STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Baron Services, Inc.

Case No. 15-0455-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Baron Services, Inc. (Baron) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on September 22, 2015, with respect to the work of improvement known as Port of Long Beach Pier E (Project) performed for the Port of Long Beach (Port) in the County of Los Angeles. The Assessment determined that the following amounts were due: $19,735.02 in unpaid prevailing wages, $280.32 in unpaid training fund contributions, $11,200.00 in Labor Code section 1775[1] statutory penalties, $20,300.00 in section 1776 statutory penalties, and $15,300 in section 1777.7 statutory penalties. Baron timely filed its Request for Review of the Assessment on November 27, 2015.[2]

Pursuant to written notice, a Hearing on the Merits was held on July 29, 2016, in Los Angeles, California, before Hearing Officer Howard Wien. Max D. Norris and Sotivear Sim appeared for DLSE. There was no appearance for Baron.

[1] All further statutory references are to the California Labor Code, unless otherwise indicated.

[2] The prime contractor on the Project, W. E. O'Neil Construction Co. of California (O'Neil), filed a timely request for review from the Assessment, and the review was designated Case No. 15-0412-PWH. On December 1, 2015, O'Neil withdrew its request for review pursuant to the written settlement agreement on that day between O'Neil and DLSE. Pursuant to the settlement agreement, O'Neil paid DLSE the sum of $20,399.20, and DLSE released O'Neil of liability for all assessments stated in the Assessment.

The issues for decision are:

- Was the Project a public work requiring payment of prevailing wages and compliance with apprentice requirements under the California Prevailing Wage Law, sections 1720 et seq.?
- Was the Assessment timely issued?
- Was the enforcement file timely made available to Baron?
- Did Baron fail to timely submit certified payroll records (CPRs) after receipt of a written request from DLSE and thereby become liable for penalties under section 1776?
- Did the Assessment correctly find that Baron failed to pay the required prevailing wages for all time worked on the Project by its workers?
- Did the Assessment correctly find that Baron failed to contribute to the training fund for its workers on the Project?
- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1775 at the rate of $200.00 per violation for 56 violations, totaling $11,200.00?
- Is Baron liable for liquidated damages under section 1742.1, subdivision (a)?
- Did Baron knowingly violate section 1777.5 and California Code of Regulations, title 8, section 230, subdivision (a) by not issuing public works contract award information in a Division of Apprenticeship Standards (DAS) Form 140 or its equivalent to the applicable apprenticeship committee(s) in the geographic area of the Project site?[3]
- Did Baron knowingly violate section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a) by not timely issuing requests for dispatch of apprentices in a DAS Form 142 or its equivalent to the applicable apprenticeship committee(s) in the geographic area of the Project site?

- Did Baron knowingly violate section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a) 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 craft of laborer?
- Is Baron liable for section 1777.7 statutory penalties, and if so, in what amount?

Since Baron failed to appear at the Hearing on the Merits, the Hearing Officer proceeded with the hearing in Baron's absence under California Code of Regulations, title 8, section 232.46, subdivision (a), and section 17246, subdivision (a).

As to the failure to pay prevailing wages and failure to make training fund contributions and the section 1775 statutory penalty, the Director finds that Baron failed to carry its burden proving that the bases of the Assessment was incorrect, its burden of proving grounds for waiver of liquidated damages, and its burden of proving that the Labor Commissioner abused her discretion in assessing the penalty under section 1775. Based on DLSE's unrebutted evidence, the Director affirms the Assessment on those issues.

As to the section 1776 statutory penalty for failure to produce CPRs requested by DLSE, the Director finds that Baron failed to carry its burden of proving that the basis of the Assessment was incorrect. Based on DLSE's unrebutted evidence, the Director affirms the Assessment on that issue.

As to the violation of apprentice requirements, the Director finds that Baron failed to carry its burden of proving that the basis of the Assessment was incorrect. Based on DLSE's unrebutted evidence, the Director finds that the Assessment correctly found Baron knowingly violated section 1777.5 and the implementing regulations. Under de novo review, however, the Director further finds that the penalty under section 1777.7 shall be $5,100,00 (computed as $100.00 per day for 51 days), rather than the assessed penalty of $15,300.00 (computed as $300.00 per day for 51 days). Accordingly, the Director modifies and affirms the Assessment on that issue.

