

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Nemecheck, Inc.

Case No. 14-0387-PWH

From a Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Nemecheck, Inc. (Nemecheck) requested review of a Determination of Civil Penalty (Determination) issued by the Division of Labor Standards Enforcement (DLSE) with respect to work performed by Nemecheck on the project of the City of Gardena (Gardena) known as the Pedestrian Safety Improvements 2013 Various Locations (Project). On April 29, 2014, DLSE served the Determination on Nemecheck. The Determination determined that Nemecheck had violated Labor Code section 1777.5 and assessed an aggregate penalty of \$5,400.00 under Labor Code section 1777.7. Nemecheck timely filed its Request for Review of the Determination on or about June 26, 2014.¹

Pursuant to written notice, a Hearing on the Merits was held on April 27, 2016, in Los Angeles, California, before Hearing Officer Howard Wien. Theresa Bichsel appeared for DLSE. There was no appearance for Nemecheck.

¹ In Case No. 14-0386-PWH Nemecheck requested review of the Civil Wage and Penalty Assessment (Assessment) issued by DLSE on April 29, 2014, addressing the identical work performed by Nemecheck on the Project that is addressed in this Case No. 14-0387-PWH. These two cases were not consolidated. Accordingly, the Director is concurrently issuing a separate Decision in Case No. 14-0386-PWH. The prime contractor on the Project, ARC Construction Company, did not file a Request for Review from the Determination or from the Assessment.

The issues for decision are:

- Was Nemecheck, as a suspended corporation, precluded from asserting a defense in this case?
- Was the Project a public work under Labor Code sections 1720 et seq.?
- Was the Determination timely issued?
- Was the enforcement file timely made available to Nemecheck?
- Did Nemecheck knowingly violate California Code of Regulations, title 8, section 230, subdivision (a)² and Labor Code section 1777.5 by not issuing public works contract award information in a DAS Form 140 or its equivalent to the applicable apprenticeship committee for the apprenticeable crafts of laborer, landscape tender and landscape laborer in the geographic area of the Project site?³
- Did Nemecheck knowingly violate section 230.1, subdivision (a) and Labor Code section 1777.5 by not timely issuing requests for dispatch of apprentices in a DAS Form 142 or its equivalent to the applicable apprenticeship committee for the apprenticeable crafts of laborer, landscape tender and landscape laborer in the geographic area of the Project site?
- Did Nemecheck knowingly violate section 230.1, subdivision (a) and Labor Code section 1777.5 by not employing apprentices on the Project in the ratio of one hour of apprentice work for every five hours of journeyman work in the crafts of laborer, landscape tender and landscape laborer?
- If Nemecheck knowingly committed any of the violations stated above, what penalty shall be assessed against Nemecheck under Labor Code section 1777.7?

² All further section references are to California Code of Regulations, title 8, unless otherwise indicated.

Since Nemecheck failed to appear at the Hearing on the Merits, the Hearing Officer proceeded with the hearing in Nemecheck's absence under California Code of Regulations, title 8, section 232.46, subdivision (a). The Director finds that Nemecheck's status as a suspended corporation did not preclude it from a defense. The Director further finds that Nemecheck failed to carry its burden of providing evidence of compliance with Labor Code section 1777.5 and the implementing regulations. Based on DLSE's un rebutted evidence, the Director finds that the Determination correctly found Nemecheck knowingly violated section 230, subdivision (a), section 230.1, subdivision (a), and Labor Code section 1777.5. The Director further finds that the penalty under Labor Code section 1777.7 shall be \$5,400.00, computed as \$60 per day for the 90-day period from April 22, 2013, to July 19, 2013.

FACTS

Nemecheck's Status as a Suspended Corporation.

On February 3, 2015, DLSE filed and served its "Application For An Order to Show Cause Why A Suspended Corporation Should Not Be Precluded From Asserting A Defense" (Application for OSC). In the Application for OSC, DLSE presented indisputable evidence that the California Franchise Tax Board (FTB) had suspended Nemecheck. In prehearing conferences on March 20, 2015 and June 22, 2015, Nemecheck's representative, President Jim Nemecheck (Mr. Nemecheck), admitted that Nemecheck was a suspended corporation and the suspension had not been lifted. On June 22, 2015, the Hearing Officer of case at that time, John J. Korbol,⁴ issued the Order to Show Cause (OSC), giving Nemecheck to and including July 22, 2015, to respond in writing. Nemecheck did not submit any response to the OSC. In the prehearing conference on August 21, 2015, the Hearing Officer told the parties that he was reserving this issue for further consideration and determination in connection with the Hearing on

⁴ On October 2, 2015, Howard Wien was appointed Hearing Officer in place of John J. Korbol.

