

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

JT2, Inc., d/b/a Todd Companies

Case No. 19-0074-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor JT2, Inc. doing business as Todd Companies (JT2) submitted a request for review of a Civil Wage and Penalty Assessment (CWPA or Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on February 12, 2019, with respect to work it performed on the Earlimart Neighborhood Park Improvement Project (Project) for Tulare County. The Assessment determined that \$1,219.10 was due in unpaid wages, and \$11,050.00 was due in statutory penalties.

A Hearing on the Merits occurred over two days, June 30, 2020, and October 29, 2020, before Hearing Officer Steven A. McGinty. Matthew W. Quall appeared as counsel for JT2 and David D. Cross appeared as counsel for DLSE. Deputy Labor Commissioner II Dina Morsi testified in support of the Assessment. James Todd, II, President of JT2, testified for JT2. The matter was submitted for decision on November 25, 2020.

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

- The work subject to the Civil Wage and Penalty 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;
- The CWPA was timely under Labor Code section 1741;¹
- The Request for Review was timely;

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

- The enforcement file was timely made available; and
- No back wages were paid nor deposit made with the Department of Industrial Relations as a result of the CWPA.

The issues for decision are as follows:

- Were the correct prevailing wage classifications used in the audit?
- Were the hours worked as listed in the audit correct?
- Were the mathematical calculations set forth in CWPA correct?
- Were the wages paid to the workers listed correctly in the certified payroll records?
- Were all workers who worked overtime paid the correct overtime rate?
- Is JT2 liable for penalties under section 1775?
- Is JT2 liable for penalties under section 1813?
- Is JT2 liable for liquidated damages and if so, should liquidated damages be waived?
- Was JT2 required to employ registered apprentices on the Project and if so, did JT2 employ sufficient registered apprentices on the Project?
- Is JT2 liable for penalties under section 1777.7?
- If JT2 is liable for any penalties, should those penalties be waived?

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for some of the Assessment, but that JT2 thereafter carried its burden of proving the basis for the Assessment was incorrect in part. (See Cal. Code Regs., tit. 8, § 17250, subs. (a) and (b).) Accordingly, the Director issues this decision affirming but modifying the Assessment.

FACTS

The Awarding Body, Tulare County, advertised the Project for bid on October 18, 2016. The bid advertisement specified that the successful bidder was to “pay all workers employed on the work not less than the prevailing wage rates determined by

the Director of the Department of Industrial Relations and shall comply with all laws and regulations relating to the employment of apprentices.” (DLSE Exhibit No. 6, p. 53.)²

JT2 entered into a contract for the Project which consisted of construction of a 3.75 acre park with landscaping and hardscaping including construction of concrete structures, irrigation, storm drains, asphalt concrete, basketball asphalt pavement, play equipment, and steel shade structures. (DLSE Exhibit No. 6, p. 52.) The contract included a specific provision labeled “PREVAILING WAGES” that required the payment of State prevailing wages for each trade or craft on the Project. (DLSE Exhibit No. 7, pp. 65 and 69.) The contract also include a specific provision labeled “COMPLIANCE WITH LAW” that required compliance with all applicable State laws, regulations, and directives, including, with respect to the contractor’s employees, compliance with laws and regulations pertaining to wages and hours. (*Ibid.*)

JT2 had workers on the Project from January 30, 2017, until April 24, 2018. (DLSE Exhibit No. 26, pp. 231 and 566.) There were several crafts employed on the Project including Cement Masons and Laborers.³ The first day a Laborer journey person was on the Project was March 8, 2017. (DLSE Exhibit No. 26, p. 242.)

DLSE opened an investigation of JT2’s compliance with prevailing wage laws on the Project based on a complaint received on or about April 28, 2018. (DLSE Exhibit No. 25, p. 221.) The alleged violations were nonpayment / underpayment of wages, failure to pay fringe benefits, and failure to pay travel and subsistence. (*Ibid.*) Morsi conducted the investigation.

On June 26, 2018, shortly after opening the investigation, Morsi received a telephone call from the complainant, Jerry Henry. Morsi’s notes indicate that Henry

² On the first day of hearing, the parties stipulated to the admission of DLSE Exhibit Nos. 1-26, and JT2 Exhibits A-Q. The Hearing Officer admitted into evidence all of those exhibits. For this Decision, the Hearing Officer declined to admit JT2’s Exhibit R as it was irrelevant.

³ The parties did not dispute that the PWD in effect for Cement Mason was NC-23-203-1-2016-2 (DLSE Exhibit No. 8, pp.71-73), the PWD in effect for Laborer was NC-23-102-1-2016-1 (DLSE Exhibit No. 14, pp.108-111) and the PWD for Laborer indicates it is an apprenticeable craft (*id.* at p. 109).

requested that the complaint be withdrawn as the union was getting his issue taken care of. (DLSE Exhibit No. 25, p. 221.) Morsi informed Henry that DLSE does not withdraw complaints. (*Ibid.*)

On February 7, 2019, Morsi called and spoke with Henry. According to Morsi's notes, Henry stated that he was paid for all hours worked and that JT2 had back paid Henry for the underpayment. Further, Morsi confirmed that the prevailing wages appeared to have been paid as required. (DLSE Exhibit No. 25, p. 220.) Morsi testified at the Hearing that Henry was paid correctly.