FACTS

Baron's Failure to Appear.

Baron's request for review was signed by its President Jeff Baron (Mr. Baron), who represented Baron throughout this case. The request for review stated Baron's address as: 8780 19th St. #248, Alta Loma, CA 91701. This was Baron's address of record in this case, and office of the Hearing Officer mailed all notices, minutes, and orders to this address of record. On May 12, 2016, the office of the Hearing Officer served upon Baron (and DLSE) the Order setting the Hearing on the Merits on July 29, 2016, commencing at 10:00 a.m.

The Hearing on the Merits commenced on Friday, July 29, 2016, at 10:00 a.m. as noticed. Max D. Norris and Sotivear Sim represented DLSE. No one appeared for Baron. From May 12, 2016, when the order setting this Hearing on the Merits was served on Baron, through this commencement of the Hearing on Merits on July 29, 2016, Baron never notified the Hearing Officer (or the office of the Hearing Officer) that Baron would not be appearing for the Hearing on the Merits.

As of 10:30 a.m. no one had appeared on behalf of Baron, so the Hearing Officer phoned Mr. Baron. Mr. Baron answered the call, and the Hearing Officer spoke with him using a speakerphone, so that Norris and Sim could hear what Mr. Baron was saying.

Mr. Baron stated that he could not attend the Hearing on the Merits because he was undergoing a specified treatment this day. The Hearing Officer stated that this Hearing on the Merits was set on a Friday because Mr. Baron or his wife Denise Baron had previously informed the Hearing Officer that Mr. Baron did not undergo the medical treatments on Fridays. Mr. Baron repeated that he was now in his medical treatment. The Hearing Officer stated that at no time had Mr. Baron notified the Hearing Officer, or the office of the Hearing Officer, that Mr. Baron would be unable to attend this Hearing on the Merits; Mr. Baron did not dispute this statement. The Hearing Officer further stated that at no time had Mr. Baron ever submitted a doctor's note or any other written evidence that he was unable to attend this Hearing on the Merits due to the specified medical treatment or any other medical treatment or condition; Mr. Baron did not dispute

this statement. The Hearing Officer further stated that at no time had Mr. Baron requested a continuance of this Hearing on the Merits; Mr. Baron did not dispute this statement.

The Hearing Officer then told Mr. Baron the provisions of California Code of Regulations, title 8, section 17246, subdivisions (a) and (b)[4] -- by reading many of these provisions verbatim and by paraphrasing the remaining provisions in layman's terms. The Hearing Officer stated that he will proceed with the Hearing on the Merits in Mr. Baron's absence. The Hearing Officer reiterated to Mr. Baron the provision of the above regulation that if Baron wished to seek relief from today's non-appearance, Baron must file a written motion for rehearing within ten days. The Hearing Officer stated that Baron may retain counsel at its own expense to advise it regarding these matters, but such retention would not extend the ten-day deadline. The Hearing Officer gave Mr. Baron the email addresses of the Hearing Officer and his assistant Simone Olsen, and the phone number of Olsen, in case Mr. Baron wished to communicate further regarding a motion for rehearing. This concluded the telephone conversation with Mr. Baron.

The Hearing Officer proceeded to conduct the Hearing on the Merits pursuant to California Code of Regulations, title 8, section 17246, subdivision (a) and section 232.46, subdivision (a). DLSE's exhibits nos. 1 through 7 and 9 through 40 were admitted into evidence without objection (with the exception of exhibit no. 8, which DLSE withdrew). Testimony was taken from DLSE's witness Deputy Labor Commissioner Jeffrey Pich. The hearing was then adjourned and the case stood submitted. Baron never filed a motion for rehearing and never communicated further with the Hearing Officer or the office of the Hearing Officer.

Assessment.

The facts stated below are based on the testimony of Pich, DLSE's Exhibits 1 through 7 and 9 through 40, and other documents in the Hearing Officer's file.

[4] This regulation for the prevailing wage and certified payroll records issues was identical to the corresponding regulation for the apprentice issues – California Code of Regulations, title 8, section 232.46, subdivisions (a) and (b) – except that the latter also allowed the Hearing Officer to enter a default for the party's failure to appear. The Hearing Officer did not intend to enter a default against Baron and so he did not discuss the default provision with Mr. Baron.

