

**STATE OF CALIFORNIA**  
**DEPARTMENT OF INDUSTRIAL RELATIONS**

In the Matter of the Request for Review of:

**Tribute Tile and Stone, Inc.**

Case No. 22-0119-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 Tribute Tile and Stone, Inc. (Tribute) submitted a timely Request for Review of a Civil Wage and Penalty Assessment (Assessment) issued on March 11, 2022, by the Division of Labor Standards and Enforcement (DLSE) with respect to work Tribute performed for the Waterford Unified School District (Awarding Body) in connection with the RMPS Restroom Remodel and Site Work (Project) located in Stanislaus County. The Assessment determined that Tribute owed \$1,320.00 in statutory penalties under Labor Code section 1777.7 because Tribute violated apprentice requirements.<sup>1</sup>

Hearing Officer Edward A. Kunnes held a Hearing on the Merits on February 21, 2023, via video conference. Evan Adams (Adams) appeared as counsel for DLSE; Tribute failed to appear.<sup>2</sup> The Hearing proceeded in the absence of Tribute pursuant to California Code of Regulations, title 8, section 17246, subdivision (a). DLSE Deputy Labor Commissioner Thuy Pham (Pham) testified in support of the Assessment. DLSE's Exhibits 1–4 were admitted into evidence.<sup>3</sup> Tribute did not file a motion seeking relief from its nonappearance as permitted under California Code of Regulations, title 8,

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

<sup>2</sup> Anthony Narducci and Daniel Voolstra of The Northern California Tile Industry Labor Management Cooperation Committee Trust and its counsel Kimberly Weber also appeared at the Hearing on the Merits.

<sup>3</sup> A copy of the Notice of Transmittal, Notice of Opportunity to Review Evidence Pursuant to Labor Code Section 1742, subdivision (b), Request for Review, the Assessment and proofs of service are in the Hearing Officer's file. DLSE transmitted the documents to the Lead Hearing Officer along with the Request for Review and other pertinent documents. The Director takes official notice of the Notices and Proofs of Service and their content pursuant to California Code of Regulations, title 8, section 17245.

section 17246, subdivision (b). The Hearing Officer submitted the matter for decision on February 21, 2023.

The issues for decision are as follows:

- Whether Tribute submitted contract award information to the applicable apprenticeship committees in a sufficient and timely manner.
- Whether Tribute requested dispatch of apprentices for all crafts employed on the Project.
- Whether Tribute employed apprentices in the required minimum ratio of apprentices to journeypersons on the Project.
- Whether Tribute is liable for penalties assessed pursuant to section 1777.7.

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

## FACTS

### Failure to Appear.

Tribute's contact information on file is as follows: 331 Pine St, Ripon, CA 95366; brett@tributetile.com. The Hearing Office set a telephonic prehearing conference by notice for August 22, 2022, at 1:00 p.m. Tribute failed to appear for the prehearing conference. The Hearing Officer set a second telephonic prehearing conference by notice for October 3, 2022, at 1:00 p.m. The notice contained the following advisory about the failure to appear:

**The Hearing Officer may require the parties to follow any of the rules of procedure set forth in the California Code of Regulations, title 8, section 17201 et seq. please be on notice that Rule 17246 titled "Failure to Appear; Relief from Default" will be followed. Subdivision (a) of Rule 17246 states, "Upon the failure of any Party to appear at a duly noticed hearing, the Hearing Officer**

**may proceed in that Party's absence and may recommend whatever decision is warranted by the available evidence, including any lawful inferences that can be drawn from an absence of proof by the non-appearing Party." Thus, your rights may be adversely affected by your failure to appear at any duly noticed hearing in this matter.**

