

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Antoun Fata, an individual doing business
as Fata Construction & Development**

Case No.: 17-0498-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Antoun Fata, an individual dba Fata Construction and Development (Fata), requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on January 31, 2018, with respect to work performed on Article III Transit / Pedestrian Improvements (Project), for the City of Highland (Awarding Body) in San Bernardino County. The Assessment found unpaid prevailing wages in the amount of \$802,697.12, penalties under Labor Code sections 1775 and 1813 in the amount of \$477,200.00, penalties under Labor Code section 1776 in the amount of \$62,400.00, and penalties under Labor Code section 1777.7 in the amount of \$30,200.00.¹

The matter was originally assigned to Hearing Officer Howard Wien, and when he left the Department of Industrial Relations, reassigned to Jessica L. Pirrone. A Hearing on the Merits occurred before Hearing Officer Pirrone in Los Angeles, California, on January 30, 2020, March 12, 2020, and March 13, 2020. William Snyder appeared as counsel for DLSE. No appearance was made on behalf of Fata. DLSE Industrial Relations Representative Patricia Rangel and Fata workers Lazaro Tanori, Victor Olubajo, and Rene Quintero testified in support of the Assessment.

On July 18, 2018, DLSE filed and served a motion to reduce the Assessment under California Code of Regulations, title 8, section 17226. The motion sought to

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

revise downward the unpaid prevailing wages and penalties. There being no objection from Fata, the Hearing Officer granted DLSE's motion on August 20, 2018. On September 16, 2019, DLSE filed and served a second motion to amend the Assessment to reduce the unpaid prevailing wages further to \$310,606.82,² reduce the section 1775 and section 1813 penalties to \$444,300.00, maintain the section 1777.7 penalties at \$30,200.00, and maintain the section 1776 penalties at \$62,400.00. On the first day of Hearing, January 30, 2020, the Hearing Officer granted DLSE's motion and proceeded to take evidence in the Hearing on the Merits on that day and on March 12 and 13, 2020, in Fata's absence in order to formulate a recommended decision as warranted by the evidence, pursuant to California Code of Regulations, title 8, section 17246, subdivision (a).

DLSE's documentary exhibits were admitted into evidence without objection. Fata has not filed a motion seeking relief from his non-appearance, as permitted under California Code of Regulations, title 8, section 17246, subdivision (b). After the opportunity for post-hearing briefs, the matter was deemed submitted as of June 8, 2020.

Prior to the first day of Hearing, the parties stipulated to the following:

- The work subject to the Assessment was a public work subject to the prevailing wage and apprenticeship requirements under the California prevailing wage law.
- The Labor Commissioner timely served the Assessment.
- The Request for Review was timely filed.
- The Labor Commissioner's enforcement file was timely requested and produced.
- No deposit was made with the Department of Industrial Relations as a result of the Assessment.

The issues for decision are as follows:

² The unpaid wage figure includes unpaid training fund contributions in the amount of \$6,302.70.

- Did Fata correctly classify all of his workers on the Project?
- Did Fata pay his workers the correct prevailing wage for all hours worked?
- Did Fata make all required training fund contributions on behalf of all workers?
- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1775?
- Is Fata liable for penalties under section 1813?
- Did Fata timely provide contract award information to all applicable apprenticeship committees for all apprenticeable crafts employed?
- Did Fata timely submit requests for dispatch of apprentices to all applicable apprenticeship committees for all apprenticeable crafts employed?
- Did Fata meet the minimum apprentice-to-journeyperson ratio for all apprenticeable crafts he employed?
- Were penalties under section 1777.7 properly assessed?
- Did Fata timely provide DLSE with accurate certified payroll records after receipt of DLSE's requests?
- Is Fata liable for liquidated damages under section 1742.1?
- Is Fata liable for penalties under section 1776?

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, as amended, and that Fata failed to carry its burden of proving that the basis for the Amended Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this decision affirming the Assessment, as amended.

FACTS

The facts stated below are based on DLSE Exhibit Numbers 1 through 130, the testimony of DLSE Representative Rangel and Fata workers Tanori, Olubajo, and Quintero, and the contents of the Hearing Officer's file.

Failure to Appear.

