

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

California Quality Construction, Inc.

Case No.: 19-0197-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor California Quality Construction, Inc. (CQC) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued on March 25, 2019, by the Division of Labor Standards Enforcement (DLSE) with respect to work performed by CQC on the North Branch Library (Project), for the City of Long Beach (City) in Los Angeles County. The Assessment indicated that \$39,759.03 in unpaid prevailing wages and \$48,820.00 in statutory penalties were due.

A Hearing on the Merits occurred on September 2, 2020, and September 14, 2020, before Hearing Officer Mirna Solis. Lance Grucela appeared as counsel for DLSE. Linus C. Amarikwa, a non-attorney authorized Representative, appeared for CQC.¹ DLSE's investigator/auditor, Selma Escobar, testified in support of the Assessment. At the conclusion of the hearing on September 14, 2020, the Hearing Officer submitted the matter for decision.

On December 9, 2019, during a Prehearing Conference, the parties stipulated to the following:

- The work subject to the Civil Wage and Penalty Assessment was performed on a public work and required the employment of apprentices and the payment of prevailing wages under the California Prevailing Wage Law, Labor Code sections 1720 through 1861.²

¹ Rigoberto Rivera, CQC's officer and owner, designated and authorized Amarikwa to represent CQC at the Hearing on the Merits.

² All further statutory section references are to the California Labor Code.

- The Request for Review was filed timely.
- The enforcement file was requested and produced in a timely fashion.
- No back wages were paid nor deposit made with the Department of Industrial Relations following issuance of the Assessment.

During the September 2, 2020, Hearing on the Merits, the parties stipulated to the following:

- The applicable Prevailing Wage Determination for the Operating Engineer classification was SC-23-63-2-2014-1.
- The two applicable apprenticeship committees for the Cement Mason classification in the geographic area of the Project were the Southern California Laborers & Cement Masons J.A.T.C. and the Southern California Cement Masons J.A.C.
- The sole applicable apprenticeship committee for the Laborer classification was the Southern California Laborers & Cement Masons J.A.T.C.
- The Assessment was timely served.
- The hours and dates used in the audit are correct.

The issues for decision are as follows:

- Whether CQC paid its employees the correct prevailing wage rates for all hours worked on the Project timely.
- Whether CQC paid the required overtime premium rates to employees properly.
- Whether CQC is liable for penalties assessed pursuant to sections 1775 and 1813.
- Whether CQC can establish that the Labor Commissioner abused her discretion in assessing penalties pursuant to section 1775.
- Whether CQC is liable for liquidated damages on wages found due and owing.
- Whether CQC submitted contract award information to all applicable apprenticeship committees in a timely and factually sufficient manner.
- Whether CQC employed apprentices in the required minimum ratio of apprentices to journeypersons on the Project.

- Whether CQC is liable for penalties assessed pursuant to section 1777.7.
- Whether CQC can establish that the Labor Commissioner abused her discretion in assessing penalties pursuant to section 1777.7.³

³ The Requesting Party stipulated to the admissibility of DLSE's Exhibits 1-37, which were subsequently admitted into evidence. DLSE did not stipulate to the admissibility of Requesting Party's Exhibits A-F (initially labeled by Requesting Party as 00-05). The Requesting Party's Exhibit A was a table identifying employees and the alleged wages paid over the same periods examined under the Assessment. The last column of the table was labeled "Over Paid Amount." Exhibit B was a 21-page table titled "Payroll Journal" from January 1, 2016 to December 31, 2016. Columns identified employees, pay dates, a "Ref No" and Gross/Net payment to each employee. Exhibit C was a table labeled "Hours and Earnings by Employee Report" from April 1, 2016, to August 31, 2016. The table showed total hours worked and total earnings by worker. Exhibit D was the same table as in Exhibit C, except the timeframe was from January 1, 2015, to December 31, 2015. Exhibit E was an EDD form titled "Quarterly Contribution Return and Report of Wages" for CQC. Exhibit F was 2016 W2s for various employees.

DLSE objected to the admissibility of CQC's exhibits because they were provided to DLSE the night before the Hearing on the Merits. In addition, the Requesting Party did not file or exchange an exhibit or witness list. Amarikwa responded that CQC was not as "learned" as counsel and argued the case should be decided on the merits of the matter and not on procedural defects. Amarikwa also argued that he believed the initial order to exchange exhibits and file an exhibit and witness list was modified by subsequent orders.

