

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Ornelas Enterprises, Inc. dba Ornelas Electric
Construction**

Case No. 15-0240-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor, Ornelas Enterprises, Inc. dba Ornelas Electric Construction (Ornelas Enterprises) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on July 9, 2015, with respect to electrical and landscaping work performed for awarding body City of Los Angeles on the L.A. River Bikeway between Winnetka and Mason project (Project) located in Los Angeles County. The Assessment determined that Ornelas Enterprises owed \$175,666.34 in unpaid prevailing wages; \$113,850.00 in penalties under Labor Code sections 1775 and 1813; \$148,000.00 in penalties under Labor Code section 1777.7; and \$60,100.00 in penalties under Labor Code section 1776, subdivision (h).¹

The hearing on the merits took place in Bakersfield, California before Hearing Officer Richard Hsueh on February 24, 2016, and March 22, 2016, and Hearing Office Edward Kunnes held the final hearing on the merits in Los Angeles, California on August 9, 2016. On the first day of the hearing on the merits, DLSE moved to amend the Assessment downward to \$52,424.79 in unpaid prevailing wages, \$108,225.00 in penalties under sections 1775 and 1813; and \$36,660.00 in penalties under section 1777.7. The Hearing Officer granted the motion and amended the Assessment (Amended Assessment) because there was no prejudice to Ornelas Enterprises. The penalties under section 1776 remained unchanged.

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

Additionally, DLSE requested an “Order to Show Cause” why Ornelas Enterprises should not be precluded from asserting a defense because the Franchise Tax Board’s suspension of Ornelas Enterprises. During the suspension, Ornelas Enterprises “may not prosecute or defend an action [citation], appeal from an adverse judgment [citation], seek a writ of mandate [citation], or renew a judgment obtained prior to suspension [citation].” (*Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1306. [citing Rev. & Tax. Code § 23301].) Notwithstanding, the Hearing Officer denied the request for an order to show cause and proceeded to hear the merits because Ornelas Enterprises, as a suspended corporation, may seek to revive the corporation by application to the Franchise Tax Board together with payment of taxes, interest and penalties.. (Rev. & Tax. Code, § 23305.)

Permitting Ornelas Enterprises to defend and present evidence before the Hearing Officer satisfied the mandate that a party be afforded administrative due process. Should Ornelas Enterprises hereafter file a petition for writ of mandate to the superior court without having secured a revivor, that court could then consider any DLSE motion to strike the petition proceedings for lack of capacity and seek entry of a final judgment.

Carlos Ornelas, president, appeared for Ornelas Enterprises and Theresa Bichsel, counsel, appeared for DLSE. The affected prime contractor, Ford E.C., Inc. (Ford), did not request review of the Assessment.

At trial, the parties stipulated to the issues for decision as follows:

- Whether the Assessment correctly found that the subcontractor, Ornelas Enterprises, failed to pay the required prevailing wages for all straight time and overtime worked on the Project by its workers.
- Whether the Amended Assessment correctly found that Ornelas Enterprises failed to contribute to the training fund for its workers on the Project.
- Whether DLSE abused its discretion in assessing penalties under section 1775 at the rate of \$200.00 per violation.
- Whether Ornelas Enterprises is liable for penalties under section 1813.

- Whether Ornelas Enterprises has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages under section 1742.1.
- Whether Ornelas Enterprises failed to timely submit certified payroll records and is therefore liable for penalties under section 1776.
- Did Ornelas Enterprises provide each applicable apprenticeship committee with timely notice of contract award information in the manner required by California Code of Regulation, title 8, section 230?
- Did Ornelas Enterprises employ the required apprentices on the Project in the minimum ratio required by section 1777.5 (20% of journeyman hours employed)?
- What were the applicable apprenticeship committees in the geographic area of the Project in the trade or craft of (a) laborer; (b) electrician (inside wire); (c) landscape irrigation laborer; and (d) operating engineer?
- Did Ornelas Enterprises request the dispatch of apprentices in a timely and factually sufficient manner pursuant to section 1777.5, so as to give rise to an affirmative defense to a minimum ratio violation under sections 1777.5 and 1777.7 pursuant to California Code of Regulations, title 8, section 230.1?
- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1777.7?

