

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Lusardi Construction Company

Case No. 17-0259-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Lusardi Construction Company (Lusardi) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued by Division of Labor Standards Enforcement (DLSE) on July 5, 2017, with respect to the work performed by Lusardi's subcontractor, Pro Works Contracting, Inc. (Pro Works) on the San Marcos K-8 School project (Project) in San Diego County. The Assessment determined that Pro Works had violated Labor Code section 1777.5 and assessed a penalty of \$30,800.00 under Labor Code section 1777.7.¹ In its request for review, Lusardi challenged the basis for, and the calculation of, the penalty assessed. Lusardi also questioned whether it should be held liable for the penalty arising from the alleged violations by its subcontractor, Pro Works.

A Hearing on the Merits occurred in San Diego, California on July 20, 2018, and June 21, 2019, before Hearing Officer John J. Korbol. Nicholas B. Salerno and John W. Prager, Jr. appeared as counsel for Lusardi, and Lance A. Grucela appeared as counsel for DLSE. Pro Works did not appear or participate in the Hearing.² Kari Anderson, Deputy Labor Commissioner, testified in support

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

² Pro Works did not file a request for review and did not seek to intervene in this proceeding.

of the Assessment. Lusardi called no witnesses. After Lusardi submitted a post-hearing brief, the matter was deemed submitted for decision on July 22, 2019.³

The issues for decision are as follows:

- Did Pro Works submit timely and complete contract award information to the applicable apprenticeship committee?
- Did Pro Works employ the minimum number of apprentices on the Project?
- Is Pro Works liable for the penalty assessed under section 1777.7?
- Is Lusardi liable for the penalty assessed under section 1777.7 due to Pro Works' failure to comply with the apprenticeship requirements of section 1777.5?

The following additional issues were proposed by Lusardi:

- Based on the Project's bid advertisement date of May 1, 2014, are the 2014 versions of the Labor Code and implementing regulations applicable to this proceeding?
- Whether Lusardi's due process rights have been violated.
- Which party has the burden of proof with regard to the application of section 1777.7, subdivision (d)?

³ Following the first day of Hearing after DLSE had presented its case and rested, the Hearing Officer accepted briefs from Lusardi and DLSE in response to Lusardi's motion for a decision in its favor. The motion was based on Lusardi's contention that DLSE had not sustained its burden of coming forward with evidence providing prima facie support for the assessment of a penalty against Lusardi. The Director ultimately declined to entertain Lusardi's motion and instructed the Hearing Officer to re-open the Hearing.

- Whether the joint and several liability imposed on contractors and subcontractors under section 1743 only applies to a penalty assessed under Labor Code section 1775.
- Whether the Labor Commissioner exhausted all reasonable remedies for collection of the penalty from Pro Works in compliance with section 1743, subdivision (a).
- Whether the Labor Commissioner properly determined the amount of the daily penalty rate under section 1777.7.
- Whether the Labor Commissioner properly determined the number of penalty days in calculating the aggregated dollar amount of the penalty.

For the reasons set forth below, the Director finds DLSE carried its burden of presenting evidence that provided prima facie support for the Assessment. Lusardi failed to satisfy its burden of proving that the basis for the Assessment is incorrect. Accordingly, the Director issues this Decision affirming the Assessment. Further, this Decision finds that Lusardi is liable for the penalty assessed under section 1777.7.

FACTS

The awarding body, the San Marcos Unified School District (Awarding Body), advertised the Project for bid in 2014.⁴ Lusardi entered into a contract with the Awarding Body in May 2014. Section 8 of the contract provides, in part, that

the Contractor and all Subcontractors . . . must comply with all applicable labor-related requirements, regardless of how implemented, including,

⁴ The precise date that the Project was advertised for bids does not appear in the evidentiary record. The parties stipulated that the bid advertisement date occurred in 2014. Because the Awarding Body awarded a contract to Lusardi in May 2014, the bid advertisement date must have occurred in 2014, in or before May.

without limitation, requirements for payment of wages in accordance with the Prevailing Wage Laws, maintenance, inspection and submittal (electronically, as required) of payroll records [and] The Contractor must make all Subcontractors aware of the foregoing requirements and must require that the Subcontractors comply with all labor-related requirements

The Project commenced May 27, 2014. On or about February 4, 2015, Lusardi subcontracted with Pro Works to install wall panel and footing rebar. Pro Works employed journey level Iron Workers and paid them at the prevailing wage rate set forth in the applicable prevailing wage determination (PWD) for Iron Worker (C-20-X-1-2014-1) (Iron Worker PWD). The Iron Worker PWD indicates that the craft of Iron Worker was an apprenticeable craft.

