STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Antoun Fata, doing business as
Fata Construction & Development
also known as Fata Construction
& Development, Inc.

Case No.: 16-0167-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Antoun Fata dba Fata Construction and Development, also known as Fata Construction & Development, Inc. (Fata) requested review of an Amended Civil Wage and Penalty Assessment (Amended Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on March 28, 2016, with respect to work performed on Wilson Elementary School (Project), for the San Bernardino City Unified School District (Awarding Body) in San Bernardino County.[1] The Amended Assessment found unpaid prevailing wages in the amount of $201,373.28, penalties under Labor Code sections 1775 and 1813 in the amount of $178,825.00, penalties under Labor Code section 1776 in the amount of $140,400.00, and penalties under Labor Code section 1777.7 in the amount of $111,800.00.[2]

The matter was assigned to Hearing Officer Jessica L. Pirrone. A Hearing on the Merits occurred in Los Angeles, California, on November 30, 2016, and resumed after

[1] The Amended Assessment identified Fata as both contractor and subcontractor with the name "Fata Construction and Development Inc., a corporation." DLSE later filed a motion to amend to correct the contractor's name (see *post*.) The Amended Assessment was served on Fata three days after an initial civil wage and penalty assessment dated March 25, 2016, which listed incorrect amounts for the Awarding Body's withholding obligations and liquidated damages.

[2] All further section references are to the Labor Code unless otherwise specified.

party-requested continuances on April 10, 2019, January 7, 2020, and February 13, 2020. Abdel Nassar appeared as counsel for DLSE on November 30, 2016, and thereafter, William Snyder appeared as counsel for DLSE. Antoun Fata, with the assistance of Labor Compliance Consultant Victoria Avila, appeared on behalf of Fata at the Hearing on November 30, 2016, but neither Fata nor Avila appeared at the subsequent Hearings. DLSE Deputy Labor Commissioner Jessica Santiesteban and Fata worker Victor Casillas testified in support of the Assessment. No testimony was presented on behalf of Fata.

On September 22, 2017, DLSE filed and served a motion to reduce the Amended Assessment under California Code of Regulations, title 8, section 17226. The motion sought to revise downward the unpaid prevailing wages including training fund contributions from $201,373.28 to $161,276.76,[3] reduce the section 1775 penalties from $178,600.00 to $175,600.00, increase the section 1813 penalties from $225.00 to $350.00, reduce the section 1777.7 penalties from $111,800.00 to $111,600.00, and maintain the section 1776 penalties at $140,400.00. There being no objection from Fata, Hearing Officer Jessica L. Pirrone granted DLSE's motion on April 10, 2019, and proceeded to continue the Hearing on the Merits in Fata's absence to formulate a recommended decision as warranted by the evidence, pursuant to California Code of Regulations, title 8, section 17246, subdivision (a).

DLSE's documentary exhibits were admitted into evidence without objection and the matter was submitted for decision on April 3, 2020. Fata has not filed a motion seeking relief from its non-appearance, as permitted under California Code of Regulations, title 8, section 17246, subdivision (b).

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

- The work subject to the Assessment was a public work subject to the prevailing wage and apprenticeship requirements under the California prevailing wage law.

[3] The unpaid wage figure includes unpaid training fund contributions in the amount of $6,468.76.

- The Labor Commissioner timely served the Assessment.
- The Request for Review was timely filed.
- The Labor Commissioner's enforcement file was timely requested and produced.
- No back wages have been paid nor deposit made with the Department of Industrial Relations as a result of the Assessment.

The issues for decision are as follows:

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

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

(See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this decision affirming the Amended Assessment, as modified.

FACTS

The facts stated below are based on DLSE Exhibit Numbers 1 through 81, the testimony of DLSE Deputy Labor Commissioner Santiesteban, and the contents of the Hearing Officer's file.

Failure to Appear.

Fata appeared in pro per and with assistance of Labor Compliance Consultant Avila at the first day of the Hearing on the Merits on November 30, 2016. Subsequent dates of Hearing were scheduled but continued at the parties' requests, until a second day of testimony was scheduled and took place on April 10, 2019. On the day before the April 10, Fata sent the Hearing Officer an email asking for a continuance because he was out of State. DLSE objected to the continuance, the motion was denied and the Hearing proceeded on April 10, 2019. On the day before another noticed day of Hearing, January 7, 2020, Fata contacted the Hearing officer to say he was in Lebanon and could not be at the Hearing. On that basis, he requested a continuance. DLSE again objected to the continuance and the Hearing proceeded. While Fata had served DLSE with copies of exhibits he planned to use at the Hearing, at no point did Fata move into evidence his exhibits nor did he testify under oath or submit post-hearing argument.