CQC's arguments are not persuasive. The plain and non-legal language of the December 9, 2019, Minutes of Hearing, ordered "[a]t least three weeks prior to the first day of the Hearing, the parties shall exchange exhibits and exhibit lists." It is unreasonable to believe that subsequent orders modified the December 9, 2019, Order to exchange exhibits three weeks prior to the Hearing. In fact, a subsequent notice changing the date of the Hearing was issued on May 14, 2020, and expressly stated "[a]ll other stipulations and orders remain in effect."

The Requesting Party did not comply with the December 9, 2019, order. CQC's Exhibits A-F were not provided to DLSE three weeks before the Hearing. The purpose of the December 9, 2019, Order to exchange exhibits and exhibit lists at least three weeks prior to the Hearing is based on fairness and to eliminate the element of surprise. DLSE was prejudiced by not having sufficient time to thoroughly review CQC's exhibits.

Even if the Requesting Party's exhibits were admitted over DLSE's objection, they are of little probative value. The drafted tables do not prove the employees were actually paid those amounts. The best evidence would be cancelled checks, which CQC

For the reasons set forth below, the Director of Industrial Relations finds that DLSE did not carry its initial burden of presenting evidence at the hearing that provided prima facie support for unpaid fringe benefits. However, the Director finds that prima facie evidence was provided to support violations of unpaid prevailing wages for overtime hours and violations of apprenticeship requirements. The Director finds that CQC failed to carry its burden of proving that the basis of the Assessment with respect to apprenticeship violations was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming the Assessment with modifications to conform to proof.

FACTS

The Project.

On May 3, 2014, the City published its bid advertisement for the Project. The City's bid advertisement stated prevailing wages were required on the Project and notified prospective bidders that prevailing wage determinations were on file and available for review at City Hall. Contractors were also directed to the Department of Industrial Relations' website for prevailing wage rates. (Exhibit 20.)

On October 8, 2014, Woodcliff Construction and the City executed the prime contract (Contract) for \$12,345,750.00. (Exhibit 19.) The Contract was for the construction of a one-story, 26,491 square foot public library. (*Ibid.*) The Contract included a clause directing Woodcliff Construction to review Prevailing Wage Determinations. (Exhibit 19, p. 180.)

did not provide as evidence. The EDD reporting is not probative of actual wages paid as the employer decides what wages they will report to EDD. Again, the best evidence would be cancelled checks showing what wages were actually paid. The W2s are not the best evidence as proof of wages paid on the Project as the 2016 W2s include wages for non-Project work. Therefore, pursuant to California Code of Regulations, title 8 section 17205, subdivision (a) and section 17243 subdivision (d), DLSE's objection is sustained and the Requesting Party's exhibits are excluded.

The contract also included clause 24, titled "Subcontractors." (Exhibit 18, p. 185.) It states "[c]ontractor agrees to and shall bind every subcontractor to the terms of this Contract"

According to the Certified Payroll Records (CPRs), CQC was on the job from March 30, 2016, through August 19, 2016. CQC employed an Operating Engineer—Group 4, Laborers and a Cement Mason.

Prevailing Wage Determinations.

The parties stipulated that the applicable prevailing wage determination (PWD) for the Operating Engineer, Group 4 classification in Los Angeles County at the time of the bid advertisement was SC-23-63-2-2014-1 (OE PWD). The total hourly rate of pay under the OE PWD was \$63.45, which included \$40.76 as a basic hourly rate, \$11.20 for health and welfare, \$7.45 for pension, \$2.95 for vacation/holiday, \$0.80 for training fund contribution, and \$0.29 for other payments. The OE PWD required a predetermined increase, but The DLSE Investigator testified she did not use the predetermined increase in the audit.

The applicable PWD for the Laborer, Group 1 classification in Los Angeles County at the time of the bid advertisement was SC-23-102-2-2013-1 (Laborers PWD). The total hourly rate of pay under the Laborers PWD was \$47.18, which included \$28.99 as a basic hourly rate, \$6.81 for health and welfare, \$6.00 for pension, \$4.25 for vacation/holiday, \$0.64 for training fund contribution, and \$0.49 for other payments. The Laborer PWD required a predetermined increase, but The DLSE Investigator testified she did not use it in the audit.

The applicable PWD for the Cement Mason classification in Los Angeles County at the time of the bid advertisement was SC-23-203-2-2013-1 (CM PWD). The total hourly rate of pay under the CM PWD was \$52.00, which included \$30.85 as a basic hourly rate, \$7.27 for health and welfare, \$7.25 for pension, \$5.99 for vacation/holiday, \$0.50 for training fund contribution, and \$0.15 for other payments. There was no predetermined increase.

