

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Zvi Kur, an individual doing business
as ZK Construction**

Case No. 14-0377-PWH

From a Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Zvi Kur, an individual doing business as ZK Construction (ZK Construction) submitted a request for review of a Determination of Civil Penalty (Determination) issued by the Division of Labor Standards Enforcement (DLSE) on June 5, 2014, with respect to work performed by ZK Construction on the Ryan Park Restrooms Improvement and ADA Compliance Project (Project) for the City of Rancho Palos Verdes (City).¹ The Determination found that ZK Construction failed to submit contract award information to applicable apprenticeship programs in accordance with Labor Code section 1777.5, subdivision (e), and failed to employ apprentices in accordance with Labor Code section 1777.5, subdivision (g). DLSE assessed an aggregate penalty of \$7,740.00 under Labor Code section 1777.7.²

A Hearing on the Merits occurred in Los Angeles, California on March 24, 2015, before Hearing Officer Richard T. Hsueh. Max D. Norris appeared for DLSE and Danny Ceron, Esq., of Ceron Law Office for ZK Construction. Prior to the commencement of the Hearing, the parties stipulated as follows:

¹ The Determination was issued against ZK Construction. By written stipulation dated November 18, 2015, the parties agreed that the Assessment was issued against "Zvi Kur, an individual, doing business as ZK Construction."

² All further statutory references are to the Labor Code unless stated otherwise.

- The Project was a public work subject to payment of prevailing wages;
- DLSE timely served the Determination on ZK Construction;
- ZK Construction timely requested review of the Determination;
- ZK Construction requested review of DLSE's enforcement file and the file was timely provided to ZK Construction;
- ZK Construction did not transmit contract award information (DAS 140 or its equivalent) in a timely and factually sufficient manner to any Laborer apprenticeship committee in the geographic region of the Project because such information was not supplied to ZK Construction by the awarding body;
- ZK Construction did not request the dispatch of apprentices (DAS 142 or its equivalent) in a timely manner because such information was not made available to ZK Construction by the awarding body;
- ZK Construction did not employ apprentices on the Project in the minimum ratio required by section 1777.5.

The matter was submitted for decision on April 7, 2015, following the submission of legal briefs by the parties regarding the standard of review governing the penalty imposed by DLSE.

The issues for decision are as follows:

- Whether ZK Construction failed to notify the applicable apprenticeship program(s) of the award of public works construction contracts;
- Whether ZK Construction failed to contact apprenticeship program(s) for dispatch of apprentices on public works;
- Whether ZK Construction failed to employ apprentices on the Project in the minimum ratio required by section 1777.5 (20% of journeyman hours employed);
- Determination of the appropriate penalty for any violations of section 1777.5.

Based on the admissions, stipulation of the parties and the evidence/testimony presented at the Hearing, the Director finds that ZK Construction failed to properly notify and request dispatch of laborer apprentices from the applicable apprenticeship committee in the geographic area of the Project, and was not excused from the requirement to employ apprentices under

section 1777.7. The Director affirms the Determination.

Facts

The Division of Apprenticeship Standards (DAS) promulgated a Public Works Contract Award Information form (DAS 140) for contractors' use in notifying the apprenticeship committee in the applicable geographical area of the public works contract. ZK Construction admitted it did not submit DAS 140 or its equivalent to the apprenticeship committee, nor did it contact the apprenticeship committee for dispatch of laborer apprentices to do work on the Project. Consequently, no apprentices were employed on the Project. For purposes of the Project, on or about February 19, 2013, ZK Construction entered into a public works agreement with the City of Rancho Palo Verdes. ZK Construction executed a document entitled "Agreement to Comply with California Labor Law Requirements" that encompassed sections 1720, 1773.8, 1775, 1776, 1777.5, 1813, 1860, 1861 and 3700. Approximately 2,613 hours of journeyman laborer work occurred on the Project over 129 days.

Applicable Committees in the Geographic Area. Deputy Labor Commissioner Kari Anderson (Anderson) testified that she searched the DAS website and printed out a list of the one apprenticeship committee in the geographic area of the Project in the trade of laborer. The applicable apprenticeship committee was Laborers Southern California Joint Apprenticeship Committee.

Request for Dispatch of Apprentices. Anderson testified that ZK Construction failed to submit a request for dispatch of laborer apprentices to the applicable apprenticeship committee in the applicable region - the one that she found on the DAS website. During a phone conference with Zvi Kur, he confirmed with Anderson that he had failed to request for dispatch of laborer apprentices.

Assessment of Penalties. Anderson testified that the penalties were mitigated from a maximum of \$100.00 to \$60.00 per day for 129 days that journeyman laborers worked on the Project.

Discussion

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, section 227³ provides that those regulations "shall govern all actions pursuant to ... Labor Code Sections 1777.5 and 1777.7."

As to the requirement to submit a DAS 140, section 1777.5, subdivision (e) states in part:

Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work.

