

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Davis Laboratories, Inc.

Case No. 14-0373-PWH

From Determinations of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Davis Laboratories, Inc. (Davis Labs) submitted a timely request for review of a Determination of Civil Penalty (Determination) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the Barry J. Nidorf Juvenile Hall Security Enhancements, Project 1122-004.01 (Project) performed for the County of Los Angeles Department of Public Works Architecture/Engineering Division. The Determination found that Davis Labs had violated Labor Code section 1777.5 and assessed an aggregate penalty of \$2,080.00 under Labor Code section 1777.7.

Pursuant to written notice, a Hearing on the Merits was held on January 14, 2015, in Los Angeles, California, before Hearing Officer Howard Wien. Counsel Max D. Norris appeared for DLSE. Kristy Davis-Jones appeared as representative for Davis Labs.

The issues for decision are:

1. Whether Davis Labs knowingly violated Labor Code section 1777.5, subdivision (e) and California Code of Regulations, title 8, section 230, subdivision (a)¹ by not submitting public works contract award information on a DAS Form 140 or its equivalent (DAS 140) to the applicable apprenticeship committee for the apprenticeable craft of Building/Construction Inspector and Field Soils and Material Tester, Group III Nondestructive Testing (NDT) (Inspector Group III) in the

¹ All further section references are to California Code of Regulations, title 8, unless otherwise indicated.

geographic area of the Project site.²

2. Whether Davis Labs is liable for a penalty of \$2,080.00 under Labor Code section 1777.7 computed at the rate of \$40.00 per day for the 52-day period commencing November 28, 2012 and ending January 18, 2013.³

In this decision, the Director finds that the Determination correctly found that Davis Labs knowingly violated Labor Code section 1777.5, subdivision (e) and section 230, subdivision (a). The Director further finds that Davis Labs is liable for an aggregate penalty of \$2,080.00 under Labor Code section 1777.7, as assessed. Accordingly, the Director affirms the Determination.

FINDINGS OF FACT

1. Davis Labs is a nondestructive testing business located in the City of Brea, California, and other locations. Its nondestructive testing work includes concrete x-ray and industrial radiography, by which Davis Labs uses x-rays to inspect the inside of beams and concrete structures in buildings.

2. As early as 2010, Davis Labs had determined that when it performed its concrete x-ray and industrial radiography services on public works projects, it would pay its workers the applicable prevailing wage. It is undisputed that the prevailing wage determination (PWD) applicable to Davis Labs' work on this Project is SC-23-63-2-2011-1D (Building/Construction Inspector and Field Soils and Material Tester for Southern California), and the applicable classification and prevailing wage rate is Group III which is designated "Nondestructive Testing (NDT)" (Inspector Group III).

² The Determination also found that Davis Labs had violated Labor Code section 1777.5, subdivision (g) and section 230.1, subdivision (a) by: (1) failing to submit a request for dispatch of apprentices (DAS Form 142 or equivalent) to the applicable apprenticeship committee; and (2) failing to employ registered apprentices in the ratio of one hour of apprentice work for every five hours of journeyman work. However, DLSE subsequently withdrew these charges.

³ The Determination asserted that this \$2,080.00 penalty was an aggregate penalty assessed not only for Davis Labs' failure to submit a DAS 140, but also for Davis Labs failure to issue the DAS 142 and failure to meet the 1 to 5 ratio of apprentice hours to journeyman hours stated in footnote 2 above. However, DLSE subsequently withdrew this assertion, thereby basing the \$2,080.00 penalty solely on Davis Labs' failure to submit a DAS 140.

3. On or about November 21, 2012, Davis Labs entered into a written contract with the prime contractor on the Project, New Creation Builders (Prime Contractor). This contract contained a page on which Davis Labs asked the Prime Contractor to answer the following question: "What State determination and rate would you classify us in for this project? Most California clients prefer building/Construction Inspector." The Prime Contractor handwrote its answer "Exempt."

4. The Prime Contractor initially requested Davis Labs to perform concrete and industrial radiography on the Project on November 27, 2012, and on that day Davis Labs had two workers perform this work: Anthony Kenny worked 8.5 hours and Robert Merrell worked 8.67 hours. Subsequently, the Prime Contractor requested Davis Labs to perform this work on January 18, 2013, and on that day Davis Labs had two workers perform this work: Anthony Kenny worked 8.67 hours and Louis Rodriguez worked 8.5 hours. Davis Labs invoiced the Prime Contractor for this work.