The Assessment.

On January 6, 2017, the Center for Contract Compliance complained to DLSE that fringe benefits were not paid and apprenticeship requirements were not being met on the Project.⁴ (Exhibit 4.) In response to the complaint, CQC provided DLSE with a packet consisting of several documents, including a document entitled "Fringe Benefit Statements," which stated fringe benefits were paid directly to employees. (Exhibit 6.) The packet also included a completed "Request for Dispatch of Apprentices" form (DAS 142) purportedly sent to the Southern California Laborers & Cement Masons Joint Apprenticeship Committee (JATC) and facsimile confirmation pages. (*Ibid.*) CQC also produced a completed "Public Works Contract Award Information" form (DAS 140) and provided facsimile confirmation pages that the DAS 140 was sent to the Southern California Laborers & Cement Masons J.A.T.C. for both the Cement Mason and Laborer classifications. (*Ibid.*)

On January 26, 2017, the DLSE Investigator sent the City a request for the Notice of Completion, CPRs, the bid advertisement, and documents showing the City advised contractors of prevailing wage law requirements. (Exhibit 5.) On January 30, 2017, the City received DLSE's request, and on March 21, 2019, the City partially responded with CPRs and the Notice of Completion. (Exhibits 10, 11.)

On January 25, 2017, the DLSE Investigator requested payroll records from CQC. (Exhibit 5.) The due date for a response from CQC was ten business days from receipt of DLSE's request. (*Ibid.*) On January 29, 2017, CQC received DLSE's request. (*Ibid.*)

On February 6, 2017, CQC responded with CPRs, but failed to provide cancelled checks. The DLSE Investigator testified she needed cancelled checks to confirm payment amounts on the CPRs were accurate. Cancelled checks also would confirm CQC's contention that fringe benefits were paid directly to the workers. The DLSE Investigator was unsuccessful in contacting Rivera, CQC's President and owner, to request the cancelled checks. On March 14, 2019, The DLSE Investigator sent CQC a

⁴ The DLSE Investigator testified she verified with the California Apprenticeship Council (CAC) that CQC paid the required training fund contributions.

letter requesting copies of all cancelled checks paid to workers on Project for the entire term of the Project no later than March 20, 2019. (Exhibit 8.) The letter also noted that since October 2018, The DLSE Investigator had called Rivera to request copies of cancelled checks to no avail. The DLSE Investigator testified she called Rivera 5 or 6 times before sending the letter.

In conducting the audit, the DLSE Investigator relied on the CPRs and the PWDs. She utilized the designated classification on the CPRs, as well as the hours worked and referred to the relevant PWD. CQC did not provide proof of payment to verify fringe benefits were paid directly to the workers. Despite not having proof of payment, The DLSE Investigator credited CQC with having paid the basic hourly rate of the prevailing wage rate, but not with payment of fringe benefits.

The DLSE Investigator also determined that Rivera, who listed himself on the CPRs, was also entitled to prevailing wages.

Apprenticeship Requirements.

The DLSE Investigator contacted the applicable apprenticeship committee (the Southern California Laborers & Cement Masons J.A.T.C. and the Southern California Cement Masons J.A.C.) and each confirmed that CQC did not submit a DAS 140. (Exhibits 16, 17.) However, CQC provided facsimile confirmation pages that a DAS 140 was sent to the Southern California Laborers & Cement Masons J.A.T.C. for the Cement Mason and Laborer classifications. (Exhibit 6.)

On June 8, 2016, CQC sent a DAS 142 by facsimile to the Southern California Laborers & Cement Masons J.A.T.C. for the Cement Mason classification. The JATC maintained notes of its communications with Rivera. In one of the JATC's notes dated June 9, 2016, by Maribel Rami, she stated she left a voicemail message advising Rivera that the JATC received CQC's DAS 142, but did not have a DAS 140 on file. (Exhibit 16, p. 169.) The JATC did not dispatch apprentices to the Project. (Exhibit 1.) CQC did not submit a DAS 142 to the Southern California Cement Masons J.A.C. for Cement Masons, and did not submit a DAS 142 to the Southern California Laborers & Cement Masons J.A.T.C. for Laborers. (Exhibits 6, 16, 17.)