DLSE's uncontroverted evidence established that Port advertised the Project for bid on June 13, 2013, and subsequently awarded the contract to prime contractor O'Neil. On or about December 17, 2014, O'Neil subcontracted with Baron to have laborers perform clean-up work on the construction of a marine operations building and maintenance shop. Baron's subcontract with O'Neil notified Baron that this was a public works project requiring payment of prevailing wages, preparation and maintenance of certified payroll records (CPRs), and compliance with apprentice requirements.

Baron had seven laborers working on the Project at various times beginning February 23, 2015, through April 15, 2015. Their scope of work fell within the classification of Laborers Group 1 in the applicable Prevailing Wage Determination, SC-23-102-2-2012-1.

DLSE's Requests for CPRs.

DLSE's uncontroverted evidence established that DLSE issued three requests for CPRs to Baron, but Baron never provided valid CPRs to DLSE.

DLSE's first request for CPRs (First Request) was on July 21, 2015. On that day, DLSE issued its request by U.S. Postal Service first class mail and certified mail (with return receipt requested) to Baron at Baron's address stated on its business record on file with the California Secretary of State, and on its California State contractor's license in effect at that time: 8780 19th Street #248, Alta Loma, CA 91701. (This was the same address as Baron's address of record in this case, as stated above.) The return receipt was signed and dated July 24, 2015, thereby showing Baron's receipt of DLSE's request on that date.

By August 7, 2015, DLSE had not received any CPRs from Baron. So DLSE issued its second request (Second Request). On that day, DLSE served the Second Request by U.S. Postal Service first class mail and certified mail (with return receipt requested), to Baron's address stated above. The return receipt was signed and dated August 10, 2015, thereby showing Baron's receipt on that date; this receipt date was also confirmed by the U.S. Postal Service tracking information.

On August 11, 2015, Baron sent to DLSE six alleged CPRs for two workers, for the three weeks ending March 28, 2015. DLSE's investigation revealed that these alleged CPRs were complete fabrications. DLSE's investigation included: (1) interviewing one of Baron's workers on the project – Nicholas Baron – who credibly stated that the two workers named on the alleged CPRs had never worked on the Project; (2) comparing the dates of work stated on the alleged CPRs with the dates of work shown on the Port inspector's Inspector Daily Reports[5], showing that the dates of work on the CPRs were false; and (3) viewing check stubs for Baron's payments to the two workers on the CPRs, showing that the checks were dated August 11, 2015, whereas the CPRs falsely stated these payments were timely made to the workers for the week ending March 14, 2015.

Consequently, DLSE issued its third request for CPRs (Third Request) on August 17, 2014. On that day, DLSE served the Third Request by U.S. Postal Service first class mail and certified mail (with return receipt requested), to Baron's address stated above. The Third Request specifically asked for "all time cards, cancelled checks, and any other evidence that reflects job assignments/job classification for all work" performed on the Project by worker Nicholas Baron. The return receipt was signed on behalf of Baron but undated; however, the U.S. Postal Service tracking information showed that the Third Request was delivered to Baron on August 19, 2015. Baron failed to provide any records in response to the Third Request.

The First Request, Second Request and Third Request each stated that Baron's failure to provide the CPRs and other payroll records requested within ten working days of receipt would subject Baron to a penalty of $100.00 per calendar day or portion thereof for each worker until the records are received, citing section 1776, subdivision (h).

As a result of its investigation stated above – including the statement obtained from work Nicholas Baron and the Port's Inspector Daily Reports -- DLSE determined that Baron had six laborers on the Project in addition to laborer Nicholas Baron. DLSE

[5] The Inspector Daily Reports did not state names of workers, but did state the dates of work, hours worked each day, the number of workers each day, and the category of each worker, i.e., supervisor, foreman, journeyman and apprentice.

designated each of the six laborers as "John Doe." Baron failed to produce any valid CPRs to DLSE for any of Baron's total seven laborers on the Project.

Prevailing Wages and Training Funds.