At the first two Prehearing Conferences conducted by the Hearing Officer, Fata was represented by counsel, Nicholas P. Carrigan. Thereafter, counsel withdrew his representation and Fata represented himself. The Hearing was noticed to commence on February 21, 2019, but Fata moved to continue the Hearing because he had submitted to DLSE canceled pay checks for DLSE's use in revising the audit underlying the Assessment. DLSE joined in the request to continue the Hearing. A subsequent date of Hearing was scheduled but continued at Fata's request because he was overseas for a family emergency and could not return for the Hearing. DLSE stipulated to a continuance and the Hearing was re-set to commence on January 30, 2020. On January 21, 2020, Fata emailed the Hearing Officer and DLSE counsel requesting another continuance of the Hearing. The Hearing Officer denied the request on the ground there was no showing of good cause for a continuance and because the Hearing had been continued three times previously. The Hearing commenced on January 30, 2020, in Fata's absence.

The Public Work Contract.

The Awarding Body advertised the Project for bid on January 28, 2016. The bid advertisement specified that the bidder must adhere to California prevailing wages. The successful bidder was Fata, who entered into a contract with the Awarding Body on March 22, 2016, to construct, among other work, bus pads, pedestrian sidewalks, gutters and curbs, landscaping, and improvements to Vine Street, Sterling Avenue, and Palm Avenue in the City of Highland. Fata's bid proposed to use three subcontractors in accordance with contract standard specifications for a "Required Listing of Proposed Subcontractors": Precision Cold Planning, Inc. for "grinding" work, B & B Electric for electrical work, and TWC Contracting for fencing. (DLSE Exhibit 16, p. 0430.) The

contract required Fata and all subcontractors to pay California prevailing wages and summarized several prevailing wage statutory requirements. (DLSE Exhibit No. 17, p. 0437.) According to the canceled checks and payroll records submitted by Fata, work on the Project proceeded from June 9, 2016, through April 7, 2017, in the crafts of Laborer, Cement Mason, and Operating Engineer. Also, DLSE classified some workers who had been omitted from the payroll records to the crafts of Teamster and Plumber (Sewer and Storm Drain Pipelayer). The work on the Project was accepted by the Awarding Body on May 23, 2017.

The Assessment.

DLSE's investigation into Fata's pay practices at the Project began with a complaint that Fata failed to pay predetermined wage increases in prevailing wage rates. Other Fata workers also complained about being paid less than prevailing wages, not being paid for all hours worked, and being paid in cash. DLSE sent questionnaires to individual workers and interviewed them, and obtained payroll records from the Awarding Body.³ The matter was assigned to Rangel to complete the investigation and audit the payroll.

DLSE's continuing investigation identified five prevailing wage determinations (PWDs) at issue in the Project. The PWD in effect on the bid advertisement date for the Laborer classification is SC-23-102-2-2015-1. With predetermined wage increases, the Laborer PWD set the hourly base rate with cumulative fringe benefits for Laborer Group 1 at \$49.84 and the training fund contribution at 69 cents per hour. Laborer is an apprenticeable craft. The PWD for Laborer Apprentice (2013-1) set the hourly rate with cumulative fringe benefits for an apprentice's work in the second period of apprenticeship at \$29.08, and the training fund contribution at 64 cents per hour.⁴

³ On December 15, 2017, DLSE issued a civil wage and penalty assessment as to Fata's work on the Project. However, by January 4, 2018, another DLSE investigation on the Project had commenced and the assessment of December 15, 2017, was dismissed on the basis of being duplicative of the other investigation.

⁴ Under PWDs apprentices are paid higher rates as they progress over time through their apprenticeship. Also, the Laborer PWD set the hourly base rates for journey level workers in Laborer "groups" at incrementally higher rates.

The PWD in effect on the bid advertisement date for the Cement Mason classification is SC-23-203-2 2015-2. With predetermined wage increases, that PWD set the hourly base rate with cumulative fringe benefits at \$54.70, and the training fund contribution at 64 cents per hour. Cement Mason, too, is an apprenticeable craft. The PWD for Cement Mason Apprentice (2015-2) set the hourly base rate for an apprentice's first period at \$12.92, the training fund contribution at 60 cents per hour, and the fringe benefits at the cumulative figure of \$9.87 per hour.

