STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Qiana Riley, an individual doing business as Astro Construction — **Case No. 17-0350-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Qiana Riley, an individual doing business as Astro Construction (Astro), requested review of a Civil Wage and Penalty Assessment (Assessment) issued on September 14, 2017, by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as 2015 Pavement Rehabilitation Project (Project) performed for the City of Richmond (the City) in the County of Contra Costa. The Assessment, as initially issued, found that statutory penalties of $428,400.00 were due under Labor Code section 1776.[1] On February 22, 2018, the case was assigned to Hearing Officer Edward Kunnes. On March 21, 2018, DLSE moved to amend the Assessment to find: $63,842.75 in unpaid prevailing wages; $1,132.46 in unpaid training fund contributions; $41,400.00 in penalties under section 1775; $5,520.00 in penalties under section 1777.7; and a reduction in penalties under section 1776 to $27,000.00. There being no prejudice to Astro, on April 19, 2018, the Hearing Officer granted the motion to amend the Assessment.

A Hearing on the Merits on the request for review was held on October 18, 2018, and January 23, 2019, in Oakland, California. Evan Adams appeared as counsel for DLSE, and Vernon Goins appeared as counsel for Astro. Testimony was presented at the Hearing in support of the Assessment by Alex Dezoysa, an assistant resident engineer to the City's project manager,

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

and Kay Tsen, a Deputy Labor Commissioner for DLSE. Astro employee John Riley, father of the owner Qiana Riley, testified for Astro. Qiana Riley did not testify. DLSE submitted Exhibits Number 1 through 7, all of which were admitted into evidence without objection. Astro submitted no exhibits. On January 23, 2019, the parties submitted the matter for decision.

The parties stipulated that the Project was a public work subject to the California Prevailing Wage Law (CPWL), the Assessment was timely, the request for review was timely, and that Astro made no deposit to the Department of Industrial Relations (DIR) to avoid liquidated damages.

The issues for decision are as follows:[2]

- Whether the Assessment correctly found that Astro failed to pay the required prevailing wages for all hours worked on the Project.
- Whether the Assessment correctly found that Astro failed to make the required training fund contributions to an approved apprenticeship program or the California Apprenticeship Council, as required by section 1777.5, subdivision (m).
- Whether the Labor Commissioner abused her discretion in assessing penalties under section 1775 at the mitigated rate of $120.00 per violation for 345 violations.
- Whether the Labor Commissioner abused her discretion in assessing penalties under section 1776 at the rate of $100.00 per calendar day, per each of nine workers, for over 30 days.
- Whether the Assessment correctly found that Astro failed to comply with section 1777.5 governing employment of apprentices on public works projects.
- Whether the Labor Commissioner abused her discretion when imposing penalties under section 1777.7 at the mitigated rate of $60.00 per violation for 92 violations.
- Whether Astro is liable for liquidated damages under section 1742.1, subdivision (a), and if so, in what amount.

[2]The parties presented evidence at the Hearing that, pursuant to a settlement between DLSE and the prime contractor on the Project, Granite Rock had paid the sum of $36,577.88 to Astro employees for unpaid prevailing wages on the Project. The Hearing Officer determined that the parties had incorrectly framed the issues for Hearing because they took into account that prior payment by Granite Rock. Because the payment did not change the nature of the underlying disputes and issues with respect to Astro, however, the Hearing Officer framed the issues as set forth above.

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, but that Astro carried its burden of proving that the basis for the Assessment was incorrect, in part, as to three workers found by DLSE to have been owed wages. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming but modifying in part the amended Assessment.

FACTS

The City advertised the Project for bid on May 21, 2015, and awarded a contract to Granite Rock Company (Granite). On August 24, 2015, Astro entered into a subcontract with Granite to remove and replace curbs and gutters, and to remove and replace sidewalks (Subcontract). Riley testified that Astro employees worked 48 days on the Project, from September 22, 2015, to December 23, 2015.