The Public Work Contract.

The Awarding Body advertised the Project for bid on May 9, 2013. The bid advertisement specified that bidder must adhere to prevailing wages. The successful bidder was Fata, who entered into a contract with the Awarding Body on July 24, 2013, for construction of a pre-checked, two-story building for classroom use and ancillary function spaces, landscaping, grading, removal of existing modular buildings, and infrastructure, utility, and site improvements. According to the certified payroll records (CPRs), Fata had 27 workers on the Project from January 13, 2014, to July 20, 2015, in

the crafts of Scaffold Builder, Drywall Finisher, Laborer, and Sewer and Storm Drain Pipelayer. The work on the Project was accepted by the Awarding Body on October 6, 2015.

The Assessment.

DLSE's investigation into Fata's pay practices at the Project began with a complaint filed on January 26, 2015, by Fata worker Martin Ramirez. The Carpenters Contractors Cooperation Committee also filed a complaint on behalf of two other workers on March 6, 2015. The investigation was assigned in Deputy Labor Commissioner Fred De Leon, who sent questionnaires to individual workers and interviewed several of them. The inspector for the Project, John Teegarden of the Division of State Architect, reported to DLSE that several workers had complained to him about being paid less than prevailing wages and sometimes being paid in cash. De Leon also requested from Fata its certified payroll records (CPRs), time records, and canceled pay checks.

DLSE's investigation identified four prevailing wage determinations (PWDs) at issue in the Project. The PWD in effect on the bid advertisement date for the Scaffold Builder classification is Carpenter, SC-23-31-2-2013-1. Before predetermined wage increases, the Carpenter PWD set the hourly base rate for Scaffold Builder at $28.55, the training fund contribution at 42 cents per hour, and the cumulative fringe benefits at $12.72 per hour. This is an apprenticeable craft.[4]

The PWD in effect on the bid advertisement date for the Drywall Finisher classification is SBR-2013-1. Before predetermined wage increases, the Drywall Finisher PWD set the hourly base rate at $33.30, the training fund contribution at 64 cents per hour, and the cumulative fringe benefits at $22.96 per hour. This, too, is an apprenticeable craft.

The PWD in effect on the bid advertisement date for the Laborer classification is SC-23-102-2-2012-1. Before predetermined wage increases, the Laborer PWD set the hourly base rate for Laborer Group 1 at $32.34, the training fund contribution at 69

[4] The same Carpenter PWD establishes the rates for Carpenter 2, also identified in the investigation.

cents per hour, and the cumulative fringe benefits at $19.05 per hour. This, too, is an apprenticeable craft. The PWD for Laborer Apprentice (2013-1) set the hourly rate for an apprentice's first period at $15.55, the training fund contribution at 64 cents per hour, and the fringe benefits at the cumulative figure of $9.12 per hour.[5]

The PWD in effect on the bid advertisement date for the Sewer and Storm Drain Pipelayer classification is Plumber (Sewer and Storm Drain Pipelayer), SBR-2013-1. Before predetermined wage increases, that PWD set the hourly base rate for Sewer and Storm Drain Pipelayer at $30.00, the training fund contribution at $1.23 per hour, and the cumulative fringe benefits at $16.40 per hour. This is an apprenticeable craft.

Using the PWDs, CPRs, and other documents obtained during his investigation, De Leon prepared an audit and the Amended Assessment. By the time the Hearing commenced, the case had been reassigned to Deputy Labor Commissioner Santiesteban, who conducted a re-audit of the amounts owed. The re-audit provided the basis for DLSE's motion of September 22, 2017, to reduce the Amended Assessment. The re-audit found 21 workers employed by Fata on the Project had been unpaid in the collective amount of $154,807.91 and training fund contributions were owed in the amount of $6,468.76. The re-audit found section 1813 penalties at the rate of $25.00 per violation in the total amount of $350.00 based on 14 instances where two workers were not paid for overtime work and section 1775 penalties at the rate of $200.00 per violation in the total amount of $175,600.00 based on 878 instances in which the workers were underpaid prevailing wages. The re-audit also found section 1777.7 penalties at the rate of $200.00 per violation in the total amount of $111,600.00 for 558 days of apprenticeship violations, and penalties under section 1776 at the rate of $100.00 per day for each worker in the total amount of $140,400.00 for 52 days for 27 workers.