Upon receiving a complaint about Pro Works concerning the violation of apprenticeship requirements for the Project, DLSE Deputy Anderson opened an investigation. She testified that she sent an “initial packet” by certified mail to Lusardi, Pro Works, and the Awarding Body.⁵ The initial packet contained a Request for Information from the Awarding Body, DLSE form PW-6, and a Request for Payroll Records, DLSE form PW-9. The top of the PW-9 form indicates that it was addressed to Pro Works. The initial packet also included DLSE form PW-11, Notice of Investigation. Addressed to Lusardi at the top, it warns that a civil wage and penalty assessment will be issued if DLSE determines that wages and/or penalties are due. A fourth form, Notice of Apprenticeship Compliance, DLSE form PW-11A, was also included in DLSE’s initial packet. Addressed to Pro Works at the top, the PW-11A form contains checked boxes giving notice to the recipients that DLSE was in the process of investigating alleged failures to provide the applicable apprenticeship committees with timely

⁵ All three entities received DLSE’s initial packet on April 23, 2015, according to the return receipts.

notice of the contract award, to timely request dispatch of apprentices, and to employ apprentices in the required apprentice-to-journeyperson ratio. On the form, DLSE asked Pro Works for two forms issued by the Division of Apprenticeship Standards (the DAS 140 and DAS 142 forms) as evidence of compliance with apprenticeship requirements. All four DLSE forms identified the Project by name and listed Lusardi as the prime contractor and Pro Works as the subcontractor.

Anderson testified that she did not attempt to contact Lusardi about the alleged apprenticeship violations during the course of her investigation. She did contact Pro Works and the Awarding Body to gather documentation concerning the Project and the apprenticeship violations alleged by the complainant. Among the documents provided by the Awarding Body was a transmittal memo dated May 5, 2015, which states that "Lusardi Construction Company holds all certified payroll on sub-contractors." (DLSE Exhibit No. 7.)

Anderson further testified that she obtained from Pro Works a filled-out DAS-140 form, Public Works Contract Award Information, dated February 20, 2015. This form was sent to the San Diego Bridge, Structural, Ornamental, and Reinforcing Iron Workers Joint Apprenticeship Training Committee, Local 229 (Iron Workers JATC). The filled-out DAS-140 form estimated the number of apprentice hours at zero, and did not include approximate dates for apprentices to be employed in the space provided in the form. Pro Works then submitted a second form DAS-140 to the Iron Workers JATC on May 7, 2015. On this form Pro Works estimated 300 apprentice hours for the Project for the period May 11, 2015, to July 30, 2015.

Anderson also testified that, based on documents she received during her investigation, Pro Works submitted a DAS 142 form, Request for Dispatch of an Apprentice, to the Iron Workers JATC on three occasions. The first one, dated

February 13, 2015, states that Pro Works did not need any apprentices. The second DAS-142 form, dated May 7, 2015 (a Thursday), asked for the dispatch of a single apprentice on May 11, 2015 (a Monday). A third version of the DAS-142 form, submitted to the Iron Workers JATC on June 1, 2015, requested dispatch of an apprentice for work on June 3, 2015.

Anderson also testified that, according to the certified payroll records (CPRs) kept by Pro Works, Pro Works used journey level Iron Workers on the Project from December 21, 2014, to June 23, 2015.⁶ Anderson calculated that Pro Works employed journey level Iron Worker for a total of 4,355 hours. At no point did Pro Works employ any Iron Worker apprentices.

Anderson testified that she contacted Gary Lane, principal of Pro Works, several times during her investigation. On April 29, 2015, Lane informed Anderson over the telephone that a retention was being withheld by Lusardi, although she was not informed of the dollar amount. Lane also sent Anderson a letter dated April 29, 2015, (DLSE Exhibit No. 8) admitting that Pro Works “turned in” the DAS forms late, due to staff error and turnover.