The Subcontract provided that Astro agreed to comply with the CPWL, including by paying the prevailing wage rate to its workers, supplying certified payroll records (CPRs) to DLSE upon request, and employing apprentices at a ratio of one hour of apprentice work to five hours of journeymen work. The Subcontract also sets forth the names of Northern California labor agreements covering work on the Project, identifying the relevant worker classifications as Operating Engineers, Laborers and Teamsters.

Employee Classifications and Prevailing Wage Determinations.

The amended Assessment used the prevailing wage rates contained in the prevailing wage rate determinations (PWDs) for the classifications of Operating Engineers, Laborers, Teamsters, and Cement Masons.

The general per diem prevailing wage rate under the Operating Engineers (Heavy and Highway Work) Group 1, number NC-23-63-1-2015-1 (Operating Engineers PWD), totals $68.30 per hour, which includes a basic hourly rate of $39.85, $13.03 per hour for health and welfare, $10.15 per hour for pension, $3.86 for vacation and holiday, $0.67 per hour for training, and $.74 per hour for "other."

The general per diem prevailing wage rate under the Laborer Group 3, number NC-23-102-1-2015-1 (Laborer PWD), totals $39.34 per hour, which includes a basic hourly rate of

$28.14, $6.84 per hour for health and welfare, $10.10 per hour for pension, $2.63 for vacation and holiday, $0.41 per hour for training, and $.22 per hour for "other."

The general per diem prevailing wage rate under the Teamster Group 2, number NC-23-261-1-2014-1A (Teamster PWD), totals $53.07 per hour, which includes a basic hourly rate of $28.26, $15.53 per hour for health and welfare, $5.75 per hour for pension, $2.15 for vacation/holiday, $0.85 per hour for training, and $0.53 per hour for "other."

The general per diem prevailing wage rate under the Cement Mason, number NC-23-203-1A-2015-1 (Cement Mason PWD) totals $53.69 per hour, which includes a basic hourly rate of $30.00, $8.15 per hour for health and welfare, $9.80 per hour for pension, $5.24 for vacation/holiday, $0.47 per hour for training, and $0.02 per hour for "other."

The Assessment.

Tawfic Halaby, the City's senior civil engineer, submitted a complaint to DLSE alleging that Astro refused to submit CPRs for work completed on the Project from mid-September 2015 through mid-December 2015. On April 13, 2016, and May 5, 2016, Deputy Tsen issued two DLSE requests to Astro for certified payroll records (CPRs). Astro responded by email on May 15, 2016, providing DLSE with payroll records identified thereon as U.S. Department of Labor forms listing nine workers. The federal forms used by Astro did not call for workers' addresses and full Social Security numbers as required by section 1776 and as appears on DIR CPR forms. There was no testimony or documentation, moreover, to confirm that the forms Astro used were current U.S. Department of Labor forms.

On May 16, 2016, Tsen responded to Astro on the same email chain Astro started on May 15, requesting Astro to immediately provide the workers' residential addresses, full Social Security numbers, and fringe benefit payment information, which is information the DIR CPR form requests but which Astro did not provide. There being no response from Astro, on September 14, 2017, Tsen issued the Assessment for penalties under section 1776 for failing to provide compliant CPRs for nine workers for 476 days, at $100.00 per day (for a total assessed penalty of $428,400.00).

On January 23, 2018, Astro finally sent to DLSE the previously requested CPRs using the DIR forms. The CPRs classified Astro workers as either Laborer or "truck driver," and showed no workers classified as an Operating Engineer or Cement Mason on the Project. Upon receipt

of these CPRs, Tsen sent questionnaires to the workers at the purported residential addresses that Astro provided in the CPRs. When Tsen received back four questionnaires marked "undeliverable," she checked the addresses on Google Maps and found that the addresses did not exist.[3] DLSE did not receive back a single completed questionnaire from any of the workers.

Tsen testified that during her investigation, she also obtained Daily Reports for the Project that were prepared by Dezoysa to inform the City on Project progress for purposes of payment under the Subcontract. Tsen reviewed and compared the CPRs that Astro had provided on January 23, 2018, with the Daily Reports prepared by Dezoysa. The Daily Reports, unlike most daily reports Tsen had seen, identified worker names, job classifications, and hours. Tsen testified that she found the information provided on the Daily Reports more reliable than Astro's CPRs because she distrusted the veracity of Astro's CPRs, based on both Astro's delay in submitting the CPRs and the incorrect residential addresses Astro had provided for its workers. Tsen testified that Astro's failure to provide correct residential addresses for its workers was likely the reason for why she had not received back any completed questionnaires from the workers.