The governing regulation for submitting a DAS 140 is section 230, subdivision (a), which states:

(a) Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. This contract award information shall be in writing and may be a DAS Form 140, Public Works Contract Award Information. The information shall be provided to the applicable apprenticeship committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work The DAS Form 140 or written notice shall include the following information, but shall not require information not enumerated in Section 230:

- (1) the contractor's name, address, telephone number and state license number;
- (2) full name and address of the public work awarding body;
- (3) the exact location of the public work site;
- (4) date of the contract award;
- (5) expected start date of the work;

³ All further regulatory references are to California Code of Regulations, title 8.

- (6) estimated journeyman hours;
- (7) number of apprentices to be employed;
- (8) approximate dates apprentices will be employed.

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 journeymen 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 journeymen 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 journeyman work.

The governing regulation as to this 1:5 ratio of apprentice hours to journeyman hours is section 230.1, subdivision (a), which states, in relevant part:

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 journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter. Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

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

According to the 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. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email....

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

When DLSE determines that a violation of the apprenticeship laws has occurred, a written Determination of Civil Penalty is issued pursuant to section 1777.7. In the review of a determination as to the 1:5 ratio requirement, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (§ 1777.7, subdivision (c)(2)(B).)

ZK Construction Failed to Submit Contract Award Information to An Applicable Apprenticeship Program

Contractors must notify applicable apprenticeship programs or committees of the public works project, including expected work start date and estimated journeyman hours. (§ 230, subd. (a) and DAS 140.) ZK admitted that it did not submit DAS 140 or its equivalent to any apprenticeship program or committee.

ZK Construction Failed To Properly Request The Dispatch Of Laborer Apprentices.

All requests for dispatch of apprentices must be in writing and provide at least 72 hours' notice of the date on which one or more apprentices are required. (§ 230.1, subd.(a).) ZK Construction admitted that it did not request the dispatch of laborer apprentices in a timely manner in compliance with the regulation.

ZK Construction Failed To Employ Laborer Apprentices.

Laborer was the apprenticeable craft at issue in the Determination. With respect to the 1:5 ratio of apprentice hours to journeyman hours, the journeymen laborers that ZK Construction employed on the Project worked a total of 2,613 hours. As it admitted, ZK Construction did not employ any apprentices to work on the Project. Accordingly, the record establishes that ZK Construction violated section 1777.5 and the implementing regulation at section 230.1.

The Penalty for Noncompliance.

If a contractor "knowingly violated Section 1777.5" a civil penalty is imposed under section 1777.7. Here, DLSE assessed a penalty against ZK Construction under the following portion of section 1777.7, subdivision (a)(1):

A contractor or subcontractor that is determined by the Labor Commissioner to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation.

The phrase quoted above -- "knowingly violated Section 1777.5" -- is defined in regulation, at section 231, subdivision (h) as follows:

For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control.

ZK Construction "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journeyman hours for Laborer apprentices. ZK Construction admitted that it did not notify any applicable apprentice committee of the contract award nor did it request the dispatch of any laborer apprentices to work on the Project. ZK Construction also knowingly violated the requirement to notify the applicable apprenticeship committee of the contract award information.

The sole defense offered by ZK Construction at the Hearing was that awarding body did not make this requirement known to it. However, as the contractor performing public works, ZK Construction had the obligation to inquire and to know the various requirements imposed by

section 1777.5 concerning the employment of apprentices on the Project. Further, the Agreement to Comply with California Labor Law Requirements that ZK Construction signed at the beginning of the Project reinforced that the apprentice obligations fell to the contractor. That document also provided the statutory citations where ZA Construction could learn about the requirements, including an express reference to section 1777.5. Therefore, ZK Construction was plainly on notice of its apprenticeship obligations and knew, or should have known, of the requirements. It is well established that ignorance of the law is no excuse. (*Hale v. Morgan* (1978) 22 Cal. 3d 388, 396.)⁴ Moreover, ZK Construction had actually worked on at least one other public works project before, which was the subject of a prior Civil Wage and Penalty Assessment.⁵ Accordingly, its claim that the present section 1777.5 violations were not “knowing” is unpersuasive.

ZK Construction failed to meet its burden of proof by providing evidence of compliance with section 1777.5. Under limited circumstances beyond the contractor’s control as defined in the regulation, a contractor may be excused from meeting the 1:5 ratio of apprentice hours to journeyman hours. (See § 230.1, subd. (a).) In order to show that its failure to employ apprentices was due to circumstances beyond its control, ZK Construction had to demonstrate that it properly requested the dispatch of laborer apprentices from the applicable committee and that no apprentices were dispatched. The record establishes that ZK Construction not only failed to submit the contract award information, it did not even request dispatch of any apprentices.

DLSE imposed a penalty upon ZK Construction on June 5, 2014. ZK Construction

⁴ The *Hale* Court held: “Speaking many years ago within a criminal context, we amplified the principle in this way: “It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. Of course it is based on a fiction, because no man can know all the law, but it is a maxim which the law itself does not permit any one to gainsay, The rule rests on public necessity; the welfare of society and the safety of the state depend upon its enforcement.... [If permitted] the plea [of ignorance] would be universally made, and would lead to interminable questions incapable of solution. Was the defendant in fact ignorant of the law? Was his ignorance of the law excusable? The denser the ignorance the greater would be the exemption from liability. The absurdity of such a condition of the law is shown in the consummate satire of Pascal, where, speaking upon this subject, he says, in substance, that although the less a man thinks of the moral law the more culpable he is, yet under municipal law ‘the more he relieves himself from a knowledge of his duty, the more approvedly is his duty performed.’” (citing, *People v. O'Brien* (1892) 96 Cal. 171, 176.)

