

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**PMK Professional, Inc.,
A California Corporation**

Case No. 21-0090-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor PMK Professional, Inc. (PMK) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on February 23, 2021, with respect to work performed on the Electric Vehicle Charging Station, Phase 2 (Project) for the City of Downey (Awarding Body or City) in Los Angeles County. The Assessment determined that \$29,809.03 was due in unpaid prevailing wages and training fund contributions, and statutory penalties. These included penalties under Labor Code section 1775,¹ as well as penalties assessed under section 1777.7 for apprenticeship violations.

A Hearing on the Merits occurred on September 10, 2021, before Hearing Officer Maureen Home. Joseph F. Hart appeared as counsel for DLSE, and PMK President and CEO Mahyar Farhadi appeared on behalf of PMK. DLSE Industrial Relations Representative Sara Brown testified in support of the Assessment. Mahyar Farhadi testified for PMK. The parties filed simultaneous closing briefs on October 12, 2021. The parties filed simultaneous reply briefs on October 27, 2021, and the matter was submitted for decision on that date.

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

- The work subject to the Civil Wage and Penalty Assessment was subject to the prevailing wage and apprenticeship requirements.

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

- The Request for Review was timely filed.
- The Labor Commissioner timely made its investigative file available to the contractor.

The issues for decision are as follows:

- Did PMK correctly pay workers based on the work performed?
- Did the Labor Commissioner provide prima facie support for the Civil Wage and Penalty Assessment?
- Did the Labor Commissioner abuse her discretion in assessing Labor Code section 1775 penalties?
- Did PMK submit the required contract award information to all applicable apprenticeship committees for the classifications of Laborer, Cement Mason, and Operating Engineer in a timely and factually sufficient manner?
- Did PMK employ apprentices in the classifications of Laborer and Cement Mason in the required minimum ratio of apprentices to journeypersons on the Project?
- Did the Labor Commissioner abuse her discretion in setting penalties under section 1777.7?²

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence that provided prima facie support for the Assessment, and that PMK failed to carry its burden of proving that the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subs. (a), (b).) Accordingly, the Director issues this decision affirming the Assessment.

FACTS

The Project.

The Awarding Body advertised the Project for bid on November 29, 2018. (DLSE Exhibit No. 12, p. 4.) The successful bidder was PMK, which entered into a contract

² This list of issues subsumes the issues as phrased by the parties. Also, PMK represented that it had deposited the full amount of the Assessment with the Department of Industrial Relations. On that basis liquidated damages in the amount of unpaid wages pursuant to section 1742.1 are not at issue.

with the Awarding Body. (DLSE Exhibit No. 4.) PMK had workers on the Project from May 20, 2019, through July 30, 2019. (DLSE Exhibit No. 2, pp. 1-13.) The Awarding Body recorded a notice of completion of the Project on September 9, 2019. (DLSE Exhibit No. 9.)

The Public Works Complaint.

On November 22, 2019, DLSE received a complaint from Augustin Barragan of the Center for Contract Compliance alleging underreporting of hours worked, misclassification of workers, failure to provide contract award information or request apprentice dispatch for all trades used on the Project, and failure to meet apprentice ratio requirements. (DLSE Exhibit No. 4, p. 6.)

The Prevailing Wage Rate Determinations.

Four prevailing wage determinations (PWDs), together with DIR requirements for Apprentices for the Electrician craft, are at issue in this matter. One PWD is for Laborer, Group 1, SC-23-102-2-2018-1.³ (DLSE Exhibit No. 4, p. 4; DLSE Exhibit No. 7, pp. 1-3.) A second PWD relevant to this matter is for Operating Engineer, Group 4, SC-23-63-2-2018-1 (Operating Engineer). (DLSE Exhibit No. 4, p. 4; DLSE Exhibit No. 7, pp. 4-8.) The Operating Engineer PWD provides Group 4 rates for work performed as an Operator and Backhoe Operator, among others. (DLSE Exhibit No. 7, p. 5.)⁴

A third PWD relevant to this matter is for Cement Mason, SC-23-203-2-2018-1. (DLSE Exhibit No. 7, pp. 9-10.)⁵ A fourth PWD relevant to this matter is for Electrician, Inside Wire[Person], LOS-2018-2 (Electrician). (DLSE Exhibit No. 7, pp. 11-18.) Because

³ The basic hourly rate for Laborer, Group 1 is \$34.24, with hourly fringe benefit payments of \$20.80 and \$0.69 for training, for a total hourly rate of \$55.73. The Laborer PWD also gives a predetermined wage increase of \$2.05 effective July 1, 2019.