Under the applicable prevailing wage determination, the required prevailing wage was $45.29 per hour for Baron's seven laborers on the Project. DLSE's uncontroverted evidence established that Baron paid one worker, Nicholas Baron, $12.00 per hour. Baron failed to produce any evidence of any payments to the other six laborers, whose work days and hours were disclosed on the Inspector Daily Reports obtained by DLSE. Accordingly, the unpaid prevailing wages totaled $19,735.02.

DLSE's uncontroverted evidence further established that Baron failed to pay any of the training fund contributions for the seven laborers required by the applicable Prevailing Wage Determination. These unpaid training fund contributions totaled $280.32.

Apprentice Requirements.

The applicable prevailing wage determination for the seven laborers stated that Laborer Group 1 was an apprenticeable craft. In the geographic area of the Project, the apprenticeship committee for this craft was the Laborers Southern California Joint Apprenticeship Committee. DLSE's uncontroverted evidence established that Baron did not issue a DAS 140 or DAS 142 to this apprenticeship committee (nor any other apprenticeship committee), and Baron did not hire any apprentices for the Project.

DISCUSSION

1. Project Was a Public Work; Assessment 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 requiring payment of prevailing wages and training fund contributions. DLSE's evidence further established that the Assessment was timely and

properly served upon Baron, and DLSE timely and reasonably made its enforcement file available to Baron for review and copying. Baron presented no contrary evidence. Accordingly, this Decision finds that the Project was a public work, the Assessment was timely and properly served on Baron, and DLSE timely and reasonably made its enforcement file available to Baron for review and copying.

2. Baron Underpaid Prevailing Wages.

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

> 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 [internal citations omitted]). 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).)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers paid less than the prevailing rate and prescribes penalties for failing to pay the prevailing rate.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal that assessment by filing a request for review under section 1742. Under section 1742, subdivision (b), and California Code of Regulations, title 8, section 17224, the contractor shall be provided with an opportunity to

review evidence that DLSE intends to utilize at the hearing. DLSE has the burden of providing evidence that "provides prima facie support for the Assessment …." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that initial 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).)

Here, under the applicable prevailing wage determination, Baron was obligated to pay each of its seven laborers $48.29 per hour. Baron paid worker Nicholas Baron $12.00 per hour, and failed to present any evidence of any payment to the other six workers. DLSE calculated the underpayment of wages applying the $48.29 per hour rate, after calculating the credit for the wages already paid to Nicholas Baron. Baron presented no evidence to disprove the basis for, or the accuracy of, the Assessment, including the limited credit the Assessment gave for paid wages. Accordingly, Baron is liable for payment of prevailing wages in the aggregate sum of $19,735.02.

3. Baron Is Liable for Liquidated Damages.

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 sixty days following service of a civil wage and penalty assessment under section 1741. It provides in pertinent 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. Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment . . . , the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Further as to liquidated damages, section 1742.1, subdivision (b) provides:

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

Here, there was no evidence that Baron paid any of the back wages to any of its workers within sixty days following service of the Assessment. There was no evidence that Baron deposited the amount of the Assessment, or any part thereof, with the Department of Industrial Relations within sixty days following service of the Assessment (or at any other time). There was no evidence that Baron had any substantial ground for appealing any portion of the Assessment. Accordingly, Baron is liable for liquidated damages in an amount equal to the unpaid wages, $19,735.02.

4. Baron Failed to Make Training Fund Contributions.

Section 1777.5, subdivision (m)(l) requires contractors on public works projects who employ journeyman 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, as follows:

> A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

Here, Baron was obligated by the applicable prevailing wage determination to make training fund contributions for the seven laborers in the aggregate sum of $280.32, but Baron made no contribution. Baron presented no evidence to disprove the basis for, or the accuracy of, the Assessment. Accordingly, Baron is liable for payment of training funds in the aggregate sum of $280.32.

5. Baron Is Liable for Penalties under Section 1775.

As to the penalty for underpayment of prevailing wages and nonpayment of training fund contributions, "[t]he determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion." (§ 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 own judgment if in 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.) The 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).)