The PWD in effect on the bid advertisement date for the Operating Engineer classification is SC-23-63-2-2015-1. Without any predetermined wage increase, the Operating Engineer PWD set the hourly base rate with cumulative fringe benefits for Operating Engineer Group 3 at \$65.16, and the training fund contribution at 80 cents per hour. Operating Engineer, too, is an apprenticeable craft, but an exemption has been granted by the Division of Apprenticeship Standards that affects the timing when apprentices are required.

The PWD in effect on the bid advertisement date for the Teamster classification is SC-23-261-2-2051-1. With no predetermined wage increase for the Project, the Teamster PWD set the hourly base rate with cumulative fringe benefits for Group III at \$52.69, and the training fund contribution at \$1.52 per hour. Teamster, too, is an apprenticeable craft, but like Operating Engineer, an exemption has been granted that affects the timing when apprentices are required.

The PWD in effect on the bid advertisement date for the Plumber (Sewer and Storm Drain Pipelayer) classification is SBR-2015-2. With the predetermined wage increase, the Plumber PWD set the hourly base rate with cumulative fringe benefits for Sewer and Storm Drain Pipelayer at \$50.42, and the training fund contribution at \$2.17 per hour. This classification, too, is an apprenticeable craft.

During her investigation Rangel sent Fata and the Awarding Body requests for certified payroll records (CPRs). Rangel also requested Fata produce proof of compliance with apprenticeship requirements. Fata and the Awarding Body produced

payroll records, but many had not been signed under penalty of perjury, as required.⁵ Using the PWDs, payroll records, apprenticeship compliance documents, employee interviews and questionnaires obtained during the investigation, Rangel prepared an audit and issued the Assessment. However, at that point Fata had not produced proof of all wage payments that had been made, and the Assessment found \$802,697.12 in unpaid wages.

After the issuance of the Assessment, Rangel requested Fata provide proof of wage payments in the form of pay stubs and canceled checks in order to re-audit the assessed wages. On February 23, 2018, and on four more occasions in December 2018 and January 2019, Fata submitted to DLSE copies of canceled checks, paystubs, and proof of training fund contributions.

Rangel also obtained Daily Inspection Reports created by the Awarding Body's inspector and Daily Logs created by Fata. The Daily Inspection Reports contained detailed information on work performed beginning June 8, 2016, and continuing to January 18, 2017. The reports listed worker crafts, worker first names, hours worked, equipment used, and a description of the work performed. Rangel evaluated the documents submitted by Fata, compared them to the worker statements and Daily Inspection Reports and, as a result, revised the audit downward significantly. On the basis of the revised audits, DLSE filed two motions to amend the Assessment; without objection from Fata, all were granted by the Hearing Officer. With the last motion, the amended Assessment found Fata had underpaid 48 workers in the collective amount of \$310,606.82 in prevailing wages, which includes underpaid training fund contributions in the amount of \$6,300.14.⁶ The amended Assessment also found section 1813 penalties in the amount of \$15,500.00 based on 620 instances of underpayment for overtime work, and section 1775 penalties in the amount of \$428,800.00 based on

⁵ The requirement is found in section 1776, subdivision (a).

⁶ DLSE also filed a motion, post-hearing, for an upward revision for unpaid wages to include \$2,000.00 more in unpaid wages to compensate for kickbacks as testified to by one worker at the Hearing. DLSE showed no reason why the motion could not have been filed earlier, with notice to Fata. For that reason the motion is denied.

2,144 instances of underpayment of prevailing wages. The amended Assessment also found section 1777.7 penalties in the amount of \$30,200.00 at the rate of \$100.00 per day for 302 days of apprenticeship violations, and penalties under section 1776 in the amount of \$62,400.00 for Fata's failure to respond to DLSE requests for payroll information for 13 days, ending on the date that DLSE's Penalty Review was prepared.

DISCUSSION

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

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

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

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

In general, and unless an exemption applies, 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. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. (§ 1777.5, subd. (e).) The Division of Apprenticeship Standards (DAS) has prepared a form, DAS 140, that a contractor may use to submit contract award information to an applicable apprenticeship committee. (Cal. Code Regs., tit. 8, § 230, subd. (a).)