The Director finds that Ornelas Enterprises has failed to carry its burden of proving that the basis of the Amended Assessment was incorrect. Therefore, the Director issues this Decision affirming the Amended Assessment, except modifying the penalty under section

1776 downward to reflect the evidence submitted by DLSE. Ornelas Enterprises has not proven the existence of grounds for a waiver of liquidated damages.

SUMMARY OF FACTS

On April 18, 2012, the City of Los Angeles published a notice for bids for the Project, and the following month, it chose Ford to construct the Project.

Ford entered into two contracts with Ornelas Enterprises: one contract to install lighting on the Project for \$637,000.00 and the other contract to install an irrigation system and landscape the Project for \$130,000.00. Ornelas Enterprises employed 23 workers on the Project from December 12, 2012, to August 17, 2014.

Ornelas Enterprises used electricians, laborers, landscapers, irrigation laborers and operating engineers on its portion of the Project. The following applicable prevailing wage determinations (PWDs) and scopes of work for these workers were in effect on the bid advertisement date:

Inside Wireman Prevailing Wage Determination for Los Angeles County (LOS-2012-1): The basic hourly rate for inside wiremen was \$37.95, the fringe benefits were \$23.25, and the training fund contribution was \$0.56, totaling \$61.76 straight-time.

Landscape/Irrigation Laborer Prevailing Wage Determination for Los Angeles County (SC-102-X-14-2011-1): The basic hourly rate for landscape/irrigation laborers was \$25.43, the fringe benefits were \$16.72, and the training fund contribution was \$ 0.64, totaling \$42.79 straight-time.

Laborer Prevailing Wage Determination for Los Angeles County (SC-23-102-1-2011-2): Ornelas Enterprises used laborers from the Group 1 classification. The basic hourly rate for Group 1 was \$27.29, the fringe benefits were \$16.75 and the train fund contribution was \$0.64, totaling \$44.68 straight-time.

Operating Engineer Prevailing Wage Determination for Los Angeles County (SC-23-63-2-2011-2): Ornelas Enterprises used operating engineers from the Group 1 classification. Effective July 1, 2012, there was an increase of \$1.70 to the PWD. The basic hourly rate for

Group I was \$37.40, the fringe benefits were \$20.69, and the train fund contribution was \$0.80, totaling \$58.89 straight-time, after July 1, 2012.

Apprentice Inside Wireman Prevailing Wage Determination for Los Angeles (2012-1): Ornelas Enterprises used electrician apprentices in their first and third period of the apprenticeship program. For the first period, the basic hourly rate for apprentices was \$15.18, the fringe benefits were \$9.95 and the train fund contribution was \$0.61, totaling \$25.74. For the third period, the basic hourly rate for apprentices was \$18.98, the fringe benefits were \$16.93, and the train fund contribution was \$0.61, totaling \$36.52.

Lori Rivera, the Deputy Labor Commissioner, prepared the Assessment and Amended Assessment against Ornelas Enterprises. Rivera testified at the Hearing on the Merits that she discovered violations of underpayment of wages, Certified Payroll Records (CPRs) not conforming to statute, unpaid overtime, unpaid employer contributions/fringe benefits, unpaid training fund contributions, misclassification of workers, and a failure to produce timely CPRs.² Additionally, she found apprenticeship violations.

Upon DLSE's request, Ornelas Enterprises was unable to provide paychecks showing that it paid workers for all the straight-time hours and fringe benefits. Also, the CPRs confirmed that Ornelas Enterprises committed an overtime violation by paying a straight-time rate as opposed to an overtime rate on at least one occasion.

Rivera testified that on a regular basis the CPRs reflected no electrician journeyman to supervise an electrician apprentice. The Associated Builders and Contractors, Inc. (ABC, Inc.), to which the president of Ornelas Enterprises is a signatory, requires direct supervision of an apprentice by a journeyman. Hence, DLSE reclassified workers from electrician apprentices to electrician journeymen to comport with the required level of supervision lacking on the Project. At times, there were as many as three electrician apprentices without a single journeyman on the Project. On the occasion when an electrician journeyman did work with an electrician apprentice, DLSE did not reclassify the apprentice.