⁴ The basic hourly rate for Operating Engineer, Group 4, is \$47.86, with hourly fringe benefit payments of \$26.04 and \$1.00 for training, for a total hourly rate of \$74.90.

⁵ The basic hourly rate for Cement Mason is \$35.75, with hourly fringe benefit payments of \$24.36, and \$.64 for training, for a total hourly rate of \$60.75. The Cement Mason PWD also gives a predetermined wage increase of \$2.05 effective July 1, 2019.

PMK used an Electrician apprentice on the Project, the requirements for apprentice pay under the Electrician PMK are also at issue.⁶ (DLSE Exhibit No. 7, pp. 19-22.)

The Assessment.

The Assessment found that PMK misclassified the work of Operating Engineer as Laborer and underreported hours for the ten workers who performed work on the Project. DLSE also found that PMK failed to submit contract award information to the applicable apprenticeship committees for the classifications of Operating Engineer, Laborer, and Cement Mason and failed to submit requests for dispatch of apprentices in the Laborer and Cement Mason classifications. It further found that PMK failed to employ apprentices in the classifications of Laborer and Cement Mason in the required minimum ratio of apprentices to journeypersons on the Project. Altogether, the Assessment found that PMK underpaid the required prevailing wages in the amount of \$13,627.48, underpaid training fund contributions of \$141.55, and imposed section 1775 penalties at the rate of \$120.00 per violation for the amount of \$10,680.00, and section 1777.7 penalties at the rate of \$80.00 per violation for the amount of \$5,360.00, for a total amount of \$29,809.03.

DLSE's Calculation of Unpaid Wages and Training Fund Contributions.

DLSE Industrial Relations Representative Brown testified that she was assigned to investigate the complaint sent to DLSE by the Center for Contract Compliance. The complaint alleged underreporting of hours worked, misclassification of workers as Laborer, Cement Mason, or Electrician when they performed the work of Operating Engineer, and failure to comply with apprenticeship requirements. Besides the complaint documentation, Brown obtained certified payroll records (CPRs), notice of completion, Daily Inspection Reports (Inspection Reports) from the Awarding Body, and two Employee Questionnaires. She also spoke with two workers about their pay issues, one of whom stated he had to talk to PMK about being paid correctly. (DLSE Exhibit No.

⁶ The basic hourly rate for Electrician is \$45.35, with hourly fringe benefit payments of \$27.66, and \$.71 for training, for a total hourly rate of \$73.72. The rate for an Apprentice Electrician is \$22.18, with hourly fringe benefits of \$21.05 and \$.76 for training, for a total hourly rate of \$43.99.

12, p. 7.) She testified she also obtained documents from apprenticeship committees for the Electrician craft and certification from the California Apprenticeship Council as to training fund contributions received from PMK for the Cement Mason and Laborer crafts.

Brown testified that in comparing the CPRs with the Inspection Reports, she found that PMK underreported hours of workers for every day of the Project, and she found that one worker listed on an Inspection Report, Manual G. Roman, did not appear anywhere on the CPRs. She considered the Inspection Reports particularly persuasive compared to the CPRs, because the inspector for the Awarding Body took "very thorough notes on the project, describing the work that was done each day, equipment used, all employees by name, and how many hours each employee spent doing each task." (DLSE Exhibit No. 12, p. 6.) She testified that the Awarding Body presented the Inspection Reports as accurate and noted they contain many other details such as the weather conditions, the location of the work, and materials used. To Brown, the level of detail in the reports enhanced their reliability. Brown allowed that an Inspection Report could potentially be inaccurate and she relied on representations in the CPRs where those show more hours of work than shown in the Inspection Reports.