Dezoysa testified that he collected the information at the jobsite for the Daily Reports by observing workers and the work performed on the Project. Dezoysa's routine was to check the progress of the construction against the Project plans, obtain the names of workers by asking the workers on the jobsite, and note whether equipment was in use or idle. Dezoysa confirmed that there were other subcontractors working on the jobsite at the same time Astro worked, and his Daily Reports identified employees by subcontractor. Dezoysa conceded, however, that at times workers were misidentified or their names were misspelled on his Daily Reports.

Tsen further testified that in reliance upon the Daily Reports, she amended her audit worksheet (DLSE worksheet) to identify 20 Astro workers, one of whom Astro had paid the prevailing wage, in the proper classification, and for the number of hours actually worked. DLSE determined that Cement Masons worked on the Project, as well as Operating Engineers, Laborers and Teamsters, crafts identified in the Subcontract. According to the DLSE penalty

[3] Riley testified that one of the workers for whom the questionnaire was returned to DLSE had predeceased the mailing. DLSE did not rebut that claim. Astro did not explain, however, its failure to provide proper addresses for the other workers. Moreover, the evidence established that the address provided for the deceased worker was not a real address in any event.

review document that Tsen prepared in support of the original Assessment, Astro had omitted nine workers from its CPRs. DLSE's amended audit shows wages owed those nine workers at Laborer rates, based on an incomplete accounting by Astro as to the hours actually worked according to the Daily Reports. The penalty review also describes Astro's failure to pay prevailing wages within the proper classification for a total of ten other workers. Tsen testified she reclassified eight of the ten workers from Laborer, the craft title Astro used in the CPRs, to Cement Mason, because Dezoysa's Daily Report classified these workers as "Cement finishers" and described them as performing cement work. DLSE also reclassified the remaining two workers from the "truck driver" as identified in the CPRs to Operating Engineer, because the Daily Reports reflected that these workers should have been classified as Operating Engineers.

In the amended Assessment, DLSE reduced the penalty under section 1776, from $100.00 per day for nine workers for 476 days of noncompliance ($428,400.00) to $100.00 dollars per day for nine workers for 30 days of noncompliance ($27,000). DLSE provided no express explanation for the reduction.

Once DLSE received the requested CPRs, Tsen created the amended audit, adding unpaid wages, section 1775 penalties, and section 1777.7 penalties, while reducing the penalties under section 1776. The amended Assessment sets section 1775 penalties at the rate of $120.00 for 345 violations, and imposes section 1777.7 penalties at the rate of $60.00 for 92 violations.

At the Hearing on the Merits, Riley testified that his daughter, Qiana Riley, was the sole proprietor of Astro, and that the Daily Reports erroneously identify him as Astro's owner. He confirmed that he did act as Astro's manager and superintendent on the Project, but maintained that he performed no journeyman work requiring that he be paid the prevailing wage rate. Additionally, Riley testified that Astro performed concrete work on the Project in removing and replacing sidewalks, but also graded a hillside and set electrical boxes into the ground.

Riley further testified that certain individuals showing on the amended audit did not work for Astro on the Project. Riley denied knowing a worker named "Antonio,"[4] a worker named "John Riley, Jr.," and a worker named "Pablo Alhumada, Jr.," stating that persons with those exact names did not work on the Project. Riley confirmed, however, that his son John Riley, II

[4] Antonio appeared on the Daily Reports as an Astro worker without a surname. This naming convention was replicated on the DLSE Worksheet.

and Pablo Alhumada II did work on the Project. Riley also testified that Jerry Barker, a person listed on DLSE's amended audit, worked for a separate subcontractor performing work on the Project, and was not an employee of Astro. Riley did not provide any details describing Barker's work for the other subcontractor. Additionally, Riley testified that two other individuals he referred to as "truck drivers," who were classified as Teamsters on the amended audit, did not drive trucks for Astro. Riley did not clarify their exact job duties, other than to state that they worked as Laborers and did "other" jobs.

