

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Tobo Construction, Inc., a California
Corporation**

Case No. 19-0226-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor Tobo Construction, Inc. (Tobo) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued on March 26, 2019, by the Division of Labor Standards Enforcement (DLSE) with respect to work performed by Tobo on the Horizon View Mental Health Rehabilitation Center (Project), for the County of Ventura (County). The Assessment determined the following amounts were due: \$94,240.38 in unpaid prevailing wages, \$88,600.00 in penalties under Labor Code section 1775,¹ \$1,025.00 in penalties under section 1813, \$30,600.00 in penalties under section 1777.7 and \$171,000.00 in penalties under section 1776.

On December 3, 2020, a duly noticed Hearing on the Merits was held in Los Angeles, California, before Hearing Officer Steven A. McGinty. Lance Grucela appeared as counsel for DLSE. There was no appearance by Tobo. Pursuant to California Code of Regulations, title 8, section 17246, subdivision (a), the Hearing on the Merits proceeded in spite of Tobo's absence. DLSE's Industrial Relations Representative, Derrick Nguyen, testified in support of the Assessment. DLSE's documentary exhibits were admitted into evidence without objection. Tobo has not filed a motion seeking relief from its non-appearance, as permitted under California Code of Regulations, title 8, section 17246, subdivision (b).

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

The issues for decision are:

- Whether Tobo timely paid its employees the correct prevailing wage rates for all hours worked on the Project.
- Whether Tobo accurately reported all workers and hours worked on its Certified Payroll Records (CPRs) for the Project.
- Whether Tobo properly classified workers for all work performed on the Project.
- Whether Tobo properly paid the required overtime premium rates to employees.
- Whether Tobo is liable for penalties assessed pursuant to sections 1775 and 1813.
- Whether Tobo is liable for liquated damages on wages found due and owing.
- Whether Tobo is liable for penalties assessed pursuant section 1776.
- Whether Tobo submitted contract award information to all applicable apprenticeship committees in a timely and factually sufficient manner.
- Whether Tobo employed apprentices in the required minimum ratio of apprentices to journeypersons on the Project.
- Whether Tobo is liable for penalties assessed pursuant to section 1777.7.

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

FACTS

Failure to Appear.

On April 6, 2019, Misa Tang (Tang) appeared telephonically for a Prehearing Conference. Tobo had not filed an "Authorization for Representation by Non-Attorney" (Authorization) permitting Tang to appear on its behalf. Tobo was ordered to complete and submit an Authorization by April 27, 2020. DLSE and Tang agreed to continue the Prehearing Conference to May 4, 2020. Tobo was notified of new Prehearing Conference date in the Minutes of Prehearing Conference, which were mailed by first class mail to Tobo at 2500 Pacific Coast Highway, Torrance, California 90505 (hereinafter, Torrance address).²

On May 4, 2020, Tobo failed to appear for the Prehearing Conference. Tobo also failed to file an Authorization as ordered. In the Minutes of Prehearing Conference for the May 4, 2020 Prehearing Conference, Tobo was advised that a Hearing on the Merits could proceed in its absence and the matter might be set for a Hearing on the Merits at the next Prehearing Conference, which the Hearing Officer scheduled for June 10, 2020. The Minutes of the May 4, 2020 Prehearing Conference were mailed to the Torrance address.

Tang appeared for the June 10, 2020 Prehearing Conference, but Tobo still failed to comply with the April 6, 2020 Order to file an Authorization. The matter was continued to August 10, 2020, to provide Tobo another opportunity to comply with the Hearing Officer's April 6, 2020 Order. The June 10, 2020 Minutes of Prehearing Conference were mailed to the Torrance address.

² The Assessment was mailed by first class mail to the Torrance address. Thereafter, Tobo filed a Request for Review. DLSE presented evidence that the Torrance address is registered with the Secretary of State as the service address for service of process. Additionally, on July 26, 2019, Tobo's first counsel withdrew its representation and stated all future correspondence should be directed to the Torrance address. On October 17, 2019, Tobo's second attorney of record also withdrew its representation and provided the Torrance address as the address for service on Tobo. After Tobo's attorneys withdrew their representation, notices were mailed to the Torrance address and emailed to Jimi Wan Chae, who appears as an officer for Tobo in business filings with the Secretary of State.