At the conclusion of her investigation, and based on the above-referenced information, Anderson prepared a Penalty Review for her supervisor, Senior Deputy Labor Commissioner Michael Nagtalon. Anderson testified that she concluded that Pro Works’ initial DAS 140 form (dated February 23, 2015) was invalid because Pro Works did not include an estimated number of apprentice

⁶ Lusardi points out that the sole copy of Pro Works’ CPRs (DLSE Exhibit No. 9) extends only to the week ending March 28, 2015. However, according to a DAS-140 form completed by Pro Works on May 7, 2015, Pro Works intended to employ apprentices until July 30, 2015 (DLSE Exhibit No.13, p. 215). Also, as stated *ante*, in a DAS-142 form dated June 1, 2015, Pro Works requested the dispatch of an Iron Worker apprentice to report June 3, 2015 (DLSE Exhibit 13, p. 217). Anderson testified that the June 23, 2015 end date for the Assessment was based on her review of Pro Works’ CPRs. Nonetheless, the DAS 140 and DAS 142 forms ultimately completed by Pro Works together corroborate Anderson’s conclusion that Pro Works was on the Project to June 23, 2015.

hours or the approximate dates for the employment of apprentices. She further concluded that the earliest valid DAS 140 form submitted by Pro Works was the second one filled out May 7, 2015. Starting with the first day after Pro Works employed an Iron Worker journeyperson on the Project (December 22, 2014), and ending May 7, 2015, Anderson tallied 135 calendar days that Pro Works had failed to comply with the legal requirements for giving notice of contract award information, thereby exposing Pro Works to a daily penalty spanning that 135-day period.

Anderson further testified that Pro Works had not employed any apprentices on the Project, and thus had committed a "ratio violation," i.e., it violated the legal requirement that a public works contractor provide employment in the ratio of one hour of apprentice work for every five hours of journeyperson work. Anderson also determined that none of Pro Works' three DAS 142 forms were valid. According to Anderson, the earliest submitted form failed to adequately provide dispatch information as to the work site where apprentices should report, and the last two DAS 142 forms failed to provide the minimum required 72-hour notice (exclusive of Saturdays, Sundays and holidays). Anderson concluded that under these circumstances, Pro Works' ratio violation could not be pardoned by asserting that the apprenticeship committee failed to dispatch apprentices as requested. Pro Works was thus exposed to an additional daily penalty for the ratio violation. To the extent the period encompassing the ratio violation, however, overlapped with the penalty period derived from Pro Works' invalid notice of contract award information, Anderson calculated the penalty solely based upon the 135-day period of the invalid contract award information, which ended on May 7, 2015. To that period, Anderson added 19 more penalty days based on the ratio violation, representing the number of days on which Pro Works employed journey level Iron Workers between May 7, 2015, and the end of the Project on June 23, 2015. Altogether,

Anderson determined that a penalty should be assessed against Pro Works for 154 days of apprenticeship violations.

Anderson testified she also reviewed a DLSE database to ascertain whether Pro Works had a history of prevailing wage violations. She found three earlier civil wage and penalty assessments. Two of the three cases involved an apprenticeship penalty assessed against Pro Works, and both were ultimately reduced to a civil judgement against Pro Works. (DLSE Exhibit Nos. 19 and 20.)

As to the penalty rate, Anderson checked boxes on the third page of the Penalty Review (DLSE Exhibit No. 4, p. 23) indicating that the rate would be based on consideration of whether the party committed other violations, whether the party took steps to voluntarily remedy the violation, the extent to which the violation resulted in lost training opportunities for apprentices, and the extent to which the violation harmed apprentices or apprenticeship programs.

Anderson testified that the Penalty Review was then forwarded to Senior Deputy Nagtalon, who considered the penalty factors. Nagtalon approved Anderson's calculation of 154 apprenticeship violations and also determined the penalty rate of \$200.00 per violation. This resulted in an aggregate penalty of \$30,800.00, with a written comment by Nagtalon on the Penalty Review stating: "Due to the nature of the violations."

The Penalty Review was returned to Anderson and she prepared the Assessment. DLSE timely served the Assessment on Lusardi, Pro Works, and the Awarding Body.⁷ The Assessment identifies the Project, names Pro Works as the subcontractor, and names Lusardi as the prime contractor.