Merits; the Hearing Officer subsequently issued a written Order stating this reservation of the issue. On the day of the Hearing on the Merits, Nemecheck remained suspended.

Nemecheck's Failure to Appear.

Nemecheck timely filed its request for review on or about June 26, 2014, signed by Mr. Nemecheck. Mr. Nemecheck participated in five prehearing conferences as Nemecheck's representative on the following dates: December 5, 2014, March 20, 2015, June 22, 2015, August 21, 2015, and January 15, 2016.

At the August 21, 2015, prehearing conference, Mr. Nemecheck participated in selecting September 22, 2015, 10:00 a.m., as the date and time for the Hearing on the Merits. However, Mr. Nemecheck did not appear. At approximately 10:30 a.m., DLSE's attorney David Cross informed the Hearing Officer that Mr. Nemecheck had sent Cross an e-mail message that Mr. Nemecheck's vehicle had a mechanical breakdown on the freeway while attempting to drive to downtown Los Angeles to attend the Hearing on the Merits. In subsequent communications with Cross, Mr. Nemecheck stated that his vehicle was towed to a shop and was out of service, and Mr. Nemecheck requested a continuance based on these circumstances. Cross did not object, and the Hearing Officer ordered a continuance of the Hearing on the Merits to December 9, 2015, at 10:00 a.m.

On December 7, 2015, Mr. Nemecheck, by email, requested a continuance of the December 9, 2015, Hearing on the Merits on the ground he was "in and out of the hospital in the past couple of weeks and ha[d] testing schedule[d] for Wednesday [December 9, 2015]." The Hearing Officer responded by email that day to Mr. Nemecheck and DLSE granting the request for the continuance, and stating that the Hearing Officer's administrative assistant will contact each of them to schedule a telephonic prehearing conference to set the new date for the Hearing on the Merits. Subsequently, with the consent of Mr. Nemecheck and DLSE, the telephonic conference was set for January 15, 2016.

Mr. Nemecheck and DLSE participated in the telephonic prehearing conference on January 15, 2016, including participating in setting the new date for the Hearing on

the Merits on April 27, 2016, commencing at 10:00 a.m. The Hearing Officer stated that there shall be no further continuances absent extraordinary circumstances established by documentary evidence. On that day, minutes of this prehearing conference and the Order on Continuance of Hearing on the Merits were served on the parties. The Order stated the date and time of the Hearing on the Merits and the above admonishment regarding no further continuances.

At the Hearing on the Merits on April 27, 2016, no one appeared for Nemecheck. DLSE was represented by Theresa Bichsel, who had replaced Cross as DLSE's representative.

At the commencement of the Hearing on the Merits, Bichsel stated that at 9:39 a.m. she had received a message from her office stating that Mr. Nemecheck had left a phone message. Mr. Nemecheck's message was that he will not attend the hearing because he no longer owned his business, and today he was called into work on his new job because another worker was injured.

The Hearing Officer immediately phoned Mr. Nemecheck. In this telephone conversation, Mr. Nemecheck stated that he had planned to attend the hearing, but his boss had called him into work due to the injury or illness of another worker. The Hearing Officer then slowly read to Mr. Nemecheck, verbatim, California Code of Regulations, title 8, section 17246, subdivisions (a) and (b). Those provisions addressed, inter alia, the authority of a hearing officer to proceed in a party's absence and recommend a decision warranted by the available evidence, and the absent party's right to seek a rehearing by filing a written motion no later than ten days after the hearing.⁵ Mr. Nemecheck responded that he was not an attorney and he did not understand what the Hearing Officer had read to him. The Hearing Officer then summarized for Mr. Nemecheck, in layman's terms, the provisions the Hearing Officer had read verbatim. Further, the Hearing Officer explained that if Mr. Nemecheck wishes to have an attorney review those regulations

⁵ This regulation regarding Civil Wage and Penalty Assessments was identical to the corresponding regulation for Determinations of Civil Penalty – California Code of Regulations, title 8, section 232.46, subdivisions (a) and (b) – except that the later also allowed the Hearing Officer to enter a default for the party's failure to appear.

with him, he may retain an attorney. Mr. Nemecheck stated that he had hoped to present evidence and testimony today. The Hearing Officer responded that Nemecheck had not exchanged with DLSE nor filed with the Hearing Officer any exhibit list or witness list and had not served any exhibits upon DLSE – all in violation of a prior written Order of the Hearing Officer requiring Nemecheck to do so prior to the Hearing on the Merits. (That Order was issued by then-Hearing Officer John J. Korbol on August 21, 2015.) Mr. Nemecheck asked if the Hearing Officer will send him a notice in writing of the matters stated in this telephone conference. The Hearing Officer stated that he would not do so, and that if Nemecheck did not timely submit a written motion for rehearing within ten days as stated above, the next communication Nemecheck would receive would be the decision on the case issued by the Director of Industrial Relations. This concluded the telephone conference.