On August 10, 2020, Tobo again failed to appear and again no Authorization had been filed. The matter was set for a December 3, 2020 Hearing on the Merits.³

On December 3, 2020, Tobo did not appear for the Hearing on Merits. The matter proceeded as scheduled.

The Public Works Contract.

On June 11, 2015, the County published its notice of invitation for bids for the Project. The invitation for bids states the successful contractor must post copies of the "prevailing wage schedule" at each job site. The invitation for bids also directs contractors to the Department of Industrial Relations' website for prevailing wage rates. According to the bid notice, the estimated cost of construction was \$6,800,000.00.

On August 11, 2015, Tobo and the County executed the prime contract (Contract). Work under the Contract was construction of a 15,000 square foot single story building and associated site improvements on a one acre vacant lot. The Contract includes Prevailing Wage Determinations and copies of sections 1725.5 to section 1815. From September 2015 to February 2017, workers on the Project performed framing, drywall work, painting, electrical and masonry work. On April 11, 2017, the County filed a Notice of Completion with the Ventura County Clerk and Recorder.

The Applicable Prevailing Wage Determinations.

The six classifications at issue are Operating Engineer, Laborer, Laborer Apprentice, Drywall Installer, Drywall Finisher, and Carpenter.

- Operating Engineer

The applicable prevailing wage determination (PWD) for the Operating Engineer classification in Ventura County in 2015 is SC-23-63-2-2014-2 (Operating Engineer PWD). The total hourly rate of pay for Operating Engineer Group 12 is \$66.07, which includes \$42.23 as a basic hourly rate, \$11.20 for health and welfare, \$8.55 for pension, \$3.00 for vacation/holiday, \$.80 for training fund contribution, and \$.29 for other payments.

³ On October 28, 2020, the Parties were notified the Hearing on the Merits would be conducted virtually by remote video.

The applicable Operating Engineer PWD provides for a predetermined increase. Effective July 6, 2015, an hourly increase of \$2.00 applies to all classification groups of the Operating Engineer (\$.90 allocated to basic hourly rate and \$1.10 to pension). Accordingly, beginning in September 2015, when Operating Engineer Group 12 performed work on the Project, the total hourly rate of pay for Operating Engineer Group 12 was \$67.27, not including training fund contribution.⁴

- Laborer

The PWD for the Laborer classification in Ventura County in 2015 is SC-23-102-2-2015-1 (Laborer PWD). The total hourly rate of pay for the Laborer Group 1 classification is \$48.98, which includes \$30.19 as a basic hourly rate, \$6.81 for health and welfare, \$6.25 for pension, \$4.47 for vacation/holiday, \$.64 for training fund contribution, and \$.62 for other payments. There is no predetermined increase for the Laborer classification. Accordingly, in September 2015, when the first Laborer appeared on the job, the total hourly rate for the Laborer classification is \$48.98.

- Laborer Apprentice

The PWD for the Laborer Apprentice classification in Ventura County in 2015 is 2015-2 (Laborer Apprentice PWD). The total hourly rate of pay for Laborer Apprentice Group 2 is \$28.59, which includes \$18.25 as a basic hourly rate, \$4.77 for health and welfare, \$1.25 for pension, \$3.13 for vacation/holiday, \$.64 for training fund contribution, and \$.55 for other payments.

The total hourly rate of pay for Laborer Apprentice Group 3 is \$30.25, which includes \$19.91 as a basic hourly rate, \$4.77 for health and welfare, \$1.25 for pension, \$3.13 for vacation/holiday, \$.64 for training fund contribution, and \$.55 for other payments. As with the journeyman Laborer classification there is no predetermined increase for the Laborer Apprentice classification.

⁴ Toba also employed Operating Engineer Group 2 and Group 4. The unpaid prevailing wages only stem from work performed by Operating Engineer Group 12.

Accordingly, in May 2016, when the Laborer Apprentice Group 2 performed work on the Project, the total hourly rate of pay was \$28.59, while the total hourly rate of pay for the Laborer Apprentice Group 3 is \$30.25.

