

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Antoun Jean Fata, Individually dba Fata  
Construction and Development**

Case No. 18-0293-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected prime contractor Antoun Jean Fata, Individually dba Fata Construction and Development (Fata) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued on July 16, 2018, by the Division of Labor Standards Enforcement (DLSE) with respect to work performed by Fata on the Casimir Middle School Modernization Project, Bid Package #03, Site Demolition and Grading (Project), for the Torrance Unified School District (District) in Los Angeles County. The Assessment determined the following amounts were due: \$3,122.72 in unpaid prevailing wages, \$224.64 in training fund contributions, \$6,000.00 in penalties under Labor Code section 1775,<sup>1</sup> and \$1,400.00 in penalties under section 1777.7. On January 16, 2019, after settlement discussions, DLSE revised the Assessment to determine the following amounts due: \$1,795.01 in unpaid wages, \$0.00 in training fund contributions, and \$4,000.00 in section 1775 penalties. Penalties under section 1777.7 remained the same at \$1,400.00.

On January 14, 2020, a duly noticed Hearing on the Merits was held in Los Angeles, California, before Hearing Officer Mirna Solís. William Snyder appeared as counsel for DLSE. There was no appearance by Fata. The Hearing Officer proceeded to conduct 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

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<sup>1</sup> All subsequent section references are to the California Labor Code, unless otherwise specified.

8, section 17246, subdivision (a). DLSE Industrial Relations Representative David Wong testified in support of the Assessment. DLSE's documentary exhibits were admitted into evidence without objection. The Enforcing Agency and Fata were afforded an opportunity to file post-hearing briefs. The matter was submitted for decision on February 7, 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).

The issues for decision are:

- Whether Fata failed to pay the required prevailing wages.
- Whether the Labor Commissioner abused her discretion in assessing penalties under section 1775.
- Whether Fata submitted contract award information to all applicable apprenticeship committees in a timely and factually sufficient manner.
- Whether the Labor Commissioner abused her discretion in assessing penalties under section 1777.7.
- Whether Fata is liable for liquidated damages under section 1742.1, subdivision(a).

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 Assessment, as amended under a revised audit, with the exception of training fund contributions, and that Fata failed to carry its burden of proving that the basis of the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subd. (a), (b).) Accordingly, the Director issues this Decision modifying and affirming the revised Assessment, as amended under the revised audit.

## **FACTS**

### Failure to Appear.

On September 30, 2019, the parties jointly requested a continuance of the Hearing on the Merits that was scheduled for October 29, 2019. The request was

based on Fata's representation to DLSE that he was in Lebanon dealing with a family member's medical issues and would not be available for the Hearing on the Merits until January 2020. The joint request for continuance was granted and the Hearing was continued to January 14, 2020. On October 9, 2019, a Notice of Continuance with the new date was served on Fata at the email address he uses to communicate with DLSE and the Office of the Director.

On January 14, 2020, Fata did not appear for the Hearing. The Hearing Officer called Fata, who represented that he previously filed a request for continuance as he was still in Lebanon caring for his elderly parents and a revolution in Lebanon prevented him from leaving the county.<sup>2</sup> During the telephone call with the Hearing Officer, Fata verbally requested a continuance of 60 days. DLSE opposed that request because it was made on the first day of the Hearing and such a continuance would prejudice DLSE, which was prepared to present its case.

The Hearing Officer denied Fata's request for continuance because it was the eve of trial, there had already been a significant lapse of time since the matter was first set for a Hearing, and Fata was on notice of the January 14, 2020 Hearing date, yet failed to request a continuance at his earliest opportunity. In addition, giving due consideration to the needs of both parties, the Hearing Officer decided that DLSE would be prejudiced by the continued delay of a Hearing.

Stipulated Facts.

On January 13, 2020, Fata signed a Joint Statement of Issues and stipulated to the following facts:

1. The work subject to the Assessment was performed on a public work and required the employment of apprentices and the payment of prevailing wages under the California Prevailing Wage Law.
2. The CWPA was served timely.
3. The Request for Review was filed timely.