Prior to the second scheduled prehearing conference on October 3, 2022, Adams of DSLE sent an email to the Hearing Officer, with copy to all parties, stating that, he "spoke just now with Brett McBay, who requested review for Tribute Stone & Tile[, and] Mr. McBay said that he will be on an airplane at 1:00 p.m. today and won't appear at the prehearing." The Hearing Officer continued the prehearing conference to November 21, 2022, at 10:00 a.m. At the third scheduled prehearing conference, Tribute failed to appear again. The Hearing Officer set the matter for Hearing on the Merits on February 21, 2023, at 10:00 a.m., via video conference. On January 17, 2023, a document titled "Minutes of Prehearing Conference; and Order Setting Hearing on the Merits" was served by email on Tribute, by email to McBay at brett@tributetile.com. The Minutes provided notice of the date and time of the Hearing on the Merits, as well as instructions for participating via video conference. They also contained the admonition regarding the effect of a failure to appear.

On February 21, 2023, the Hearing on the Merits Commenced at 10:00 a.m. Tribute did not appear for the Hearing. The matter proceeded as scheduled.

#### The Project.

On April 2, 2020, the Awarding Body advertised the Project for individual trades to bid respective parts of the overall Project. (DLSE Exhibit No. 1, p. 2.) The Project was completed on September 17, 2020, and a Notice of Completion was signed by the Awarding Body's superintendent on September 18, 2020, evidencing acceptance of the Project. (*Ibid.*)<sup>4</sup> The Awarding Body confirmed that Tribute was not a subcontractor on the Project, but rather worked on the Project in its own trade, as a tile installer and

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<sup>4</sup> The Notice of Completion is attached to DLSE Exhibit No. 1, Pham's declaration, as Exhibit A.

finisher. (*Ibid.*) Tribute installed new floor and wall tile in Administration Building restrooms and installed floor and wall tile in classroom restrooms. (DLSE Exhibit No. 3, p. 5.) The cost of the Project was \$ 93,393.60 based on invoices provided to DLSE by the Awarding Body. (*Id.* at p. 4.)

#### The Complaint and Investigation.

Anthony Narducci of The Northern California Tile Industry Labor Management Cooperation Committee Trust filed a complaint against Tribute with DLSE. The complaint alleged that Tribute failed to provide public works contract award information (form DAS 140), failed to request dispatch of apprentice (form DAS 142), and failed to employ apprentices. (DLSE Exhibit No. 3, p. 5.)

DLSE assigned Pham to investigate the complaint. Pham served on Tribute a Notice of Investigation, Request for Payroll Records, Statement of Employer Payments form, Public Works Payroll Reporting form, and Notice of Apprenticeship Compliance. Separately, Pham served on the Awarding Body a request for project information. (DLSE Exhibit No. 1, p. 2.) Pham received information from the Awarding Body regarding the work performed, the bid date, and the completion date. (*Ibid.*) Tribute responded to the Request for Payroll records by sending certified payroll records (CPRs) to Pham. The CPRs showed that Tribute worked on the Project over a 33-day period, beginning on June 22, 2020, and ending on July 24, 2020.<sup>5</sup> (*Ibid.*) On the CPRs, Tribute documented 242 journeyman hours in the craft of Tile Finisher and 213 journeyman hours in the craft of Tile Setter on the Project. (*Ibid.*) The CPRs indicated that Tribute employed no apprentices on the Project. (*Id.* at p. 3.) Tribute did not respond to the Notice of Apprenticeship Compliance. (*Id.* at p. 3.) However, Brett McBay the owner of Tribute, sent a letter with the CPRs, in which he admitted that Tribute did not have apprentices on the Project because it was a small project, and they were not familiar with section 1777.5. (*Id.* at p. 5; also see, DLSE Exhibit No. 2.)