- Drywall Installer

The PWD for the Drywall Installer/Lather classification in Ventura County in 2015 is SC-31-X-41-2014-1 (Drywall Installer PWD). The total hourly rate of pay for the Drywall Installer is \$53.95, which includes \$39.30 as a basic hourly rate, \$6.10 for health and welfare, \$4.16 for pension, \$3.40 for vacation/holiday, \$.47 for training fund contribution, and \$.52 for other payments.

Effective July 1, 2015, an hourly increase of \$2.00 applies for the Drywall Installer/Lather classification (\$1.10 allocated to basic hourly rate, \$.50 to health and welfare, \$.25 to pension, \$.05 to vacation/holiday and \$.10 to training). Accordingly, in April 2016 when the drywall work was first performed on the Project, the total hourly rate for a Drywall Installer is \$55.95.

- Drywall Finisher

The General PWD for Ventura County in 2015 is VEN-2015-1. The total hourly rate for the Drywall Finisher craft is \$51.56, which includes \$35.18 as the basic hourly rate, \$7.55 for health and welfare, \$4.62 for pension, \$3.07 for vacation/holiday, \$.67 for training, and \$.47 for other payments.

Effective October 1, 2015, an hourly increase of \$1.91 applies to the Drywall Finisher craft. Accordingly, in 2016 when drywall finishing work was performed on the Project, the total hourly rate for the Drywall Finisher is \$53.47.

- Carpenter

The PWD for the Carpenter classification in Ventura County in 2015 is SC-23-31-2-2014-1 (Carpenter PWD). The total hourly rate of pay for the Carpenter classification is \$53.77, which includes \$39.30 as a basic hourly rate, \$6.10 for health and welfare, \$4.16 for pension, \$3.40 for vacation/holiday, \$.47 for training fund contribution, and \$.34 for other payments.

Effective July 1, 2015, an hourly increase of \$2.00 applies for the Carpenter classification (\$1.10 allocated to basic hourly rate, \$.50 to health and welfare, \$.25 to pension, \$.05 to vacation/holiday and \$.10 to training). Accordingly, in April 2016 when the Carpentry work began on the Project, the total hourly rate for a Carpenter is \$55.77.

The Assessment.

DLSE received three complaints of prevailing wage violations on the Project. On February 9, 2017, DLSE requested information from the County. On March 22, 2017, DLSE requested CPRs and other compliance documents from Tobo and the County. On April 3, 2017, the County returned the February 9, 2017, Request for Information (form "PW 9") to DLSE. The County responded with handwriting on the PW-9 form next to each of the requested documents/ information. The County's response confirms the Project began on April 14, 2015. The County notes the completion date was October 12, 2016, and adds "liquidated damages 76 days." Next to the request for a Notice of Completion or Acceptance document, the County response notes "Not Complete." On April 11, 2017, the County recorded its Notice of Completion.⁵

Tobo did not respond to the March 22, 2017 request for CPRs and other documents.

On September 4, 2018, DLSE mailed Tobo a second request for CPRs and a Notice Impending Debarment. In response, on October 4, 2018, Tang provided Tobo's payroll records, but they were deficient and not considered CPRs.⁶ Nguyen testified not

⁵ The hearing record contains various dates for the Project's completion date. Christopher Cooper, the County's Public Works Deputy Director of Public Works, signed the Notice of Completion under penalty of perjury stating the Project was completed on April 11, 2017. The last payroll summary for Tobo is for the week ending February 1, 2017.

A different completion date for the Project is found on the County's "Construction Contract Pay Estimate" form. (See DLSE Exhibit No. 33, p. 798.) That form authorizes a \$1.00 payment to Tobo on May 15, 2017. The form also states the scheduled completion date for the Project was October 12, 2016, and "Field Completion occurred on 12/27/16."

⁶ Hereinafter, the records provided by Tobo on October 4, 2018, will be referred to as "payroll summaries."

all the payroll records were signed under penalty of perjury and the records failed to report all workers.⁷ On October 4, 2018, Tang signed a document acknowledging that the records are noncompliant. When Tang signed the acknowledgment, Deputy Labor Commissioner Norbert Flores discussed the records' deficiencies with her.⁸ Tang was also provided an example of compliant CPRs. Thereafter, DLSE did not receive CPRs from Tobo.