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<sup>2</sup> No record shows that Fata filed that request for continuance in the instant matter. Rather, Fata filed the request for a continuance in another matter (Case No. 16-0167-PWH).

4. The enforcement file was requested and produced in a timely fashion.
5. No back wages have been paid or deposited with the Department of Industrial Relations as a result of the Assessment.

The Public Work Contract.

On June 29, 2015, and on July 6, 2015, the District published its notice of invitation for bids for the Project. The invitation for bids cites prevailing wage law sections and states the Project is subject to enforcement by the Department of Industrial Relations. On August 19, 2015, Fata and the District executed the prime contract (Contract). Work under the Contract was site demolition and grading at a cost to the District of \$348,000.00. Fata's employees worked on the Project from February 3, 2016, to August 3, 2016. The District filed a Notice of Completion with the county on April 4, 2017.

The Applicable Prevailing Wage Determination.

The classification at issue is Operating Engineer. The applicable prevailing wage determination (PWD) for the Operating Engineer classification in Los Angeles County in 2015 is SC-23-63-2-2014-2 (Operating Engineer PWD). Pursuant to the Operating Engineer PWD, there are 25 sub-classification groups, each with a different total hourly rate of pay. As relevant to the Project, the total hourly rate of pay for Operating Engineers Group 3 is \$63.96, which includes \$40.12 as a basic hourly rate, \$11.20 for health and welfare, \$8.55 for pension, \$3.00 for vacation/holiday, \$.80 for training fund contribution, and \$.29 for other payments. The Operating Engineer PWD lists the following sub-classifications within Group 3: Asphalt Rubber Bead Operator, Bobcat or similar type (skid steer with all attachments), Equipment Greaser (rack), Ford Ferguson (with dragtype attachments), Helicopter Radioman (ground), Stationary Pipe Wrapping, and Cleaning Machine Operator.

The total hourly rate of pay for Operating Engineers Group 4 is \$65.45, which consists of \$41.61 as a basic hourly rate, \$11.20 for health and welfare, \$8.55 for pension, \$3.00 for vacation/holiday, \$.80 for training fund contribution, and \$.29 for

other payments. Twenty-five sub-classifications are listed within Group 4, including Roller Operator (compacting).

The Operating Engineer PWD expired on July 5, 2015, but provided for a predetermined increase for work performed after the expiration date. Effective July 6, 2015, an hourly increase of \$2.00 applies for all classification groups of the Operating Engineer (\$.90 allocated to basic hourly rate and \$1.10 to pension). Accordingly, in 2016 when the work was performed on the Project, the hourly rate for Operating Engineers Group 3 is \$65.16 and the hourly rate for Operating Engineers Group 4 is \$66.65, plus \$.80 for training fund contributions for both groups.

#### The Assessment.

Wong was assigned to investigate the complaint of prevailing wage violations on the Project. On July 21, 2017, Wong requested certified payroll records (CPRs) and other compliance documents from Fata. In response, on July 28, 2017, Fata provided its CPRs. According to DLSE's Penalty Review, Wong determined there was underpayment of wages concerning three employees. At the Hearing, however, Wong testified that pursuant to a revised audit based on resolution of the claims of other employees, the only issues remaining were with respect to the work of the sole Operating Engineer on the job, William Ocampo. Under the revised audit, the remaining issues were unpaid wages in the amount of \$1,000.00, training fund contributions in the amount of \$70.40, penalties under section 1775 penalties in the amount of \$2,200.00, and penalties under section 1777.7 penalties in the amount of \$1,400.00.

As part of his investigation, Wong sent employee questionnaires to all workers on the CPRs. Although no worker responded to the employee questionnaire, Wong spoke to one worker, Joan Ramirez, who stated that Ocampo worked on the Project. Ocampo was not listed on the CPRs.