Here, the Assessment set the penalty rate at the maximum allowed by section 1775, subdivision (a)(1) -- $200.00 per violation. In exercising her discretion to set the penalty rate, the Labor Commissioner is to consider whether the contractor's or subcontractor's failure to pay the prevailing wages was a good faith mistake (and if so, whether the contractor or subcontractor promptly and voluntarily corrected the error when brought to its attention), and whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations. (§ 1775, subd. (a)(2)(A).) DLSE's uncontroverted evidence showed that Baron's failure to pay prevailing wages and training funds was not a good faith mistake, Baron failed to correct this failure when brought to Baron's attention, and Baron had a prior record of failing to meet its prevailing wage obligations.[6]

At to assessing the number of violations, the penalty is imposed for "each calendar day, or portion thereof, for each worker paid less than the prevailing wage

[6] The prior record was evidenced by the Decision issued on November 21, 2014, in Case No. 14-0188-PWH, finding that Baron failed to pay prevailing wages in the sum of $10,293.20 and failed to make training fund contributions in the sum of $148.48 for work performed May 2 through May 10, 2013.

rates…." (§ 1775, subdivision (a)(1).) Here, DLSE presented prima facie evidence that Baron committed 56 total violations; Baron presented no evidence otherwise. Accordingly, Baron is liable for the section 1775 statutory penalty in the sum of $11,200.00, computed as $200.00 per violation for 56 violations.

6. Baron Violated Section 1776.

Employers on public works are required to keep accurate payroll records that record, among other things, the work classification, straight time and overtime hours worked, and actual per diem wages paid for each worker. (§ 1776, subd. (a).) Section 1776, subdivision (b)(2) requires the contractor or subcontractor to furnish CPRs upon request to DLSE and the awarding body. Under section 1776, subdivision (h), if the contractor or subcontractor fails to furnish CPRs to the requesting party within ten days after receipt of the request, the contractor or subcontractor forfeits one hundred dollars ($100.00) for each calendar day for each worker "until strict compliance is effectuated." The pertinent provisions of section 1776 state:

> (a) Each contractor and subcontractor shall keep accurate payroll records, showing 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 journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:
>
>> (1) The information contained in the payroll record is true and correct.
>>
>> (2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.
>
> (b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract and the Division of Labor Standards Enforcement of the Department of Industrial Relations.

* * *

(h) The contractor or subcontractor has 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars ($100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated.

Here, as stated above, DLSE served Baron with three requests for CPRs, but Baron failed to provide DLSE any valid CPRs for any of its seven laborers on the Project. The Labor Commissioner determined that the $100.00 per day penalty per worker under section 1776 applied for 29 days, beginning August 24, 2015 (Baron's 15-day deadline to respond to DLSE's Second Request) through September 21, 2015 (the date DLSE's deputy labor commissioner submitted DLSE's written penalty review to the Senior Deputy Labor Commissioner). Since Baron failed to submit any CPR's for the seven workers for this 29-day period, Baron is liable for the section 1776 statutory penalty in the sum of $20,300.00.

7. Baron Violated Apprenticeship Requirements.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. California Code of Regulations, title 8, section 227 provides that the regulations "shall govern all actions pursuant to . . . Labor Code Sections 1777.5 and 1777.7." In the

review of a determination as to the apprentice requirements, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (See § 1777.7, subd. (c)(2)(B), as it existed from June 27, 2012, to December 31, 2014 [stats. 2012, ch. 46, § 96], and Cal. Code Regs., tit. 8, § 232.50(b).)

8. Baron 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, California Code of Regulations, title 8, 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 presented prima facie evidence that Baron failed to submit a DAS 140 to the applicable apprenticeship committee in the geographic area of the Project for the apprenticeable craft of laborer -- the Laborers Southern California Joint Apprenticeship Committee. Baron provided no evidence to the contrary.

9. Baron Violated the DAS 142 and One-to-Five Ratio Requirements.

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 . . . ." 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 California Code of Regulations, title 8, 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.[7] 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 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.)

DLSE submitted prima facie evidence showing that Baron had journeymen

[7] Here, the record established no exemption for Baron.

laborers working on the Project at various times from February 23, 2015, through April 15, 2015, totaling 438 hours, but Baron failed to submit a DAS 142 to the Laborers Southern California Joint Apprenticeship Committee and failed to hire any apprentices. Baron failed to prove the basis for the Assessment was incorrect.

10. Baron Is Liable for a Modified Penalty 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 day of noncompliance. (§ 1777.7, subd. (a)(1).) However, the penalty may be increased up to $300.00 for each full day of noncompliance under the following limited facts:

> A contractor or subcontractor that knowingly commits a second or subsequent violation within a three-year period, if the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance."

