STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

East Bay Floorcovering, Inc. Case No. 14-0290-DAS

From a Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor East Bay Floorcovering, Inc. (East Bay) submitted a request for review of a Determination of Civil Penalty (Determination) issued by the Division of Labor Standards Enforcement (DLSE) on April 1, 2014, with respect to work performed by East Bay on the Hotel Isabel Remodel Project (Project) for TODCO Development Company (TODCO) in San Francisco, California. The Determination found that East Bay failed to timely request the dispatch of apprentices and failed to employ apprentices in compliance with the required apprentice to journeyman ratio on the Project. DLSE assessed an aggregate penalty of $7,220.00 under Labor Code section 1777.7. [1]

The parties submitted the matter for decision on stipulated facts and exhibits and the parties' briefs before Hearing Officer Nathan D. Schmidt on November 21, 2014. Dennis Cook appeared for East Bay and David Cross appeared for DLSE. Both East Bay and DLSE submitted post hearing briefs, some with exhibits attached, all of which are deemed admitted into evidence.[2]

The issues for decision are as follows:

[1] All further statutory references are to Labor Code unless stated otherwise.

[2] East Bay's Request for Official Notice of apprenticeship publications from the Department of Industrial Relations' website is also granted.

- Whether East Bay timely requested the dispatch of soft floor layer apprentices for the Project and satisfied the one apprentice to five journeymen ratio required by section 1777.5, thereby avoiding liability for penalties under section 1777.7 for failure to satisfy the ratio requirement.[3]
- If East Bay is found not to have requested the dispatch of soft floor layer apprentices for the Project and satisfied the one apprentice to five journeymen ratio required by section 1777.5, what penalties should be imposed under section 1777.7.

In this Decision, the Director finds that East Bay did not fail to timely request the dispatch of soft floor layer apprentices for the Project with sufficient lead time to satisfy the one apprentice to five journeymen ratio required by Labor Code section 1777.5 and is, therefore, not subject to penalties under section 1777.7. Therefore, the Director of Industrial Relations issues this Decision dismissing the Determination.

SUMMARY OF FACTS

The parties' stipulated facts are set forth verbatim:

"1. The Hotel Isabel Remodel (Project) is a public works project subject to the apprenticeship requirements of the Prevailing Wage Law (PWL), California Labor Code Sections 1777.5 through 1777.7.

"2. TODCO Development Company issued a Notice to Proceed to NCR Construction, Inc. (NCR), the general contractor, on November 7, 2011, to start construction work on the Project by no later than November 11, 2011.

"3. East Bay Floor Covering, Inc. (East Bay) contracted with NCR to perform the installation of soft floor covering on the Project. The Subcontract Agreement between East Bay and NCR is attached and incorporated herein by reference marked Exhibit D.

[3] The classification at issue is referred to as "Carpet Linoleum" or "Carpet, Linoleum & Soft Tile Layer." For sake of simplicity, the classification will be designated herein as "soft floor layer."

"4. Attached and incorporated herein by reference marked Exhibit A are the certified payroll reports (CPRs) for East Bay on the Project.

"5. East Bay's first day of work was May 24, 2012, and last day of work was May 13, 2013, on the Project.

"6. East Bay sent a request for dispatch of apprentice using the DAS 142 form [Division of Apprenticeship Standards (DAS) Request for Dispatch of an Apprentice form (DAS 142)] three times to the Northern California Floor Covering Joint Apprenticeship and Training Committee (JATC). Attached and incorporated herein by reference, marked Exhibits B1, B2 and B3, are the three DAS 142 forms that East Bay sent to the JATC.

"7. The first DAS 142 dated August 2, 2012, (Exhibit B1) was sent on August 1, 2012, via facsimile asking for an apprentice to start work on August 6, 2012. The JATC dispatched apprentice Ralph Lee to East Bay in response to this request for dispatch and he worked a total of 31.5 hours from August 6 through August 10, 2012.