Wong met with Ocampo and completed his affidavit. According to the affidavit, Ocampo worked on the job from July 15, 2016, to July 29, 2016, eight hours a day, five days a week, for a total of 88 hours. Ocampo's affidavit states that Fata hired him to

perform demolition; grading; digging out concrete, sand, and gravel; and compacting. The equipment he used was a skid steer and a skip loader with attachments. Ocampo also operated a roller and a Ford Ferguson. Ocampo rented the equipment, including a bobcat. He submitted invoices to Fata, who paid him \$50.00 an hour. At the end of the Project, Fata issued him an IRS form 1099. According to copies of cancelled checks issued by Fata, Ocampo was paid \$4,757.92. After crediting this amount in his audit, Wong determined Fata still owed \$1,000.00 in unpaid wages to Ocampo. DLSE's audit worksheet for Ocampo states that from July 15, 2016, to July 27, 2016, Ocampo should have been paid at the Operating Engineer Group 3 rate of \$65.16. From July 28, 2016, to July 29, 2016, DLSE's audit worksheet states Ocampo should have been paid as a Operating Engineer Group 4 at a rate of \$66.65 an hour.

In justifying its revised audit, DLSE relies on Wong's interview with Ocampo and Ocampo's affidavit, Wong's testimony, the Operating Engineer PWD together with its sub-classifications, and the revised audit sheets.

Although Fata did not appear to present evidence or argument, based on his prior conversations with Fata, Wong testified that Fata did not include Ocampo on the CPRs based on a position that Ocampo was an independent contractor. According to the California State Licensing Board, Ocampo had a general building contractor's license, but his license expired on November 30, 1995.

#### Assessment of Penalties under Section 1775.

Wong testified that the section 1775 penalties under the Assessment, as revised, were set at \$200.00 per violation for 11 violations, amounting to a total of \$2,200.00. Relying on the CPRs, Wong found a violation for each day of work for which Ocampo was not paid prevailing wages.

#### Apprentice Requirements.

Wong further testified that there was one applicable apprenticeship committee for the Operating Engineer trade in the geographic area of the Project, the Southern California Operating Engineers Joint Apprenticeship Committee (JAC). Wong requested from Fata confirmation that proper contract award information and request for dispatch

of apprentices were submitted to the JAC. Fata did not provide confirmation as Wong had requested.

DLSE imposed section 1777.7 penalties due to Fata's failure to send the contract award information (a DAS 140 form) to the JAC. According to the DLSE Penalty Review, penalties under section 1777.7 were assessed at the rate of \$100.00 per violation for 14 days, for a total of \$1,400.00. The penalty period was computed from Ocampos' first day of work on Project, July 15, 2016, to July 29, 2016, the last day he worked on the Project.

DLSE chose the \$100.00 rate based on Fata's prior violations of section 1777.5. Before the Project, Fata had been issued two civil wage and penalty assessments for section 1777.5 violations.<sup>3</sup> In addition to the prior assessments, in setting the penalty rate DLSE also considered the extent of lost training opportunities for apprentices. The total journeyman hours worked on the Project by Ocampo was 88.76, which required a minimum of 17.6 apprentice hours, or just over two days of apprentice work.

## **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 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

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<sup>3</sup> The first prior assessment listed in the Penalty Review (DLSE Case No. 40-42908) was issued on March 25, 2015. Fata was assessed penalties under section 1775 at \$120.00 per violation and penalties under section 1777.7 at \$50.00 per violation. According to the Penalty Review, the case settled at \$60.00 per violation for section 1775 penalties and \$20.00 per violation for section 1777.7 penalties.

The second assessment listed in the Penalty Review (DLSE Case No. 40-44316-178) was issued on March 28, 2016. Fata was assessed penalties under section 1775 at \$200.00 per violation and penalties under section 1777.7 at \$200.00 per violation. DLSE did not provide any settlement amounts for this case.

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.)