⁵ Case No. 40-33243/235, Civil Wage and Penalty Assessment issued June 10, 2013, for \$51,057.74, as testified to by Anderson. ZK Construction did not offer any rebuttal evidence showing that it did not work on a prior public work project.

sought review of that penalty on June 20, 2014. Under the version of section 1777.7, in effect at both the time of the imposition of the penalty and the time of the request for review, subdivision (f)(2) requires the Director to decide the appropriate amount of the penalty de novo.⁶ In making this decision, the Director is to consider the factors stated in section 1777.7, subdivision (f)(1), stated as follows:

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

Under factor “A,” the evidence establishes that the violation was intentional in that ZK Construction made no effort to comply with the requirement to submit contract award information to the applicable apprenticeship committee, request dispatch of apprentices from that committee, and employ laborer apprentices in the appropriate ratio to journeymen. The testimony and evidence establish that ZK Construction knew or should have known that it had to comply with the various Labor Code sections, including section 1777.5, because it had executed the Agreement to Comply with California Labor Law Requirements that encompassed section 1777.5. Further, ZK Construction offered no evidence to show what steps it took to acquaint itself with the legal requirements that it agreed to abide by. Under factor “B” there is no

⁶ There is no express declaration in the statute that the amendments to section 1777.7 that went into effect on January 1, 2015, changing the standard of review from de novo to abuse of discretion, would apply to pending cases. Statutes apply prospectively unless there is a clearly expressed statutory intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) In this matter, application of the amendments to section 1777.7 changes the legal consequences to the affected contractor in that it precludes the affected contractor from a new review of the alleged conduct to determine whether a penalty is appropriate at all or whether it should be ordered to provide apprenticeship employment equivalent or whether the penalty should be less than that imposed. It alters the affected contractor’s burden on the issue of penalty by making the affected contractor establish that the Labor Commissioner abused her discretion where no such burden existed before. (*Id.*, at p. 938.) Moreover, equity requires that the affected contractor, who requested review in this matter prior to the change in the law, not be prejudiced by any delay in bringing this matter to hearing.

evidence that ZK Construction committed other violations of section 1777.5.⁷ ZK Construction was not informed of the violation until after the Project was complete, so factor “C” is irrelevant to the consideration of penalty. There is some evidence of lost training opportunities for apprentices under factor “D” as there were approximately 2,613 hours of journeyman laborer work on the Project, and therefore, at a minimum, there should have been 522.60 hours of apprentice work.

Here, the consideration of these factors appears to favor the imposition of a higher penalty amount than the mitigated penalty amount assessed by DLSE, for the reasons stated above—ZK Construction was on express notice that it must comply with section 1777.5, and a considerable amount of apprentice work was lost. ZK Construction previously worked on a public work project and had to comply with the California prevailing wage laws, including the obligation to hire and train apprentices. The Public Works Agreement between ZK Construction and the City in this case expressly required compliance with section 1777.5, among others. All the evidence points to a knowing violation of section 1777.5. Moreover, the loss of over five hundred hours of apprentice work, under the circumstances of this case, cannot be characterized as insignificant. That being said, in applying the other factors, because ZK Construction was not informed of a violation until after the Project and it had no prior apprentice violation, the Director concludes that a daily penalty of \$60.00 is the appropriate penalty under section 1777.7.

FINDINGS AND ORDER

1. The Determination of Civil Penalty was timely served by DLSE on Zvi Kur doing business as ZK Construction (ZK Construction).
2. There was one applicable apprenticeship committee in the geographic area of the Project in the craft of laborer.
3. ZK Construction violated Labor Code section 1777.5 by failing to employ laborer apprentices on the Project in the minimum ratio required by the law.

⁷ Although there was a prior Case No. 40-33243/235; Civil Wage and Penalty Assessment issued June 10, 2013, for \$51,057.74, DLSE did not present any evidence that it involved a violation of section 1777.5.

4. ZK Construction failed to properly inform the applicable apprenticeship committee in the geographic area of the Project of contract award information and request the dispatch of laborer apprentices from the applicable apprenticeship committee, and it was not excused from the requirement to employ apprentices under Labor Code section 1777.7.
5. Under Labor Code section 1777.7, a penalty is assessed upon affected contractor Zvi Kur, an individual doing business as ZK Construction, in the amount of \$7,740.00, computed as \$60.00 per day for the 129 days that journeymen laborer worked on the Project.

The Determination of Civil Penalty is affirmed in full as set forth in the above Findings. The Hearing Officer shall issue a Notice of Decision and appeal rights which shall be served with this Decision on the parties.

Dated: 5/19/2016


Christine Baker
Director of Industrial Relations