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio if it has properly requested 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. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DAS has prepared another form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees. Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal the assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of presenting evidence that "provides prima facie support for the

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

The prevailing rate of pay for a given craft, classification, or type of worker is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. The Director determines the rate for each locality in which public work is performed (as defined in section 1724), and publishes a general prevailing wage determination (PWD) for a craft to inform all interested parties and the public of the applicable prevailing wage rates. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.) Ultimately, the Director’s PWDs determine the proper pay classification for a type of work. The nature of the work actually performed, not the title or classification of the worker, is determinative of the rate that must be paid. The Director publishes an advisory scope of work for each craft or worker classification for which she issues a PWD. The decision about which craft or classification is appropriate for the type of work requires comparison of the scope of work contained in the PWD with the actual work duties performed.

Fata Failed to Pay Required 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 No. 16-2001, which applies to on-site occupations in the construction industry, provides as follows:

Every employer who has control over wages, hours, or working conditions, must keep accurate information with respect to each employee including...name, home address, occupation, and social security number...[,] [t]ime records showing when the employee begins and ends

each work period...[,] [t]otal wages paid each payroll period...[and] [t]otal hours worked during the payroll period and applicable rates of pay....

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

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 prima facie support for the Assessment, and Fata failed to prove the basis for the Assessment was incorrect. Rangel testified that in performing the re-audit, she credited Fata for paid wages based on post-Assessment proof submitted by Fata. That proof significantly reduced the amount of wages and training fund contributions owed by Fata and formed the basis for amending the CWPA downward.

Rangel also adjusted aspects of the audit upwards. Where the canceled checks and paystubs showed workers' hours that had not appeared in the payroll records Fata earlier had submitted to DLSE, unpaid wages were added to the audit. Rangel declined credit for paid wages where canceled checks to five workers bore signatures on the back that did not match other exemplars of their signatures. For one worker, Rangel added hours over a three month period based on worker's representation that, without pay, he had picked up equipment in the morning and returned it at day's end to Fata's equipment yard. The worker testified that Fata had told him not to complain or he would not have a job. No evidence was presented to rebut that testimony.

Overall, however, the revised audit removed or reduced wages owed for several workers, resulting in a deduction of almost \$494,000.00 from the amount of unpaid wages that had been found in the original audit.

Fata Failed to Show that Workers Were Employed by His Subcontractors.

During the DLSE investigation, Fata claimed that some of the workers listed in the audit were not his employees but instead were employed by a subcontractor. Yet, having not appeared at the Hearing, Fata offered no evidence to prove that claim. Fata's bid proposal listed three subcontractors he anticipated using on the Project. But nothing shows any of the workers named in the Assessment were employed by those three subcontractors.

DLSE introduced into evidence canceled checks and corporate formation records, however, that tend to support Fata's claim to DLSE, made during the investigation, that

four workers - two sets of persons with the same last name – worked on the Project for “A & M Landscaping & Maintenance” and “Conrad’s General Hauling.” Although foundational facts are absent from the record, DLSE’s exhibits suggest Fata paid A & M Landscaping & Maintenance for work done from September 2016 to February 2017, and Conrad’s General Hauling for work done in February 2017 and for work done in early 2018. (DLSE Exhibit Nos. 40, 71.)

The fact that Fata wrote checks to A & M Landscaping and Maintenance and Conrad’s General Hauling does not, in and of itself, resolve the question whether the workers who performed the work were Fata’s employees or employees of subcontractors. No worker testified he or she worked for A & M Landscaping and Maintenance or Conrad’s General Hauling, and Rangel did not testify the workers in question made that representation to DLSE during the investigation.

Nor do the Daily Inspection Reports (DLSE Exhibit No. 89) establish that the four workers were employed by the two subcontractors. Those reports were unusually detailed, listing Fata worker first names and craft titles, hours worked, and equipment used. Unlike the reports’ description of Fata crews, for dates when subcontractors were also on the job, the reports noted their presence on the job site without identifying the worker names. (DLSE Exhibit No. 89, pp. 2120-2121, 2144, 2155-2166, 2262 [indicating crafts and hours worked, but not names of workers for subcontractors Precision, Ace Paving, and Estes Paving].) In that way the Daily Inspection Reports separated out the hours of work by Fata workers from the hours worked by the unnamed workers of the subcontractors. Based on a review of the re-audit, Rangel used the hours worked by Fata workers, as identified in the Daily Inspection Reports, not the subcontractor hours, as a basis for the amended Assessment. Fata did not assert to DLSE that workers of the subcontractors identified in the Daily Inspection Reports were improperly included on the re-audit. Further, nothing in the record suggests they were.