On March 22, 2019, Nguyen called Tang about Tobo's failure to submit compliant CPRs. Tang claimed that on October 28, 2018, she mailed the CPRs to DLSE. Nguyen requested proof of mailing and copies of the mailed CPRs, but Tobo failed to provide them.

Nguyen also testified Tobo's payroll summaries show Tobo inaccurately classified at least one worker. From April 2016, to May 11, 2016, Tobo classified Jesus Castro as a Laborer. From May 12, 2016, to August 12, 2016, Tobo classified Castro as a Drywall Installer, with the exception of May 25, 2016, when he was classified as a Drywall Finisher.⁹ In his complaint, Castro disputes that he was Laborer.

On February 9, 2017, the Carpenters / Contractors Cooperation Committee, Inc. filed a complaint on behalf of Castro. Castro asserts he was not paid the correct wage. In the complaint, Castro states his job title was "Metal Stud Framer." He describes his duties on the Project as "build[ing] and assembl[ing]" using tools such as drills, lasers and clamps.

According to the DLSE's Penalty Review, Castro is one of 57 workers on the Project. The March 25, 2019 Summary Audit Worksheet states the total amount of

⁷ Also, Tobo's payroll summaries from October 17, 2016, to December 25, 2017, contain 47 pages of unsigned "Public Works Certified Payroll Reporting Form[s]". (See DLSE Exhibit No. 14.3 at pp. 428 to 475). Various hours are reported on these forms, but Tobo failed to identify the employees who worked those hours.

⁸ On February 15, 2019, the matter was reassigned from Deputy Labor Commissioner Norbert Flores to Industrial Labor Representative Derrick Nguyen.

⁹ Similar to Castro, Tobo's payroll summaries show workers performed various types of work throughout the duration of the Project and were assigned different classifications based on the work they performed.

wages owed is \$94,240.38, which includes \$80,808.36 carried over from an "Audit5 Summary"¹⁰ and \$928.24 carried over from an "Audit3 Summary."¹¹

Six workers do not appear on the payroll summaries. Jimmy Lara, Eduardo Espinoza Figueroa, Elmer Cuatro, Cesar Bolanos, Jaime Bolanos, and Antonio Zamora submitted affidavits. These unreported workers are listed in the Audit5 Summary.¹² DLSE relied on the worker affidavits, as well as the workers' calendars to determine that the unreported workers were not paid the required prevailing wages. In their affidavits, the workers state they performed framing, drywall installation, and drywall finishing. Jimmy Lara states in his affidavit that he performed electrical work, such as installing wiring for outlets, electrical boxes, as well as running wiring for air conditioning unit. Most of the unreported workers state they were paid between \$160.00 to \$170.00 a day and worked six days a week, eight hours a day.

Although Training Fund Contribution amounts appear on the Assessment as owed, Nguyen testified that those amounts were no longer at issue.

Assessment of Penalties under Section 1775.

According to the Penalty Review, DLSE set section 1775 penalties at \$200.00 per violation. The Assessment notes 443 section 1775 violations. The Assessment determines a total of \$88,600.00 is owed for section 1775 penalties.

Assessment of Penalties under Section 1813.

The Assessment finds a total of 41 section 1813 violations. At the statutory rate of \$25.00 per violation, DLSE assessed a total amount of \$1,025.00 for section 1813 penalties.

Assessment of Penalties under Section 1776.

DLSE requested CPRs on March 22, 2017. When the Assessment issued on March 26, 2019, Tobo had yet to comply with DLSE's request for CPRs. DLSE assessed a total

¹⁰ The Audit5 Summary appears at DLSE Exhibit Number 3.1, page 82.

¹¹ The Audit3 Summary appears at DLSE Exhibit Number 3, page 55.

¹² See footnote 10.

amount of \$171,000.00 in section 1776 penalties, based on 57 workers at \$100 per day for 30 days.

Apprentice Requirements.

For the Electrician classification there are two Joint Apprenticeship Committees (JACs) in Ventura County, the Ventura County Electrical J.A.T.C. and the Los Angeles/Ventura Chapter of the A.B.C Inc. E.U.A.C. (A.B.C.). Nguyen confirmed via email with A.B.C. that Tobo did not submit contract award information (a DAS 140 form) to A.B.C. According to the Penalty Review, Tobo also did not send a DAS 140 to the Ventura County Electrical J.A.T.C.