Morsi performed an audit of JT2's payroll for the workers on the Project. She used JT2's certified payroll records (CPRs) (DLSE Exhibit No. 26) in performing the audit. Morsi determined that there were several instances in which workers were underpaid on Saturday. Morsi testified that according to JT2's CPRs, Saturday work was not paid at the required Saturday rate. According to Morsi's penalty review, workers were not compensated at the required Saturday rate and/or at the required double-time rate for all hours worked after the first eight hours of Saturday work. This occurred on three specific Saturdays: (1) July 22, 2017; (2) July 29, 2017; and (3) August 2, 2017.⁴ (DLSE Exhibit No. 5, pp. 46-47.)

The prevailing wage rate determinations (PWDs) for Cement Mason and Laborer included the rates for Saturday work. According to Morsi, the Saturday rate for Cement Mason was \$73.285 per hour.⁵ In addition, there was a predetermined increase of

⁴ The date August 2, 2017, appears to be a mistake. The parties elicited testimony about Saturday, December 2, 2017, as being the date in question. In addition, the audit worksheet summary attached to the CWPA, DLSE's Exhibit Number 1 at page 7, refers to the week ending December 2, 2017, on multiple entries as do the individual audit sheets, DLSE Exhibit Number 2 at pages 16, 19, 20, 23, and 25. Morsi testified that for worker Jose Rodriguez-Rizo, the week-ending date next to his name on the audit worksheet summary, July 16, 1997, was a mistake and should have been December 2, 2017. She also testified that the day of the week shown, Wednesday, was wrong; it should have been Saturday. (DLSE Exhibit No. 1 p. 8.) The Parties ultimately stipulated that the correct day and date for work by Rodriguez-Rios was Saturday, December 2, 2017.

⁵ The PWD for Cement Mason indicates that the first eight hours of work on Saturday are payable at time and one-half and that all other hours worked on Saturday are paid at the Sunday/Holiday rate (double time), which was \$89.36 per hour. (DLSE Exhibit No. 8, p. 71, fn. d.)

\$1.80 per hour for work on or after July 1, 2017. (DLSE Exhibit No. 8, pp. 71 and 73.) The Saturday rate for Laborer for the first eight hours was \$64.965 per hour, which the PWD characterizes as time and one-half.⁶ In addition, there was a predetermined increase of \$1.60 per hour for work on or after June 26, 2017. (DLSE Exhibit No. 14, pp. 108 and 111.) Each PWD also included a provision indicating that Saturdays in the same work week could be worked at straight time if the job was shut down during the normal work week due to inclement weather or major mechanical breakdown (and for the Laborer craft only, a “lack of materials beyond the control of the employer”). (DLSE Exhibit No. 8, p. 71, fn. c; DLSE Exhibit No. 14, p. 108, fn. b.)

In addition to the underpayment of wages on several Saturdays, Morsi determined that JT2 failed to employ a sufficient number of Laborer apprentices on the Project to satisfy the required 1:5 apprentice to journeyman ratio.⁷ According to Morsi’s audit of JT2’s CPRs, there were 2,639.75 total Laborer journeyman hours worked on the Project. Morsi testified that the minimum apprenticeship hours required were 499.9 hours. She determined that JT2 employed apprentices for 43.75 hours; thus, it was short 456.15 hours. (DLSE Exhibit No. 23, pp. 208-209; DLSE Exhibit No. 5, p. 48.) Morsi measured the apprentice ratio violation at 105 days, calculated by

⁶ The PWD for Laborer has two areas, Area 1 and Area 2, and multiple groups within each. Morsi testified that Tulare County, the site of the Project, is in Area 2. The correct group for the work being done was Group 1(A). (DLSE Exhibit No. 14, pp. 108-109.) All further references to Laborer in this decision refer to Laborer Group 1(A).

⁷ Morsi testified that there was one approved applicable apprenticeship program for the craft of Laborer, the Northern California District Council of Laborers Construction Craft Laborers J.A.T.C. (Northern CA District Council of Laborers JATC) (DLSE Exhibit No. 21, p. 164.) However, she identified two Requests for Dispatch of an Apprentice—DAS 142 Forms each dated January 3, 2017—that were sent by JT2 to two Laborer apprenticeship programs: the ABC Laborer UAC (an unapproved program) and the Northern CA District Council of Laborers JATC. (DLSE Exhibit No. 22, pp. 173 and 186.) According to Morsi’s penalty review document, JT2 was a signatory to the ABC Laborer UAC. (DLSE Exhibit No. 5, p. 48.) With respect to the request form sent to the ABC Laborer UAC, Morsi testified the form contained a time to report and an address at which to report. Morsi testified that on the request form sent to the Northern CA District Council of Laborers JATC, in the space after “Time to Report:” was typed “call to confirm” and after “Address to Report to:” was typed, “Please call to confirm....” (Exhibit No. 22, p. 186.) On cross-examination, Morsi testified that she could not remember whether the contents of the request form to the Northern CA District Council of Laborers JATC affected her analysis of the violation. Her penalty review did not contain that information.

counting the number of days that Laborer journeypersons worked on the Project. (DLSE Exhibit No. 23, pp. 208-209; DLSE Exhibit No. 5, p. 49.)

