day of noncompliance. The rate of \$40.00 was selected, in part, based on the fact that MB Plumbing had no prior history of violating apprentice requirements. The low rate is likewise appropriate given the relatively short period of the Project and MB Plumbing's use of apprentices, albeit without the

benefit of journeypersons, and the minimal loss of apprentice training opportunity. (§ 1777.7, subd. (b).)

Based on the evidence as a whole, MB Plumbing did not establish that the Labor Commissioner abused her discretion in assessing the penalties at \$40.00 per violation. Accordingly, as determined by DLSE and specified in the Assessment, MB Plumbing is liable for section 1777.7 penalties at \$40.00 per violation for 82 days, for a total amount of \$3,280.00.

FINDINGS AND ORDER

1. Michael Marlon Bandy, an individual doing business as MB Plumbing Services, underpaid its workers \$3,891.88 in prevailing wages.
2. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code Section 1775 at \$60.00 per violation for 13 violations in the aggregate sum of \$780.00.
3. Michael Marlon Bandy, an individual doing business as MB Plumbing Services, is liable for liquated damages in the full amount of the unpaid wages, which is \$3,891.88.
4. Michael Marlon Bandy, an individual doing business as MB Plumbing Services, did not submit contact award information (DAS 140 form) to all of the applicable apprenticeship committees.
5. Michael Marlon Bandy, an individual doing business as MB Plumbing Services, did not submit a request for dispatch (DAS 142 form) to all of the applicable apprenticeship committees.
6. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code Section 1777.7 at \$40.00 per violation for 82 violations in the aggregate sum of \$3,280.00.
7. The amounts found due in the Assessment, as affirmed and modified by this Decision, are as follows:

Wages due:	\$3,891.88
Penalties under section 1775, subdivision (e):	\$780.00
Liquidated damages:	\$3,891.88
Penalties under section 1777.7:	\$3,280.00
Total:	\$11,843.76

In addition, interest is due from Michael Marlon Bandy, an individual doing business as MB Plumbing Services, and shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

The Civil Wage and Penalty Assessment 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: May 8, 2020

 /s/ *Katrina S. Hagen*

Katrina S. Hagen
Director of the Department of Industrial Relations