Pham continued investigating the alleged apprentice violations. First, Pham

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<sup>5</sup> The CPRs are attached to DLSE Exhibit No. 1, Pham's declaration, as Exhibit C.

identified one training committee in the geographic area of the Project, the Northern California Tile Industry Joint Apprenticeship Training Committee (Tile Industry JATC). (DLSE Exhibit No. 1, p. 3.) Second, Pham contacted the Tile Industry JATC, and received confirmation that Tribute had not submitted to it either contract award information (form DAS 140) or request for dispatch of apprentices (form DAS 142) for the Project. (*Ibid.*) Finally, Pham determined that based on the number of hours Tribute had employed journeyman workers in the classifications of Tile Finisher and Tile Setter on the Project, in order for Tribute to meet the minimum ratio of apprentices to journeymen on the Project, Tribute should have employed Tile Finisher apprentices a minimum of 48.4 hours and Tile Setter apprentices a minimum of 42.6 hours on the Project. (*Ibid.*)

#### The Assessment.

Pham determined that Tribute had violated section 1777.5 for the 33 calendar days that it worked on the Project. (DLSE Exhibit No. 1, p. 3.). Pham recommended a penalty rate of \$40.00 per violation (33 calendar days) based on Tribute's prior record, having settled a case the previous year for a wage violation and being under investigation for two other cases, as well as lost opportunities for apprentices and harm to apprentices and apprenticeship programs. (DLSE Exhibit No. 3, pp. 3 and 6.) Mitigating against a harsher penalty rate was that Tribute paid the correct prevailing wage rates to its workers on the Project and had an active public works contractor registration. Ultimately, Pham based the recommendation for the \$40.00 penalty rate on good faith mistake. (*Id.* at p. 6.) The Senior Deputy Labor Commissioner approved Ms. Pham's recommendation of \$40.00 per violation for a total of \$1,320.00 in section 1777.7 penalties. (*Id.* at p. 2.) DLSE served the Assessment on Tribute by first class mail and certified mail attention Brett Elton McBay on March 11, 2022. (DLSE Exhibit No. 4.)

## DISCUSSION

All public works contracts valued at \$30,000 or more carry an obligation to employ apprentices. (See § 1777.5, subd. (o).)<sup>6</sup> The uncontroverted evidence in this matter was that Tribute was paid in excess of \$93,000.00 for its work on the Project. Thus, the requirements of section 1777.5 applied to Tribute.

### DLSE Served the Assessment Timely.

Section 1741, subdivision (a) provides in pertinent part:

The assessment shall be served no 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. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first class and certified mail to the contractor, subcontractor, and awarding body.

The Awarding Body filed a Notice of Completion with the Stanislaus County Clerk and Recorder on October 6, 2020. The Notice stated that the Project was completed on September 17, 2020. The filing of the Notice occurred more than 15 days after the Project was completed, so the notice was invalid. (See Civ. Code, § 9204.) However, the Awarding Body's superintendent signed the Notice of Completion on September 18, 2020, evidencing acceptance of the Project. (See *Madonna v. State of California* (1957) 151 Cal.App.2nd 836, 840.) DLSE served the Assessment by first class mail and certified mail on March 11, 2022, within 18 months of September 18, 2020. (DLSE Exhibit No. 4.) Therefore, the Assessment was served timely.

### DLSE Made Its Enforcement File Available to Tribute Timely.

Section 1742, subdivision (b) provides in pertinent part: "The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of a written request for a hearing." California Code of Regulations, title 8, section 17224 provides in pertinent

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<sup>6</sup> There is an exception where the craft or trade does not require the use of apprentices, as indicated in the corresponding prevailing wage determination.

part:

- (a) Within ten (10) days following its receipt of a Request for Review, the Enforcing Agency shall also notify the Affected Contractor or Subcontractor of its opportunity and the procedures for reviewing evidence to be utilized by the Enforcing Agency at the hearing on the Request for Review.
- (b) An Enforcing Agency shall be deemed to have provided the opportunity to review evidence required by this Rule if it (1) gives the Affected Contractor or Subcontractor the option, at the Affected Contractor or Subcontractor's own expense, to either (A) obtain copies of all such evidence through a commercial copying service or (B) inspect and copy such evidence at the office of the Enforcing Agency during normal business hours; or if (2) the Enforcing Agency at its own expense forwards copies of all such evidence to the Affected Contractor or Subcontractor.