The Assessment further states that DLSE "has determined that violations of the California Labor Code have been committed by the contractor and/or subcontractor identified above."

⁷ The Assessment sent to Pro Works was returned by the Postal Service as undeliverable.

DISCUSSION

The California Prevailing Wage Law (CPWL) requires the payment of prevailing wages to workers employed on public works 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*, at p. 985.)

Former 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.⁸ (See Cal. Code Regs., tit. 8, §§ 227 to

⁸ For purposes of this Decision, the Director applies the language of former section 1777.7 that was in effect in May 2014. Also, 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.

232.70.)⁹

Former section 1777.5, subdivision (d), provides as follows:

(d) If a subcontractor is found to have violated Section 1777.5, the prime contractor of the project is not liable for any penalties under subdivision (a), unless the prime contractor had knowledge of the subcontractor's failure to comply with the provisions of Section 1777.5 or unless the prime contractor fails to comply with any of the following requirements:

1) The contract executed between the contractor and the subcontractor or the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall continually monitor a subcontractor's use of apprentices required to be employed on the public works project pursuant to subdivision (d) of Section 1777.5, including, but not limited to, periodic review of the certified payroll of the subcontractor.

(3) Upon becoming aware of a failure of the subcontractor to employ the required number of apprentices, the contractor shall take corrective action, including, but not limited to, retaining funds due the subcontractor for work performed on the public works project until the failure is corrected.

(4) Prior to making the final payment to the subcontractor for work performed on the public works project, the contractor shall obtain a declaration signed under penalty of perjury from the subcontractor that the subcontractor has employed the required number of apprentices on the public works project.

When DLSE determines that a violation of the prevailing wage laws has occurred, including violations involving the employment of apprentices, a written civil wage and penalty assessment is issued 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

⁹ All subsequent references to the apprenticeship regulations are to the California Code of Regulations, title 8, with each individual reference to be identified as a "Rule."

the Director, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) The request for review is transmitted to the Director, 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 producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs., tit. 8, 17250, subd. (a); accord, Rule 232.50, subd. (a).) When DLSE’s 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); former § 1777.7, subd. (c)(2)(B);¹⁰ and Rule 232.50, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)¹¹

Subdivision (b) of section 1742 also provides in part that “The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.”

For the reasons set forth below, in this case DLSE has met its burden to

¹⁰ Former section 1777.7, subdivision (c)(2)(B) provides: “(2) The provisions of Section 1742 shall apply to the review of any determination issued pursuant to subdivision (a) or (b), subject to the following: ... (B) In the review of a determination under this section, the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5.”

¹¹ Under Rule 232.50, subdivision (a), DLSE has the burden of coming forward with evidence showing the Labor Commissioner considered all of the circumstances under former section 1777.7, subdivision (f), and, where an assessment is issued against a prime contractor for violations of a subcontractor, DLSE has the burden to present evidence showing prima facie support of knowledge of the prime contractor or failure by the prime contractor to comply with requirements listed under former section 1777.7, subdivision (d). (Rule 232.50, subd. (a).) Under Rule 232.50, subdivision (b), if DLSE meets its burden under Rule 232.50, subdivision (a), Lusardi has the burden to produce evidence to disprove Pro Works’ knowing violation of section 1777.5, to disprove the Labor Commissioner’s showing as to the section 1777.7, subdivision (f) circumstances, and to disprove Lusardi’s knowledge or failure to comply with the section 1777.7, subdivision (d) requirements.

present evidence showing prima facie support for the Assessment. The evidence supports DLSE's conclusion that Lusardi knew of the violations by Pro Works and is liable under section 1777.7, subdivision (d). For its part, Lusardi failed to carry its burden to show the Assessment was incorrect and further failed to carry its burden to rebut DLSE's showing of Lusardi's knowledge of Pro Works' violations in order to secure the benefit of the safe harbor provisions of former section 1777.7, subdivision (d). (See Rule 232.50, subds. (a), (b).)

Pro Works Violated Apprentices Requirements.

Former 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 (unless the contractor is exempt for reasons that do not pertain to this case). The governing regulation as to this 1:5 ratio of apprentice to journeyperson hours is Rule 230.1, subdivision (a), which states;

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

However, a contractor shall not be considered in violation of the 1:5 ratio requirement if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic are 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. (Rule 230.1, subd. (a).) According to that Rule 230.1, subdivision (a), a contractor properly requests the dispatch of apprentices by doing the following:

Request 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.