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

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

In this case, Operating Engineer classification was the sole classification at issue and one Operating Engineer worked on the Project (Ocampo). DLSE provided prima facie evidence of wages owed to Ocampo at the Operating Engineer Group 3 rate of pay. According to Ocampo's affidavit and DLSE's January 16, 2019 individual audit worksheet, Ocampo worked a total of 88 hours. According to the Ocampo's individual audit worksheet, DLSE lists the rate of pay for 72 hours at an Operating Engineer Group 3 rate of pay of \$65.16. However, for 16 hours (work on July 28, 2016, and July 29, 2016), the audit worksheet lists \$66.50 as the rate of pay for a Operating Engineer Group 4. DLSE did not explain why the rate is different for these 16 hours. However, the Operating Engineer PWD shows that a roller operator is listed under Group 4. In his affidavit, Ocampo stated he was a roller operator, but does not state when and for how long he worked in that capacity.<sup>4</sup> Because there is insufficient evidence to establish when Ocampo performed work in the capacity of a Roller Operator, all 88 hours must be paid at Operating Engineer Group 3. Accordingly, Ocampo's earned wages were \$5,734.08 (88 hours at \$65.16). After applying a credit for payment to Ocampo in the amount of \$4,757.92, a total amount of \$976.16 is owed in wages.

As noted, Wong testified that Fata disputed he owed any wages to Ocampo based on the argument that Ocampo was an independent contractor. Having not appeared, Fata presented no evidence on which to base that argument. Further, the parties stipulated that the Project is a public work. Consequently, each worker on the Project, regardless of status, must be paid not less than the general prevailing wage rate. The California prevailing wage law does not distinguish between those workers eligible for prevailing wages based on their status in a business that contracted to do

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<sup>4</sup> DLSE Exhibit Number 26 consists of Ocampo's affidavit, a copy of Ocampo's Driver's License, Ocampo's invoices and cancelled checks received from Fata. Also, included as part of DLSE Exhibit Number 26 is a 2016 calendar with the State of California emblem on the top left hand side and Ocampo's name handwritten at the top. For July 28, 2016 and July 29, 2016, eight hours are handwritten for each day and a partially illegible notation "Rol [illegible letters] OPF [illegible letters]." DLSE provided no testimony as to the source of the handwriting on the calendar, what the illegible words state, the date the calendar was completed or the author of the calendar.

work. (See § 1771 [the prevailing wage rate “shall be paid to all workers employed on public works”]; § 1723 [“ ‘Worker’ includes laborer, worker, or mechanic.”].)

Accordingly, Fata is liable for payment of prevailing wages owed to Ocampo in the aggregate sum of \$976.16.

Fata is Liable for Liquidated Damages.

Section 1742.1, subdivision (a) provides in part:

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

The statutory scheme regarding liquidated damages, as applicable to this case, provides contractors two means to avert liability for liquidated damages (in addition to prevailing on the case, or settling with DLSE agreeing to waive liquidated damages). Under section 1742.1, subdivision (a), the contractor has 60 days to decide whether to pay the workers all or a portion of the wages assessed in the civil wage penalty assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the civil wage penalty assessment, the contractor deposits with the Department of Industrial Relations (DIR) the full amount of the assessment of unpaid wages, including all statutory penalties.

In this case, no back wages have been paid, nor has a deposit been made with DIR as a result of the Assessment. Accordingly, Fata is liable for liquidated damages in the amount of the unpaid prevailing wages, totaling \$976.16.

Fata Does Not Owe \$70.40 in Training Fund Contributions.

Section 1771 requires that all workers on a public work receive at least the general prevailing wage. There are three components to the prevailing wage: (1) the basic hourly rate; (2) fringe benefit payments; and, (3) a contribution to the California

Apprenticeship Council (CAC) or an approved apprenticeship program that can supply apprentices to the site of the public works project (these are payments referred to as “training fund contributions”). The first two components (also known as the total prevailing wage) must be paid to the worker or on the worker’s behalf and for his or her benefit (in the case of the fringe benefit payments). An employer cannot pay a worker less than the required basis hourly rate.

DLSE contends that training fund contributions are due based on the Operating Engineer PWD. However, the revisions DLSE made to the Assessment on January 16, 2019, based on settlement discussions, indicate that no training fund contributions are due. It was not until the Hearing of January 14, 2020, that DLSE reasserted that training fund contributions were owed in the amount of \$70.40. That assertion amounts to a request to increase the Assessment, one asserted without prior notice to Fata.