For the Carpenter classification, the Southern California Carpenter J.A.T.C is the only applicable JAC in Ventura County. On May 17, 2016, Tobo sent a DAS 140 to that JAC by facsimile. However, a Carpenter first appeared on the Project on April 1, 2016, which was the last day Tobo could submit a timely DAS 140. Instead, Tobo sent the DAS 140 over a month later.

DLSE imposed section 1777.7 penalties due to Tobo's failure to submit a timely DAS 140 form to all the JACs for the Electrician and Carpenter trades in the geographic area of the Project. Nguyen testified that while Tobo committed multiple violations of section 1777.5 per day across various trades, in assessing section 1777.7 penalties DLSE only considered violations for failure to submit DAS 140s to the Electrician and Carpenter JACs.

DLSE assessed section 1777.7 penalties for a total of 306 violations at \$100.00 per violation. Nguyen testified he did not count more than one violation per calendar day. For the Carpenter classification Nguyen counted 44 violations from the date a Carpenter first appeared on the Project, to the date when the DAS 140 was sent to the Carpenter J.A.T.C. Nguyen also counted 295 violations from the date an Electrician first appeared on the Project, to the last day an Electrician journey person was on the Project. Discounting the number of calendar days of overlap of the two DAS 140 violations, the total number of violations for purposes of the section 1777.7 penalties was 306.

According to the Penalty Review, DLSE imposed a \$100.00 penalty rate based on Tobo's prior violations of section 1777.5. Four assessments are listed as "Prior History" in the Penalty Review. Six others are listed as "investigation pending." In addition to considering prior violations of 1777.5, in setting the penalty rate DLSE considered the extent of lost training opportunities for apprentices and the extent of harm to the apprentices or apprenticeship programs. The total amount found in the Assessment for section 1777.7 penalties is \$30,600.00.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987, citations omitted (*Lusardi*)). DLSE enforces prevailing wage requirements not only for the benefit of workers, but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a); see also *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants

the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. Section 1813 provides additional penalties for failure to pay the correct overtime rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if those wages are not paid within 60 days following service of a civil wage and penalty assessment under section 1741.

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

The Assessment Was Timely Served on Tobo.

The limitations period for DLSE to serve an assessment is stated in section 1741, subdivision (a). Section 1741, subdivision (a), has been in effect without amendment since January 1, 2014. (Stats. 2013, ch. 792, § 1.) It states in relevant part:

The assessment shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last.

The 18-month limitations period stated above is tolled “for the period of time

that a contractor or subcontractor fails to provide in a timely manner certified payroll records pursuant to a request from the Labor Commissioner” (§ 1741.1, subd. (a).)

The Assessment was timely served on Tobo. The County recorded its Notice of Completion on April 11, 2017, indicating the Project was also completed on April 11, 2017. Under Civil Code section 9204, “[a] public entity may record a notice of completion on or within 15 days after the date of completion of a work of improvement,” and the notice of completion “shall... include the date of completion.” While the record contains several possible completion dates for the Project, the County’s public official signed under penalty of perjury that the Project was completed on April 11, 2017. The Notice of Completion was recorded on the same day as the Project’s completion date, April 11, 2017, and within the 15 day period required under Civil Code section 9204. Accordingly, it is presumed that the Notice of Completion is valid and timely filed with the County Register Recorder. (See Evid. Code, §664; *Furman v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 416, 422 [there is a rebuttable presumed that a public official has performed their official duties].) The filing of the Notice of Completion triggered the 18-month limitation period under section 1741, subdivision (a).

On March 26, 2019, 23 months after the Notice of Completion was filed on April 11, 2017, the Assessment was served. However, pursuant to section 1741.1, subdivision (a), Tobo’s failure to produce CPRs in response to DLSE’s multiple requests since 2017 tolled the 18-month limitations period.