5. Davis Labs subsequently prepared certified payroll records (CPRs) for this work on the Project. In its CPR's, Davis Labs classified and paid its workers the applicable Inspector Group III prevailing wage rate specified by PWD SC-23-63-2011-1D.⁴

6. PWD SC-23-63-2011-1D designated the Inspector Group III classification as apprenticeable. During the period Davis Labs worked on the Project (as well as preceding and following this period), there was a training committee for apprentices in the Inspector Group III craft in the geographic area of the Project: the Southern California Operating Engineers J.A.C., located in Whittier, California (J.A.C.). Davis Labs knew of the J.A.C. before, during and after Davis Labs worked on the Project.

7. Commencing in or about 2010, and continuing through and beyond Davis Labs' work on the Project, Davis Labs communicated orally and in writing with the J.A.C., the Department of Industrial Relations (DIR) and its Division of Apprenticeship Standards (DAS), and the Operating & Maintenance Engineers Apprenticeship & Training Trust for Southern California located in Los Angeles (OMEATT), asking various questions that chiefly

⁴ However, Davis Labs did not pay the required training fund contribution, as addressed in companion Case No. 14-0372-PWH.

addressed two issues:

a. Was there any apprentice committee in Southern California that could provide concrete x-ray and industrial radiography apprentices who were sufficiently trained so that Davis Labs' use of the apprentices would not put Davis Labs in violation of the California safety regulations governing Davis Labs' operations, which protect workers and the general public from the harmful effects of x-rays. These California regulations are stated in California Code of Regulations, title 17, section 30100 et seq.; particularly in Article 6 entitled "Special Requirements for Radiographic Operations in Industrial Radiography," sections 30330 et seq. (California radiography safety regulations).

b. If no Southern California apprentice committee could provide such apprentices, was Davis Labs thereby exempt from the apprentice provisions of Labor Code sections 1777.5 and 1777.7, and applicable regulations?

8. As to the requirement stated in Labor Code section 1777.5, subdivision (e) and section 230, subdivision (a) regarding the submission of the DAS 140 (as well as other provisions regarding the issuance of the DAS 142), DAS sent an email to Davis Labs on April 1, 2010 stating: "Yes, all contractors doing public works projects are required to submit the DAS 140 and request dispatch of an apprentice (DAS 142) from the applicable apprenticeship programs."

9. Davis Labs never received any communication from DAS, DIR, the J.A.C., OMEATT or anyone else stating any credible information that any apprentice committee in Southern California could provide concrete and industrial radiography apprentices who were sufficiently trained so that Davis Labs' use of the apprentices would enable Davis Labs to remain in compliance with the California radiography safety regulations. Davis Labs merely received several vague and ambiguous responses that apprentices trained in concrete and industrial radiography could be provided to Davis Labs – without any assertion that such training satisfied the requirements that the California radiography safety regulations imposed upon Davis Labs.

10. As to the requirement to submit a DAS 140 stated in Labor Code section 1777.5, subdivision (e) and section 230, subdivision (a), Davis Labs never received any communication from DAS, DIR, any apprenticeship committee, or any government agency stating that Davis Labs was exempt from this requirement.

11. As to the requirements to issue a DAS 142 and hire apprentices in the ratio of one hour for every five hours of journeymen work stated in Labor Code section 1777.5, subdivision (g) and section 230.1, subdivision (a), in early October 2013 Davis Labs learned that effective April 4, 2011, it had been exempt from these requirements for projects in Southern California. The letter communicating this matter to Davis Labs was dated October 2, 2013, and it referred to a letter from DAS dated May 16, 2011. These letters clearly stated that the exemption was solely from the requirement of having apprentices work one hour for every five hours of journeymen work. These letters did not purport to grant any exemption from the DAS 140 requirement.

12. Davis Labs chose not to send a DAS 140 to the J.A.C for the Project because it determined it would not receive any benefit from sending the DAS 140: (1) Davis Labs could not accept any apprentice from the J.A.C. because using such apprentice would make Davis Labs non-compliant with the California radiography safety regulations; and (2) the J.A.C. would not provide any apprentice to Davis Labs because Davis Labs was not a union shop.

13. In the Hearing on the Merits, Davis Labs key witness and representative Kristy Davis-Jones testified as to several additional reasons why Davis Labs did not issue the DAS 140. Unlike the reasons stated in the preceding paragraph, none of these additional reasons were credible, and Davis Labs in fact did not base its decision on any of these alleged reasons:

a. Ms. Jones testified that she thought the exemption obtained by Davis Labs addressed in paragraph 11 above exempted Davis Labs from the DAS 140 requirement. This is not credible both because the letters did not purport to grant an exemption from the DAS 140 requirement and because Davis Labs was not aware of these letters until early October 2013; many months after Davis Labs had completed its work on the Project.