² DLSE relied upon a combination of CPRs from Ford and Ornelas Enterprises. DLSE used Ornelas Enterprises' CPRs for the week ending December 16, 2012, through November 3, 2013, and used Ford's CPRs for the week ending November 10, 2013, through August 17, 2014.

DLSE also reclassified the complainant from a laborer journeyman to an electrician journeyman based on complainant's description of the work he performed and the fact that he had completed the apprenticeship program for an electrician. As Rivera explained at the Hearing on the Merits, it seemed improbable to her that complainant would work as a laborer on a job requiring electrical work after having completed his electrician apprenticeship program.

Rivera also pointed out DLSE would have assessed more penalties against Ornelas Enterprises if the complainant were not reclassified as an electrician journeyman because Ornelas Enterprises did not have an electrician journeyman supervising the electrician apprentice on the days that complainant worked on the Project. Thus, reclassifying the complainant rectified Ornelas Enterprises' apprenticeship ratio violation for electrician. Additionally, DLSE reclassified one other worker from electrician apprentice to electrician journeyman because he did not appear on the list of registered apprentices.

DLSE also examined Ornelas Enterprises' payroll checks and the CPRs to determine the amount owed for training fund contributions. DLSE determined the total owed for training fund contributions by adding hours worked on the Project and multiplying them by the applicable train fund contribution. DLSE also gave credit for training fund contributions for cancelled checks that corresponded to work on the Project. DLSE credited training fund contributions to Ornelas Enterprises of \$2,129.88, and concluded that Ornelas Enterprises did not pay training fund contributions of \$415.07.

DLSE credited the training fund contribution first to those workers who Ornelas Enterprises had otherwise properly paid (five workers) so that the penalties assessed under section 1775 against Ornelas Enterprises were limited to only those workers who Ornelas Enterprises failed to pay the prevailing wage, thus favoring Ornelas Enterprises by reducing penalties. DLSE removed these five workers from the Amended Assessment.

Ornelas Enterprises exceeded the minimum required apprenticeship hours for electrician on the Project and fell under an exemption for Operating Engineer whereby no apprenticeship hours were required. But Ornelas Enterprises failed to meet its requirement of 279 hours for laborer apprentices and seven hours for landscape laborers. Ornelas Enterprises

hired no apprentices under these categories and failed to submit contract award information to the applicable apprenticeship committees that could supply apprentices.

Ornelas Enterprises failed to deliver CPRs for three workers for 24 days after the production deadline. Also, on March 26, 2015, DLSE made a request for all 23 workers' "Payroll Records," as that term is defined at title 8, California Code of Regulations, section 16000. DLSE never received all the supporting documents it requested from Ornelas Enterprises but it stopped calculating penalties after May 7, 2015, because DLSE issued an amended assessment on May 8, 2015. DLSE calculated the period as 23 days from April 15, 2015, to May 7, 2015, for the Payroll Records.

DLSE assessed penalties under section 1775 at the maximum rate of \$200.00 per violation for 541 violations. Prior to the issuance of this Assessment, DLSE had recently issued a Civil Wage and Penalty Assessment against Ornelas Enterprises for a different public work project that resulted in a hearing and a finding that affirmed the DLSE's assessment of \$132,205.91 for similar violations. Additionally, a Labor Compliance Program (LCP) previously brought a claim against Ornelas Enterprises for public work violations.

DLSE assessed penalties under section 1777.7 at the rate of \$60.00 per violation for 611 violations. The DLSE found that the ratio violations were willful violations based on Ornelas Enterprises' prior history and Ornelas Enterprises' knowledge or constructive knowledge of the standard that apprentices require direct supervision by journeymen.