Under California Code of Regulations, title 8, section 17226, subdivision (a)(3), DLSE may, upon motion, amend an assessment for good cause to increase a claim for wages based upon a “recomputation or the discovery of new evidence subsequent to the issuance of the original Assessment.” (Cal. Code Regs., tit. 8, § 17226, subd. (a)(3).) The original Assessment found \$224.62 in unpaid training fund contributions. However, as noted, DLSE reduced that figure to zero under the revised Assessment. DLSE now asserts that \$70.40 is due under a further revised Assessment.

DLSE provided no testimony or reasoning, however, as to why it did not seek the increase in training fund contributions sooner, nor did it proceed by way of a motion for the increase which could have provided Fata with notice of the new assertion.

Accordingly, no good cause is shown to increase the Assessment to find training fund contributions were due.

DLSE Did Not Abuse Its Discretion By Assessing \$2,200.00 in Penalties Under Section 1775.

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

(a)(I) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

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

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

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

(B)(i) The penalty may not be less than forty dollars (\$40) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, unless the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

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

(iii) The penalty may not be less than one hundred twenty dollars (\$120) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1. [5]

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<sup>5</sup> 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 (e). According to that subdivision, a willful violation is defined as one in which "the contractor or subcontractor knew or reasonably should have

(C) If the amount due under this section is collected from the contractor or subcontractor, any outstanding wage claim under Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 against that contractor or subcontractor shall be satisfied before applying that amount to the penalty imposed on that contractor or subcontractor pursuant to this section.

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. 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); § 1775, subd. (a)(2)(D).)

Abuse of discretion is established if the “agency’s nonadjudicatory action . . . is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy.” (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute her or his own judgment “because in [her or his] own evaluation of the circumstances the punishment appears to be too harsh.” (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

Fata did not establish that DLSE abused its discretion in setting the section 1775 penalty rate at \$200.00 per violation. There were 11 separate violations—one violation per day worked by Ocampo, the sole Operating Engineer on the job. Fata did not appear and thus presented no evidence or argument that the section 1775 penalties were an abuse of discretion. Accordingly, this Decision affirms the Assessment’s finding of 11 violations of penalties under section 1775 totaling \$2,200.00.

#### Fata Violated Apprenticeship Requirements.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing

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known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.”

the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council.<sup>6</sup> DLSE enforces the apprenticeship requirements not only for the benefit of apprentices, but to encourage and support apprenticeship programs, which the Legislature has recognized as “a vital part of the educational system in California.” (Stats. 1999, ch. 903, § 1 [Assem. Bill 921].)

Section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journey[persons] in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). (§ 1777.5, subd. (g); § 230.1, subd. (a).)

Contractors are also required to notify apprenticeship committees when a public works contract has been awarded. (§ 1777.5, subd. (e); § 230, subd. (a).) DAS has prepared a form for this purpose (DAS 140), which a contractor may use to notify all apprenticeship committees for each apprenticeable craft in the area of the site of the project. 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 for specified dates and with sufficient notice.

In the present case, DLSE carried its initial burden of presenting evidence at the hearing that provided prima facie support for the Assessment as to Fata’s failure to notify the JAC of a public contract award. (Cal. Code Regs., tit. 8, § 17250, subd. (a).) Wong testified that he asked Fata for confirmation that contract award information was sent to the JAC, but Wong did not receive such confirmation. Fata did not appear at the duly noticed hearing to rebut that evidence or otherwise carry its burden to prove the basis of the amended Assessment is incorrect in that regard. (Cal. Code Regs., tit.

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<sup>6</sup> All subsequent references to the apprenticeship regulations are to the California Code of Regulations, title 8.

8, § 17250, subd. (b).)

Accordingly, it is concluded that Fata violated section 1777.5, subdivision (e), and the applicable regulation, section 230, as to the notice requirement.

The Labor Commissioner Did Not Abuse Her Discretion in Assessing Penalties under Section 1777.7.