Within three weeks after the Assessment was issued, on February 28, 2019, JT2 paid wages to 17 of the 18 workers who were allegedly underpaid. (JT2 Exhibit N, pp. 97-120.)⁸ After the Assessment issued and prior to the Hearing, Morsi gave JT2 credit for the payments. After that credit, Morsi determined that four workers were still owed wages: a penny (\$0.01) for Gerardo Medina for the week ending July 29, 2017; and \$10.13 for Jesus Cabral, \$10.13 for Matthew Kuckenbaker and \$59.13 for Jose Rodriguez-Rizo, totaling \$79.40 for the week ending December 2, 2017.⁹ (JT2 Exhibit O, p. 121.) Morsi testified that the first three workers had received restitution checks, but not in an amount sufficient to eliminate wages the CWPA deemed as due and owing. (JT2 Exhibit N.) Jose Rodriguez-Rizo did not receive a restitution check. Thus, after applying credit, according to Morsi, JT2 owed a total of \$79.40 in wages.¹⁰

JT2 offered several explanations for why Morsi erred in her investigation and findings that JT2 committed violations of prevailing wage laws. First, the workers who were allegedly underpaid for Saturday work on July 29, 2017, inadvertently listed Cement Mason as their classification for the work performed on that day when they were in fact performing Laborer work that day. Second, JT2 had a deficiency in materials during the week ending July 29, 2017, so that the Project was shut down for two days, July 24 and July 25; thus, it was "appropriate" to pay Laborers the straight-time rate on Saturday, July 29. Third, during the week ending December 2, the Project was shut down on Monday, November 27, 2017, because of rain; thus, it was

⁸ James Todd, II testified that without reviewing whether the allegations in the Assessment were true, JT2 issued checks to employees found to be owed wages because JT2 was trying to obtain final payment from the County of Tulare for the Project.

⁹ Morsi testified that the notation on Exhibit O, page 121 next to the name of Jose Rodriguez-Rizo, "WE (week ending) 7/16/17" was incorrect; the correct week ending date was December 2, 2017.

¹⁰ While the Assessment found \$1,219.10 in unpaid wages, Morsi calculated that figure before granting credit for wages paid within three weeks after the Assessment.

appropriate to pay Cement Masons and Laborers the straight-time rate on Saturday, December 2, 2017. (JT2 Exhibit P, p. 122.)

James Todd, II testified that a series of mistakes were made in documenting and processing the payroll for the week ending July 29, 2017. As background, Todd explained that JT2 employees filled out their own time cards daily, writing in their craft, the work they were doing, the hours worked, and the times for rest and meal periods. The employees turned the daily time cards (the "dailies") into the human resources department weekly. After a review process in JT2's human resources and compliance departments, the dailies were sent to the payroll department for processing.

Explaining the mistakes in payroll for the week ending July 29, Todd testified that worker Luis Rapan did Cement Mason work 99 percent of the time. On Rapan's daily for July 29 the craft was written down as Cement Mason. But Rapan performed Laborer work that day. Todd testified he himself was at the Project site on July 29. On that date the first phase of the park Project was to be turned over to the County to open for public use.¹¹ July 29 was the date for final cleanup. The workers were washing down sidewalks and streets, sweeping and cleaning, and blowing "things" off. They were not pouring concrete. Every employee on site that day was providing Laborer work not Cement Mason work.¹² Todd said he remembered the work that was being performed that day and the employees who were there with him because that day was his father's birthday, and he was having a party for his father.

¹¹ In corroboration of this testimony, JT2 offered into evidence three type-written letters on JT2 stationary, two dated July 21, 2017, referencing completion of the work on or about July 28 or July 31, and a third letter dated July 27, 2017, indicating that the park would be ready for use on July 30. (JT2 Exhibit P, pp. 153, 154, and 156.)

¹² In corroboration of this testimony, JT2 offered into evidence the written statements of eight of the 12 workers listed on the CPRs as Cement Masons for July 29, 2017, that they performed Laborer work not Cement Mason work, they inadvertently wrote down Cement Mason as their classification, they had been asked to help with clean-up, and they understood that they had been overpaid. The statements were admitted into evidence with no objection. (JT2 Exhibit P, pp. 126 (Luis Rapan), 129 (Saul Saldana), 132 (Jose Alvarado Rios), 135 (Jose Herrera), 139 (Fidel Martin), 143 (Martin Corona), 146 (Fidel Parra) and 149 (Hugo Sanchez).)