b. Ms. Jones testified that Davis Labs was given short notice by the Prime Contractor of the days on which it would be performing its work on the Project, whereas the DAS 142 regulations stated the DAS 142 is to be sent at least 72 hours before the work was to be done. This assertion regarding the DAS 142 requirement is irrelevant to the DAS 140 requirement, which merely required Davis Labs to issue the DAS 140 no later than the first day Davis Labs had workers employed on the Project. (§ 230, subd. (a).)

c. Ms. Jones testified that Davis Labs believed it was exempt from the DAS 140 requirement because the Prime Contractor wrote the word "exempt" on the contract in response to Davis Labs' question on "What State determination and rate would you classify us in for this project?" (as described in paragraph 3 above). This is not credible because the prior extensive communications between Davis Labs and DIR, DAS, J.A.C. and OMEATT made clear that Davis Labs was not exempt from the DAS 140 requirement; particularly the email from DAS on April 1, 2010, stating that Davis Labs must submit a DAS 140.

14. The Determination assessed penalties under Labor Code section 1777.7 at the rate of \$40.00 per day. The Determination computed the number of days that Davis Labs was in violation of Labor Code section 1777.7 as 52 days, commencing with November 28, 2012, the calendar day following Davis Labs' first day of work on the Project, and ending on the second, and last, day of Davis Labs' work on the Project, January 18, 2013.

15. Davis Labs had no prior violations of Labor Code sections 1777.5 or any applicable regulations.

16. DLSE timely served the Determination upon Davis Labs. Davis Labs timely filed its Request for Review of the Determination.

DISCUSSION

Labor Code sections 1777.5 through 1777.7 set forth the statutory requirements governing apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. Section 227 provides that the

regulations "shall govern all actions pursuant to ... Labor Code Sections 1777.5 and 1777.7."

For purposes of Labor Code sections 1777.5 through 1777.7, Davis Labs was a contractor subject to those sections, pursuant to Labor Code section 228, subdivision (c) stating: "For the purpose of this Article 10 ... CONTRACTOR means a general, prime, specialty or subcontractor." Under this definition, the fact that Davis Labs performed services on the Project rather than supplied goods or materials to the Project does not alter the conclusion that Davis Labs falls within the definition of "contractor." Further, the record establishes that Davis Labs performed its services pursuant to a written contract with the Prime Contractor.

As to the requirement to submit a DAS 140, Labor Code section 1777.5, subdivision (e) states in part:

Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work.

The governing regulation for submitting a DAS 140 is section 230, subdivision (a), stating:

(a) 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.... The DAS Form 140 or written notice shall include the following information, but shall not require information not enumerated in Section 230:

- (1) the contractor's name, address, telephone number and state license number;
- (2) full name and address of the public work awarding body;
- (3) the exact location of the public work site;
- (4) date of the contract award;
- (5) expected start date of the work;
- (6) estimated journeyman hours;
- (7) number of apprentices to be employed;

(8) approximate dates apprentices will be employed.

The above statute and regulation on DAS 140 are stated separately and independently of the statute and regulation on submitting a DAS 142 and having apprentices work one hour for every five hours of journeymen work, which are stated in Labor Code section 1777.5, subdivision (g)⁵ and section 230.1, subdivision (a)⁶.

In the review of a determination on this DAS 140 requirement, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (Labor Code section 1777.7, subdivision (c)(2)(B).)

If a contractor "knowingly" violated Section 1777.5, a civil penalty is imposed under Labor Code section 1777.7. Here, DLSE assessed a penalty against Davis Labs under the following portion of Labor Code section 1777.7, subdivision (a)(1):

(a)(1) A contractor or subcontractor that is determined by the Labor Commissioner to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation.

A "knowing" violation is defined by section 231, subdivision (h) as follows:

(h) 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

⁵ Labor Code section 1777.5 subdivision (g) states:

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

⁶ Section 230.1, subdivision (a) states:

Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with the required 1 hour of work performed by an apprentice for every five hours of labor performed by a journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter. Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

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, or the contractor had previously employed apprentices on a public works project.”

Here, the record establishes that Davis Labs knowingly violated Labor Code section 1777.5, subdivision (e) and section 230, subdivision (a). Davis Labs performed concrete and industrial radiography on the Project, using three radiography journeymen. Davis Labs acknowledged in its CPRs that the work of these three journeymen was subject to the Inspector Group III prevailing wage rate and Davis Labs paid its journeymen the applicable prevailing wage for that classification. PWD SC-23-63-2011-1D clearly designated Inspector Group III as an apprenticeable craft. Davis Labs knew that the J.A.C. was the apprenticeship committee in the geographic area of the Project for the craft of Inspector Group III. Davis Labs knew the provisions of Labor Code section 1777.5, subdivision (e) and section 230, subdivision (a) as shown by its numerous prior written and oral communications on these matters with DAS, DIR, J.A.C. and OMEATT. However, Davis Labs chose not to send a DAS 140 to the J.A.C. This was a knowing violation.