DISCUSSION

The California Prevailing Wage Law, set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects. The California Supreme Court has summarized the purpose of the CPWL 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, among other provisions, that contractors and subcontractors pay the difference to workers who received less than the prevailing wage rate, and also prescribes penalties for failing to pay the prevailing wage 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.

Additionally, employers on public works must also keep accurate payroll records, recording among other information, the work classification, straight time and overtime hours

worked, and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) A failure to supply certified payroll records to DLSE within 10 days from receipt of a request may result in a $100.00 penalty for each calendar day, or portion thereof, for each worker, "until strict compliance is effectuated." (§ 1776, subd. (h).) The penalty rate provided by the statute is mandatory.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those unpaid prevailing wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the assessment (or CWPA), the contractor deposits into escrow with DIR the full amount of the assessment of unpaid wages, including the statutory penalties thereon. In the instant case, Astro did not make a deposit with the DIR.

In general, and unless an exemption applies, 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 journeymen in the applicable craft or trade. (Cal. Code Regs, tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs in the geographic area that can supply apprentices to the project. (§ 1777.5, subd. (e).) The Division of Apprenticeship Standards (DAS) has prepared form DAS 140 that a contractor may use to submit contract award information to an applicable apprenticeship committee. (Cal. Code Regs, tit. 8, § 230, subd. (a).)

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio, however, if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).) DAS has prepared another form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees. Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request

dispatch of apprentices. A failure to do so may result in a penalty of $100.00 per day, or less if mitigated by the Labor Commissioner, for each full day of noncompliance.

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 that 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 presenting 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." (§1742, subd. (b); Cal. Code Regs., tit. 8, § 17250, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

Astro Failed to Pay the Required Prevailing Wage Rates.

In this case, based on the Daily Reports, the testimony, and the applicable prevailing wage rate determinations, DLSE met its initial burden to present prima facie support for its amended Assessment. For its part, Astro failed to carry its burden to prove that the basis for the amended Assessment was incorrect, except as to the three workers identified on the amended audit as Antonio, Jerry Barker, and John Riley, Jr., as explained below. DLSE's evidence presented at Hearing showed that Astro misclassified workers and also underreported worker hours. DLSE reasonably relied upon the Daily Reports for identification of the proper classification of workers, the work functions they performed, and the hours they worked. As the awarding body's inspector on the Project, Dezoysa had the opportunity to observe the workers on the jobsite, and his Daily Reports provided a neutral and reliable resource from which deputy Tsen could evaluate the number of workers on the Project for Astro and their classifications, and compare and cross-reference the hours on the Daily Reports with those reported by Astro on the CPRs. By providing CPRs with incorrect addresses, Astro in effect denied DLSE a means to contact Astro's workers directly in order to verify the accuracy of the late-produced CPRs. Additionally, the CPRs only showed workers in two classifications, Laborer and Teamster,

reflecting what was clearly misclassification given the nature and scope of the Project, and the actual work performed as reflected in the Daily Reports.

Specifically, DLSE was justified in reclassifying workers Astro had labeled and paid as Laborers to Cement Masons because Astro identified no Cement Masons on the CPRs, while the Subcontract clearly indicated that concrete work was required of Astro on the Project. The Daily Reports, too, described concrete work performed by Astro. While Astro performed other incidental work on the Project, including grading a hillside and placing electrical boxes in the ground, the Subcontract specifies that the job was primarily for the removal and replacement of sidewalks, curbs and gutters.

While the scope of work provisions for Laborer include cement work, the primary scope of work of a Laborer is to tend the trade or craft. Therefore, it is not proper for Astro to have workers performing journeyman work in the trade of Cement Mason without classifying some of the workers as Cement Masons. Additionally, Astro never denied that DLSE properly reclassified its Laborers as Cement Masons.

Furthermore, Riley essentially conceded that DLSE properly reclassified Laborers to Operating Engineers by virtue of his identification of various Astro employees working on the jobsite as mechanics. Comparing the Operating Engineer PWD scope of work with DLSE's evidence presented at the Hearing, the preponderance of the evidence supports DLSE's reclassification to Operating Engineer for those individuals who acted as mechanics.