On the basis of her investigation, Brown prepared an audit that details the hours, days, and weeks of work on the Project by each of the ten workers. (DLSE Exhibit No. 2.) The audit reflects that for particular hours on numerous days of the Project, DLSE reclassified workers from the Laborer, Cement Mason, and Electrician crafts listed in the CPRs to Operating Engineer. For that purpose Brown relied on the information from the Inspection Reports that indicate equipment and activities associated with the Operating Engineer craft were used for specific hours and days. (DLSE Exhibit No. 7, p. 5; DLSE Exhibit No. 14.) The audit also reflects additional hours that, based on the hours indicated on the Inspection Reports, Brown added for workers in all four crafts and the Electrician apprentice she found were involved in the Project. (DLSE Exhibit Nos. 7, 12.) In reaching a figure for the final amount of underpayment, Brown gave credit to PMK for wages paid as indicated in the CPRs. (DLSE Exhibit Nos. 2, 8.)

The audit also found that PMK underpaid training fund contributions required under the four classifications and Electrician apprentice used on the Project in amounts ranging from \$0.64 to \$1.00 for every hour of work. (DLSE Exhibit No. 2, p. 2; DLSE No. 12, p. 1.). Brown determined that PMK owed a total of \$141.55 in training fund contributions based on the workers' hours, as reflected on the audit worksheets. (DLSE Exhibit No. 2.)

Assessment of Penalties Under Section 1775.

Based on the underpayment of wages found in the audit and pursuant to section 1775, Brown recommended to her Senior Deputy Labor Commissioner a penalty rate of \$120.00 per violation. Brown testified that in her view the underpayments were willful, justifying the \$120.00 rate, in spite of the fact that PMK did not have a record of a prior prevailing wage violation. The Senior Deputy adopted her recommendation.

Brown identified 89 days where PMK underpaid its workers for performing work on the Project. Accordingly, the audit determined that the penalties under section 1775 at the \$120.00 rate totaled \$10,680.00. (DLSE Exhibit No. 12, pp. 1-2.)

Apprenticeship Violations and Assessment of Penalties Under Section 1777.7.

Brown testified that aside from the underpayment of training fund contributions, her investigation disclosed that PMK violated other apprenticeship requirements. While PMK issued a Public Works Contract Award Information form (DAS 140 Form) to an apprenticeship committee for the Electrician craft, it did not do the same as to committees for the crafts of Laborer, Cement Mason, and Operating Engineer used on the Project. She also found PMK failed to request dispatch of apprentices from the Laborer and Cement Mason apprenticeship committees.

Brown testified that the fact PMK issued a timely DAS 140 form to the Electrician apprenticeship committee showed her that it was aware of its obligation to do the same for other crafts. Further, while PMK used an Electrician apprentice on the Project, it used no Laborer or Cement Mason apprentices on the job. Under the 1:5 apprentice to journeyman ratio required by law, the number of journeymen in those two crafts

means that opportunity for 100 hours of apprentice work were lost. (DLSE Exhibit No. 12, p. 8.)

Brown's Senior Deputy Labor Commissioner assessed penalties under section 1777.7 at the rate of \$80.00 per day for 67 apprenticeship violations. (DLSE Exhibit No. 12, pp. 1, 7-8.) The number of violations was based on the number of calendar days on which journey level Laborers performed work on the Project between May 24, 2019, and July 30, 2019. (DLSE Exhibit Nos. 2, 8.)

Testimony of PMK CEO Mahyar Farhadi.

Farhadi testified that he was present at Project sites on a daily basis. He testified the Project involved construction of electric vehicle charging stations for six different locations, and PMK bid on the Project assuming only Electricians would be needed. However, the Awarding Body added construction of "handicap ramps" for the charging stations, which required the use of Cement Masons and Laborers. Farhadi testified PMK was an electrician contractor and could not find subcontractors for the added work within the time for PMK to commence the job, and as a result he hired Cement Masons and Laborers directly. He also hired a masonry subcontractor for some of the work.

Farhadi further testified he took issue with the audit on several counts. For example, he admitted he did work as an Electrician on the Project, but did so for only 15 hours over two days, not the 27 hours found for him in the audit. He testified he did not know Manual G. Roman, the Laborer DLSE added in the audit based on his being listed in an Inspection Report as working for eight hours on May 24, 2019, the first day PMK had Laborers on the Project.

PMK also contended that DLSE could not use the Inspection Reports at the Hearing because when he obtained copies of DLSE's file after the Assessment was issued, the Inspection Reports contained redactions of the worker names. Farhadi admitted that he received a copy of the unredacted reports from DLSE after he emailed Brown noting the redactions. PMK made a variety of other contentions, which will be discussed, *post*.