In addition to the fact that the Daily Inspection Reports provide no basis for associating workers with A & M Landscaping & Maintenance or Conrad’s General

Hauling, nor do Fata's own payroll records make that association. Some, but not all, of Fata's payroll records were certified and signed by Fata as "owner." They listed the two A & M Landscaping & Maintenance workers and the two Conrad's General Hauling workers as Fata employees, with taxes withheld. (See, e.g., DLSE Exhibit No. 95, pp. 2595-2601, 2611-2621.) Fata's listing the workers as his employees creates a strong inference that they in fact were his employees.

It bears stressing that Fata provided no testimony about the work being performed by the two purported subcontractors or employees of subcontractors. In the end, whether Fata himself subjectively considered the employees performing work on the Project as subcontractor employees or Fata employees does not control the analysis. A person who performs public work may not be deemed a subcontractor rather than an employee to avoid payment of prevailing wages, for all workers on a public work must be paid prevailing wages. (§§ 1771, 1774.) On the basis of the record as a whole, Fata has not shown the Assessment incorrectly included employees of subcontractors.

Fata Failed to Carry Burden of Proof as to Wages of Individual Workers.

Rangel testified as to a variety of ways that Fata underpaid prevailing wages for several individuals. Fata hand-wrote on uncertified payroll records that he paid Lazaro Tanori cash for his fringe benefits. (DLSE Exhibit No. 95, p. 2597.) Tanori, however, testified that he was not paid cash for fringe benefits, and no evidence refutes that testimony. Fata's payroll records listed Tanori as a Cement Mason. However, Tanori testified that in the early months on the Project he drove a dump truck. His affidavit provided to DLSE before the Assessment issued corroborates that claim. (DLSE Exhibit No. 27, p. 0515.) Based on the affidavit, Rangel properly reclassified Tanori to the Teamster craft for four weeks, and Fata did not contest the reclassification.

DLSE also presented testimony from worker Victor Olubajo that Fata had obtained a kickback of his wages for work as a Laborer. Olubajo testified that Fata told him he would pay him \$1,000.00 a month by check and instructed him he would have to say he also was paid cash for the "balance" owed him. While Olubajo denied being

paid in cash, he also testified that Fata gave him checks for \$1,000.00 in payment for work, after which Fata escorted him to cash the checks and forced him to send the money via “moneygram” to Fata’s family. Section 1778 makes it a felony for any person to take or receive a portion of a worker’s wages for services rendered on a public work. Olubajo testified he thought he had no choice but to comply with Fata’s demand because he was under threat of eviction from his home. The record provides some corroboration of that claim by way of cancelled checks made out to Olubajo on Fata’s bank account for \$1,000.00. (DLSE Exhibit No. 68, pp. 1390 – 1414.) Because Olubajo’s testimony was unrebutted, it is accepted.⁷

Rangel also testified that Fata’s payroll records did not list six workers at all, who Rangel added to her audit. She testified that hours were “shaved” off for some workers who were listed on payroll records, Fata failed to pay some workers the correct prevailing wage rates, he failed to employ apprentices who had been properly registered with the Department of Industrial Relations, and he failed to meet the 1:5 apprentice to journeyman ratio for three crafts. Rangel also reclassified workers based on the PWD scopes of work and description of work contained in the Daily Inspection Reports. Fata did not contest the reclassifications.

DLSE introduced into evidence extensive records of a federal criminal conviction on gun possession and transportation charges in an effort to expose what DLSE saw as Fata’s lack of credibility. Resort to those records is not necessary in this case, however, as the documentary and testimonial evidence of the pay practices and violations found in the amended Assessment are undisputed.

By virtue of evidence presented at the Hearing, DLSE met its burden of producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs., tit. 8, § 17250, subd. (a).) The burden then shifted to Fata to prove the Assessment was incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Fata failed to carry his burden of proof. It is concluded that the workers Fata employed on the Project were underpaid in the amount of \$304,306.68.

⁷ See *ante*, footnote 6.

DLSE's Penalty Assessment under Section 1775 Was Proper.