Riley testified that two workers did not drive trucks and therefore DLSE had erred in reclassifying them as Teamsters. Astro failed to effectively rebut DLSE's classification of Teamster for these two workers, however, because Riley's description of the work performed was simply "miscellaneous tasks," and Riley refused to submit his own personal notebook containing hours and job descriptions, despite the Hearing Officer suggesting its submission. Further, Dezoysa affirmatively testified that he knew the drivers and had observed them driving. Based on a preponderance of the evidence, Dezoysa's testimony provides an basis for DLSE's reclassification of the two workers according to the Teamster PWD.

With regard to whether "John Riley, Jr." worked on the Project, Riley testified that only his son, John Riley II, worked on the Project, not a John Riley, Jr. The Daily Reports listed both names – John Riley, II and John Riley, Jr. Dezoysa testified that he believed John Riley, Jr. was

the same person as John Riley II, thereby conceding to a mistake in listing both names in the Daily Reports. The DLSE Worksheet, however, assigns hours to both John Riley, Jr. and John Riley II, as if they were separate individuals. DLSE did not rebut Riley's testimony that no one by the name of John Riley, Jr. worked on the Project, and that the correct name of the person who worked on the Project was John Riley II. The DLSE Worksheet reports that John Riley, Jr. worked 318 straight-time hours as a Laborer and that John Riley II worked 300.5 straight-time hours as an Operating Engineer. Based on the evidence, it cannot be concluded that these were separate hours worked by the same person. Accordingly, the Assessment will be reduced by the 318 hours attributed to John Riley, Jr. at the Laborer hourly rate of $39.34 for a total reduction of $12,510.12.

Riley testified that an individual named "Antonio" never worked for Astro on the Project. Dezoysa was unable to explain why he could not obtain Antonio's surname, despite having reported other workers' surnames. Additionally, Riley testified credibly that Jerry Barker was another subcontractor, not an Astro employee, on the Project. Dezoysa was unable to testify as to the work performed by Barker. While Dezoysa was a neutral witness and Riley was an interested participant, Riley appeared to be the more credible source of information as to whether these two individuals worked on the Project. Furthermore, as happened in the face of Riley's evidence on Riley, Jr., DLSE did not attempt to refute or rebut Riley's testimony that Antonio and Barker were not Astro workers.[5]

Riley's credibility as to the three individuals discussed above for whom hours were incorrectly listed in DLSE's audit does not cure his failure to rebut DLSE's findings as to the other workers shown to be due wages on the amended Assessment. Nor did Riley even attempt to contest DLSE's re-classification of some workers paid as Laborers to the craft of Cement Mason. In fact, Riley's testimony confirmed a number of aspects of the Daily Reports. For example, Riley testified to the death of Michael Henderson, a Laborer, who had worked on the Project. The dates of Henderson's work and death, according to Riley, corresponded to the

[5] With regard to whether Pablo Alhumada, Jr. worked on the Project, Riley testified that a person named Pablo Alhumada II worked for Astro on the jobsite, but not Pablo Alhumada, Jr. Both the Daily Reports and DLSE Worksheet list hours of work for just one of the two, Pablo Alhumada, Jr. Dezoysa testified that he believed Pablo Alhumada Jr. and Pablo Alhumada II were the same person. Dezoysa's testimony provides a reasonable explanation for the slight difference in the names. No reduction in hours on the DLSE worksheet is required.

information contained in the Daily Reports. These circumstances provide reason to accept the representations of the workers' actual classifications and hours of work as recorded in the Daily Reports and relied upon in the amended Assessment.

The amended Assessment found $63,842.75 due in wages for nineteen workers. Included in that sum were the wages allegedly due for "John Riley, Jr.", "Antonio," and Jerry Barker in the collective amount of $23,232.84. Deducting this amount for the reasons cited *ante*, Astro is liable for payment of unpaid prevailing wages in the remaining amount of $40,609.91, excluding training fund contributions, as addressed *post*.[6]

DLSE's Penalty Assessment Under Section 1775 Was Proper.