(§ 1777.7, subd. (a)(1).)

As used in the above provisions, a "knowing" violation 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 contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects, . . .

Under the former version of section 1777.7 that applies to this case, upon a request for review the Director decides the appropriate penalty de novo. In setting the penalty the Director considers all of the following circumstances:

> (A) Whether the violation was intentional.
> (B) Whether the party has committed other violations of Section 1777.5.
> (C) Whether, upon notice of the violation, the party took steps to

voluntarily remedy the violation.
(D) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.
(E) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

(§ 1777.7, subd. (f)(1) and (2).)

Here, the evidentiary record establishes the basis for the Assessment and Baron's liability under sections 1777.5 and 1777.7 and the implementing regulations. Baron 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. Baron's violations were "knowing" violations under the irrebuttable presumption quoted above: Baron's subcontract with prime contractor O'Neil notified Baron of Baron's obligation to comply with the Labor Code provisions applicable to public works projects. Baron failed to prove the basis of the Assessment was incorrect.

Applying the de novo standard in effect for this case, factors "A", "D" and "E" strongly favor a penalty rate of $100.00. As to factor "A", DLSE's evidence supports finding that Baron's violation of the apprentice requirements was intentional. The applicable prevailing wage determination stated that Laborers Group I was an apprenticeable craft, and the Department of Industrial Relations website clearly showed that the apprenticeship committee for this craft in the geographic area of the Project was the Laborers Southern California Joint Apprenticeship Committee. Baron's subcontract expressly notified Baron of its obligation to comply with the apprenticeship requirements. For example, subcontract article XVIII, paragraph 1.B.32 stated, "Subcontractor shall file DSA [*sic*] 140 form to the applicable apprenticeship committee within 10 days from the date of this agreement and shall provide a copy to General Contractor prior to their first invoice." Subcontract exhibit "I" stated, "DAS 140 Public Works Award Information with Proof of Sent Transmittal (i.e., Fax confirmation) ***Must be submitted to*** at least TWO ***Apprenticeship Programs*** (approved programs can be found on www.dir.ca.gov)" (emphases in original). Further, subcontract exhibit "J" enclosed a copy of section 1777.5 (and other prevailing wage sections of the Labor Code), and stated that the Baron

agrees to comply with all of those Labor Code provisions applicable to the performance of its work on the Project, including its obligation to "[c]omply with the applicable requirements and joint apprenticeship standards as required by Labor Code 1777.5." There was no evidence whatsoever that Baron's failure to comply with these apprentice requirements – all of which Baron had such clear, unambiguous notice -- was unintentional.

As to the de novo review factors "D" and "E", DLSE's evidence established that Baron's journeymen worked 438 hours on the Project. Applying the five-to-one ratio, Baron's violations of the apprentice requirements deprived laborer apprentices 88 hours of paid on-the-job training, and deprived the Laborers Southern California Joint Apprenticeship Committee the opportunity to provide that on-the-job training to the apprentices in its program.

Factor "C" is neutral in this case. DLSE's evidence shows that DLSE did not notify Baron of its violations until three months or more after Baron's work on the Project ceased. So there was no opportunity for Baron to voluntarily remedy the violation after receiving notice.

The sole factor that arguably fails to support a $100.00 penalty rate is "B": other violations. DLSE presented little, if any, evidence that Baron had committed other violations of section 1777.5. DLSE's evidence consisted solely of a penalty review report written by Pich's predecessor on this case, deputy labor commissioner Morgan Levanger. In her penalty review, Levanger commented upon her viewing of a DLSE database purportedly containing information on three cases in which Baron had requested review of DLSE assessments for alleged violations of section 1777.5. In the Hearing on the Merits, DLSE did not submit as evidence the portion of the database viewed by Levanger, DLSE did not submit the three assessments as evidence, and DLSE did not have Levanger testify as a witness. Given the above, the penalty review was unreliable double-hearsay on the issue of whether Baron had committed other violations. Further, on two of those three assessments, Levanger's penalty review was entirely silent on what happened after Baron sought review. As to the third assessment, the penalty review

contained a mysterious, equivocal statement, "It appears the case was settled for $540.00." The penalty review did not say what gave this "appearance" nor did it state any terms of the apparent settlement.