The total Cement Mason journeyman hours worked on the Project was 658 hours, which required a minimum of 131.6 apprentice hours on the Project. (Exhibit 1.) For the Laborers, 1407.5 journeyman hours were worked on the Project, requiring 281.4 apprentice hours on the job. (*Ibid.*) No apprentice was employed on the Project. (*Ibid.*)

Section 1775 Penalties.

The DLSE Investigator recommended a penalty rate of \$200.00 per violation for section 1775 penalties. However, the Senior Deputy mitigated the penalty rate down to \$120.00 per violation because CQC did not have prior violations. According to the Penalty Review, there were 315 violations—one for each day CQC failed to pay prevailing wages for each worker. The Assessment indicated a total of \$39,560.00 was owed in section 1775 Penalties.

Section 1813 Penalties.

The DLSE Investigator determined there were a total of 12 overtime violations, four of which pertained to Rivera's overtime work on the Project. At the statutory rate of \$25.00 per violation, DLSE assessed \$300.00 for section 1813 penalties.

Section 1777.7 Penalties.

The section 1777.7 penalties were based on CQC's failure to submit DAS 140s to all the applicable apprenticeship committees. The DLSE Investigator testified she recommended a penalty rate of \$100.00 per violation, but the Senior Deputy mitigated the penalty rate down to \$80.00 per violation per calendar day. The DLSE Investigator testified that the total penalty assessed was computed by counting the number of calendar days from the second day a journeyman was on the job until the last day a journeyman worked on the job. Relying on the CPRs, The DLSE Investigator counted 112 violations, beginning April 3, 2016, through August 20, 2016.⁵ 112 violations were then multiplied by \$80.00 per violation for a total of \$8,960.00.

⁵ The CPRs show that April 2, 2016, was a Saturday. (Exhibit 7.) No workers were reported working on Saturday, April 2, 2016. The CPRs show the first day a journeyman was on the job was Wednesday, March 30, 2016, and the last day, was Friday, August 19, 2016. There are 142 calendar days from March 31, 2016 (second

CQC's Defense.

CQC admitted it used the 2015 prevailing wage determinations, rather than the prevailing wage determinations for a 2014 bid advertisement date but argued that the 2015 prevailing wage determinations required a higher rate of pay, which it asserts was paid. CQC insisted it paid more than the prevailing wage rate and pointed out the complaint was not filed by a CQC worker. Further, CQC criticized DLSE for not subpoenaing workers to appear at the hearing to verify whether or not fringe benefits were paid directly to them.

Amarikwa testified CQC could not produce cancelled checks because CQC closed its bank account and therefore the cancelled checks no longer existed. Despite not providing cancelled checks, CQC argued that The DLSE Investigator relied on the CPRs for proof of payment with respect to the basic hourly rate, but refused improperly to provide CQC with a credit for payment of fringe benefits. Although unclear, Amarikwa argued in favor of "impeaching the record" and stated, "if the record is not good you do not use it for what suits you and then not use it or toss it for what doesn't suit you . . . DLSE cannot pick and choose which parts of the CPRs it would accept, while at the same time rejecting other parts of the CPRs." Consequently, CQC argued that if CPRs were used as proof of payment for the basic hourly rate and for hours worked, then DLSE should also use the CPRs as proof of payment for fringe benefits.

CQC also argued that Rivera's status as an officer of the company exempted him from overtime payments. Therefore, section 1813 penalties were invalid.

DISCUSSION

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

day a journeyman was on the job), through August 19, 2016 (the last day a journeyman was on the job).

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

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

Section 1775, subdivision (a), requires that contractors and subcontractors pay the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1, with the latter paid to the California Apprenticeship Council in accordance with section 1777.5, subdivision (m)(1). Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. Section 1813 provides additional penalties for failure to pay the correct overtime rate. Section 1742.1, subdivisions (a) and (b), provide for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if those unpaid wages are not paid within 60 days following service of a civil wage and penalty assessment under section 1741 or the full amount assessed is not deposited with the Department of Industrial Relations.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal the assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct

a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the burden of producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that initial burden is met, the contractor or subcontractor “has the burden of proving that the basis for the Civil Wage and Penalty Assessment... is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

DLSE Provided Prima Facie Evidence that CQC Failed to Pay Overtime Wages.