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

Prior to requesting the dispatch of apprentices, under former section 1777.5, subdivision (c), "every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work." The implementing regulation is Rule 230, subdivision (a), which provides in pertinent part:

Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. This contract award information shall be in writing and may be a DAS Form 140, Public Works Contract Award Information. The information shall be provided to the applicable apprenticeship committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work. Failure to provide contract award information, which is known by the awarded contractor, shall be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed by the awarding body

Rule 230, subdivision (a), further requires the contract award information to include the expected start date of the work, the estimated number of journeyperson hours, the number of apprentices to be employed, and the approximate dates apprentices will be employed.

Thus, a public works contractor is required to both promptly notify apprenticeship programs of upcoming opportunities and to timely request the dispatch of apprentices.

If a contractor knowingly violates section 1777.5, a civil penalty is imposed under section 1777.7. Here, DLSE assessed a penalty under the following portion of former 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.... A contractor or subcontractor that knowingly commits a second or subsequent violation of section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars (\$300) for each full calendar day of noncompliance....

The phrase quoted above -- "knowingly violated Section 1777.5" -- is defined by a 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.

Pro Works Failed to Employ Apprentices in the Required Ratio.

There is no dispute that Pro Works failed to employ any apprentices on the Project. Anderson's review of the CPRs revealed that Pro Works recorded 4,255 journeyman hours for Iron Workers for the duration of the Project. Pro Works was required to employ apprentices in no less than a 1-to-5 ratio of apprentice hours to journeyman hours. (Former § 1777.5, subd. (g); Rule 230.1, subd. (a).) Pro Works did not employ the minimum number of apprentices required for the Project.

Pro Works Failed to Provide Proper Contract Award Information.

DLSE produced prima facie evidence that, in violation of former section 1777.5, subdivision (e), and Rule 230, subdivision (a), Pro Works did not submit timely and complete contract award information to the applicable apprenticeship committee until Pro Works submitted its second DAS 140 form dated May 7, 2015. Its initial submittal, dated February 23, 2015, was properly deemed incomplete because Pro Works did not provide the approximate dates for apprentices to be employed, or the estimated number of journeyman hours, as required by Rule 230. Although an estimated number of apprentice hours is not required by Rule 230, the DAS 140 form includes a box for such a number, and Pro Works put in a zero, despite also providing an estimated number of journeyman hours at 1,500. Given the ratio requirement, it was not unreasonable for DLSE to consider the "zero" for apprentice hours to be another defective aspect of the filled-out form, one that negates the very purpose of the form and essentially omits the requirement of Rule 230 that the form include the

number of apprentices to be employed.

Pro Works had first assigned an Iron Worker journey person to work on the Project on December 23, 2014. In light of that evidence, it was reasonable for DLSE to infer that Pro Works knew of its apprentice needs by February 23, 2015. Indeed, given all the facts in the record, it is also reasonable to infer that Pro Works never had any intention of employing apprentices on this Project in December of 2014, in February of 2015, or even in May of 2015 when it finally submitted a complete and valid DAS 140 form. That Anderson did not directly inquire of Pro Works or make a finding as to the state of Pro Works' knowledge of apprentice needs does not detract from the record of Pro Works' violations in this case.

Pro Works Failed to Properly Request Dispatch of Apprentices.

DLSE also produced prima facie evidence that Pro Works did not submit the required requests for dispatch of Iron Worker apprentices. Of the three DAS 142 dispatch requests Pro Works submitted to the Iron Workers JATC, the first request failed to adequately provide dispatch information as to the work site where apprentices should report, and the last two requests failed to provide the minimum required 72-hour notice (exclusive of Saturdays, Sundays and holidays.) (See Rule 230.1, subd. (a).) Lusardi presented no evidence to carry its burden to disprove the basis for, or the accuracy of, this showing by DLSE. (Former § 1777.7, subd. (c)(2)(B); Rule 232.50, subd. (b).)