Section 1775, subdivision (a)(1), provides that the contractor and any subcontractor be penalized a maximum of \$200.00 "for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director" Section 1775, subdivision (a)(2)(B)(iii), states that the penalty for failure to pay the required prevailing wage rates may not be less than \$120.00 if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of section 1777.1⁸ Section 1775, subdivision (a)(2)(D), provides that the determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for an abuse of discretion. Abuse of discretion by DLSE is established if the "agency's nonadjudicatory action... is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

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

DLSE assessed section 1775 penalties at the rate of \$200.00 based on Fata underreporting the size of his workforce and underreporting the days and hours worked, among other violations. After reducing the number of violations based on late-submitted records from Fata showing fringe benefit and wage payments, DLSE

⁸ 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 as it existed on the January 28, 2016 date of the bid advertisement, 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."

concluded that Fata owed hourly wages to 36 of its 48 workers on 2,144 occasions over the term of the Project, and underpaid training fund contributions for a dozen other workers. The maximum penalty rate of \$200.00 per violation was chosen based on Fata's failure to voluntarily correct the underpayment when brought to its attention and its prior record of violations.

The burden was on Fata to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of \$200.00 per violation and in calculating the number of violations. Having not appeared at the Hearing, Fata failed to carry that burden.

Accordingly, Fata is liable for section 1775 penalties in the sum of \$428,800.00, calculated at the \$200.00 penalty rate for 2,144 violations.

Assessment of Penalties under Section 1813.

Section 1813 provides that a contractor or subcontractor shall pay a flat \$25.00 penalty for each calendar day, per worker, for failure to pay the required overtime premium prescribed by the applicable PWD. In this case, the amended Assessment found that section 1813 penalties were due at the rate of \$25.00 per violation, in the total amount of \$15,500.00 for 620 instances of Fata failing to pay overtime rates to his workers.

The burden was on Fata to prove that DLSE abused its discretion in finding the 620 violations. Fata failed to carry his burden of proof. Accordingly, Fata is liable for section 1813 penalties in the sum of \$15,500.00, calculated at the \$25.00 penalty rate.

Fata Violated Apprentices 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 231.)⁹

If a contractor "knowingly violated Section 1777.5" a civil penalty is imposed

⁹ All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

under section 1777.7. The phrase quoted above -- "knowingly violated Section 1777.5" -- is defined by a regulation (Cal. Code Regs., tit. 8, § 231, subd. (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.

"[T]he determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for an abuse of discretion. (§ 1777.7, subd. (d).)

DLSE established its prima facie case that Fata failed to submit contract award information to all applicable apprenticeship programs for the crafts of Laborer, Cement Mason, Plumber, Operating Engineer and Teamster.¹⁰ While the last two crafts were exempt from use of apprentices until five journey level workers were on the job, the obligation to submit contract award information still applied for those crafts. DLSE also established its prima facie case that Fata failed to request dispatch of apprentices from all applicable apprenticeship committees. Although Fata did employ Cement Mason and Laborer apprentices on the Project, Fata failed to employ sufficient apprentices to meet the required 1:5 apprentice to journey person ratio for the applicable Laborer, Cement Mason, and Plumber crafts. Fata did not rebut the evidence of these failures. Hence, it is concluded that Fata violated section 1777.5, subdivisions (e) and (g), and the applicable regulation (Cal. Code Regs., tit. 8, §§ 230, subd. (a), 230.1 subd. (a)) for his failures to provide the requisite notice of its public work contract to applicable apprenticeship committees, to request dispatch of apprentices from those committees,

¹⁰ Rangel testified that Fata failed to submit the required notice of contract award to seven identified applicable apprenticeship programs for the crafts at issue.

and to employ sufficient apprentices to meet the required 1:5 apprentice to journeyman ratio for the crafts employed on the Project.

Based on the record, it is concluded that Fata violated section 1777.5, subdivisions (e) and (g), and the applicable regulations (Cal. Code Regs., tit. 8, § 230, subd. (a)), by his failure to provide the requisite notice of its public work contract to applicable apprenticeship committees.

Fata's violations were "knowing" violations under the irrebuttable presumption quoted above in that Fata was an experienced public works contractor and had been assessed for apprenticeship violations on three prior occasions. Moreover, Fata's timely notification of at least one applicable Laborer apprenticeship committee and employment of some Laborer apprentices on the Project demonstrates an awareness of his obligations. Fata presented no evidence that it was unfamiliar with the requirement to notify all applicable apprentice committees of contract award information.