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 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. 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.

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).)

DLSE Made Out a Prima Facie Case for Its Assessment Against PMK.

The documentary and testimonial evidence in this case is largely undisputed. DLSE based its Assessment that PMK underpaid wages on representations of the hours, days, and type of work performed as described in the Inspection reports the inspector submitted to the Awarding Body, the hours and wages as reflected in the CPRs, and the PWDs for Laborer, Cement Mason, Operating Engineer and Electrician.

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).)

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 support for the Assessment. With regard to its reclassification of Operating Engineers, DLSE relied on the Operating Engineer PWD that specifically identified trenching work as falling within that craft, which the Inspection Reports show was work that was performed on 23 days during the Project. (DLSE Exhibit Nos. 2 and 5.) DLSE also presented prima facie support for the Assessment as to the underreporting of hours found in the audit and failure to pay training fund contributions, mostly relying on the Inspection Reports prepared by Awarding Body’s inspector and the CPRs.⁷ The Inspection Reports when compared to CPRs show that PMK undercounted hours of work on 66 other occasions from May 24, 2019, to July 30, 2019. (DLSE Exhibit No. 14.)

Similarly, DLSE presented prima facie support for its findings that PMK failed to submit the DAS 140 form to apprenticeship committees for Laborer, Cement Mason, and Operating Engineer, and that PMK was liable for specified penalties for underpayment of wages and the apprenticeship violations.

Based on these facts, the Assessment found underpaid prevailing wages in the amount of \$13,627.48 and training fund contributions of \$141.55 and imposed penalties under sections 1775 and 1777.7. This evidence presents a prima facie support for the Assessment. (Cal. Code Regs., tit. 8, § 17250, subd. (a).)

⁷ Brown testified why she accepted the Inspection Reports as reliable. Being retained by the City, the inspector appeared to be a neutral observer from DLSE’s perspective. Also, Brown perceived the level of detail of the facts recounted in each page of the reports as reason to accept the accuracy of the reports. Review of the Inspection Reports lends support to Brown’s perception. Full names of workers and the number of hours each worker performed particular types of work on a given day appear in the reports. The reports set out for each day the Project name and contract number, and the date, start time and weather conditions. The amount of detail found in the reports justifies DLSE’s acceptance of the Inspection Reports as reliable sources of information as to the hours of work.

PMK Failed to Carry Its Burden of Proof to Show the Assessment Was Incorrect.

The single prevailing rate of pay for a given “craft, classification, or type of work” is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. (*Sheet Metal Workers Intern. Ass’n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1082) (*Sheet Metal Workers*). 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 (*Ericsson*).)

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 Department publishes an advisory scope of work for each craft or worker classification for which it issues a PWD.

In response to DLSE’s prima facie showing, PMK makes no argument as to the underpaid training fund contributions or the penalty calculations used for purposes of sections 1775 and 1777.7. However, PMK asserts that mistakes were made in the audit and also argues the Inspection Reports were not reliable sources of information. On the latter point, PMK contends that because the inspector did not work full time or remain on the Project site for eight hours a day, he could not have known the hours the employees worked. PMK also notes the Inspection Reports did not include worker arrival and leave times or lunch and break times. Whether the inspector worked full or part time casts no doubt on the reliability of the Inspection Reports, in part because PMK provided no evidence as to the length of time the inspector was on the Project or the various sources of information the inspector must have used to inform the reports. That the reports do not include worker lunch or break times likewise does not detract from their impact. The inspector was retained by the City and PMK offered no reason that the City sought or needed exact times workers took lunch and breaks.

Farhadi testified that no worker complained in writing of being underpaid, which he took to mean they had not been underpaid. The inference PMK takes from the lack of a formal complaint to DLSE is misplaced. Many reasons can exist for a worker to refrain from filing a written complaint, the most obvious being concern for retaining a job in the future. While PMK's broad assertion that no worker complained of underpayment of wages indirectly conflicts with one worker's statement during Brown's investigation that "he had to talk to the contractor about being paid correctly" (DLSE Exhibit No. 12, p. 7), a formal complaint was, in fact, filed by a labor compliance committee. DLSE properly investigated the complaint and found underpayment.