In addition to missing that the worker classification on the dailies was wrong, Cement Mason rather than Laborer, the JT2 payroll department paid the wrong rate for Cement Mason on Saturday. Todd testified that the compliance department told the payroll department to pay wages at time and a half, the rate for Laborer on Saturday, so payroll paid the Cement Masons time and a half, which was the wrong rate of pay for Cement Mason work on a Saturday; Cement Masons were supposed to be paid double time for Saturday work.¹³ Thus, the CPRs showed both the wrong classification, Cement Mason, and the wrong rate of pay, time and a half, for Cement Mason work on a Saturday.¹⁴ According to Todd, as a result of the errors, all of the workers were overpaid because there was a difference in the hourly wage rates for Cement Mason and Laborer: the Cement Mason rate was higher than the Laborer wage rate. However, JT2 did not seek to recoup the overpayments.

Todd testified that the Project was shut down on Monday, November 27, 2017, in the week ending December 2, 2017, because of rain. He identified JT2's Exhibit P, page 157, as a copy of a text message that he sent to employee Matt Kuchenbaker on the morning of November 27, 2017. The message advised Kuchenbaker that they were taking a "rain day." Todd testified the shutdown was for either forecasted rain or rain that may have occurred in the days before Monday, November 27, 2017. He testified that the majority of the on-site workers were called off work that day, except for one employee, Cesar Sierra, who probably went out to the site to ensure that storm water pollution prevention mechanisms were working properly and to take a picture of the rain gauge, and who otherwise would have worked in the office the remainder of the day preparing for the coming days work.¹⁵ No other hours worked on the Project were

¹³ According to the PWD for Cement Mason, double time is paid after the first eight hours of work on Saturday; the first eight hours of work are paid at time and a half. So not all of the workers were paid at the incorrect rate for their listed trade, as Todd believed. (DLSE Exhibit No. 8, p. 71.)

¹⁴ Todd's explanation is not entirely accurate. The CPRs showed that four workers classified as Cement Mason were paid the straight-time rate for the first eight hours of work. (DLSE Exhibit No. 26, pp. 434-436 and 440.)

¹⁵ JT2 asserted that Sierra was a supervising foreperson.

reported on the CPRs for Monday, November 27, 2017. Thus, Todd claimed that because there was a rain day in the week, it was proper to pay the employees who worked on Saturday, December 2 the straight-time rate.

In addition, Todd testified that Morsi made a mistake in her audit for the week ending December 2, 2017, with respect to the classification of one employee and his correct rate of pay. According to Todd, employee Gerardo Medina was classified as a Laborer on the payroll for the week ending December 2, 2017, but Morsi listed him as a Cement Mason in her audit.¹⁶

Finally, Todd said that no Laborer committee dispatched apprentices to the Project in response to the Requests for Dispatch. JT2 did employ Laborer apprentices on the Project, but those persons were dispatched to JT2 for other projects JT2 had going. Because JT2 probably had no work available on the other projects, JT2 used the apprentices on this Project. In addition, Todd testified that apprentices were told to call and report to him first rather than go straight to the job site so the apprentices could complete necessary paperwork for JT2 human resources prior to starting employment with the company. Also, JT2 wanted to ensure that the apprentices had the proper safety gear and participated in an orientation prior to starting work.

On cross-examination, Morsi testified to doing an online Google search between the two days of Hearing, to determine if November 27, 2017, the Monday of the week ending Saturday, December 2, 2017, was a rainy day. Morsi determined there was rain that day, but could not remember whether it was .03 or .003 inches of rainfall that day.

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

¹⁶ Todd's testimony as to the audit is mistaken. Morsi listed Medina as a Cement Mason / Laborer on the summary audit sheet (DLSE Exhibit No. 2, p. 11), but broke down that designation on the individual audit sheet as Cement Mason for the week ending July 29, 2012, and Laborer for the week ending December 2, 2017 (*id.* at p 25).

works construction projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

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

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

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

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

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

JT2 Met Its Burden to Prove the Assessment Was Incorrect as to Some Unpaid Wages.

DLSE based its Assessment that JT2 owed wages solely on review of the CPRs. At the Hearing, JT2 provided credible explanations for why DLSE’s reliance on the CPRs alone was sometimes misplaced.

The Assessment of unpaid wages was based solely on the allegation that JT2 failed to pay the proper rate for work on three Saturdays in 2017: July 22, July 2, and December 2. JT2 offered no evidence to contradict the Assessment with respect to wages owed for July 22. However, JT2 established that the Assessment was mostly incorrect for July 29, and entirely incorrect for December 2.