[5] The Laborer PWD set the hourly base rate for Laborer, Group 2, at $28.64, the training fund contribution at 64 cents per hour, and the fringe benefits at the cumulative figure of $17.20 per hour.

DISCUSSION

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

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

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

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if the unpaid wages are not paid within 60 days following service of a civil wage and penalty assessment under section 1741.

In general, and unless an exemption applies, section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeypersons in the applicable craft or trade. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. (§ 1777.5, subd. (e).) The Division of Apprenticeship Standards (DAS) has prepared a form, DAS 140, that a contractor may use to submit contract award information to an applicable apprenticeship committee. (Cal. Code Regs., tit. 8, § 230, subd. (a).)

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio if it has properly requested dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DAS has prepared another form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees. Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal the assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of presenting evidence that "provides prima facie support for the Assessment . . . ." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that burden is met, "the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment . . . is incorrect." (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process,

the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

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

Fata Failed to Pay Required Prevailing Wages.

Every employer in the on-site construction industry, whether the project is a public work or not, must keep accurate information with respect to each employee. Industrial Welfare Commission (IWC) Wage Order No. 16-2001, which applies to on-site occupations in the construction industry, provides as follows:

> Every employer who has control over wages, hours, or working conditions, must keep accurate information with respect to each employee including…name, home address, occupation, and social security number…[,] [t]ime records showing when the employee begins and ends each work period…[,] [t]otal wages paid each payroll period…[and] [t]otal hours worked during the payroll period and applicable rates of pay….

(Cal. Code Regs., tit. 8, § 11160, subd. (6)(A).) Also, the employer must furnish each employee with an itemized statement in writing showing all deductions from wages at

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

When an employer fails to keep accurate and contemporaneous time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount owed by a just and reasonable inference from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed or with evidence to rebut the reasonable estimate. (See, e.g., *Furry v. E. Bay Publ'g, LLC* (2019) 30 Cal.App.5th 1072, 1079 ["'[A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate'"], citing *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727, and *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687-88 [66 S.Ct.1187].) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

In this case, the record establishes that DLSE presented prima facie support for the Assessment, and Fata failed to prove the basis for the Assessment was incorrect.[6] Fata had claimed to DLSE that 11 of its workers were actually employed by two subcontractors. De Leon requested copies of the subcontracts, but Fata never produced them. Nothing in Fata's contract with the Awarding Body reflects the name of any subcontractor. While Fata appeared on the first day of Hearing, he offered into evidence no documents and gave no testimony to support his claims. DLSE introduced into evidence extensive records of a federal criminal conviction on gun possession and transportation charges in an effort to expose what DLSE saw as Fata's lack of credibility. Resort to those records is not necessary in this case, however, as the documentary and testimonial evidence of the pay practices and violations found in the Amended Assessment are undisputed.

Santiesteban testified about the content of the Amended Assessment, the underlying original audit and her re-audit, her analysis of the CPRs, the daily inspection reports, canceled pay checks, worker interviews and questionnaires, and the results of DLSE's investigation. Her re-audit took into account canceled checks offered by Fata after March 28, 2016, as proof of wage payments having been made during the Project. Santiesteban found that Fata had paid his workers from three difference checking accounts, one a personal account, often without referencing the project for which the

[6] On June 2, 2017, DLSE filed a Motion to Amend Assessment to Correct the Identity of Respondent Requesting Party (Motion). At the time, Fata opposed the Motion and was represented in that effort by counsel, Collin D. Cook of Fisher & Phillips LLP. The Amended Assessment filed on March 28, 2016, listed Fata as "Fata Construction and Development Inc., a corporation." The Motion sought to change the contractor's name to "Antoun Fata, doing business as Fata Construction & Development, also known as Fata Construction & Development, Inc." The Hearing Officer deferred a ruling on the Motion to this Decision. The Motion is granted. The public work contract between Fata and the Awarding Body was entered into by "Antoun Fata, sole proprietor of Fata Construction & Development." Fata signed the contract as "owner" of Fata Construction & Development. (DLSE Exhibit No. 18.) By the date of the Amended Assessment, Fata had already filed a Certificate of Dissolution of Fata Construction and Development Inc. at the Secretary of State's office. Fata signed the Request for Review of the amended Assessment for "Fata Construction and Development," without the moniker "Inc." The Contractors State License Board (CSLB) listed the holder of Fata's license as "Fata Construction & Development," a "sole ownership," issued on December 7, 1988, and reissued on January 15, 2005. Fata, an individual doing business as Fata Construction & Development, is not a new party and cannot claim surprise or prejudice by the correction of his name on the Assessment.

check was payment. Fata had claimed to her that at times the workers were assigned to a different Fata project. Yet, when she asked for time records that might substantiate that claim, Fata produced nothing. A few workers were misclassified as employees of subcontractor and were left off of the CPRs entirely.