Section 1775, subdivision (a), as it read at the time the Project was bid (May 21, 2015), states in relevant part:

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars ($200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
>
> (2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
>
> (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
>
> (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
>
> (B)(i) The penalty may not be less than forty dollars ($40) . . . unless the failure of the contractor 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) . . . 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

[6] As noted above, however, and as reflected in the Findings and Order below, a portion of this total sum has already been paid to the workers pursuant to a settlement between DLSE and the prime contractor on the Project. The Findings and Order reflect that Astro is entitled to a credit against the amount owed for this prior payment.

subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty ($120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[7]

((Former) § 1775, subd. (a).)

The Labor Commissioner's determination as to the amount of penalty is reviewable only for abuse of discretion. (§ 1775, subd. (a)(2)(D).) This is an inquiry as to whether the action was "arbitrary, capricious or entirely lacking in evidentiary support ...." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his/her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

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

DLSE assessed section 1775 penalties for a total amount of $41,400.00 at the rate of $120.00, based on Astro's misclassifying and underpaying the 19 workers listed in the audit in 345 instances. The burden was on Astro to prove that DLSE abused its discretion in setting the penalty amount under section 1775. Astro failed to carry that burden because Astro did not address the issue at the Hearing. Hence, the penalty assessment rate will be affirmed, but with the follow exceptions.

In the DLSE Worksheet, DLSE calculated the penalty under section 1775 on the basis of 19 workers, including the three workers discussed above, "Antonio," "John Riley Jr.," and Barker, whose inclusion is rejected, as discussed *ante*. The section 1775 penalties DLSE assessed against Astro for failure to pay those three workers amounted to $6,360.00 for 53 instances at the rate of $120.00. Accordingly, the section 1775 penalties are reduced by that

[7] The reference to section 1777.1, subdivision (c) is a typographical error in the statute. The correct subdivision of section 1777.1 is subdivision (e), which defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

amount, leaving Astro with liability for section 1775 penalties for 292 instances at the rate of $120.00, for a total amount of $35,040.00.

Astro Violated the Requirement to Supply CPRs Within Ten Days From DLSE's Request.

Section 1776, subdivision (a), sets forth the information and statements that CPRs must contain to qualify as compliant records under the CPWL, as follows:

> (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.

Astro first responded to DLSE's request for certified payroll records with records on U.S. Department Labor forms. These payroll record forms contained information including the workers' names, the last four digits of the Social Security numbers, job classifications, hours worked, and rates of pay, but not the other information required by section 1776, including worker addresses, full Social Security numbers, and the statement that the employer complied with the requirements of sections 1771, 1811 and 1815. While the federal form provided space to list fringe benefits, Astro neglected to complete that portion of the form.

On May 16, 2016, deputy Tsen asked for the complete CPRs on DIR forms. Astro did not respond to her request with corrected CPRs until January 23, 2018, 628 days later. DLSE chose to limit the assessed penalty to a period of 30 days. (§ 1776, subd. (h).) DLSE also chose to assess the penalty for only nine workers, apparently on the grounds that nine workers were missing from the CPRs that were ultimately provided to DLSE on January 23, 2018. DLSE could have assessed a much higher section 1776 penalty based on both the number of days for which Astro failed to produce CPRs and the number of workers on the Project. Given

that, the Director affirms the amended Assessment as to the penalties under section 1776 in the amount of $27,000.

Astro Violated Apprentice 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. (Cal. Code Regs., tit. 8, §§ 227 to 232.70.)[8]

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 journeymen 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).) However, a contractor shall not be considered in violation of the regulation if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).) The Division of Apprenticeship Standards (DAS) has prepared a form (DAS 142) that a contractor may use to request dispatch of apprentices from apprenticeship committees.

Contractors are also required to notify apprenticeship committees when a public works contract has been awarded. DAS has also prepared a form for this purpose (DAS 140), which a contractor may use to notify apprenticeship committees for each apprenticeable craft in the area of the site of the project. The required information must be provided to the applicable committee 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." (§ 230.1, subd. (a).)

Thus, 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.