The CPRs on their face demonstrated that CQC improperly paid overtime hours at straight time pay on 12 occasions. Specifically, CQC’s CPR for the week ending July 16, 2016, for Jose Rivera Raya (Laborer, Group 1) shows he worked 1.5 hours of overtime on each of the following days: July 11, 13, and 15th. (Exhibit 7, p. 108.) CQC’s CPR for this week showed that these hours were paid at the straight time total hourly rate of \$49.84, of which the straight time basic hourly rate was \$28.99. (Exhibit 7, p. 108.) The correct basic hourly overtime rate was \$43.49. Providing the appropriate credit for CQC’s payment at the straight time rate, Rivera Raya is owed \$65.25 in overtime wages for the week of July 16, 2016.

Also, for the week ending July 16, 2016, Juan Manual Martinez (Laborer, Group 1) worked 1.5 hours of overtime on July 15, 2016. (Exhibit 7, p. 109.) Like Rivera Raya, Martinez was paid at the straight time basic hourly rate instead of the basic hourly overtime rate of \$43.49. After credit for payment at the straight time rate, Martinez is owed \$21.75.

Jose Luis Rivera (Laborer, Group1) worked overtime on four occasions. CQC’s CPR for the week ending July 16, 2016, for Jose Luis Rivera (Laborer, Group 1) shows he worked 1.5 hours of overtime on each of the following days: July 11, 12, 13, and 15th. (Exhibit 7, p. 109.) According to CQC’s CPR, Rivera was paid at the straight time basic hourly rate instead of the basic hourly overtime rate of \$43.49. After the appropriate credit, Rivera is owed \$87.

Rigoberto Rivera (Cement Mason) worked overtime on four occasions. CQC's CPR for the week ending July 16, 2016, lists Rigoberto Rivera work classification as Cement Mason, and indicates that he worked 1.5 hours of overtime on each of the following days: July 11, 12, 13, and 15th. (Exhibit 7, p. 107.) CQC's CPR for this week showed that these hours were paid at CQC's straight time *total* hourly rate of \$54.70. (Exhibit 7, p. 107.) The CM PWD required a straight time basic hourly rate of \$30.85. (Exhibit 12.) However, the correct basic hourly overtime rate was \$46.28. Providing the appropriate credit for CQC's payment at the straight time rate, Rigoberto Rivera is owed \$92.50 in overtime wages for the week ending in July 16, 2016.

CQC provided no explanation why the CPRs indicate it paid overtime hours at straight time pay and provided no evidence with cancelled checks that it indeed paid overtime hours at the correct prevailing overtime rate. Accordingly, CQC is liable for \$266.50 in unpaid overtime wages.

DLSE Failed to Come Forward with Evidence that Provided Prima Facie Support for the Unpaid Fringe Benefits.

The rules governing prevailing wage hearings state that, "The Enforcing Agency has the burden of coming forward with *evidence*...and (3) that such *evidence* provides *prima facie support* for the Assessment..." (Rule 50(a) [Cal. Code Regs., tit. 8, § 17250, subd. (a)] (emphasis added).) "'Evidence' means testimony, writings, material objects, or other things presented to the sense that are offered to prove the existence of a fact." (Evid. Code, § 140.) Black's Law Dictionary defines prima facie as: "Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue <a prima facie showing>." Further, prima facie evidence is:

'that which will support a ruling in favor of its proponent if no controverting evidence is presented. [Citations] It may be slight evidence which creates a reasonable inference of fact sought to be established but need not eliminate all contrary inferences. [Citation.]' (*Evans v. Paye* (1995) 32 Cal.App.4th 265, 280, fn. 13....)

(*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1172, fn. 14.) Further, “[a]ll burdens of proof and burdens of producing evidence shall be construed in a manner consistent with relevant sections of the Evidence Code...” (Rule 50(d).)

Here, DLSE did not come forward with evidence making a prima facie showing of failure to pay fringe benefits. DLSE relied on an allegation made by the Center for Contract Compliance that fringe benefits were not paid, and the failure of CQC to produce records of fringe benefits payments upon request. However, CQC’s CPRs indicate that workers on the project were paid the total hourly rate which included the fringe benefits, and DLSE produced no employee questionnaires or employee testimony documenting the failure to pay fringe benefits. DLSE did not come forward with evidence making a prima facie showing that CQC failed to pay fringe benefits.