Santiesteban considered the daily inspection reports as a neutral source for determining the work days and hours for Fata workers as asserted in the CPRs, the previous audit, and worker interviews. She testified that she found that the daily inspection reports at times contradicted the CPRs, whereby the CPRs recorded no work being performed on days that the inspection reports showed the presence of Fata crews on the Project. In those instances Santiesteban's re-audit credited the claim of work done as made in worker interviews. However, Santiesteban took an even-handed approach to the re-audit, reducing or eliminating the claimed wages for days on which the daily inspection reports indicated no work or only half days of work where no reasonable basis for the claim otherwise appeared. That approach enhanced Santiesteban's credibility as a witness and as an auditor.

Based on scopes of work for relevant PWDs and worker claims they had performed Carpenter framing work, Santiesteban reclassified two workers from how they were classified in the CPRs, resulting in a finding of unpaid wages. She also upgraded an apprentice to journey level at times when the CPRs did not indicate any journeyperson had been on duty at the time. The re-audit also evaluated the amount of the training funds that Fata paid and found that Fata underpaid training fund contributions to the California Apprenticeship Council.

By virtue of evidence presented at the Hearing, DLSE met its burden of producing evidence that "provides prima facie support for the Assessment …." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) The burden then shifts to Fata to prove the Assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Having appeared only on the first day of Hearing where he provided no testimony beyond cross-examination of one worker and submitted no exhibits for admission into the record,

Fata has failed to carry his burden of proof. It must be concluded that the workers Fata employed on the Project were underpaid in the amount of $154,807.91.

DLSE's Penalty Assessment under Section 1775 Was Proper.

Section 1775, subdivision (a)(1), provides that the contractor and any subcontractor be penalized a maximum of $200.00 "for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director . . . ." Section 1775, subdivision (a)(2)(B)(iii), states that the penalty for failure to pay the required prevailing wage rates may not be less than $120.00 if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of section 1777.1[7] Section 1775, subdivision (a)(2)(D), provides that the determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for an abuse of discretion. Abuse of discretion by DLSE is established if the "agency's nonadjudicatory action … is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

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

[7] The reference in section 1775, subdivision (a)(2)(B)(iii), to section 1777.1, subdivision (c), is mistaken. The correct reference is to section 1777.1, subdivision (d). According to that subdivision as it existed on the May 9, 2013 date of the bid advertisement, a willful violation is defined as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

DLSE assessed section 1775 penalties at the rate of $200.00 based on Fata's underreporting of the size of its workforce, underreporting the days and hours worked, and underpaying 21 of its workers. The maximum penalty rate of $200.00 per violation was chosen because DLSE deemed Fata's violations to be deliberate and egregious.

The burden was on Fata to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of $200.00 per violation and in calculating the number of violations. Having not appeared at the Hearing except for one day where he neither testified nor submitted exhibits, Fata failed to carry that burden.

Accordingly, Fata is liable for section 1775 penalties in the sum of $175,600.00, calculated at the $200.00 penalty rate for 878 violations.

Assessment of Penalties under Section 1813.

Section 1813 provides that a contractor or subcontractor shall pay a flat $25.00 penalty for each calendar day, per worker, for failure to pay the required overtime premium prescribed by the applicable PWD. In this case, the amended Assessment found that section 1813 penalties were due at the rate of $25.00 per violation, in the total amount of $350.00 for 14 instances of Fata failing to pay overtime rates to two of its workers.

The burden was on Fata to prove that DLSE abused its discretion in finding the 14 violations. While Fata cross-examined one worker as to his claim of working overtime on weekends, Santiesteben found the three overtime violations for that worker based on Fata's CPRs. Fata did not otherwise submit any affirmative evidence disputing the worker or the re-audit finding of overtime violations. For that reason Fata failed to carry his burden of proof. Accordingly, Fata is liable for section 1813 penalties in the sum of $350.00, calculated at the $25.00 penalty rate for 14 violations.