Ornelas Enterprises attempted to rebut DLSE's findings by enlisting several workers to testify that Ornelas Enterprises had properly compensated them and by arguing that the complainant, whom DLSE reclassified, could not be a journeyman because he lacked an electrician's license. But if DLSE had not reclassified the complainant from laborer journeyman to electrician journeyman, Ornelas Enterprises would have not sufficiently employed electrician apprentices to meet the minimum required ratio.

DISCUSSION

Sections 1720 and following statutes set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. DLSE enforces prevailing wage requirements for the benefit of not only 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, too, *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.)

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

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review under section 1742. Subdivision (b) of section 1742 provides, among other things, that the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing. At the hearing, the contractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (§ 1742, subd. (b).) If the contractor “demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment..., the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.” (§ 1742.1, subd. (a).) Furthermore, as to unpaid wages DLSE’s determination “as to the amount of the penalty shall be reviewable only for abuse of discretion.” (§ 1775, subd. (a)(2)(D).)

Ornelas Enterprises Underpaid Wages, Including Fringe Benefits and Training Fund Contributions.

Ornelas Enterprises underpaid wages due to a host of underlying problems, including misclassification. The misclassification was a threefold problem: 1) DLSE was required to reclassify certain workers to conform to supervision requirements of apprentices; 2) DLSE was required to reclassify the complainant to match his work duties; and 3) the DLSE was

required to reclassify a worker to journeyman because he was not a registered apprentice. But Ornelas Enterprises also underpaid wages where there was no classification problem and its failure to properly compensate its workers extended to fringe benefits and training fund contributions. Total underpaid wages were \$52,424.79, including unpaid training fund contributions at \$415.07. Underpaid wages, unpaid fringe benefits and unpaid training fund contributions collectively comprised the basis for penalties under section 1775.

DLSE Did Not Abuse Its Discretion by Assessing Penalties Under Section 1775 at the Maximum Rate.

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 her own judgment “because in [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.” (Rule 50, subd. (c) [Cal. Code Reg., tit. 8 §17250, subd. (c)].)

Thus, the burden is on Ornelas Enterprises to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of \$200.00 per violation. Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. However, DLSE need not mitigate the statutory maximum penalty. And the Director is not free to substitute her own judgment.

DLSE assessed section 1775 penalties at the rate of \$200.00 because Ornelas Enterprises misclassified workers and underpaid workers in a significant amount, comprising 541 violations. Further, this Amended Assessment follows on the heels of a recent DLSE assessment that went to hearing and was affirmed (Case No. 15-0010). In the previous case, Ornelas Enterprises misclassified workers based on the work they performed. The reason for

misclassification varies somewhat in the present case, but the theme remains the same: Ornelas Enterprises underpaid workers for the work they performed. The attempts by Ornelas Enterprises to rebut DLSE's findings on the proper classifications are unpersuasive. DLSE's documentary evidence contradicted Ornelas Enterprises' witnesses and provided substantial evidence to support DLSE's contention that Ornelas Enterprises underpaid and misclassified workers. Ornelas Enterprises has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of \$200.00 is affirmed at 541 violations.

Overtime Penalty Is Due for One Occasion Where Overtime Was Paid as Straight-time.

Section 1813 states, in pertinent part, as follows:

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.

Section 1815 states in full as follows:

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors 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.

The record establishes that Ornelas Enterprises violated section 1815 by paying less than the required prevailing overtime wage rate to a worker on one occasion. No testimony refuted DLSE's contention of unpaid overtime. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of the penalty under section 1813 is affirmed for \$25.00.

There Are No Grounds for a Waiver of Liquidated Damages.

At all times relevant to this Decision, section 1742.1, subdivision (a) provided in pertinent part 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. Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment . . ., the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages. . . .

Absent waiver by the Director, Ornelas Enterprises is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is partially tied to Ornelas Enterprises' position on the merits and specifically whether, within the 60-day period after service of the Assessment, it had "substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment."