Based on a comparison of hours on the CPRs and the Inspection Reports, DLSE found that Farhadi performed craft work on the Project for 27 hours but was not paid prevailing wages for that work, which constitutes a violation. Farhadi admits he did work as an Electrician on the Project, but asserts he did craft work for only 15 hours over two days. However, the record provides no basis on which to accept that assertion because Farhadi failed identify either the days or hours he admittedly worked or the particular hours in the audit for which he asserted he did no craft work. The Inspection Reports appear to note when Farhadi was merely present at the work site, versus when he was actually performing craft work for certain days. Based on those details, DLSE justifiably accepted the facts as to Farhadi's work as presented in the Inspection Reports.

PMK further attempts to undermine the validity of the Inspection Reports by claiming the Awarding Body's inspector confused the work on the Project with a second public work project on which PMK worked in addition to the Project. Yet, except for one day of work, PMK identified no hours or days when the inspector supposedly confused the work. For each day of work, the Inspection Reports identify the name of the Project, and specify the tasks performed and the individual worker names performing them. As presented, the Inspection Reports on their face suggest it is unlikely the inspector confused PMK's work on the Project with work elsewhere.

PMK identified June 18, 2019, as a date on which the inspector allegedly mistook hours of work on another project by Electrician Mehdi Jafari (also known as Hossein Jafair Mimandi in the CPRs) and Electrician apprentice John Gorsky as being done on the Project. In support of its argument PMK offered documents for each worker entitled "Timesheet." (PMK Exhibit F.) For that date, the Timesheets for Jafari and Gorsky show eight hours of work on another project and no hours on the Project.

The conclusion PMK draws from the timesheet evidence requires acceptance of trustworthiness of the data presented. If the Timesheets are business records, PMK did not present foundational facts upon which to conclude their trustworthiness. (Evid. Code § 1271.) Also, the November 9, 2020 date of the Timesheet evidence, over two years after the fact, suggests caution in accepting them as accurate. Based on the record, PMK employees do not submit their own hours. Instead, CEO Farhadi does. The Timesheets in the record that PMK offered as alternative to the hours on the Inspection Reports are not actual timesheets signed by workers showing time spent on a given job. Instead, the Timesheets are unsigned compilations of work hours prepared by PMK's accounting firm based on whatever PMK submitted to it. PMK contended DLSE could not rely on the Inspection Reports where they conflict with the Timesheets, but PMK failed to present sufficient evidence to conclude the Timesheet exhibit was more accurate or neutral than the Inspection reports.⁸

PMK also argues against the Assessment because when Brown prepared her audit, on occasion she used a higher figure for hours worked as shown on the CPRs when the Inspection Reports gave a lower figure. As PMK does not concede the CPRs are mistaken in its reporting of those hours, DLSE's acceptance of figures in the CPRs was proper.

⁸ In its reply post-hearing brief, PMK argues it "explained" at the Hearing that the reclassification to the craft of Operating Engineer for several hours of work was improper based on the type of machine used. There is no merit to that argument, however, as review of PMK's exhibits and testimony of Farhadi, PMK's only witness, discloses no factual basis for the argument. Farhadi's conclusory statement fails to carry PMK's burden to prove the Assessment was incorrect.

PMK further asserts that the audit includes eight hours for one worker, Manual G. Roman, whose name does not appear on the CPRs. Yet, a Laborer by that name appears in the Inspection Report as working eight hours on just one day of the Project, along with two other Laborers. As a neutral source of information, the Inspection Report provided DLSE with an acceptable basis to find Roman worked eight hours that one day. That the Project was the first one on which PMK used Laborers in addition to Electricians, the facts that Roman worked the one day and no other day and the Inspection Report used his full name, contribute to the conclusion that Roman did work on the Project and PMK failed to carry its burden to prove the Assessment is incorrect on that score. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

PMK argues that DLSE could not use the Inspection Reports to frame the audit because worker names had been redacted the copies that PMK's copy service first obtained from DLSE's file. However, at the Hearing PMK stipulated to the admission of the unredacted Inspection Reports into the record. By that stipulation, PMK waived any complaint that the exhibit should not be used. Further, PMK identifies no prejudice in the use of those reports at the Hearing. Farhadi admitted that he had received a copy of the unredacted reports from the City as early as March or April 2021. Farhadi testified he was aware of the redactions in the Inspection Reports he received from DLSE's file since May 2021 when he noticed them, but did not notify DLSE of the redactions until July. Brown testified that during her investigation, she obtained the Inspection Reports the City and was unaware of redactions in the Inspection Reports until PMK complained about them. In response to PMK's information, DLSE provided PMK with an unredacted copy of the report on August 11, 2021.