Tobo has the burden of proving the Assessment was untimely served and the burden of rebutting the presumption that the Notice of Completion was filed within 15 days of the Project’s completion date. (*Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1310 [a statute of limitations defense is an affirmative defense and its elements must be proved by the party asserting it.]) As Tobo failed to appear, it did not meet its burden of proving the Assessment is untimely. Accordingly, the Assessment as timely served on Tobo.

Tobo Is Liable for Unpaid Wages of \$ 94,240.38

DLSE provided prima facie evidence of wages owed due to numerous errors as evidenced in its payroll summaries and failure to report all of its workers. Tobo failed to report six workers and pay these workers prevailing wages. Tobo also failed to use the correct prevailing wage rates when it did not include predetermined increases for the Drywall Finisher craft and when it paid straight time instead of using the overtime rate. In addition, Tobo incorrectly paid Operating Engineer Group 12 at the Operating Engineer Group 2 rate of pay, misclassified a Carpenter as a Laborer, and failed to pay the correct prevailing wage for a Laborer Apprentice. The following are examples of Tobo's failure to pay prevailing wage rates:

- For the week ending July 24, 2016, Jose I. Gutierrez and Esteban Vargas, Operating Engineer Group 12, were paid \$64.87 per hour, the hourly rate of pay for Operating Engineer Group 2. Not including the training fund contribution that is not payable to workers, the correct hourly rate of pay is \$67.27. Gutierrez is owed \$40.88 in wages and Vargas is owed \$26.40.
- Luis Arroyo, a Laborer Apprentice, was paid the incorrect hourly rate of pay throughout his work on Project. From May 22, 2016, through July 10, 2016, Tobo classified Arroyo as a Laborer Apprentice 2, requiring an hourly rate of pay of \$27.95, not including the training fund contribution. However, Arroyo was paid at \$18.91 per hour. From July 17, 2016, through September 18, 2016, Tobo classified Arroyo as a Laborer Apprentice 3, requiring an hourly rate of pay of \$29.61, not including the training fund contribution. Instead, Tobo paid \$21.20 an hour. The total wages owed to Arroyo is \$4,974.24.
- For the week ending May 1, 2016, Jaime Huerta and Julio Contreras, Drywall Finishers, were paid at the incorrect hourly rate of \$50.89 because Tobo failed to include a predetermined increase in the rate of pay. The correct hourly rate of pay is \$52.80, not including the training fund contribution. The error resulted in a \$7.64 underpayment for Huerta and a \$15.28 underpayment for Contreras. Tobo repeatedly failed to include the

predetermined increases with three other workers classified as Drywall Finishers.

For the following workers, Tobo used the correct prevailing wage rate during some weeks, but appears to have miscalculated the prevailing wage rate in other weeks:

- For the weeks ending October 9, 2016, and October 16, 2016, Tobo paid, Hector Cruz, a Laborer, at \$48.24 an hour instead of the correct hourly rate of pay of \$48.34, not including the training fund contribution. This results in an underpayment of \$7.10 for both weeks.
- For week ending October 2, 2016, Tobo paid Juan Rubalcava, a Laborer, at the incorrect hourly rate of \$48.24, instead of \$48.34 (again, not including the training fund contribution). This error results in an underpayment of \$3.60 to Rubalcava.

The same error of using \$48.24 instead of \$48.34 occurred with eight other workers classified as Laborers.

Tobo also misclassified at least one worker, Jesus Castro. According to Castro's complaint, his job title is "Metal Stud Framer." Castro describes his duties as "build and assemble" using tools such as drills, lasers and clamps. The job title and duties Castro describes are characteristic of the Carpentry trade, yet Tobo classified Castro as a Laborer. Based on Castro's complaint, the DLSE properly reclassified Castro from a Laborer to a Carpenter from April 10, 2016, to May 11, 2016.

Castro states in his complaint that he was paid \$20 per hour. This contradicts Tobo's payroll summaries which show that Castro was paid at \$48.34 as a Laborer Group 1 worker, \$50.89 as a Drywall Installer, and \$55.38 as a Drywall Finisher. Tobo's payroll summaries also reference check numbers and amounts paid per week for Castro. However, Tobo's payroll summaries are not CPRs and no copies of the checks were provided to DLSE. DLSE properly computed Castro is owed \$7,319.34 in wages.