Further, Davis Labs’ failure to comply was not due to any circumstances beyond its control: Davis Labs’ numerous prior communications to DAS, DIR, J.A.C. and OMEATT establish that Davis Labs was fully capable of completing the simple form DAS 140 (or an equivalent) and sending it to the J.A.C.. As to the content of the form DAS 140, Davis Labs was fully capable of stating “0” or “none” in the boxes asking for the estimated number of apprentice hours and the dates apprentices are to be employed, and leaving blank any additional boxes that it considered inapplicable.

Since Davis Labs knowingly violated the requirement to send a DAS 140 to the J.A.C, a penalty must be assessed under Labor Code section 1777.7. Here, DLSE assessed a penalty of \$2,080.00. In reviewing a penalty, it is customary first to state the standard of review. Labor Code section 1777.7 subdivision (f)(2), which was in effect until December 31, 2014, states that the Director shall decide the appropriate penalty de novo, thereby giving the Director broad power to reverse or amend the penalty. Labor

Code section 1777.7 subdivision (d), which became effective January 1, 2015, states that the penalty “shall be reviewable only for an abuse of discretion,” thereby limiting the Director’s power to reverse or amend the penalty. Here, Davis Labs performed its work prior to January 1, 2015, but the Hearing on the Merits occurred after January 1, 2015. The question of which of these two standards of review applies in this situation need not be decided here, because the result is identical under each of these standards of review: as this Decision will now address, the record establishes that Davis Labs is liable for a penalty of \$2,080.00.

The five factors for setting the daily sum of the penalty are stated in Labor Code section 1777.7 as follows:

- (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.

Here, the first and third factors favor a high penalty – even a penalty as high as \$100: the violation was intentional, and Davis Labs took no steps to voluntarily remedy the violation. The facts establishing that the violation was intentional are fully described in this Decision above. Moreover, during the Hearing on Merits, Davis Labs further established that its violation was intentional by steadfastly asserting that it did not send the DAS 140 to J.A.C. because Davis Labs would not receive any benefit from doing so. The lack of benefit to Davis Labs is entirely irrelevant under the law. The Labor Code and applicable regulations make clear that the DAS 140 requirement is not for the benefit of contractors, and is not conditioned upon contractors receiving any benefit, but rather is for the benefit of apprenticeship committees and apprentices.

However, the second, fourth and fifth factors favor a low penalty. Davis Labs had no previous violation. There were no lost training opportunities for apprentices, and the violation did not harm any apprentices or apprenticeship programs. Davis Labs' work in concrete x-ray and industrial radiology is subject to the California radiology safety regulations, and despite Davis Labs' extensive communications over many years with DAS, DIR, J.A.C. and the OMEATT, none of them ever provided Davis Labs with any credible information that any apprentice committee in Southern California could provide apprentices for concrete x-ray and industrial radiography sufficiently trained so that Davis Labs' use of the apprentices would not put Davis Labs in violation of the California safety regulations that protect workers and the general public from the harmful effects of x-rays.

In applying these factors, the Director concludes that the daily penalty of \$40.00 is the appropriate penalty under Labor code section 1777.7.

The remaining issue is the number of days the penalty is imposed. The number of days is set by section 230, subdivision (a):

“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, Davis Labs worked on the Project only two days: November 27, 2012 and January 18, 2013. DLSE chose to assess the penalty for fewer days than stated in section 230, subdivision (a): rather than computing the period as ending on the filing of the Notice of Completion, DLSE computed the period as ending earlier -- on January 18, 2013. The Director finds this appropriate given the particular facts of this case in which the subcontractor worked only two days on a project, separated by the lengthy 50-day period. Accordingly, Davis Labs is liable for the penalty of \$2,080.00.

FINDINGS

1. Affected subcontractor Davis Laboratories, Inc. knowingly violated Labor Code section 1777.5, subdivision (c) and 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 Building/Construction Inspector and Field Soils and Material Tester, Group III Nondestructive Testing (NDT).

2. Affected subcontractor Davis Laboratories Inc. is liable for a penalty of \$2,080.00 under Labor Code section 1777.7, computed at the rate of \$40.00 per day for the 52 days commencing November 28, 2012 and ending on January 18, 2013.

ORDER

The Determination of Civil Penalty is affirmed as set forth in the above Order. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated:

6/9/2015

Christine Baker

Christine Baker
Director of Industrial Relations