Here the Request for Review was received by DLSE on April 11, 2022. Four days later, on April 15, 2022, DLSE served Tribute with the Notice of Opportunity to Review Evidence Pursuant to Labor Code section 1742(b). Thus, it must be concluded that DLSE satisfied its obligations under section 1742 and the above regulation.

Apprenticeship Violations.

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.)

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 journeypersons in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). (§ 1777.5, subd. (g); Cal. Code Regs., tit. 8, § 230.1, subd. (a).) 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.

Contractors are also required to notify apprenticeship programs to the fact that

they have been awarded a public works contract at which apprentices may be employed. (§ 1777.5, subd. (e); Cal. Code Regs., tit. 8, § 230, subd. (a).) The Division of Apprenticeship Standards has prepared a form for this purpose (DAS 140), which a contractor may use to notify all apprenticeship programs 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 execution of the prime contract or subcontract, "but in no event no later than the first day in which the contractor has workers employed on the public work." (Cal. Code Regs., tit. 8, § 230, subd. (a).) Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities for training and work, and to request dispatch of apprentices for specified dates with sufficient notice. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).)

There Was One Applicable Committee in the Geographic Area.

DLSE established there was one applicable apprenticeship committee for the Tile Finisher and Tile Setter classifications in the geographic area of the Project: the Tile Industry JATC.

Tribute Failed to Properly Notify The Applicable Committee of Contract Award Information.

DLSE established that Tribute failed to notify the Tile Industry JATC of contract award information. Tribute produced no evidence to the contrary. Thus, Tribute has not met its burden of proving that the Assessment was incorrect in finding that it failed to notify the applicable apprentice committee of its public works contract. Thus, it violated section 1777.5, subdivision (e) and the applicable regulation, section 230, subdivision (a).

Tribute Failed to Request the Dispatch of Tile Finisher and Tile Setter Apprentices.

All requests for dispatch of apprentices must be in writing and provide at least 72 hours' notice of the date on which one or more apprentices are required. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DLSE established that Tribute made no such request to the Tile Industry JATC for a Tile Finisher or Tile Setter apprentice, and that no Tile



Finisher or Setter apprentice was employed on the Project. Tribute produced no evidence that it complied with the above regulation in this respect, and accordingly failed to meet its burden of proving the Assessment incorrect.

Tribute Failed to Employ Tile Finisher and Setter Apprentices in the Required Ratios.

Tile Finisher and Tile Setter were the apprenticeable crafts at issue in this matter. Tribute employed no Title Finisher or Tile Setter apprentices on the Project; it admitted as such. By the conclusion of its work on the Project, Tribute had employed Tile Finisher journeypersons for 242 hours. Thus, to meet the one to five ratio Tribute was required to employ Tile Finisher apprentices for a total of 48.4 hours. Tribute employed Tile Setter journeypersons for 213 hours. Thus, to meet the one to five ratio Tribute was required to employ Tile Setter apprentices for a total of 42.6 hours. Accordingly, the record establishes that Tribute violated section 1777.5 and the related regulation, section 230.1, in its failure to meet the required one to five apprentice to journeyperson hour ratio by not employing any apprentices.

The Penalty for Noncompliance.

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 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. 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.

(Emphasis added.) In determining the penalty amount, the Labor Commissioner is to consider all of the following circumstances under section 1777.7, subdivision (b):

- (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.

The Labor Commissioner's determination of the amount of the penalty, however, is reviewable only for abuse of discretion. (§ 1777.7, subd. (d).) A contractor or subcontractor has the burden of proof with respect to the penalty, namely, that the Labor Commissioner abused discretion in determining that a penalty was due or in determining the amount of the penalty. (Cal. Code Regs., tit. 8, § 17250.)