Section 1742, subdivision (b), does require DLSE to provide an opportunity to a contractor to review evidence to be utilized at a hearing. But the statute also provides that "[a]ny evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor." The applicable regulation reiterates that caveat. (Cal. Code Regs., tit. 8, § 17224, subd. (e).) DLSE did promptly disclose the unredacted copies of the Inspection Reports after discovery after

the 20-day cutoff. As such, the unredacted Inspection Reports are properly used by DLSE in making its case at the Hearing.

Although PMK disputed that it had it underpaid the workers and put forth a number of contentions to support its position, it provided no compelling or probative evidence establishing that the workers were properly paid.

For all these reasons, and based on the record as a whole, PMK failed to carry its "burden of proving that the basis for the Civil Wage and Penalty Assessment . . . is incorrect." (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, PMK underpaid prevailing wages in the amount of \$13,627.48 and training fund contributions in the amount of \$141.55.

PMK Failed to Prove the Labor Commissioner Abused Her Discretion in Assessing Penalties Under Section 1775.

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

- (1) 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) . . . unless the failure of the contractor . . . 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 . . .

- (ii) The penalty may not be less than eighty dollars (\$80) . . . if the contractor . . . 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)... if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.⁹

. . .

- (D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for 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).)

DLSE assessed section 1775 penalties at the rate of \$120.00 for 89 instances of underpayment of prevailing wages. Further, DLSE determined that the failure to pay the correct prevailing wage was willful. The burden was on PMK to prove that DLSE abused

⁹ Section 1777.1 defines a willful violation 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."

its discretion in these determinations. However, PMK provided no argument or evidence of abuse of discretion by DLSE in imposing the section 1775 penalties.

Accordingly, the amount of \$10,680.00 DLSE assessed for section 1775 penalties is confirmed.

PMK Failed to Comply with the Apprenticeship Requirements of Section 1777.5.

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.)¹⁰

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, which is inapplicable to the facts of this case). In this regard, section 1777.5, subdivision (g), provides:

The ratio of work performed by apprentices to journey[persons] employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journey[person] work.

The governing regulation as to this 1:5 ratio of apprentice hours to journey[person] hours is section 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.

¹⁰ All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

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

According to that regulation, 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. If the apprenticeship committee from which apprentice dispatch(es) are requested does not dispatch apprentices as requested, the contractor must request apprentice dispatch(es) from another committee providing training in the applicable craft or trade in the geographic area of the site of the public work, and must request apprentice dispatch(es) from each such committee either consecutively or simultaneously, until the contractor has requested apprentice dispatch(es) from each such committee in the geographic area. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email. . . . [I]f in response to a written request no apprenticeship committee dispatches or agrees to dispatch during the period of the public works project any apprentice to a contractor who has agreed to employ and train apprentices in accordance with either the apprenticeship committee's standards or these regulations within 72 hours of such request (excluding Saturdays, Sundays and holidays) the contractor shall not be considered in violation of this section as a result of failure to employ apprentices for the remainder of the project, provided that the contractor made the request in enough time to meet the above-stated ratio. . . .

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

Prior to requesting the dispatch of apprentices, the regulations require contractors to alert apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed. The applicable regulation provides, in relevant part, as follows:

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. The 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 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, for the purpose of determining the accrual of penalties under Labor Code section 1777.7

(§ 230, subd. (a).) Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

“The determination of the Labor Commissioner as to the amount of the penalty imposed under subdivisions (a) and (b) shall be 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 matter, the record demonstrates that PMK violated the apprenticeship requirements. Laborer and Cement Mason are apprenticeable crafts. But PMK employed no Laborer or Cement Masons apprentices on the Project. PMK admits that it did not send the required contract award information or requests for dispatch of apprentices to any Laborer or Cement Mason apprenticeship committee.