The Hearing Officer proceeded to conduct the Hearing on the Merits pursuant to California Code of Regulations, title 8, section 232.46, subdivision (a). DLSE's exhibits were admitted into evidence without objection, and the matter was submitted on the evidentiary record based on the testimony of DLSE's witness, Deputy Labor Commissioner Jeffrey Pich. The matter stood submitted on April 27, 2016. Nemecheck never filed a motion for rehearing.

Determination.

The facts stated below are based on the testimony of Pich and DLSE's Exhibits 1 through 26, including the Determination.

DLSE submitted evidence regarding Nemecheck's ten journeymen who performed work on the Project at various times from April 22, 2013, to July 19, 2013, totaling 1152 hours. The evidence showed that seven workers performed work as laborers, for which the applicable Prevailing Wage Determination was SC-23-102-2-2012-1. The evidence further showed that one worker performed work as landscape tender, and two workers performed work as landscape laborers -- for which the applicable Prevailing Wage Determination was SC-102X-14-2011-1. The above Prevailing Wage

Determinations clearly showed that laborer, landscape tender and landscape laborer were apprenticeable crafts. In the geographic area of the Project, the apprenticeship committee for these crafts was the Laborers Southern California Joint Apprenticeship Committee. Nemecheck did not issue a DAS 140 or DAS 142 to that apprenticeship committee, and Nemecheck did not hire any apprentices for the Project.

DISCUSSION

1. Nemecheck's Status as a Suspended Corporation.

DLSE's application for an OSC to preclude Nemecheck from asserting a defense to the Determination in this case was reserved for the Hearing on the Merits. Notably, during Nemecheck's suspension, it "may not prosecute or defend an action [citation], appeal from an adverse judgment [citation], seek a writ of mandate [citation], or renew a judgment obtained prior to suspension [citation]." (*Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1306 [citing Rev. & Tax. Code § 23301].) Still, permitting Nemecheck to defend and present evidence before the Hearing Officer would satisfy the mandate that a party in a hearing under section 1742 be afforded administrative due process. Nemecheck, as a suspended corporation, could seek to revive the corporation by application to the Franchise Tax Board together with payment of taxes, interest and penalties. (Rev. & Tax. Code, § 23305.) If Nemecheck does not so and thereafter filed a petition for writ of mandate to the superior court without having secured a revivor, that court could then consider any DLSE motion to strike the petition proceedings for lack of capacity and seek entry of a final judgment. Accordingly, this Decision finds that Nemecheck was not precluded from asserting any defense to the Determination in this section 1742 hearing due to its status as a suspended corporation.

2. Project Was a Public Work; Determination Was Timely; DLSE Made Its Enforcement File Available.

In the Hearing on the Merits, DLSE presented evidence establishing that the Project was a public work, the Determination was timely and properly served upon

Nemecheck, and DLSE timely and reasonably made its enforcement file available to Nemecheck for review and copying. Nemecheck presented no evidence otherwise. Accordingly, this Decision finds that the Project was a Public Work, the Determination was timely and properly served on Nemecheck, and DLSE timely and reasonably made its enforcement file available to Nemecheck for review and copying.

3. Nemecheck's Burden of Providing Evidence of Compliance.

Labor Code 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. Section 227 provides that the regulations "shall govern all actions pursuant to . . . Labor Code Sections 1777.5 and 1777.7." In the review of alleged violations of the public works apprentice requirements, ". . . the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (Lab. Code, §1777.7, subd. (c)(2)(B).)

4. Nemecheck Violated the DAS 140 Requirement.

Labor Code section 1777.5, subdivision (e) requires that, prior to commencing work on a public works project, every contractor shall submit contract award information to an apprenticeship program that can supply apprentices to the site of the public work. The implementing regulation section 230, subdivision (a) states 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 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.

Here, DLSE submitted evidence that Nemecheck knowingly failed to submit a DAS 140 to the applicable apprenticeship committee in the geographic area of the Project for the apprenticeable crafts of laborer, landscape tender and landscape laborers. That committee was the Laborers Southern California Joint Apprenticeship Committee. Nemecheck provided no evidence of compliance with the DAS 140 requirement.