Further, Pro Works' violations of apprentice requirements are deemed to be "knowing" within the meaning of section 1777.7, subdivision (a)(1). This is so because, as reflected in DLSE records, Pro Works had previously been found to have violated section 1777.5. Under Rule 231, subdivision (h), an irrebuttable presumption arises that Pro Works knew or should have known of the requirements of section 1777.5. Consequently, Pro Works is subject to penalties

under section 1777.7.

DLSE Presented Evidence Showing Prima Facie Support for Former Section 1777.7 Penalty Factors.

The Assessment determined that Pro Works was in violation of section 1777.5 for 154 calendar days and was assessed a penalty at the rate of \$200.00 per day for a total amount of \$30,800.00.

In setting the penalty, DLSE must consider all of the following circumstances:

- (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.

(Former § 1777.7, subd. (f)(l) and (2).)

In this case, on DLSE Exhibit Number 4, at page 23, Anderson checked four of the boxes on a pre-printed form which corresponded to the factors listed in section 1777.7, subdivision (f), subparagraphs (1)-(4). This step was done just prior to sending the Penalty Review, including page 23, to her supervisor, Nagtalon, for his consideration and approval. According to Anderson's testimony and the Penalty Review, Nagtalon considered the five penalty factors, approved the Penalty Review prepared by Anderson, and set the penalty rate at \$200.00 per violation "due to the nature of the violations," before returning the Penalty Review to Anderson for preparation of the Assessment. These facts establish a prima facie showing that Nagtalon reviewed the summary of the investigation

prepared by Anderson, considered the statutory factors, and properly exercised his discretion in setting the penalty rate.

In turn, Lusardi failed to present any evidence to rebut that showing. Lusardi thereby failed to carry its burden to show that the Assessment was incorrect. (§ 1742, subd. (b).)

DLSE Presented Prima Facie Support for the Calculation of Penalty Days.

In opposition to DLSE's showing as to the penalty, Lusardi attacks DLSE's count of the calendar days of violations in order to challenge the dollar amount of the penalty. Lusardi contends that because the CPRs encompass a period of time that ends March 28, 2015, there is no support in the record for a penalty based on violations that go through June 23, 2015.

DLSE properly calculated the number of days that Pro Works was in violation of the apprenticeship requirements. Under Rule 230, DLSE could have extended the penalty period back to ten days from the execution of the subcontract, but instead DLSE took the more conservative course and counted 135 penalty days from the day after the first day Pro Works had workers on the Project (December 22, 2014) to the May 7, 2015 date of the first valid DAS 140 form that Pro Works submitted. To those 135 penalty days, DLSE properly added another 19 days' worth of ratio violations, representing the number of work days that Pro Works had journeypersons on the Project with no apprentices between May 7, 2015, and June 23, 2015, Pro Works' last day on the Project.

The best evidence for the duration of both penalties would have been a complete set of CPRs. However, the copy admitted into evidence at the Hearing ends on March 28, 2015, and is therefore incomplete, in and of itself. (DLSE Exhibit No. 9.) The gap in the evidentiary record between March 28, 2015, and June 23, 2015, was bridged by Anderson's oral testimony, the Penalty Review

Anderson prepared, and the DAS 142 forms prepared by Pro Works in May and June 2015. Altogether, this evidence provides prima facie support for the duration of the penalty period as calculated by DLSE, even in the absence of a complete set of Pro Works' CPRs.¹² Lusardi presented no evidence to carry its burden to disprove the basis for, or the accuracy of, DLSE's showing as to the number of penalty days. (Former § 1777.7, subd. (c)(2)(B), and Rule 232.50, subd. (b).)

Under De Novo Review, a Penalty Rate of \$200.00 Per Violation Is Appropriate.

DLSE set the penalty rate for Pro Works' violations at \$200.00 per violation. Under former section 1777.7, subdivision (f)(2), the Director decides the appropriate amount of the penalty de novo. In making this decision, the Director considers the factors stated in subdivision (f)(1), as stated *ante*. (§ 1777.7, subd. (f)(2).)