PMK seeks to excuse its apprenticeship violations because it is an electrician contractor, it did not know separate DAS 140 forms were required for each craft used on the Project, and under the timeframe the City gave for commencing work, it could not find subcontractors for the added work in constructing handicap ramps. Nothing in

the statute or regulations provides an exception to compliance with apprenticeship regulations based on project timelines or contractor skill. Once PMK bid and undertook the Project, it was duty-bound to comply with all applicable apprenticeship requirements. For these reasons, PMK failed to carry its burden of proving that the basis of the Assessment as to violation of apprenticeship requirements is incorrect.

Accordingly, the record establishes that PMK violated the ratio requirement of section 1777.5, subdivision (g), the notice requirement of section 1777.5, subdivision (e), and the related regulations, sections 230 and 230.1, and PMK is therefore subject to penalties under section 1777.7.

PMK Failed to Prove the Labor Commissioner Abused Her Discretion in Assessing Penalties Under Section 1777.7.

If a contractor "knowingly violate[s] Section 1777.5" a civil penalty is imposed under section 1777.7. Section 1777.7 provides, in relevant part:

(a) (1) If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5, the contractor and any subcontractor responsible for the violation shall forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than 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 within a three-year period, if the noncompliance results in apprentice 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.

(§ 1777.7, subd. (a)(1).) 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 requirement 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, or the contractor had previously employed apprentices on a public works project.

Failure to provide a contract award notice is a continuing violation for the duration of the work, starting no later than the first day in which the contractor has workers employed upon the public work, and ending when a Notice of Completion is filed by the awarding body. (§ 230, subd. (a).) Penalties for that failure, as well as failure to meet the required 1:5 ratio, can be assessed "for each full calendar day of noncompliance . . ." (§ 1777.7, subd. (a)(1).) The determination of the Labor Commissioner as to the penalty is reviewable only for an abuse of discretion. (§ 1777.7, subd. (d).) DLSE calculates the calendar days of noncompliance with the ratio requirement based on the number of journey person calendar days of work on the Project in the craft at issue.

PMK "knowingly violated" the requirement of issuing a DAS 140 form to each apprenticeship committee for the crafts of Laborer and Cement Mason. That PMK issued such a form to an apprenticeship committee for Electrician demonstrates it was aware or on reasonable notice of its obligations under the law yet failed to submit the required contract award information and requests for dispatch to the applicable craft apprenticeship committees. PMK failed to meet its burden of proof by providing evidence of compliance with section 1777.5 and because it knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a penalty rate of \$80.00 per violation for 67 calendar days of noncompliance. PMK neither argued nor showed an abuse of discretion under section 1777.7, subdivision (d), as to either the penalty rate or the number of days of violations found in the Assessment. Accordingly, penalties at the rate of \$80.00 for 67 days in the amount of \$5,360.00 is affirmed.

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. PMK Professional, Inc. underpaid prevailing wages for workers on the Project in the amount of \$13,627.48.
6. The Labor Commissioner's evidence provides prima facie support for penalties under Labor Code section 1775 in the amount of \$120.00 for each of 89 violations, and PMK Professional, Inc. did not carry its burden of proving that the basis for those penalties was an abuse of discretion.
7. In light of Finding numbers 5 and 6, penalties under Labor Code section 1775 are due in the amount of \$10,680.00.
8. PMK Professional, Inc. is liable for unpaid training fund contributions in the amount of \$141.55.
9. PMK Professional, Inc. failed to submit contract award information and failed to submit timely requests for dispatch of apprentices to the applicable apprenticeship committees for the crafts of Laborer, Cement Mason, and Operating Engineer.
10. PMK Professional, Inc. failed to request apprentices in timely fashion from applicable apprenticeship committees for the crafts of Laborer and Cement Mason.

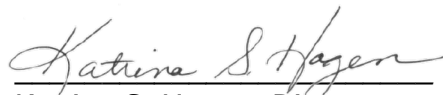
11. The Labor Commissioner did not abuse her discretion in setting penalties under section 1777.7 at the rate of \$80.00 per violation for 67 calendar days, resulting in the total penalty amount of \$5,360.00.
12. The amounts found due in the Assessment in this Decision, are as follows:

Basis of the Assessment	Amount
Wages due:	\$13,627.48
Training fund contributions due:	\$141.55
Penalties under section 1775:	\$10,680.00
Penalties under section 1777.7:	\$5,360.00
TOTAL:	\$29,809.03

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 is affirmed 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: 2-3-2022



Katrina S. Hagen, Director
California Department of Industrial Relations