"8. The second DAS 142 dated January 23, 2013 (Exhibit B2) was sent on January 22, 2013, via facsimile. East Bay requested that an apprentice be dispatched on January 28, 2013. However, the JATC did not dispatch an apprentice to East Bay in response to this request for dispatch until February 4, 2013. Apprentice J. Sergio Lomell was employed from February 4 through February 6, 2013, for a total of 18.5 hours.

"9. The third DAS 142 dated April 24, 2013, (Exhibit B3) was sent on April 24, 2013, via facsimile. The JATC did not dispatch an apprentice to East Bay in response to this request for dispatch.

"10. East Bay also sent a request for dispatch on April 24, 2013, (Exhibit C1) to CityBuild, a hiring program mandated and operated by the City and County of San Francisco asking for an apprentice to start on April 29, 2013. On the same day, CityBuild sent an e-mail to East Bay stating that it would dispatch Li-Yang Chen to start on April 29, 2013. This e-mail and the enclosed Job Notice Form, Referral Slip, and DAS Confirmation of Apprentice Registration are

attached and marked Exhibit C2. Li-Yang Chen did not show up on the Project on April 29, 2013, and East Bay sent an e-mail to CityBuild (Exhibit C3) notifying it that the apprentice did not show up.

"11. East Bay has no history of apprenticeship violations under the PWL within the past three (3) years."

Based on the above, East Bay submitted a total of three DAS 142 forms requesting the dispatch of apprentices to the JATC. However, East Bay did not submit the first DAS 142 requesting an apprentice until August 1, 2012, after four journeyman worked 235 hours over 11 days off and on at the Project from the week ending May 27, 2012, through the week ending June 17, 2012, at which date East Bay's work paused and workers were laid off (pending a recall when Project needs arose). The DAS 142 asked for an apprentice to report on August 6, 2012. In response, the JATC dispatched one apprentice who worked starting August 6 for 31.5 hours over five days that week, during which time four East Bay journeymen worked another 82.5 hours. After that week, another work layoff occurred.

East Bay journeymen resumed work in the week ending November 18, 2012, working 23 days off and on through the week ending January 27, 2013, during which period East Bay sent no DAS 142 asking for apprentices to work, despite the journeymen working another 328 hours.[4] On January 22, 2013, East Bay sent its second DAS 142 to the JATC, requesting an apprentice to report on January 28, 2013. Journeymen worked 78.5 hours over four days in that work week, but no apprentice appeared. The JATC did dispatch an apprentice, but he appeared a week late, working a total of 18.5 hours over 3 days from February 4 to February 6, 2013. During that week, three journeymen worked 64.5 hours over three days.

East Bay journeymen worked the following amounts in the following workweeks

[4] Figures for numbers of hours and days as used in this Decision differ in some respects from those offered by the parties. For example, East Bay counted 349 journeyman hours in this segment of work, but that figure included hours worked by a Laborer as well as soft floor layer journeymen. To determine the result of the 1:5 ratio of apprentices to journeymen, only the journeymen in the classification at issue should be counted. The minor differences in figures do not affect the result reached herein.

when no DAS 142 was submitted: week ending February 17, 2013, 14.5 hours over 2 days; week ending March 17, 2013, 5 hours over 1 day; week ending March 31, 2013, 6.5 hours over 1 day; week ending April 14, 2013, 13 hours over 2 days; and week ending April 28, 2013, 129 hours over 5 days.

On April 24, 2013, East Bay sent its third and last DAS 142 requesting an apprentice to report April 29, 2013. The JATC did not dispatch an apprentice in response to this request. East Bay also sent a request for an apprentice dispatch on April 24, 2013, to a hiring program mandated and operated by the City and County of San Francisco, seeking an apprentice to start on April 29, 2013. No apprentice arrived to work in response to that request.

Finally, East Bay journeymen worked in the following workweeks through the end of East Bay's work on the Project: week ending May 5, 2013, 89 hours over 5 days; week ending May 12, 2013, 5 hours over 1 day; and week ending May 19, 2013, 6.5 hours over 1 day.