It is true that when an employer fails to keep accurate and contemporaneous records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount owed by a just and reasonable inference from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed or with evidence to rebut the reasonable estimate. (See, e.g., *Furry v. E. Bay Publ’g, LLC* (2019) 30 Cal.App.5th 1072, 1079 [“ [A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence....’ ”])

In addition, under the Evidence Code, “second-hand” evidence is afforded little to no weight. Evidence Code section 412 states, “[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.” The Evidence Code likewise provides that the fact finder may draw negative inferences from failure of a party to explain or deny evidence. Evidence Code section 413 states, “[i]n

determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by his testimony such evidence or facts in the case against him...." However, those Evidence Code provisions are only relevant here if the Enforcing Agency provided the fact finder with some evidence of CQC's failure to pay prevailing wages, specifically fringe benefits. In this case, DLSE did not make a prima facie showing that CQC failed to pay fringe benefits. (Rule 50 (a).)

CQC is Liable for Liquidated Damages for the Unpaid Overtime Wages.

Section 1742.1, subdivision (a) provides in part:

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

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

In this case, CQC did not pay back wages nor did it make the deposit necessary with the Department as a result of the Assessment. Accordingly, CQC is liable for liquidated damages in the amount of the unpaid prevailing wages for overtime hours, totaling \$266.50.

DLSE Did Not Abuse Its Discretion by Assessing Penalties Under Section 1775.

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

- (a)(I) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
- (2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
 - (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
 - (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
- (B) (i) The penalty may not be less than forty dollars (\$40) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, unless the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
- (ii) The penalty may not be less than eighty dollars (\$80) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the contractor or subcontractor has been assessed penalties within the previous three years for failing to

meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty dollars (\$120) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1. [6]

(C) If the amount due under this section is collected from the contractor or subcontractor, any outstanding wage claim under Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 against that contractor or subcontractor shall be satisfied before applying that amount to the penalty imposed on that contractor or subcontractor pursuant to this section.

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs., tit. 8, §17250, subd. (c); § 1775, subd. (a)(2)(D).)

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

DLSE did not abuse its discretion in setting the section 1775 penalty rate at \$120 per violation. With respect to unpaid overtime wage violations, there are 12 violations—

⁶ The correct citation for the definition of willful is to subdivision (e) of section 1777.1.

one violation per day worked per employee in which CQC failed to pay prevailing overtime wages. At \$120 per violation for 12 violations, the total assessed amount for section 1775 penalties is \$1,400.

CQC presented no evidence or argument that the \$120 penalty rate was an abuse of discretion. Based on CQC's lack of prior violations, DLSE used its discretion to mitigate the recommended \$200 penalty rate down to \$120. DLSE considered whether the violations were "good faith mistakes" and, if so, whether CQC promptly and voluntarily corrected the violations when it was brought to their attention. There is no evidence that the violations were "good faith mistakes" nor is there any evidence that CQC promptly paid the amounts owed. CQC failed to carry its burden of proving the \$120 penalty rate per violation was an abuse of discretion. This Decision affirms and modifies the Assessment's section 1775 penalties amounting to \$1,440.

CQC is Liable for Section 1813 Penalties.

Section 1813 penalties were assessed for CQC's failure to pay workers at the correct overtime rate. Labor Code section 1813 states:

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

Section 1815 states as follows:

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

DLSE determined CQC failed to pay overtime to workers on 12 occasions.⁷ At the statutory rate of \$25.00 per violation, the total amount of section 1813 penalties

⁷ For the week ending July 16, 2016: Jose Rivera Raya worked overtime on three occasions; Juan Manual Martinez worked one day of overtime; Jose Luis Rivera worked

amounts to \$300.00. Four of the 12 overtime violations were with respect to Rivera. According to the CPRs, Rivera performed work on the Project as a Cement Mason. (Exhibit 7.) CQC argued Rivera was an officer of the company and exempt from overtime laws. The prevailing wage law does not distinguish who is eligible for prevailing wages based on a worker's title or status within the company. The Labor Code states that a "worker" includes "laborer, worker or mechanic." (§ 1723.) What is dispositive is whether the duties performed by the individual on a public works project constitute covered work. (§ 1771.) Here, Rivera was listed on CQC's own CPRs as performing work in the classification Cement Mason. As such, Rivera is entitled to prevailing wages for the work he performed on the Project despite his status as an officer, assuming CQC is correct that he was one. CQC failed to prove that no overtime was owed with respect to the other eight violations involving non-officer employees. Thus, DLSE correctly determined that CQC was liable for \$300.00 in section 1813 penalties.

CQC Violated Apprenticeship Requirements.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council.⁸ DLSE enforces the apprenticeship requirements not only for the benefit of apprentices, but to encourage and support apprenticeship programs, which the Legislature has recognized as "a vital part of the educational system in California." (Stats. 1999, ch. 903, § 1 [Assem. Bill 921].)