Thus, DLSE failed to present sufficient evidence to establish that Baron had committed other violations under section 1777.5, and de novo factor "B" does not weigh in favor of a $100.00 penalty rate. However, factors "A", "D" and "E" so greatly favor a $100.00 penalty rate, this Decision finds that a weighing of the five factors supports the penalty rate at $100.00 per violation.

We note that the Labor Commissioner set the rate at $300.00 per violation. Any rate above $100.00 requires a finding that the contractor or subcontractor knowingly committed a second or subsequent violation of section 1777.5 within a three-year period, and that such violation resulted in a denial of apprenticeship training. However, as stated above, DLSE failed to present sufficient evidence to establish that Baron committed any violation of section 1777.5 other than the violation at issue in this case. Accordingly, this Decision sets the penalty rate at $100.00 per violation.

As to the number of days the penalty is imposed, California Code of Regulations, title 8, section 230, subdivision (a) permitted the Labor Commissioner to assess the penalty from the first day Baron's journeymen worked on the project, February 23, 2015, to the filing of the Notice of Completion on December 8, 2015. However, the Labor Commissioner shortened the penalty period by using the end date of April 15, 2015 -- the final day Baron's journeymen worked on the Project. Accordingly, the Labor Commissioner's $15,300.00 penalty assessment is modified as follows: Baron is liable for the section 1777.7 statutory penalty in the sum of $5,100.00, computed at the rate of $100.00 per day for the 51 days from February 23, 2015 to April 15, 2015.

FINDINGS

1. Affected subcontractor Baron Services, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Baron Services, Inc. underpaid the prevailing wages owed to seven of its workers on the Project in the aggregate amount of $19,735.02. Accordingly, prevailing wages in the sum of $19,735.02 are due.

3 Baron Services, Inc. did not prove any basis for waiver of liquidated damages. Accordingly, under section 1742.1, subdivision (a), liquidated damages in the sum of $19,735.02 are due.

4. Baron Services, Inc. did not make required training fund contributions in the aggregate amount of $280.32 for seven workers on the Project. Accordingly, training fund contributions in the sum of $280.32 are due.

5. The Labor Commissioner did not abuse her discretion in assessing penalties under section 1775, subdivision (a), at the rate of $200.00 per violation for 56 violations. Accordingly, statutory penalties in the sum of $11,200.00 are due.

6. Baron Services, Inc. failed to timely submit valid certified payroll records (CPRs) to DLSE at any time after its receipt of DLSE's second request for CPRs. Baron Services, Inc. is liable for penalties under section 1776, subdivision (h) at the rate of $100.00 per worker, for seven workers, for a period of 29 days. Accordingly, statutory penalties in the sum of $20,300.00 are due.

7. Baron Services, Inc. knowingly violated 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 craft of laborer.

8. Baron Services, Inc. knowingly violated 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 craft of laborer in the geographic area of the Project site; and (2) not employing on the Project apprentices in the craft of laborer in the ratio of one hour of apprentice work for every five hours of journeyman work.

9. Baron Services, Inc. is liable for an aggregate penalty under section 1777.7 in the sum of $5,100.00, computed at $100.00 per day for the 51 days from February 23, 2015 to April 15, 2015.

10. The amounts found due in the Assessment, as affirmed and modified by this Decision, are as follows:

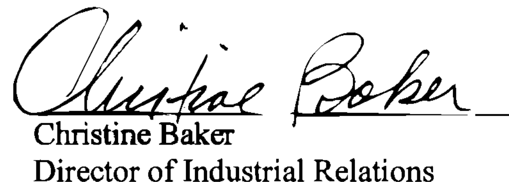
Wages:	$	19,735.02
Liquidated damages under section 1742.1:	$	19,735.02
Training Fund Contributions:	$	280.32
Penalties under section 1775, subdivision (a):	$	11,200.00
Penalties under section 1776	$	20,300.00
Penalties under section 1777.7	$	5,100.00
TOTAL:	**$**	**76,350.36**

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

ORDER

The Civil Wage and Penalty Assessment is modified and 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: 7/5/2017



Christine Baker
Director of Industrial Relations