With respect to Saturday, July 22, JT2 underpaid employee Santos Hernandez. The CPRs indicated that Hernandez performed work as a Cement Mason for seven hours and that he was paid at the straight-time rate. (DLSE Exhibit No. 26, p. 421.) He was not paid at the Saturday rate, which was time and a half. Morsi determined that Hernandez was underpaid \$117.22. (DLSE Exhibit No. 2, p. 31.) JT2 did not rebut that determination, which is therefore accepted by this Decision.

For Saturday, July 29, JT2 underpaid four employees and overpaid eight employees. According to Morsi, review of JT2’s CPRs showed that employees listed as Cement Mason were either (a) not paid at the required Saturday rate and the required double-time rate for all hours worked after the first eight hours (four employees),¹⁷ or (b) if paid at the required Saturday rate were not paid the double-time rate for all hours

¹⁷ Gerardo Medina, Ignacio Barrios, Cesar Carmona and Horacio Garcia. (DLSE Exhibit No. 5, pp. 46-47.)

worked after the first eight hours (eight employees).¹⁸ However, Todd credibly testified that on July 29 all of the employees performed Laborer work. He had a specific, detailed memory of the day. Also, he testified about corroborating documentary evidence consisting of letters sent out by JT2 concerning the end of phase one of the work on the Project occurring at the end of July as well as statements by employees acknowledging overpayments, all of which were admitted into evidence. Cement Masons are paid at rates higher than Laborers. Because the employees were inadvertently misclassified as Cement Masons rather than Laborers, employees were overpaid.

However, not all of the employees were overpaid. The first group of four employees who were paid straight time as Cement Masons,¹⁹ according to the CPRs (DLSE Exhibit No. 26, pp. 434-436 and 440), were underpaid if regarded as Laborers performing work on Saturday. The straight time total hourly rate for a Cement Mason was \$59.01. (DLSE Exhibit No. 8, pp. 71 and 73.)²⁰ The Saturday overtime total hourly rate for a Laborer was \$66.82. (DLSE Exhibit No. 14, pp. 108 and 111.)²¹ There is a difference of \$7.81 between the two rates. Thus, employees Gerardo Medina, Ignacio Barrios, Cesar Carmona and Horacio Garcia were underpaid for Saturday work as Laborers.²² They were not underpaid as much as Morsi calculated, however, as there is a difference of \$8.94 between the Saturday total hourly rate for Cement Mason (\$75.76) and Laborer (\$66.82), and Morsi used the higher Saturday rate for Cement Mason in her audit based on JT2's CPRs. (DLSE Exhibit No. 2, pp. 15, 17, 21, and 25.)

¹⁸ Martin Corona, Jose Guadalupe Herrera, Hugo Sanchez, Fidel Martin, Saul Saldana, Fidel Para, Luis Rapan and Jose Luis Alvarado Rios. (DLSE Exhibit No. 5, pp. 46-47.)

¹⁹ Which would have been incorrect if actually performing Cement Mason work as they should then have been paid time and a half for the first eight hours of work on a Saturday. (DLSE Exhibit No. 8, p. 71.)

²⁰ Taking into account the predetermined increase.

²¹ Taking into account the predetermined increase.

²² JT2 did not introduce statements from those four workers that they were overpaid.

Nonetheless, the four workers were underpaid at the rate of \$7.81 per hour for hours worked performed on July 29.

Finally, for Saturday, December 2, JT2 did not underpay six employees as claimed by DLSE, and actually overpaid four of those employees. According to Morsi, review of JT2's CPRs showed that six employees listed, two as Cement Mason,²³ and four as Laborer,²⁴ were either not paid at the required Saturday rate and the required double-time rate for all hours worked after the first eight hours, or if paid at the required Saturday rate were not paid the double-time rate for all hours worked after the first eight hours.²⁵ Todd credibly testified that the Project was shut down because of inclement weather on Monday, November 27, in the week ending Saturday, December 2. As corroboration, JT2 introduced a screen shot of Todd's cell phone showing a text to employee Matthew Kuckenbaker on November 27 at 5:42 a.m., "Rain day today." (JT2 Exhibit P, p. 157.) Morsi confirmed that it rained on November 27. When a Project is shut down for inclement weather during the normal work week, Saturday in the same week may be paid at straight-time.

DLSE disputed whether the Project was actually shut down. One employee, Cesar Sierra, was listed on the CPRs as working on November 27. Todd credibly testified that Sierra would have gone to the site to monitor pollution control devices and take a picture of the rain gauge. None of the other 13 employees who were listed in the CPRs as having worked on the Project that week worked on November 27. The reasonable inference to be drawn from the evidence is that the Project was shut down for inclement weather.

²³ Maximiano Cruz and Benjamin Cruz. (DLSE Exhibit No. 2, p. 47.)

²⁴ Gerardo Medina, Matthew Kuckenbaker, Jesus Cabral, and Jose Rodriguez-Rizo. (DLSE Exhibit No. 2, p. 47.)