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

four days of overtime; and Rigoberto Rivera worked four days of overtime. (Exhibit 7, pp. 107-109.)

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

in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). (§ 1777.5, subd. (g); Cal. Code Regs., tit. 8, § 230.1, subd. (a).) Contractors are also required to notify apprenticeship committees when a public works contract has been awarded. (§ 1777.5, subd. (g); Cal. Code Regs., tit. 8, § 230, subd. (a).) DAS has prepared a form for this purpose (DAS 140), which a contractor may use to notify all apprenticeship committees for each apprenticeable craft in the geographic area of the site of the project. The required information must be provided to the applicable committees within ten days of the date of the execution of the prime contract or subcontract, “but in no event later than the first day in which the contractor has workers employed upon the public work.” (Cal. Code Regs., tit. 8, § 230, subd. (a).) Once a contractor commences work, if they “are not already employing sufficient registered apprentices...to comply with the one-to-five ratio [they] must request the dispatch of required apprentices from the apprenticeship committees...” (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DAS has prepared form DAS 142 that a contractor may use to request dispatch of apprentices. To ensure compliance with the law, the regulations provide for a method of first informing applicable apprenticeship committees of the anticipated need for apprentices for a project, and second—separately—to request from applicable apprenticeship committees the dispatch of the number of requested apprentices when they are actually needed on the project. 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.

In the present case, DLSE carried its initial burden of presenting prima facie evidence of CQC’s failure to notify the appropriate apprenticeship committees of a public works contract award and the failure to request dispatch of apprentices from all apprenticeship committees in the geographic area of the Project. The DLSE Investigator testified that based on her email communications with the applicable apprenticeship committees, the DAS 140s and DAS 142s were not sent to all of the applicable apprenticeship committees. CQC did not provide facsimile confirmation pages to show a DAS 140 and DAS 142 was sent to *each* applicable apprenticeship committee. Specifically, CQC provided no evidence that it submitted a DAS 140, contract award

information, to the Southern California Cement Masons J.A.C. Also, CQC failed to provide evidence that it submitted a DAS 142, request for dispatch of apprentices, to the Southern California Cement Masons J.A.C. for a Cement Mason apprentice and a DAS 142 to the Southern California Laborers & Cement Masons J.A.T.C. for a Laborer apprentice.

While CQC emphasized it sent a DAS 142 form to one apprenticeship committee for the Cement Mason classification, it failed to present any evidence showing compliance with all of its obligations under section 1777.5. Accordingly, CQC violated the law as follows: (1) section 1777.5, subdivision (e), and the applicable regulation, section 230, as to the contract award notice requirement; (2) regulation section 230.1, subdivision (a), as to the request for dispatch requirement; and 3) section 1777.5, subdivision (g), as to the one-to-five ratio employment requirement.

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

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

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

(Cal. Code Regs., tit. 8, former § 231, subd. (h), repealed Oct. 1, 2021 (emphasis added).) In setting the penalty, the Labor Commissioner is to consider all of the following circumstances:

- (1) Whether the violation was intentional.

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

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

In this case, DLSE set the section 1777.7 penalty rate at \$80 per violation. The DLSE Investigator testified the penalty rate was based on CQC's failure to provide a DAS 140 to all the applicable apprenticeship committees. DLSE provided prima facie evidence that CQC's knowingly failed to provide notice of the contract award. The irrebuttable presumption of former regulation section 231, subdivision (h) applied because both the contract and the bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects. (Exhibit 19, p. 182 and Exhibit 20, pp. 204-205.) In addition, under the facts of this case, there was indication that CQC knew of its obligation to submit a DAS 140 because on March 2, 2016, CQC sent it to one of two apprenticeship committees for the Cement Mason classification. Yet, there is no record of a DAS 140 being sent to the other Cement Mason apprenticeship committee or the Laborer's apprenticeship committee. Further, CQC did not provide any evidence that its failure to comply with the law was due to circumstances beyond its control. (Former Cal. Code Regs., tit. 8, § 231, subd (h).)