Ornelas Enterprises did not demonstrate that it had substantial grounds for appealing the Assessment because its argument that it had properly classified all its workers according to the work they performed misunderstood the problem DLSE was addressing. Ornelas Enterprises routinely identified apprentices on days when no journeymen in the apprentices' craft worked according to the CPRs, and accordingly, no journeymen were present to supervise the apprentices. To no avail, Ornelas Enterprises answers this charge through testimony identifying various supervisors to these apprentices. But again, the charge goes unanswered that Ornelas Enterprises classified the supervisors in a craft other than that of the apprentices. DLSE reassigned classifications so that Ornelas Enterprises complied with its apprenticeship obligation. The workers' situation vis-à-vis their classification was legally untenable and legally unjustifiable. Additionally, Ornelas Enterprises did not consider the effect of misclassification upon the training fund contribution, whereby Ornelas Enterprises failed to pay the training fund with no serious justification for contending otherwise.

Ornelas Enterprises has therefore not shown substantial grounds for contending that the Assessment was in error. Because the assessed back wages remained due more than sixty

days after service of the Assessment, and Ornelas Enterprises has not demonstrated grounds for waiver, it is also liable for liquidated damages in an amount equal to the unpaid wages.

Ornelas Enterprises Owes Penalties for Failure to Submit CPRs Timely But Not to the Full Extent Requested by DLSE.

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

Section 1776, subdivision (h) provides that:

(a) Each contractor and subcontractor shall keep accurate payroll records, showing 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 journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

* * *

(d) A contractor or subcontractor shall file a certified copy of the records

enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

* * *

(h) In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated.

On January 16, 2015, DLSE issued an initial request to Ornelas Enterprises for CPRs for three workers. Ornelas Enterprises delivered the CPRs 24 days late incurring a penalty of \$100 per violation ($3 \times 100 = \300, $\$300 \times 24 = \$7,200.00$). Thereafter, on March 26, 2015, DLSE made an additional request for records, including cancelled payroll checks (front and back of check), itemized wage statements (a/k/a paystubs), daily time cards for each worker, full social security numbers for each worker, and proof of training fund contributions (front and back of cancelled checks).

The applicable regulation provides a definition of “payroll records”, as follows:

Payroll Records. All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

(Cal. Code Regs., tit. 8, § 16000.)

Ornelas Enterprises never delivered all of the requested items. DLSE therefore assessed a penalty under section 1776, but stopped calculating penalties after it issued an amended assessment on May 8, 2015. In addition to the penalty for \$7,200.00 for the late response to its January 16, 2015, request for CPRs, DLSE assessed penalties for the incomplete response to its March 26, 2015, request for payroll records, calculating those penalties from April 15, 2015, to May 7, 2015, for a total of 23 days for 23 workers ($23 \times \$100 = \$2,300$, $\$2,300 \times 23 = \$52,900.00$).

Accordingly, the Director affirms DLSE assessed penalties under section 1776 for a total of \$60,100.00.

Ornelas Enterprises Failed to Notify Applicable Apprenticeship Committees. Request Apprentices, and Employ Apprentices for Laborer and Landscaper Apprentices.

1. Ornelas Enterprises failed to notify applicable committees and request apprentices.

The Division of Apprenticeship Standards (DAS) has prepared form DAS 140 that a contractor may use to submit contract award information to an applicable apprenticeship committee that can supply apprentices to the public works site in compliance with the statute. (§ 1777.5, subd. (e); Cal.Code Regs, tit. 8, § 230(a).) DAS has also prepared a form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).)

Pursuant to the latter 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 dispatches 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.

Ornelas Enterprises presented no evidence to rebut DLSE's assertion that it failed to submit contract award information to applicable apprenticeship committees for each craft-electrician, laborer, landscape laborer and operating engineer. Los Angeles Electrical J.A. & E.T.C., Los Angeles/Ventura Chapter of A.B.C. Inc., E.U.A.C., I.B.E.W. Local Union No. 40 Los Angeles County Chapter Neca J.A.C., Laborers Southern California Joint Apprenticeship Committee, Southern California Laborers Landscape & Irrigation Fitter J.A.C., and Southern California Operating Engineers J.A.C. were the applicable apprenticeship committees in the Project's geographic area. Ornelas Enterprises contacted none of these committees. Likewise, Ornelas Enterprises also failed to request apprentices from each craft.