Section 1777.5, subdivision (e), and the regulation at section 230, subdivision (a),

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

provide that prior to commencing work on its public works contract, a contractor shall notify apprenticeship programs in the area of the site of the public works project that has approved the contractor to train apprentices that it has been awarded a public works contract at which apprentices may be employed.

DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment as to Astro's failure to notify applicable apprenticeship committees. (Cal. Code Regs., tit. 8, § 17250, subd. (a).) DLSE presented evidence that three applicable apprenticeship committees existed in the geographic area of the Project covering three of the four crafts used on the job: Cement Mason, Laborer, and Operating Engineer. DLSE also presented evidence that those three committees were not properly notified of Astro's public works contract. Astro did not rebut that evidence or otherwise carry its burden to prove the basis of the amended Assessment is incorrect in that regard. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, it is concluded that Astro violated section 1777.5, subdivision (e), and the applicable regulation, section 230, as to the notice requirement.

Similarly, DLSE carried its initial burden of presenting evidence as to Astro's failure to request the dispatch of apprentices for the crafts of Cement Mason, Laborer and Operating Engineer in compliance with the applicable regulation. Astro failed to introduce any evidence to rebut DLSE's evidence or otherwise carry its burden of proof as to its failure to request for dispatch of apprentices to the Project.

DLSE's evidence also shows that Astro employed no apprentices on the Project, and Astro did not rebut that evidence. Accordingly, the record establishes that Astro violated section 1777.5, subdivision (g), and section 230.1, subdivision (a), based on its failure to employ sufficient apprentices to meet the required 1:5 apprentice to journeyman ratio for the crafts of Cement Mason, Laborer, and Operating Engineer.

The Labor Commissioner Did Not Abuse Her Discretion in Assessing Penalties Under Section 1777.7 at the Reduced Rate of $60.00 per Violation.

As it existed on the date of the bid advertisement (May 21, 2015), section 1777.7 states in relevant part:

> (a) (1) If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5, the contractor and any subcontractor responsible for the violation shall

> forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than one hundred dollars ($100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation. ...

The phrase "knowingly violated Section 1777.5" is defined by the regulation, section 231, subdivision (h) as follows:

> For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control.

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

In this case, Astro failed to notify the applicable apprenticeship committees, failed to request dispatch of apprentices in the crafts of Cement Mason, Laborer, and Operating Engineer, and failed to hire any apprentices in those crafts. Moreover, the record provides no reason for Astro's failures. Based on these facts, Astro "knowingly violated" the requirements of Section 1777.5, and is subject to the statutory penalty of up to $100.00 for each full calendar day of noncompliance. (§ 1777.7, subd. (a)(1).) As set forth in the penalty review, DLSE mitigated the penalty downward to $60.00 per day, for a stated number of violations at 92 days (from September 22, 2015, to December 23, 2015), and a total penalty of $5,520.00.[9] Riley failed to demonstrate at the Hearing that either the penalty rate or the number of days for which the penalty was assessed constituted an abuse of discretion. Accordingly, the penalty of $5,520.00 is affirmed.

[9] While Astro journeymen may have worked on the Project for a total of 48 days, as Riley testified, DLSE's penalty period of 92 days is based on the dates encompassing Astro's failure to submit the DAS 140 notice, a period of time that spans the entire period for the Project, not just on the number of days that journeymen were present on the jobsite. (See Cal. Code Regs., tit. 8, § 230, subd. (a).) In this case, Astro did not show DLSE abused its discretion in finding the period of the Project lasted 92 days.

Astro Failed to Make the Required 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. Here, Astro was obligated by the applicable prevailing wage determinations to make training fund contributions for the workers. Astro presented no evidence to disprove the basis for, or the accuracy of, the amended Assessment in this regard, except with respect to the three workers, Antonio, Riley Jr., and Barker, whose inclusion in the DLSE audit is not accepted, as discussed *ante*. Based on that limited exception, the amount owed by Astro for training fund contributions will be reduced by the amount attributable to those three workers, who were classified in the DLSE Worksheet as Operating Engineer, Cement Mason and Teamster. In the amended Assessment, DLSE found that Astro owed $1,132.46 in training fund contributions. Removing the three workers reduces the amount owed for training fund contributions by $333.42, representing the number of work hours attributed to them in the amended Assessment multiplied by the training fund rates of the three classifications applicable to them, Operating Engineer, Cement Mason, and Teamster. Accordingly, Astro is liable for payment of training funds in the sum of $799.04.