Here, the factors favor a high penalty. The utter lack of apprentice employment and the haphazard and incomplete efforts to comply with the apprentice rules, evidenced by late-filed and defective DAS 140 and 142 forms, contribute to a conclusion that Pro Works' violations were intentional. The applicable prevailing wage determination states that the Iron Worker craft is apprenticeable, and the Department of Industrial Relations website clearly identifies the apprenticeship committee for that craft in the geographic area of the Project. DLSE records show that Pro Works had a history of other apprentice violations. (See DLSE Exhibit Nos. 19, 20.) Moreover, Pro Works took few meaningful steps to voluntarily remedy its violations upon its receipt of the initial

¹² Under the regulations a potential defense to a violation of failing to meet the required 1:5 ratio is available to a subcontractor. That defense can be asserted where the requested apprentice committees fail to dispatch apprentices to the Project in response to a timely and proper request for dispatch. (See Rule 230.1, subd.(a).) Although Lusardi questioned Anderson on her opinion that the DAS 142 forms were invalid, Lusardi does not rely on that potential defense.

packet, which occurred before the end of the Project. Further, Anderson calculated a loss of 871 apprentice hours, almost 22 weeks of what could have served as on-the-job training for apprentices--a significant loss of training opportunities and consequent harm to apprentices and the Iron Workers JATC.

In applying these factors, 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 per violation for 154 days of violations is appropriate, and accordingly, the Assessment is affirmed in this respect.

Lusardi Is Liable for the Penalty Assessed.

Section 1743, subdivision (a), provides, in part, that "The contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order under this chapter or a judgment thereon." A safe harbor protecting a prime contractor from liability for a subcontractor's violations exists in former section 1777.7, subdivision (d). That statute provides as follows:

If a subcontractor is found to have violated Section 1777.5, the prime contractor of the project is not liable for any penalties under subdivision (2), unless the prime contractor had knowledge of the subcontractor's failure to comply with the provisions of Section 1777.5 or unless the prime contractor fails to comply with any of the following requirements:

- (1) The contract executed between the contractor and the subcontractor or [*sic*] the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.
- (2) The contractor shall continually monitor a subcontractor's use of the apprentices required to be employed on the public works project pursuant to subdivision (d) of Section 1777.5, including, but not limited to, periodic review of the certified payroll of the subcontractor.
- (3) Upon becoming aware of a failure of the subcontractor to employ the required number of apprentices, the contractor shall take corrective

action, including, but not limited to, retaining funds due the subcontractor for work performed on the public works project until the failure is corrected.

- (4) Prior to making the final payment to the subcontractor for work performed on the public works project, the contractor shall obtain a declaration signed under penalty of perjury from the subcontractor that the subcontractor has employed the required number of apprentices on the public works project.

Lusardi contends that the joint and several liability provision of section 1743 does not apply to expose a prime contractor to penalties under former section 1777.7 for its subcontractor's violation of section 1777.5. In this case, however, resort to section 1743 is unnecessary because Lusardi has not rebutted DLSE's prima facie showing that the statutory condition exists for Lusardi's liability for Pro Works' penalties under former section 1777.7, subdivision (d).

DLSE produced evidence that Lusardi knew about the ongoing apprentice violations by Pro Works, and that it possessed this knowledge while the Project was still underway and while Pro Works was using Ironworker journeypersons on the Project. DLSE's initial investigation packet, received by Lusardi on April 24, 2015, placed Lusardi on notice that DLSE had a complaint that Pro Works was not in compliance with section 1777.5. DLSE's packet specified the nature of the alleged violations, most notably on the Notice of Apprenticeship Compliance, where Lusardi and this Project were identified. On April 29, 2015, Pro Works' principal Gary Lane informed Anderson that Lusardi was withholding a retention from Pro Works in connection with the complaint about apprentice violations. The Awarding Body's transmittal letter to DLSE on May 5, 2015, is evidence that Lusardi was in possession of Pro Works' CPRs.¹³ All of this is sufficient evidence

¹³ Such records begin the week ending December 27, 2014. As can be seen in the incomplete set of CPRs in evidence, Pro Works employed no apprentice Iron Workers.

for finding that Lusardi was aware of Pro Works' failure to hire apprentices, thereby satisfying section 1777.7 which deprives Lusardi of the statutory safe harbor based on its knowledge of Pro Works' violations.