5. Nemecheck Violated the DAS 142 and One-to-Five Ratio Requirements.

Labor Code section 1777.5, subdivision (d) establishes that every contractor awarded a public work contract by the state or any political subdivision who employs workers in any apprenticeable craft or trade “. . . shall employ apprentices in at least the ratio set forth in this section” Labor Code section 1777.5, subdivision (g) specifies the ratio as not less than one hour of apprentice work for every five hours of journeyman work. The governing regulation for the one-to-five ratio of apprentice hours to journeyman hours is section 230.1, subdivision (a), which states in part:

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 one hour of work performed by an apprentice for every five hours of labor performed by a journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter.⁶ Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract. Contractors who are not already employing sufficient registered apprentices (as defined by Labor Code Section 3077) to comply with the one-to-five ratio must 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

⁶ Here, the record established no exemption for Nemecheck.

are required. . . . All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email. Except for projects with less than 40 hours of journeyman work, each request for apprentice dispatch shall be for not less than an 8 hour day per each apprentice, or 20% of the estimated apprentice hours to be worked for an employer in a particular craft or trade on a project, whichever is greater, unless an employer can provide written evidence, upon request of the committee dispatching the apprentice or the Division of Apprenticeship Standards, that circumstances beyond the employer's control prevent this from occurring.... (Emphasis added.)

Here, DLSE submitted evidence showing that Nemecheck had journeymen working on the Project at various times from April 22, 2013, through July 21, 2013, for a total of 1152 hours, but Nemecheck knowingly failed to submit a DAS 142 to the Laborers Southern California Joint Apprenticeship Committee, and knowingly failed to hire any apprentices. Nemecheck failed to carry its burden of providing evidence of compliance with the DAS 142 and one-to-five ratio requirements.

6. Nemecheck Is Liable for the Penalty under Labor Code Section 1777.7.

If a contractor knowingly violates Labor Code section 1777.5, a civil penalty is imposed under Labor Code section 1777.7 in an amount not exceeding \$100.00 per day⁷ for noncompliance. (Lab Code, § 1777.7, subd. (a)(1).) Under the former version of Labor Code section 1777.7 that applies to this case, upon a request for review the Director decides the appropriate penalty de novo.⁸

Here, the record establishes the basis for the Determination, and Nemecheck's liability, under Labor Code sections 1777.5 and 1777.7 and the implementing regulations. The evidentiary record establishes that Nemecheck did not hire any apprentices for the Project, nor did it attempt to obtain apprentices by sending a DAS 140 and DAS 142 to the applicable apprenticeship committee. Nemecheck failed to meet its burden of providing evidence of compliance.

⁷ Under certain circumstances inapplicable here, the penalty may exceed \$100.00 per day.

⁸ Labor Code section 1777.7 was amended effective January 1, 2015, stating the Director reviews the penalty for abuse of discretion. The pre-2015 de novo standard of review applies here because the bid date for the project was in 2013.

The Labor Commissioner assessed the penalty at the rate of \$60.00 per day. Although section 230, subdivision (a) permitted the Labor Commissioner to assess this penalty from the first day Nemecheck's journeymen worked on the project, April 22, 2013, to the filing of the Notice of Completion by the awarding body on August 27, 2013, the Labor Commissioner instead shortened the penalty period by using the end date of July 21, 2013 -- the final day Nemecheck's journeymen worked on the Project. On this de novo review, the Director affirms this Determination, and thereby affirms the aggregate penalty of \$5,400.00, computed at the rate of \$60.00 per day for the 90 days from April 22, 2013, to July 21, 2013.

FINDINGS

1. Affected subcontractor Nemecheck, Inc. filed a timely Request for Review from the Determination of Civil Penalty issued by the Division of Labor Standards Enforcement in case number 14-0387-PWH.
2. Nemecheck, Inc. knowingly violated Labor Code section 1777.5 and California Code of Regulations, title 8, section 230, subdivision (a) by not issuing public works contract award information in a DAS Form 140 or its equivalent to the applicable apprenticeship committee in the geographic area of the Project site for the apprenticeable crafts of landscape tender, landscape laborer, and laborer.
3. Nemecheck, Inc. knowingly violated Labor Code section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a) by: (1) not issuing a request for dispatch of apprentices in a DAS Form 142 or its equivalent to the applicable apprenticeship committee for the crafts of landscape tender, landscape laborer, and laborer in the geographic area of the Project site; and (2) not employing on the Project apprentices in those crafts in the ratio of one hour of apprentice work for every five hours of journeyman work.

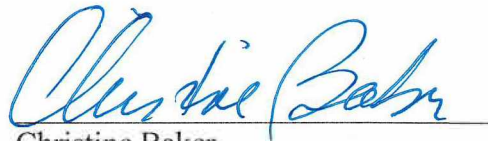
4. Nemecheck, Inc. is liable for an aggregate penalty under Labor Code section 1777.7 in the sum of \$5,400.00, computed at \$60.00 per day for the 90 days from April 22, 2013, to July 21, 2013.

ORDER

The Determination of Civil Penalty 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:

6/16/2017



Christine Baker

Director of Industrial Relations