Astro Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages , essentially a doubling of the unpaid wages, under specified circumstances. It 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 provides contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). Under section 1742.1, subdivision (a), the contractor has 60 days to pay 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. Alternatively, 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.[10]

Here, no evidence shows that Astro either paid any of the wages owed or made any deposit to DIR within 60 days of issuance of the amended Assessment. Accordingly, Astro is liable for liquidated damages of the underpaid prevailing wages, $40,609.91.

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

FINDINGS AND ORDER

1. Affected subcontractor Qiana Riley, an individual doing business as Astro Construction, underpaid $40,609.91 of prevailing wages owed to 16 of its workers on the Project. Accordingly, prevailing wages in the sum of $40,609.91 are due (less a credit for the prevailing wages already paid to these workers on June 26, 2018, pursuant to a settlement between DLSE and prime contractor Granite Rock Company).
2. Qiana Riley, an individual doing business as Astro Construction, did not make required training fund contributions of $799.04 for workers on the Project. Accordingly, training fund contributions in the sum of $799.04 are due.
3. Qiana Riley, an individual doing business as Astro Construction, did not pay the unpaid prevailing wages or deposit funds with DIR within 60 days after the amended Assessment issued. Accordingly, under Labor Code section 1742.1, subdivision (a), liquidated damages in the sum of $40,609.91 are due.
4. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code section 1775, subdivision (a), at the rate of $120.00 per violation for 292 violations. Accordingly, statutory penalties in the sum of $35,040.00 are due.
5. Qiana Riley, an individual doing business as Astro Construction, did not timely provide certified payroll records following the request by the Division of Labor Standards and

[10] On June 27, 2017, before Astro filed its request for review of the amended Assessment, the Director's discretionary ability to waive liquidated damages was deleted from section 1742.1 by legislative amendment. (Stats. 2017, ch. 28, §16 [Sen. Bill No. 96].)

Enforcement. Accordingly, Labor Code section 1776, subdivision (h) penalties at $100.00 for nine employee at 30 days, totaling $27,000.00, are due.

6. Qiana Riley, an individual doing business as Astro Construction, knowingly violated Labor Code section 1777.5 and California Code of Regulations, title 8, section 230, subdivision (a) by not issuing public works contract award information in a DAS 140 form or its equivalent to the applicable apprenticeship committees in the geographic area of the Project site for the crafts of Cement Mason, Laborer, and Operating Engineer.
7. Qiana Riley, an individual doing business as Astro Construction, knowingly violated Labor Code section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a) by: (1) not issuing requests for dispatch of apprentices in a DAS 142 form or its equivalent to the applicable apprenticeship committees for the crafts of Cement Mason, Laborer, and Operating Engineer in the geographic area of the Project site; and (2) not employing on the Project apprentices in the applicable crafts of Cement Mason, Laborer, and Operating Engineer in the ratio of one hour of apprentice work for every five hours of journeyman work.
8. Qiana Riley, an individual doing business as Astro Construction is liable for an aggregate penalty under Labor Code section 1777.7 in the sum of $5,520.00, computed at $60.00 per day for 92 days.
9. The amounts found due in the Assessment, as modified and affirmed by this Decision, are as follows:

Wages:	$40,609.91[11]
Training fund contributions:	$799.04
Liquidated damages under section 1742.1:	$40,609.91
Penalties under section 1775, subdivision (a):	$35,040.00
Penalties under section 1776, subdivision (h):	$27,000.00
Penalties under section 1777.7	$5,520.00
TOTAL:	**$149,578.86**

[11] The wages owed are to be reduced by $36,577.88 as per the payment from Granite Rock Company.

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

The amended 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: August 2, 2019

Victoria Hassid
Chief Deputy Director
Department of Industrial Relations[12]

[12] See Government Code sections 7, 11200.4.