Accordingly, Tobo did not carry its burden of proving the basis of the Assessment was incorrect. Tobo is liable for payment of prevailing wages owed in the aggregate

sum of \$94,240.38.

Tobo Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a) provides in part:

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

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

In this case, no back wages have been paid nor has a deposit been made with the Department of Industrial Relations as a result of the Assessment. Accordingly, Tobo is liable for liquidated damages in the amount of the unpaid prevailing wages, totaling \$94,240.38.

Tobo Is Liable for \$171,000.00 in Penalties under Section 1776

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 Number 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, (§ 1776, subd. (a).) Each payroll record must be signed under penalty of perjury, stating that the information in the payroll record is true and correct and 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. (*Ibid.*)

Contractors who fail to provide payroll records within ten days of DLSE's request for such records are subject to penalties. (§ 1776, subd. (h).) Penalties are calculated by multiplying the number of workers on the project, by the number of days of noncompliance, by the penalty rate of \$100.00. (*Ibid.*)

DLSE presented prima facie evidence that Tobo failed to provide CPRs after repeated requests. Nguyen testified that DLSE believed it could have assessed more in section 1776 penalties as Tobo never complied with requests for CPRs, but DLSE limited the section 1776 penalties to 30 calendar days. Tobo failed to carry its burden of proving the statutory penalty for its violation of section 1776 was incorrect. Accordingly, Tobo is liable for \$171,000.00 in section 1776 penalties.

Tobo Is Liable for \$1,025.00 in Section 1813 Penalties.

Section 1813 penalties were assessed for Tobo's failure to pay workers at the correct overtime rate.

Labor Code section 1813 states:

The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article.

Section 1815 states as follows:

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1¹/₂ times the basic rate of pay.

DLSE counted 41 violations by Tobo for failure to pay overtime to workers. At the statutory rate of \$25.00 per violation, the section 1813 penalties amount to \$1,025.00. Tobo did not carry its burden of proving the Assessment with respect to section 1813 penalties was incorrect. Accordingly, Tobo is liable for \$1,025.00 in section 1813 penalties.

DLSE Did Not Abuse Its Discretion By Assessing \$88,600.00 in Penalties Under Section 1775.

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

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

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

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

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

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

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

(iii) The penalty may not be less than one hundred twenty dollars (\$120) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1. ^[13]

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

¹³ The reference in section 1775, subdivision (a)(2)(B)(iii), to section 1777.1, subdivision (c), is mistaken. The correct reference is to section 1777.1, subdivision (e). According to that subdivision, a willful violation is defined as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, “the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty.” (Cal. Code Regs., tit. 8, §17250, subd. (c); § 1775, subd. (a)(2)(D).)

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

DLSE did not abuse its discretion in setting the section 1775 penalty rate at \$200.00 per violation. There were 443 separate violations—one violation per day worked in which Tobo failed to pay prevailing wages. Tobo did not appear and thus presented no evidence or argument that the assessed section 1775 penalties were an abuse of discretion. Accordingly, this Decision affirms the Assessment’s section 1775 penalties amounting to \$88,600.00.

Tobo 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.¹⁴ DLSE enforces the apprenticeship requirements not only for the benefit of apprentices, but to encourage and support apprenticeship programs, which the Legislature has recognized as “a vital part of the educational system in California.” (Stats. 1999, ch. 903, § 1 [Assem. Bill 921].)

Section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journey[persons]

¹⁴ All subsequent references to the apprenticeship regulations are to the California Code of Regulations, title 8.

in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). (§ 1777.5, subd. (g); § 230.1, subd. (a).)

Contractors are also required to notify apprenticeship committees when a public works contract has been awarded. (§ 1777.5, subd. (g); § 230, subd. (a).) DAS has prepared a form for this purpose (DAS 140), which a contractor may use to notify all apprenticeship committees for each apprenticeable craft in the area of the site of the project. The required information must be provided to the applicable committees within ten days of the date of the execution of the prime contract or subcontract, “but in no event later than the first day in which the contractor has workers employed upon the public work.” (§ 230, subd. (a).) The contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices for specified dates and with sufficient notice. (§ 230.1, subd. (a).)