However, Ornelas Enterprises did employ electrician apprentices in the proper ratio for the electrician craft or trade and received an exemption from the requirement to employ operating engineer apprentices, as per DLSE's testimony. Ultimately, the DAS 142 violations and failure to employ apprentices did not affect the number of violations because DLSE made the decision to penalize Ornelas Enterprises only for the number of contract days for which Ornelas Enterprises did not submit the DAS 140 to the applicable programs.

2. Ornelas Enterprises employed no laborer apprentices and no landscape laborer apprentices.

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). 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, in pertinent part, 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 journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter.

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, subd. (c)(3).)

Ornelas Enterprises did not hire a single laborer apprentice or landscape irrigation laborer apprentice for the Project.

3. 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 Ornelas Enterprises 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 by regulation 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. ...

Ornelas Enterprises “knowingly violated” the requirement of a 1:5 ratio of apprentice hours to journeyman hours for the category of laborer apprentices and landscape-irrigation laborer apprentice. The record establishes that Ornelas Enterprises knew or should have known of the requirements because Ornelas Enterprises hired electrician apprentices for this Project. Ornelas Enterprises initialed all the pages of the lighting and irrigation contracts between Ford and Ornelas Enterprises, including the Subcontractor Addendum. The Subcontractor Addendum contains verbatim section 1777.5. Ornelas Enterprises’ president was a signatory to ABC, Inc., an employer association that sponsors apprenticeship programs. Since Ornelas Enterprises knowingly violated the law, a \$60.00 penalty per violation is appropriate under section 1777.7. DLSE presented evidence that the failure to submit the DAS 140 lasted 611 days, and Ornelas Enterprises did not dispute that number of days. Therefore, Ornelas Enterprises did not carry its burden of proof under section 1777.7, subdivision (c)(3) and DLSE properly assessed the penalty for \$36,660.00 for 611 violations.

FINDINGS AND ORDER

1. Affected subcontractor, Ornelas Enterprises, Inc., timely requested review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement

with respect to the L.A. River Bikeway between Winnetka and Mason project located in Los Angeles County.

2. The Assessment was issued timely.

3. Ornelas Enterprises, Inc. failed to pay all its workers the required prevailing wages. DLSE found errors in the Certified Payroll Records and DLSE was required to reclassify some of the workers. The associated penalties assessed under section 1775 are therefore affirmed. Ornelas Enterprises, Inc. underpaid its workers for their work on the Project in the aggregate amount of \$52,424.79, including \$415.07 for unpaid training fund contributions.

4. DLSE did not abuse its discretion by setting the penalty for these violations under section 1775, subdivision (a) at the maximum rate of \$200.00 per violation for 541 violations on the Project by Ornelas Enterprises, Inc., totaling \$108,200.00.

5. Penalties under section 1813 at the rate of \$25.00 per violation are due for one violation on the Project by Ornelas Enterprises, Inc., totaling \$25.00 in penalties.

6. Ornelas Enterprises, Inc. is liable for liquidated damages on the Project under Labor Code section 1742.1, subdivision (a) in the amount of \$52,424.79.

7. Ornelas Enterprises, Inc. also failed to deliver Certified Payroll Records for three workers for 24 days and Payroll Records for 23 workers for 23 days at \$100.00 per violation for penalties under section 1776, totaling \$60,100.00 in penalties.

8. Penalties under section 1777.7 are due in the amount of \$36,660.00 for 611 instances of failure to submit the Division of Apprentice Standards Form 140.

9. The amounts found due in the Amended Assessment against Ornelas Enterprises, Inc. and as affirmed by this Decision are as follows:

Wages Due:	\$52,424.79
Penalties under section 1775, subdivision (a):	\$108,200.00
Penalties under section 1813:	\$25.00

Liquidated Damages:	\$52,424.79
Penalties under section 1776:	\$60,100.00
Penalties under section 1777.7:	\$36,660.00
TOTAL:	\$309,834.58

The Amended Civil Wage and Penalty Assessment is affirmed in full 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: 10/31/2014



Christine Baker
Director of Industrial Relations