Since Fata was aware of his obligations under the law and provided no evidence of why he could not have complied with the law, Fata failed to meet his burden of proof by providing evidence of compliance with section 1777.5. Since Fata knowingly violated the law, a penalty should be imposed under former section 1777.7.

Rangel testified that her supervisor selected a \$100.00 per day penalty rate for 302 calendar days of apprenticeship violations in failing to submit contract award information to the sole applicable apprenticeship committee for the craft of Teamster. Rangel measured this span of time from June 9, 2016, the first day of work according to the Daily Inspection Reports, to April 7, 2017, the last day a journeyman was on the Project.¹¹ Fata did not contest that calculation.

Based on the record, Fata knowingly violated the requirement to provide contract award information to the applicable apprenticeship committee or request the dispatch

¹¹ The Daily Inspection Reports end on January 18, 2017, and subsequent reports were not presented by DLSE. (DLSE Exhibit No. 89.) However, the re-audit shows that at least one worker, Michael Boutrous, last worked on April 7, 2017, and a canceled check by Fata to the worker, was dated April 10, 2017. (DLSE Exhibit No. 72, p. 1512.)

of apprentices from them. Accordingly, Fata is liable for penalties at the rate of \$100.00 per day for 302 calendar days for a total of \$30,200.00.

Training Fund Contributions Are Due and Owing.

Section 1777.5, subdivision (m)(1), requires contractors on public works projects who employ journeypersons or apprentices in any apprenticeable craft to pay training fund contributions to the California Apprenticeship Council or to an apprenticeship committee approved by the Division of Apprenticeship Standards. In this case, DLSE presented prima facie evidence that training fund contributions were owed. Based on her determination that Fata underreported the wages of his workers as well as the hours and days his workers worked, and based on her review of the California Apprenticeship Council training fund records, Rangel found that Fata underpaid training fund contributions in the amount of \$6,300.14, as reflected in DLSE's post-hearing brief. Fata failed to carry his burden to prove the Assessment was incorrect as to training fund contributions found due and is liable for payment of those funds. Accordingly, the total amount of unpaid training fund contributions owed by Fata is \$6,300.14.

Fata Is Liable for Liquidated Damages.

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

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

At the time the Assessment was issued, the statutory scheme regarding liquidated damages provided contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These required the contractor to make key decisions within 60 days of the service of the civil wage and penalty assessment on the contractor.

First, the above-quoted portion of section 1742.1, subdivision (a), states that the contractor shall be liable for liquidated damages equal to the portion of the wages “that still remain unpaid” 60 days following service of the civil wage and penalty assessment. Accordingly, the contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the civil wage and penalty assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Second, under section 1742.1, subdivision (b), a contractor would entirely avert liability for liquidated damages if, within 60 days from issuance of the civil wage and penalty assessment, the contractor deposited into escrow with DIR the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775. Section 1742.1, subdivision (b), stated in this regard:

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

Here, no evidence shows Fata paid any back wages to the workers within 60 days after the Assessment or deposited with the Department the full amount of assessed wages and statutory penalties.¹² However, based on DLSE evidence of canceled checks, Fata did pay two workers (Jesus Ortiz and Victor Olubajo) the sums of \$13,620.00 and \$1,000.00, respectively, more than 60 days after the Assessment. Accordingly, Fata is liable for liquidated damages for those amounts under section 1742.1, in addition to \$304,306.68 as measured by the unpaid wages. Fata is therefore liable for liquidated damages in the total amount of \$318,926.68.

Fata Is Liable for Penalties under Section 1776.

Employers on public works must keep accurate payroll records, recording among other things, the work classification, straight time and overtime hours

¹² On June 27, 2017, the Director’s discretionary waiver power was deleted from section 1742.1 by statutes 2017, chapter 28, section 16 (Sen. Bill 96) (SB 96)).

worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) The payroll records must be certified and available for inspection or furnished upon request to a representative of DLSE. (§ 1776, subd. (b)(2).) The contractor must file a certified copy of the payroll records within ten days after receipt of a written request. (§ 1776, subd. (d).) "In the event the that the contractor...fails to comply within the 10-day period, he or she...shall, as a penalty to the state..., forfeit one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated." (§ 1776, subd. (h).) DLSE lacks discretion in setting penalties under section 1776.