For purposes of determining section 1777.7 penalties, the number of violations is calculated pursuant to section 1777.5, subdivision (e), and the

California Code of Regulations, title 8, section 230, subdivision (a). That regulation states:

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

(Cal. Code. Regs., tit. 8, § 230, subd. (a).) Thus, per the regulation, a failure to provide contract award information is a violation that runs throughout the duration of a contract. Although DLSE could have counted the number of violations through the duration of the contract, DLSE elected to assess penalties for 112 days only. The DLSE Investigator testified she counted the days from the second day a journeyperson was on the job through the last day a CQC journeyperson performed work on the job. She stated the second day a journeyperson was on the job was April 3, 2016, and that August 20, 2016, was the last day a journeyperson worked on the job for CQC.

The CPRs show the first day a journeyperson was on the job was Wednesday, March 30, 2016, which means the second day was Thursday, March 31, 2016. The last day a journeyperson was on the job for CQC was Friday, August 19, 2016. Applying The DLSE Investigator's methodology of counting between the second and last days a journeyperson was on the job, results in 142 calendar days, not 112 days. There is no basis to show DLSE's use of a reduced number of violations (112 as opposed to 142 violations) is an abuse of discretion. Additionally, CQC did not argue or present evidence that the 112 violations was an abuse of discretion.

Further, DLSE deemed the penalty rate of \$80.00 per violation appropriate after weighing several factors. While CQC had not committed any violations of 1777.5 in the prior three years, there was a significant loss of training opportunities. For the Cement Mason classification, 131.6 hours of apprenticeship training was lost and there was a training loss of 281.4 hours for the Laborer classification. CQC did not raise any argument or present evidence that the \$80.00 penalty rate per violation imposed by DLSE was an abuse of discretion. Therefore, CQC did not carry its burden of proving the basis of the Assessment was incorrect with respect to 1777.7 penalties. (Cal. Code

Regs., tit. 8, § 17250, subd. (b).) Accordingly, as determined by DLSE and specified in the Assessment, CQC is liable for section 1777.7 penalties at \$80.00 per violation for 112 calendar days, totaling \$8,960.00.

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

FINDINGS AND ORDER

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. The Civil Wage and Penalty Assessment was served timely by DLSE in accordance with section 1741.
3. The affected subcontractor California Quality Construction, 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 California Quality Construction, Inc. its enforcement file timely.
5. No back wages were paid nor deposit made with the Department of Industrial Relations following issuance the Civil Wage and Penalty Assessment.
6. California Quality Construction, Inc. underpaid its workers \$266.50 in prevailing wages for overtime hours.
7. The Labor Commissioner did not present prima facie evidence of California Quality Construction, Inc.'s failure to pay fringe benefits.
8. The Labor Commissioner did not abuse her discretion in assessing penalties against California Quality Construction, Inc. under Labor Code section 1775 at \$120 per violation for 12 violations of failure to pay prevailing wages for overtime hours in the aggregate sum of \$1,440.
9. California Quality Construction, Inc. is liable for liquated damages in the full amount of the unpaid wages, which is \$266.50.
10. California Quality Construction, Inc. is liable for penalties assessed under Labor Code section 1813 in the amount of \$300.

11. California Quality Construction, Inc. was not excused from the requirement to employ apprentices on the Project.
12. There were two applicable apprentice committees in the geographic area of the Project for the craft of Cement Mason, namely the Southern California Laborers & Cement Masons J.A.T.C. and the Southern California Cement Masons J.A.C.
13. There was one applicable apprentice committee in the geographic area of the Project for the craft of Laborer, namely the Southern California Laborers & Cement Masons J.A.T.C.
14. California Quality Construction, Inc. did not submit contact award information (DAS 140 form) to all of the applicable apprenticeship committees in a timely and factually sufficient manner.
15. California Quality Construction, Inc. violated section 1777.5 by failing to employ apprentices in the crafts of Cement Mason and Laborer on the Project in the minimum ratio required by the law.
16. California Quality Construction, Inc. knowingly violated section 1777.5.
17. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code section 1777.7 at \$80 per violation for 112 violations in the aggregate sum of \$8,960.

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

Basis of the Assessment	Amount
Wages due:	\$ 266.50
Penalties under section 1775):	\$ 1,440.00
Liquated Damages:	\$ 266.50
Penalties under section 1813:	\$ 300.00
Penalties under section 1777.7:	\$ 8,960.00
TOTAL:	\$11,233.00

The Civil Wage and Penalty Assessment is affirmed as modified herein, as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings that shall be served with this Decision on the parties.

Dated: 3/9/2026

A handwritten signature in black ink, appearing to read "Jennifer Osborn", written over a horizontal line.

Jennifer Osborn, Director
California Department of Industrial Relations