If a contractor knowingly violates section 1777.5, a civil penalty is imposed under section 1777.7 in an amount not exceeding \$100.00 for each full calendar day of noncompliance. (§ 1777.7, subd. (a)(1).) The phrase “knowingly violated Section 1777.5” is defined by California Code of Regulations, title 8, 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, . . . .

In setting the penalty, the Labor Commissioner is to consider all of the following circumstances:

- (1) Whether the violation was intentional.
- (2) Whether the party has committed other violations of Section 1777.5.
- (3) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.
- (4) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.
- (5) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

(§ 1777.7, subd. (b).) The Labor Commissioner’s determination of the amount of the

penalty, however, is reviewable only for an abuse of discretion. (§ 1777.7, subd. (d).) A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment, namely, the affected contractor has the burden of proving that the basis for assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

In this case, the Assessment set the section 1777.7 penalty at \$100.00 per violation. DLSE provided prima facie evidence that Fata's violation of the apprenticeship requirement of providing notice of the contract award was made knowingly as the Project was not Fata's first public works contract. DLSE based penalties under section 1777.7 on Fata's failure to submit contract award information as required under section 1777.5, subdivision (e), and section 230, subdivision (a) of the applicable regulation. That regulation states:

Failure to provide contract award information, which is known by the awarded contractor, shall be deemed to be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed by the awarding body for the purpose of determining the accrual of penalties under Labor Code Section 1777.7.

(Cal. Code. Regs., tit. 8, § 230, subd. (a).) Thus, per the regulation, a failure to provide contract award information is a violation that runs throughout the duration of a contract. In this case, the duration of the contract was from February 3, 2016, to April 4, 2017, when the Notice of Completion was filed. However, DLSE assessed penalties for 14 days of violations—one violation for each calendar between July 15, 2016, when the Operating Engineer journeyman (Ocampo) was first on the Project to July 29, 2016, the last calendar day that Ocampo was on the job.

Wong testified the penalties were assessed \$100.00 per calendar day for which an Operating Engineer was on the job. According to the Penalty Review, the rate of \$100.00 was selected, based on the fact that Fata had two prior violations of apprentice requirements and because 17.6 hours were lost in training opportunities for Operating Engineer apprentices.



Having not appeared at the Hearing, Fata did not establish that the Labor Commissioner abused her discretion in assessing the penalties at \$100.00 per violation.

Accordingly, as determined by DLSE and specified in the Assessment, Fata is liable for section 1777.7 penalties at \$100.00 per violation for 14 days, for a total amount of \$1,400.00.

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

### **FINDINGS AND ORDER**

1. Antoun Jean Fata, Individually dba Fata Construction and Development, underpaid its worker \$976.16 in prevailing wages.
2. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code Section 1775 at \$200.00 per violation for 11 violations in the aggregate sum of \$2,200.00.
3. Antoun Jean Fata, Individually dba Fata Construction and Development, is liable for liquated damages in the full amount of the unpaid wages, which is \$976.16.
4. Antoun Jean Fata, Individually dba Fata Construction and Development, does not owe for training fund contributions.
5. Antoun Jean Fata, Individually dba Fata Construction and Development, did not submit the required contact award information (DAS 140 form) to the applicable apprenticeship committee.
6. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code Section 1777.7 at \$100.00 per violation for 14 violations in the aggregate sum of \$1,400.00.
7. The amounts found due in the Assessment, as affirmed and modified by this Decision, are as follows:

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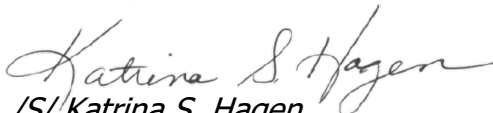
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<b>Basis of the Assessment</b>	<b>Amount</b>
Wages due:	\$976.16
Penalties under section 1775, subdivision (a):	\$2,200.00
Liquated Damages:	\$976.16
Training Fund Contributions Due:	\$0.00
Penalties under section 1777.7:	\$1,400.00
<b>TOTAL:</b>	<b>\$5,552.32</b>

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

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

Dated: 09-15-2020

  
/s/ Katrina S. Hagen

Katrina S. Hagen  
Director, Department of Industrial Relations