²⁵ This formulation appears to be in error for the employees listed as Laborer who worked more than eight hours as there is no indication that they should have been paid double time for hours in excess of eight but less than 12 on a Saturday. (See DLSE Exhibit No. 14, p. 108, section 510.)

Because the Project was shut down on Monday, November 27, under the terms of the PWDs, JT2 could pay straight time for work on Saturday, December 2. JT2 paid time and a half rates to four employees on December 2,²⁶ and straight time and time and a half rates to two other employees.²⁷ Thus, JT2 overpaid the first four and did not underpay the other two.

In sum, five employees were underpaid when they performed the work in question. For work on Saturday, July 22, Santos Hernandez was underpaid in the amount of \$117.22, as Morsi determined. For work on Saturday July 29, Gerardo Medina, Ignacio Barrios, Cesar Carmona and Horacio Garcia were underpaid, but not as much as Morsi determined.²⁸

Within three weeks after the Assessment was issued, JT2 paid wages to 17 of the 18 employees who were allegedly underpaid. Jose Rodriguez-Rizo was the only employee not to receive a restitution check. The sole basis for the assessment of unpaid wages for Rodriguez-Rizo was his work on December 2. Based on the evidence of record, Rodriguez-Rizo was not underpaid for that work and there are no further wages due him. Since it can only be determined with any certainty that by the end of the Project five employees were underpaid, Santos Hernandez, Ignacio Barrios, Cesar Carmona, Horacio Garcia and Gerardo Medina, and all were compensated by restitution at the rate Morsi had determined, no employees presently are owed wages.

The Number of Penalties DLSE Assessed Under Section 1775 Is Reduced.

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

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for

²⁶ Maximiano Cruz, Benjamin Cruz, Gerardo Medina, and Jose Rodriguez-Rizo. (DLSE Exhibit No. 26, pp. 513-516.)

²⁷ Matthew Kuckenbaker and Jesus Cabral. (DLSE Exhibit No. 26, p. 515.)

²⁸ As a result, these five employees were owed wages from July 2017 until after the issuance of the CWPA in 2019, when JT2 provided restitution to these five employees. There is no dispute that these five employees are not owed wages at this time.

each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

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

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B)(i) The penalty may not be less than forty dollars (\$40) . . . unless the failure of the contractor . . . to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor....

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

(iii) The penalty may not be less than one hundred twenty dollars (\$120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.

....

(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for 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 \$80.00 in part because JT2 had been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract. The DLSE penalty review indicated that JT2’s prior history included a CWPA in case number 40-57234-148 issued on August 2, 2018, for wages and penalties.²⁹ (DLSE Exhibit No. 5, p. 50.)

The burden was on JT2 to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of \$80.00 per violation. While JT2 established through Morsi’s testimony that the CWPA in case number 40-57234-148 was later withdrawn, it was withdrawn after the Assessment was issued in this matter. In addition, Morsi’s penalty review indicated that JT2 had a history of public works violations predating the case that had been withdrawn. (DLSE Exhibit No. 5, p. 50.)

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty of \$200.00 per day in light of prescribed factors, but it does not mandate mitigation in all cases. Thus, while section 1775, subdivision (b)(ii), indicates that the chosen penalty rate cannot be less than \$80.00 where there have been penalties assessed for violations within the previous three years, the statute does not say the contractor must have such prior violations before DLSE can, in its discretion, select \$80.00 as the penalty rate. The Director is not free to substitute her own judgment. JT2 has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of \$80.00 is affirmed.

²⁹ Little more than six months prior to the issuance of the Assessment in this matter.

However, the total number of assessed violations is reduced because JT2 established that not all workers were underpaid, as described, *ante*, and because of errors in DLSE's calculations. DLSE erred in assessing multiple section 1775 penalties for each employee when there was only one calendar day—Saturday—on which it was alleged employees were underpaid. The audit worksheets indicate that Morsi issued a section 1775 penalty for each calendar day an employee worked in the weeks ending July 22, July 29 and December 2, not just for the Saturdays. For example, in the week ending July 22, Morsi determined that Santos Hernandez worked 7 hours performing work as a Cement Mason on Saturday, July 22 and was paid at the straight time rate rather than the required time and a half Saturday rate. However, rather than issue one section 1775 penalty for \$80.00 for that one violation on that particular calendar day, she issued three penalties for a total of \$240.00, without explanation. Hernandez also worked on Thursday and Friday of that week ending July 22, however, there was no testimony or evidence that he was not paid correctly on those two days. The pattern was repeated throughout the audit worksheets: it would be alleged that an employee was underpaid on the one calendar day—Saturday—but section 1775 penalties were issued in direct correlation to the number of days the employee worked during that week. DLSE presents no valid basis for calculating a penalty other than what the statute provides: "for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates..." (§ 1775, subd. (a).) Thus, this Decision reduces the total number of assessed violations to five, one each for the underpayment of Santos Hernandez on July 22 and the one-time underpayments to each of Gerardo Medina, Ignacio Barrios, Cesar Carmona, and Horacio Garcia on July 29. Accordingly, the penalty under the Assessment is modified to five violations at \$80.00 per violation for a total of \$400.00.