Fata Violated Apprentice Requirements.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council.

(Cal. Code Regs., tit. 8, §§ 227 to 231.)[8] Section 1777.5 requires the hiring of apprentices to perform one hour of work for every five hours of work performed by journeypersons in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). ((Former) § 1777.5, subd. (g).) However, a contractor shall not be considered in violation of the ratio requirement 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. (§ 230.1, subd. (a).)

Prior to requesting the dispatch of apprentices, another regulation provides that contractors must notify all apprenticeship programs for each apprenticeable craft in the area of the site of the project that they have been awarded a public works contract at which apprentices may be employed. (§ 230, subd. (a)); accord, (former) §1777.5, subd. (e).) DAS has prepared a form (DAS 140) that a contractor may use to notify those programs. The required information must be provided to the applicable committees within ten days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work. (§ 230, subd. (a).) Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

When DLSE determines that a violation of the apprenticeship laws has occurred, "… the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." ((Former) § 1777.7, subd. (c)(2(B), as the statute existed on the date of the bid advertisement for the Project, May 9, 2013.)

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

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

> A contractor or subcontractor that is determined by the Chief of the Division of Apprenticeship Standards 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 Chief if the amount of the penalty would be disproportionate to the severity of the violation.[9]

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

> For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control. There is an irrebuttable presumption that a contractor knew or should have known of the requirements of Section 1777.5 if the contractor had previously been found to have violated that Section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects.

DLSE established its prima facie case that Fata failed to submit contract award information to all applicable apprenticeship programs that could have supplied Laborer, Carpenter, Drywall Finisher, and Plumber apprentices, and further failed to request dispatch of such apprentices. The record shows Fata sent one contract award notice to one Laborer apprenticeship program, but not the other applicable Laborer apprenticeship programs. Although Fata did employ Laborer apprentices on the Project, Fata failed to employ sufficient apprentices to meet the required 1:5 apprentice to journeyperson ratio.[10] Fata did not rebut the evidence of these failures. Hence, it is concluded that Fata violated former section 1777.5, subdivisions (e) and (g), and the

[9] Effective June 27, 2012, the duty to enforce sections 1777.5 and 1777.7 changed from the Chief of the Division of Apprenticeship Standards to the Labor Commissioner. (Stats. 2012, ch. 46, § 96). This change does not alter the analysis in this case.

[10] Based on the 3,340 hours that Laborer journeypersons worked on the Project, 668 apprentice hours were required for the minimum ratio. Fata employed Laborer apprentices for a total of 432 hours, less than the minimum ratio required.

applicable regulations, sections 230 and 230.1, subdivision (a), for his failures to provide the requisite notice of its public work contract to applicable apprenticeship committees, to request dispatch of apprentices from those committees, and to employ sufficient apprentices to meet the required 1:5 apprentice to journeyperson ratio for the craft of Laborer, an apprenticeable craft.

Santiesteban's supervisor selected a $200.00 per day penalty rate, and Fata did not contest that rate. In the re-audit the penalty period ran from October 15, 2013, the day after the first day of work by a Laborer journeyperson, to April 24, 2015, the last day a Laborer journeyperson worked, a period of 557 calendar days. DLSE added one penalty day for a ratio violation, based on its use of the first journeyperson work day as commencement for purposes of a ratio violation penalty. Fata did not contest the penalty period. Based on the selected rate and penalty period, the amount of apprenticeship penalties imposed by DLSE totaled $111,600.00

To analyze whether the penalty is correctly calculated, under the version of former section 1777.7 applicable to this case, the Director decides the appropriate penalty de novo.[11] In setting the penalty, the Director considers all of the following circumstances (which also guide DLSE's Amended Assessment):

(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.

[11] As noted *ante*, section 1777.7 was amended effective January 1, 2015. Applying the version of section 1777.7, subdivision (f), that was in effect on the bid advertisement date, the Director reviews de novo the penalty for violation of section 1777.5.

((Former) § 1777.7, subd. (f).)