In the present case, DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment as to Tobo’s failure to notify the appropriate JACs of a public works contract award. (Cal. Code Regs., tit. 8, § 17250, subd. (a).) Nguyen testified he confirmed with one of the applicable JACs for the Electrician classification that Tobo did not send a DAS 140. For the Carpenter classification, Tobo sent a DAS 140 only after the first day a Carpenter appeared on the job. Tobo did not appear at the duly noticed hearing to rebut that evidence or otherwise carry its burden to prove the basis of the Assessment is incorrect in that regard. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, Tobo violated section 1777.5, subdivision (e), and the applicable regulation, section 230, as to the notice requirement.

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

If a contractor knowingly violates section 1777.5, a civil penalty is imposed under section 1777.7 in an amount not exceeding \$100.00 for each full calendar day of noncompliance. (§ 1777.7, subd. (a)(1).) The phrase “knowingly violated Section 1777.5” is defined by California Code of Regulations, title 8, section 231, subdivision (h), as follows:

For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control. There is an irrebuttable presumption that a contractor knew or should have known of the requirements of Section 1777.5 if the contractor had previously been found to have violated that section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects,

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

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

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

In this case, DLSE set the section 1777.7 penalty rate at \$100.00 per violation. DLSE provided prima facie evidence that Tobo's violation of the apprenticeship requirement to provide notice of the contract award was made knowingly as Tobo received notification from the County that it was required to comply with section 1777.5 requirements and received a copy of the language of section 1777.5 as part of the

Contract. The Penalty Review indicates DLSE also considered both the fact that Tobo committed other violations of 1777.5 and the extent of lost training opportunities, which was 26 hours for the Electrician classification.

DLSE based section 1777.7 penalties on Tobo's failure to submit contract award information as required under section 1777.5, subdivision (e), and section 230, subdivision (a), of the applicable regulation. That regulation states:

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

(Cal. Code. Regs., tit. 8, § 230, subd. (a).) Thus, per the regulation, a failure to provide contract award information is a violation that runs throughout the duration of a contract. However, in this case, DLSE assessed penalties for 306 days of violations for failure to submit a timely DAS 140 violation to the Carpenters JAC and failure to submit a DAS 140 to all the Electrician JACs in the geographic area.

Having not appeared at the Hearing, Tobo did not establish that the Labor Commissioner abused her discretion in assessing the penalties at \$100.00 per violation. Accordingly, as determined by DLSE and specified in the Assessment, Tobo is liable for section 1777.7 penalties at \$100.00 per violation for 306 days, for a total amount of \$30,600.00.

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

FINDINGS AND ORDER

1. Tobo Construction, Inc., a California Corporation, underpaid its workers \$94,240.38 in prevailing wages.
2. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code section 1775 at \$200.00 per violation for 443 violations in the aggregate sum of \$88,600.00.

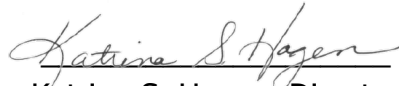
3. Tobo Construction, Inc., a California Corporation, is liable for liquated damages in the full amount of the unpaid wages, which is \$94,240.38.
4. Tobo Construction, Inc., a California Corporation, is liable for penalties assessed under Labor Code section 1776 in the amount of \$171,000.00
5. Tobo Construction, Inc., a California Corporation, is liable for penalties assessed under Labor Code section 1813 in the amount of \$1,025.00.
6. Tobo Construction, Inc., a California Corporation, did not submit contact award information (DAS 140 form) to all of the applicable apprenticeship committees in a timely and factually sufficient manner.
7. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code section 1777.7 at \$100.00 per violation for 306 violations in the aggregate sum of \$30,600.00.
8. The amounts found due in the Assessment, as affirmed by this Decision, are as follows:

Basis of the Assessment	Amount
Wages due:	\$94,240.38
Penalties under section 1775, subdivision (a):	\$88,600.00
Liquated Damages:	\$94,240.38
Penalties under section 1776	\$171,000.00
Penalties under section 1813	\$1,025.00
Penalties under section 1777.7:	\$30,600.00
TOTAL:	\$479,705.76

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 and modified as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 1-11-22



Katrina S. Hagen, Director
California Department of Industrial Relations