JT2 Is Not Liable for Penalties Under Section 1813.

Section 1815 states:

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

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

Section 1813 states:

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

Here, four employees were underpaid on Saturday July 29, but they were underpaid for the first eight hours of work only. They were overpaid for the hours they worked in excess of eight hours. They were paid at the Cement Mason Saturday total hourly rate of \$75.76 which was higher than the Laborer Saturday total hourly rate of \$66.82. There was no provision in the Laborer PWD for double time hours on Saturday for Laborers who worked more than eight but less than 12 hours (DLSE Exhibit No. 14, p. 108; section 510), and DLSE does not assert that any JT2 employee worked 12 hours or more on a Saturday. Thus, no penalties are due under section 1813.

JT2 Is Not Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages upon the contractor. It 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.

Here, JT2 issued restitution on February 28, 2019, within 16 days of the Assessment being issued. No employees were owed wages after the payment of the

restitution. Accordingly, no liquidated damages can be imposed under section 1742.1, subdivision (a).

Apprenticeship Violations.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. California Code of Regulations, title 8, sections 227 to 231.³⁰

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

The ratio of work performed by apprentices to journey[persons] employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journey[person] work.

The governing regulation as to this 1:5 ratio of apprentice hours to journey level worker hours is section 230.1, subdivision (a), which states:

Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with the required 1 hour of work performed by an apprentice for every five hours of labor performed by a journey[person], unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter.

³⁰ All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

However, a contractor shall not be considered in violation of the regulation if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).)

According to that regulation, a contractor properly requests the dispatch of apprentices by doing the following:

[r]equest the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays, and holidays) before the date on which one or more apprentices are required. If the apprenticeship committee from which apprentice dispatch(es) are requested does not dispatch apprentices as requested, the contractor must request apprentice dispatch(es) from another committee providing training in the applicable craft or trade in the geographic area of the site of the public work, and must request apprentice dispatch(es) from each such committee either consecutively or simultaneously, until the contractor has requested apprentice dispatch(es) from each such committee in the geographic area. ...

. . . [I]f in response to a written request no apprenticeship committee dispatches or agrees to dispatch during the period of the public works project any apprentice to a contractor who has agreed to employ and train apprentices in accordance with either the apprenticeship committee's standards or these regulations within 72 hours of such request (excluding Saturdays, Sundays and holidays) the contractor shall not be considered in violation of this section as a result of failure to employ apprentices for the remainder of the project, provided that the contractor made the request in enough time to meet the above-stated ratio.

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

JT2 Employed Laborer Apprentices But Not in the Correct Ratio.

Laborer was the apprenticeable craft at issue in this matter. JT2 employed two

apprentices for 43.75 total hours but that was far from the ratio required under the law for the Project. Journeypersons were on the Project for 2499.5 straight-time hours over 105 days. (DLSE Exhibit No. 23, p. 209.) At the 1:5 ratio, JT2 was required to employ apprentices for 499.9 hours under section 230.1, subdivision (a), and would be found in violation unless its compliance was excused under the terms of the regulation.

There Was One Applicable Committee in the Geographic Area, and JT2 Properly Requested Dispatch of Apprentices.

DLSE established that there was one applicable apprenticeship committee for Laborer in the geographic area of the Project: the Northern CA District Council of Laborers JATC. (DLSE Exhibit No. 21, p. 164.) JT2 did not dispute that the committee listed was the applicable committee for the Laborer craft.

JT2 established that it sent out the request for dispatch of apprentices (the DAS 142) to the approved, applicable committee. DLSE concedes that the form was submitted timely. DLSE acknowledges that JT2 submitted the request for dispatch of apprentice to the applicable committee on January 3, 2017, which was more than the required 72 hours before the date on which the apprentices were required. A journeyman Laborer was first on the job on March 8, 2017. (DLSE Exhibit 26, p. 242.)

However, DLSE maintains that the dispatch request was invalid for several reasons. First, the exact time to report and the location to report were not included on the form.³¹ Second, DLSE argues that because no journeyman Laborer was on the

³¹ Todd testified that "call to confirm" was inserted on the time to report and location lines so that apprentices could be directed to human resources to complete necessary paperwork and participate in a safety gear check and orientation. DLSE pointed out that another DAS 142, one sent to the ABC Laborer UAC, the unapproved, non-union program of which JT2 was a signatory, included a time to report, 06:00, and a location to report, the office address for JT2. Todd was not questioned about this difference by DLSE. (During the Hearing, DLSE declined its opportunity to question Todd.) The difference in completing the DAS 142 for the two Laborer apprentice programs does create an appearance of favoritism or unequal treatment between the two programs. But under the facts of this case, without more, it does not change the result.