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

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

Applying the de novo standard for this case, factors "A" and "B" would suggest a substantial penalty rate. The applicable prevailing wage determinations state that the relevant Laborer, Carpenter, Drywall Finisher, and Plumber crafts were apprenticeable. DLSE submitted evidence to justify finding that Fata's violations of the notification, 1:5 apprentice-to-journeyperson ratio, and dispatch requirements were intentional. Fata did not deny that it was on notice of these requirements. Fata did not bear its burden of proving by a preponderance of the evidence that the violations were not intentional. Moreover, DLSE's Penalty Review reveals that Fata previously was assessed for apprenticeship violations on March 25, 2015, for work that ended on July 18, 2014. (DLSE Exhibit No. 3, p. 00027.) These dates show that during this Project, Fata was on notice of apprenticeship requirements and could have brought himself into compliance, at least as to the required dispatch and ratio requirements before the end of the Project.

Factor "C" also suggests a high penalty rate in this case. The evidence shows that DLSE notified Fata of its investigation into allegations of failure to abide by apprenticeship requirements prior to issuing the Amended Assessment. Hence, Fata

had opportunity to voluntarily remedy the violations after receiving notice but failed to do so.

Factors "D" and '"E" also support a relatively high penalty rate. DLSE's Penalty Review indicates that Fata was required to notify and request dispatch from all applicable apprenticeship committees for the four crafts used on the Project, and meet the required 1:5 ratio for all four crafts, but failed to do so. Accordingly, the Amended Assessment found violations for those failures and imposed penalties. The evidence shows that Fata's violations resulted in lost training opportunities for apprentices of over 29 days for Laborer apprentices, 33 days for Plumber apprentices, 33 days for Carpenter apprentices, and 20 days for Drywall Finisher apprentices. (DLSE Exhibit No. 81.) These numbers suggest a correlative harm to the applicable apprenticeship programs.

Overall, based on a de novo review of the five factors above and in light of the evidence as a whole in this case, the Director finds that a penalty rate of $200.00 is appropriate, and accordingly the Assessment is affirmed in this respect

Based on the record, Fata knowingly violated the requirement of a 1:5 ratio of apprentice hours to journeyperson hours for apprentices and failed to notify the applicable apprenticeship committee or request the dispatch of apprentices from them. Accordingly, Fata is liable for penalties at the rate of $200.00 per day for 558 calendar days for a total of $111,600.00.

Training Fund Contributions Are Due and Owing.

Section 1777.5, subdivision (m)(1), requires contractors on public works projects who employ journeypersons or apprentices in any apprenticeable craft to pay training fund contributions to the California Apprenticeship Council or to an apprenticeship committee approved by the Department of Apprenticeship Standards. In this case, DLSE presented prima facie evidence that training fund contributions were owed. Based on her determination that Fata underreported the wages of its workers as well as the hours and days its workers worked, and based on her review of the California Apprenticeship Council training fund records, Santiesteban found that Fata underpaid

training fund contributions in the amount of $6,468.76, as reflected in the re-audit. Fata failed to carry his burden to prove the Assessment was incorrect as to training fund contributions found due and is liable for payment of those funds. Accordingly, the total amount of unpaid training fund contributions owed by Fata is $6,468.76.

Fata Is Liable for Liquidated Damages.

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

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

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

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

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

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

Lastly, the contractor could choose not to pay any of the assessed wages to the workers, and not to deposit with DIR the full amount of assessed wages and penalties, and instead ask the Director to exercise her discretion to waive liquidated damages under the following portion of section 1742.1:

> 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.

((Former) §1742.1, subd. (a).)

Here, Fata did not pay any back wages to the workers within 60 days after the Assessment or deposit with the Department the full amount of assessed wages and statutory penalties. That leaves the question whether Fata has demonstrated to the Director's satisfaction it had substantial grounds for appealing the Amended Assessment as a basis for the Director's discretionary waiver of liquidated damages.[12] Having not

[12] On June 27, 2017 (after service of the Amended Assessment on March 28, 2016, and 60 days had expired), the Director's discretionary waiver power was deleted from section 1742.1 by statutes 2017, chapter 28, section 16 (Sen. Bill 96) (SB 96)). Legislative enactments are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Further, "[a] statute is retroactive if it substantially changes the legal effect of past events." (*Kizer v. Hannah* (1989) 48 Cal.3d 1, 7.) Here, the law in effect at the time the Amended Assessment was issued allowed a waiver of liquidated damages in the Director's discretion, as specified, which could have influenced the contractor's decision as to how to respond to the assessment. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what the contractor elected to do in response to the Assessment). Accordingly, this Decision finds that the Director's discretion to waive liquidated damages in this case under section 1742.1, subdivision (a), is unaffected by SB 96.

appeared but for the first day of Hearing, Fata showed no substantial grounds for appeal the Amended Assessment. The Director finds insufficient grounds for a discretionary waiver of liquidated damages.