In this case, DLSE based section 1777.7 penalties on Tribute's failure to submit contract award information as required by section 1777.5, subdivision (e), and section 230, subdivision (a) of the applicable regulations. Section 230, subdivision (a) states as follows:

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 the penalties under Labor Code Section 1777.7

Thus, per the regulation, a failure to provide contract award information is a violation that runs throughout the duration of the contract. DLSE imposed a mitigated penalty rate of \$40.00 (down from \$100.00) for each of 33 days of noncompliance, based on the period from the day on which the DAS 140 notice was required to be given through the last day Tribute worked on the Project. (These penalties were assessed on the basis of Tribute's failure to notify the applicable committee; no additional penalties were assessed for the additional section 1777.5 violations found.) DLSE found that the violation was a good faith mistake but nevertheless that the violation resulted in lost

opportunities for apprentices, and otherwise harmed apprentices or apprenticeship programs.

Tribute should have known of the apprenticeship requirements of section 1777.5. It paid the workers on the Project the correct prevailing wage rates. The Prevailing Wage Determination (PWD) for Stanislaus County in effect at the time of the Project included a hash (#) sign before the classifications of Tile Finisher and Tile Setter.<sup>7</sup> The hash sign indicates an apprenticeable craft. Also, Tribute made an apprenticeship training fund payment. Finally, Tribute claimed it did not need to employ apprentices on the Project because the Project was not a Lease Buy Back one.<sup>8</sup> Taken together, there are enough indications that Tribute should have known of the apprenticeship requirements, even if its actions could be classified as a mistake.

Having not appeared at the Hearing, Tribute did not establish that the Labor Commissioner abused her discretion in assessing \$40.00 per violation. Accordingly, as determined by DLSE and specified in the Assessment, Tribute is liable for 1777.7 penalties of \$40.00 per violation for 33 days, for a total amount of \$1,320.00. Based on the foregoing, the Director makes the following findings:

### **FINDINGS AND ORDER**

1. The Project was a public work subject to the employment of apprentices.
2. The Civil Wage and Penalty Assessment was served timely by DLSE in accordance with section 1741.
3. Affected contractor Tribute Tile and Stone, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. DLSE made available to Tribute Tile and Stone, Inc. its enforcement file timely.

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<sup>7</sup> The PWD is attached to DLSE Exhibit No. 1, Pham's declaration, as Exhibit B.

<sup>8</sup> See DLSE Exhibit No. 2.

5. There was one applicable apprenticeship committee in the geographic area of the Project for the craft of Tile Finisher and Tile Setter, namely, the Northern California Tile Industry Joint Apprenticeship Training Committee.
6. Tribute Tile and Stone, Inc. failed to issue a Notice of Contract Award Information to the Northern California Tile Industry Joint Apprenticeship Training Committee for the crafts of Tile Finisher and Tile Setter.
7. Tribute Tile and Stone, Inc. failed to properly request dispatch of Tile Finisher and Tile Setter apprentices from the Northern California Tile Industry Joint Apprenticeship Training Committee, and it was not excused from the requirement to employ apprentices under Labor Code section 1777.5.
8. Tribute Tile and Stone, Inc. violated section 1777.5 by failing to employ apprentices in the crafts of Tile Finisher and Tile Setter on the Project in the minimum ratio required by the law.
9. Tribute Tile and Stone, Inc. knowingly violated section 1777.5.
10. The Labor Commissioner did not abuse her discretion in setting section 1777.7 penalties at the rate of \$40.00 per violation for 33 violations, and such penalties are due from Tribute Tile and Stone, Inc. in the amount of \$1,320.00.

The amount found due under the Assessment is as follows:

<b>Basis of the Assessment</b>	<b>Amount</b>
Penalties under section 1777.7:	\$1,320.00
<b>TOTAL:</b>	<b>\$1,320.00</b>

The Civil Wage and Penalty Assessment is affirmed in full 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: 05-03-2023

  
**Katrina S. Hagen, Director**  
 California Department of Industrial Relations