Project until March 8, the request for dispatch for a Laborer apprentice for January 9 was illusory.³²

DLSE's arguments are not persuasive. Neither the statute nor the regulation contain a requirement that an exact time to report be included in the request or that the exact location to report be included. All section 230.1, subdivision (a), requires is that (1) the contractor request the required apprentices from the applicable apprenticeship committee, (2) in writing and (3) at least 72 hours before the date on which the apprentice is needed. JT2 complied with these requirements. It sent the applicable committee a request for dispatch in writing on January 3, 2017, two months before the date an apprentice may have been needed, which in this case was March 8, 2017, the date JT2 first had a Laborer journeyman on the Project. That the request indicated that the apprentice was needed on January 9 rather than March 8 was inaccurate, but not invalidating. No evidence was produced that the committee relied on the January 9 date or that the committee called to confirm the time or location.³³ The only evidence was that the committee did not respond to the request.

As stated, *ante*, JT2 did not employ apprentices on the Project in sufficient hours to meet the 1:5 apprentice to journeyman ratio for the Laborer craft. However, after JT2 sent the required dispatch request, the sole approved, applicable Laborer apprenticeship committee did not dispatch apprentices in response. JT2 employed Laborer journeymen on the Project for 105 days from March 8, 2017, until April 24,

³² Furthermore, the record does not establish that the DLSE investigator relied on those arguments at the time the CWPA was issued. There is no information in the penalty review why the investigator found JT2 to be in violation of the regulations despite timely serving the DAS 142, other than that it failed to meet the required ratio of apprentice hours to journeyman hours. When Morsi was asked directly whether the fact that the DAS 142 did not have a time or a location to report affected her analysis of a violation, she could not remember. Morsi testified that because JT2 employed some apprentices but had not met the ratio, they were in violation.

³³ Consideration of the DAS 142 is not done in a vacuum. From the Notice of Contract Award (the DAS 140) that JT2 sent to the Northern CA District Council of Laborers JATC on January 3, 2017, the committee knew the name and location of the Project, JT2's contact information, the expected start date, the estimate of journeyman hours, the estimate of apprentice hours and the approximate dates for the apprentices to be employed, which was expected to be a year from January 3, 2017, through December 30, 2017. (DLSE Exhibit No. 22, p. 165.)

2018, and the subject dispatch request was sent to the applicable committee on January 3, 2017. Consequently, under the terms of section 230.1, subdivision (a), JT2 cannot be considered in violation as a result of failure to employ apprentices in the proper ratio because JT2 made the request in "enough time" to meet the ratio by the end of the Project. Therefore, JT2 was not in violation of section 1777.5, and, for that reason, it has shown an abuse of discretion in the imposition of the section 1777.7 penalty.

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

FINDINGS AND ORDER

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. The Civil Wage and Penalty Assessment was timely served by DLSE in accordance with section 1741.
3. Affected Contractor JT2, Inc., d/b/a Todd Companies filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. DLSE timely made available its enforcement file.
5. Wages were paid to employees as a result of the Assessment.
6. The Assessment used the correct prevailing wage rates for Laborer Group 1(A) and Cement Mason.
7. Santos Hernandez performed work in Tulare County during the pendency of the Project, and was entitled to be paid the Saturday journeyman rate for Cement Mason for that work.
8. Gerardo Medina, Ignacio Barrios, Cesar Carmona and Horacio Garcia performed work in Tulare County during the pendency of the Project and were entitled to be paid the Saturday journeyman rate for Laborer Group 1(A) for that work.

9. In light of findings 7 and 8 above, JT2, Inc., d/b/a Todd Companies underpaid its employees on the Project.
10. DLSE did not abuse its discretion in setting the section 1775 penalty rate at \$80.00 per violation, and the resulting total penalty of \$400.00, as modified, is affirmed.
11. JT2, Inc., d/b/a Todd Companies is not liable for section 1813 penalties.
12. The unpaid wages found in findings 7 and 8 above were paid to the employees within 60 days following issuance of the Assessment. Thus, JT2, Inc., d/b/a Todd Companies is not liable for liquidated damages under section 1741.1.
13. JT2, Inc., d/b/a Todd Companies requested dispatch of Laborer apprentices from the applicable apprenticeship committee in the geographical area of the Project, and was thereby excused from the requirement to employ apprentices under section 1777.5.
14. DLSE abused its discretion in setting section 1777.7 penalties at \$40.00 per violation, and no penalties are due.

The amounts found remaining and due in the Assessment are modified and affirmed as follows:

Basis of the Assessment	Amount
Wages Due:	\$0.00
Penalties under section 1775:	\$400.00
Penalties under section 1813:	\$0.00
Liquidated damages:	\$0.00
Penalties under section 1777.7:	\$0.00
TOTAL:	\$400.00

The Civil Wage and Penalty Assessment is affirmed, as modified, 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: 08 - 23 - 2021


Katrina S. Hagen, Director
California Department of Industrial Relations