Accordingly, Fata is liable for liquidated damages under section 1742.1 in the amount of $154,807.91.

Fata Is Not Liable for Penalties under Section 1776.

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

Over the course of its investigation, DLSE sent Fata multiple requests for information. Its first request for CPRs was sent on January 26, 2015. Fata's initial responses on February 17, 2015, included CPRs for 18 workers but DLSE found those deficient for lack of worker classifications. (DLSE Exhibit Nos. 6, 8.) On January 7, 2016, DLSE sent Fata a second request for CPRs with proper classifications, and Fata responded with a second set of CPRs on January 29, 2016, eight days overdue. Meanwhile, based on information from the Awarding Body, on January 13, 2016, DLSE sent Fata a third request, this time for copies of all worker cancelled checks. According to DLSE's Penalty Review some, but not all, cancelled checks were received on March 3,

2016, 45 days from the date Fata received the third request. Omitted were cancelled checks for some workers later found to be missing from CPRs and cancelled checks for the full period of the Project. (DLSE Exhibit Nos. 9, 10.) While DLSE sent Fata a fourth request asking for employee time cards or sign-in sheets to verify the hours, DLSE decided to find a penalty under section 1776 based on Fata's failure to provide all cancelled checks in timely fashion.

According to the Penalty Review, DLSE calculated a penalty period under section 1776 from February 2, 2016, the date a response to its request for cancelled checks was due, to March 24, 2016, the date the Penalty Review was written, a period of 52 days. (DLSE Exhibit No. 3.) The penalty was calculated at the statutory $100.00 per day rate for each of 27 workers, for a total of $140,400.00.

The problem with basing the section 1776 penalty on failure to fully respond to a request for cancelled checks is that the statute does not justify a penalty on that basis. Instead, the statute states "The contractor must file a certified copy of the payroll records within ten days after receipt of a written request." (§ 1776, subd. (d).) Failure to do so renders the contractor liable for a daily $100.00 penalty per worker "until strict compliance." (§ 1776, subd. (h).) While DLSE lacks discretion in setting penalties under section 1776, penalties cannot be imposed without a statutory basis. Accordingly, no penalties under section 1776 are due.

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

FINDINGS AND ORDER

1. The work subject to the Civil Wage and Penalty Assessment was subject to prevailing wage and apprenticeship requirements.
2. The Labor Commissioner timely served the Civil Wage and Penalty Assessment.
3. The Request for Review was timely filed.
4. The Labor Commissioner timely made its investigative file available to the contractor.

5. No back wages have been paid nor deposit made with the Department of Industrial Relations as a result of the Assessment.
6. Antoun Fata, an individual doing business as Fata Construction and Development, underpaid the workers' prevailing wages in the amount of $154,807.91, and underpaid training fund contributions in the amount of $6,468.76.
7. The Labor Commissioner did not abuse her discretion in assessing Labor Code section 1775 penalties at the rate of $200.00 per violation for 878 violations, resulting in the total penalty amount of $175,600.00.
8. Antoun Fata, an individual doing business as Fata Construction and Development, failed to satisfy the minimum ratio requirement for the employment of Laborer apprentices on the Project.
9. The Labor Commissioner did not abuse her discretion in assessing Labor Code section 1777.7 penalties at the rate of $200.00 per violation for 558 calendar days, resulting in the total penalty amount of $111,600.00.
10. Antoun Fata, an individual doing business as Fata Construction and Development, is liable for interest on all unpaid wages, which is due and shall continue to accrue as provided in Labor Code section 1741, subdivision (b).
11. Antoun Fata, an individual doing business as Fata Construction and Development, is liable for liquidated damages in the amount of $154,807.91.
12. The amounts found due in the Amended Assessment, as modified by this Decision, are follows:

Basis of the Assessment	**Amount**
Wages Due:	$154,807.91
Penalties under section 1813:	$350.00
Training Fund Contributions Due:	$6,468.76

Penalties under section 1775:	$175,600.00
Liquidated damages:	$154,807.91
Penalties under section 1776:	$ -0-
Penalties under section 1777.7:	$111,600.00
TOTAL:	**$603,634.58**

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

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

Dated: 5/19/2021

Katrina S. Hagen
Director,
Department of Industrial Relations