Lusardi argues that section 1777.7, subdivision (d), should be understood to mean that the "knowledge" requirement in the first prong cannot be applied independently, but must be applied in conjunction with the requirements of the second prong contained in subparagraphs (1) to (4), and especially the "awareness" element of subparagraph (3). However, that argument would read out of the statute the disjunctive "or" as used in the preface of former section 1777.7, subdivision (d), which suggests the two prongs do apply independently. Further, the "knowledge" requirement of the prime contractor in the first prong of subdivision (d) can be understood to apply whenever a prime contractor gains knowledge of a subcontractor's noncompliance with any of the apprentice requirements in former section 1777.5. The element in the second prong found in subdivision (d)(3) can be understood to apply whenever a prime contractor becomes "aware" of a specific type of violation, a subcontractor's failure to employ apprentices, and takes the corrective action prescribed in subparagraph (3), along with the other steps described for the safe harbor. The two prongs of section 1777.7 apply independent of one another, contrary to Lusardi's argument.

In this case, DLSE produced prima facie evidence that Lusardi had knowledge of Pro Works' apprentice violations, thus satisfying the first prong of subdivision (d). This conclusion could have conceivably been rebutted by Lusardi, but Lusardi did not deny it had knowledge. Had Lusardi denied knowledge, evidence may have been explored as to whether Lusardi failed to comply with the second prong of subdivision (d). However, in the absence of such evidence, it is reasonable to infer that Lusardi possessed knowledge,

thereby depriving Lusardi of the safe harbor from liability for Pro Works' violations.

Lusardi's Due Process Rights Were Not Violated.

Lusardi argues that neither the Assessment nor the investigation by Anderson leading to the Assessment provided Lusardi with "fair notice" of its potential liability as required by section 1742, subdivision (b). Lusardi contends that none of the documents in the initial packet issued by DLSE give notice that Lusardi would be expected to provide responsive information. Lusardi argues that the Assessment itself announces an assessment of penalties only against Pro Works and fails to state any intention to assess penalties against Lusardi or to hold Lusardi liable for penalties. Taken together, asserts Lusardi, the lack of sufficient notice in the Assessment and the absence of contact from Anderson amount to a deprivation of Lusardi's due process rights.

Given DLSE's evidence supporting a prima facie showing of Lusardi's knowledge of actual and ongoing apprentice violations by Pro Works during the course of the Project, and given the opportunity to be heard in the form of the Hearing, Lusardi was not deprived of its due process rights. Lusardi was put on notice by the contents of DLSE's initial packet, and it cannot plausibly assert that its potential liability was not manifest from the start of DLSE's investigation. The withholding of the retention from Pro Works at the time of DLSE's investigation is evidence to the contrary. Further, by virtue of section 1743 and former section 1777.7, Lusardi was on notice that its liability was at issue.¹⁴

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

¹⁴ An issue was raised as to whether the Labor Commissioner exhausted all reasonable remedies for collection of the penalty against Pro Works pursuant to section 1743, subdivision (a). This issue falls outside the scope of the Director's jurisdiction in this matter, and appears to be a defense to DLSE collection efforts in Superior Court.

FINDINGS

1. Affected subcontractor Pro Works Contracting, Inc. knowingly violated Labor Code section 1777.5 and California Code of Regulations, title 8, section 230, by issuing untimely and incomplete public works contract award information in a DAS form 140 or its equivalent to the applicable apprenticeship committee.

2. Affected subcontractor Pro Works Contracting, Inc. violated Labor Code section 1777.5 and California Code of Regulations, title 8, section 230.1, by failing to employ registered apprentices in the craft of Iron Worker in the ratio of one hour of apprentice work for every five hours of journey person work on the Project.

3. Under Labor Code section 1777.7, a penalty is assessed upon affected subcontractor Pro Works Contracting, Inc. in the amount of \$30,800.00, computed at the rate of \$200.00 per day for 154 days commencing December 23, 2014, and ending on June 23, 2015.

4. Under Labor Code section 1777.7, subdivision (d), affected contractor Lusardi Construction Company is liable for the penalty assessed against its subcontractor, Pro Works Contracting, Inc.

5. The amounts found due from Lusardi Construction Company, as affirmed by this Decision, are as follows:

Penalties under section 1777.7:	\$30,800.00
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ORDER

The penalties for violation of Labor Code section 1777.5, as stated in the Civil Wage and Penalty Assessment, is affirmed and Lusardi Construction Company is liable for the penalties contained therein. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 5/13/20



Katrina S. Hagen
Director, Department of Industrial Relations