Rangel testified that on October 2, 2017, she sent Fata a request for CPRs and a statement of employer payments to his address on file with the Contractor State License Board. (DLSE Exhibit 13, p. 0388.) On October 18, 2017, Fata delivered payroll records to DLSE, but many failed to comply with section 1776 for lack of certifying signatures and declarations under penalty of perjury that the information was true and correct, as required by section 1776, subdivision (a)(1). On December 18, 2017, Rangel sent Fata a request for additional payroll records in the form of canceled checks and time records, but Fata failed to comply before the Assessment was issued. Rangel calculated penalties under section 1776 on the basis of 48 workers for a period of 13 days, commencing January 18, 2018, when the response to the request for records was due, ending January 30, 2018, for a total of \$62,400.00.

Whether or not the December 18, 2017 request for canceled checks and time records provides a proper basis for a section 1776 penalty, because Fata never did produce a complete set of CPRs in response to DLSE's October 2, 2017 request for CPRs, the penalty period could have been much longer than the 13-day penalty period DLSE selected. The ten-day statutory period Fata had to respond to the request for CPRs commenced October 15, 2017, continuing to the "the date when strict compliance

is effectuated.” (1776, subd. (h).) Since Fata never did effectuate strict compliance with the request for CPRs, the penalty period could have continued to the date Assessment was issued. On that basis, the conclusion is drawn that Fata did not establish that DLSE’s penalty under section 1776 constituted an abuse of discretion.

Accordingly, penalties under section 1776 in the amount of \$62,400.00 are due. Based on the foregoing, the Director makes the following findings:

FINDINGS AND ORDER

1. The work subject to the Civil Wage and Penalty Assessment was subject to prevailing wage and apprenticeship requirements.
2. The Labor Commissioner timely served the Civil Wage and Penalty Assessment.
3. The Request for Review was timely filed.
4. The Labor Commissioner timely made its investigative file available to the contractor.
5. No back wages have been paid nor deposit made with the Department of Industrial Relations as a result of the Assessment.
6. Antoun Fata, an individual doing business as Fata Construction and Development, underpaid the workers’ prevailing wages in the amount of \$304,306.68, and underpaid training fund contributions in the amount of \$6,300.14.
7. The Labor Commissioner did not abuse her discretion in assessing Labor Code section 1775 penalties at the rate of \$200.00 per violation for 2,144 violations, resulting in the total penalty amount of \$428,800.00.
8. The Labor Commissioner did not abuse her discretion in assessing Labor Code section 1813 penalties at the rate of \$25.00 per violation for 620 violations, resulting in the total penalty amount of \$15,500.00.
9. Antoun Fata, an individual doing business as Fata Construction and Development, failed to satisfy the minimum ratio requirement for the employment of Laborer apprentices on the Project.

10. Antoun Fata, an individual doing business as Fata Construction and Development, failed to satisfy the requirement to provide contract award information to all applicable apprenticeship committees for the craft of Teamster.
11. The Labor Commissioner did not abuse her discretion in assessing Labor Code section 1777.7 penalties at the rate of \$100.00 per violation for 302 calendar days, resulting in the total penalty amount of \$30,200.00.
12. Antoun Fata, an individual doing business as Fata Construction and Development, is liable for a statutory penalty under Labor Code section 1776 in the amount of \$62,400.00.
13. Antoun Fata, an individual doing business as Fata Construction and Development, is liable for liquidated damages in the amount of \$318,926.68.
14. The amount found due in the Assessment, as amended, is affirmed by this Decision, as follows:

Basis of the Assessment	Amount
Wages Due:	\$ 304,306.68
Penalties under section 1813:	\$ 15,500.00
Training Fund Contributions Due:	\$ 6,300.14
Penalties under section 1775:	\$ 428,800.00
Liquidated damages:	\$ 318,926.68
Penalties under section 1776:	\$ 62,400.00
Penalties under section 1777.7:	\$ 30,200.00
TOTAL:	\$1,166,433.50

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

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

Dated: 5/26/2021



Katrina S. Hagen
Director
Department of Industrial Relations