DISCUSSION

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects.[5] These requirements are further addressed in regulations promulgated by the California Apprenticeship Council and enforced by DLSE. California Code of Regulations, title 8, section 227[6] provides that the regulations "shall govern all actions pursuant to ... Labor Code Sections 1777.5 and 1777.7."

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

[5] The parties did not present evidence of any bid advertisement notice associated with any award of the public works contract. The stipulated facts do show that TODCO issued a notice to proceed to NCR, the prime contractor, on November 7, 2011, which then subcontracted soft floorcovering work to East Bay. In turn, East Bay commenced work on May 12, 2012. Therefore, the November 7, 2011, date will be used as the benchmark date for purposes of determining which version of sections 1777.5 and 1777.7 apply in this case.

[6] All further regulatory references are to California Code of Regulations, title 8.

or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). In this regard, section 1777.5, subdivision (g) (as it existed from October 19, 2010, to June 26, 2012) (stats. 2010, ch. 719, § 52, eff. Oct. 19, 2010) provides:

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

Section 1777.5, subdivision (h), provides:

> This ratio of apprentice work to journeyman work shall apply during any day or portion of a day when any journeyman is employed at the jobsite and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract or, in the case of a subcontractor, before the end of the subcontract.

The governing regulation as to the 1:5 ratio of apprentice hours to journeyman hours is section 230.1, subdivision (a). As applicable to the facts in this case, that regulation provides that a contractor properly requests the dispatch of apprentices by doing the following:

> Request the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays, and holidays) before the date on which one or more apprentices are required....All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.

DAS has prepared a form (DAS 142) that a contractor may use to request dispatch of apprentices from apprenticeship committees.

Section 230.1, subdivision (a) also provides that:

> ...if in response to a written request no apprenticeship committee dispatches, or agrees to dispatch during the period of the public works project any apprentice to a contractor ... within 72 hours of such request (excluding

> Saturdays, Sundays and holidays) the contractor *shall not be considered in violation* of this section as a result of failure to employ apprentices *for the remainder of the project*, provided that the contractor *made the request in enough time to meet the above-stated ratio*. If an apprenticeship committee dispatches fewer apprentices than the contractor requested, the contractor shall be considered in compliance if the contractor employs those apprentices who are dispatched ....

(§ 230.1, subd. (a) (emphasis added).)

When it is determined that a subcontractor not complied with section 1777.5, it becomes liable for a civil penalty under section 1777.7, subdivision (a)(1) if DLSE determines that the subcontractor "knowingly violated" section 1777.5. The penalty amount may not to exceed $100.00 for each full day of noncompliance.[7] The amount may be reduced in the determination if the amount would be disproportionate to the severity of the violation.

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

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

In the review of a determination as to the apprentice requirements, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (See § 1777.7, subd. (c)(1,), as it existed from January 1, 2001, to June 27, 2012.) DLSE determined that East Bay violated Labor Code section 1777.5 by

[7] Section 1777.7 was amended in 2012 to provide enforcement by the Labor Commissioner rather than the Chief of DAS. (Stats. 2012, ch. 46, § 96, eff. June 27, 2012 to Dec. 31, 2014 [Senate Bill 1038].) Section 1777.7 had another amendment in 2014 that maintains the enforcement role by the Labor Commissioner. (Stats 2014, ch. 297, § 3, eff. Jan. 1, 2015 [Assembly Bill 2744].) This change in enforcement by the Chief of DAS to the Labor Commissioner does not alter the analysis in this case.

failing to timely request apprentices when required and failing to employ apprentices in the required 1:5 apprentice to journeyman ratio. DLSE counted 1,179 total journeyman hours to arrive at a figure of 235.8 apprentice hours required by the ratio, but DLSE does not explain how it calculated the 1,179 journeyman hours. Based on the record, the correct total journeyman hours amount to 1,038.5. This figure discounts the hours performed by the journeyman Laborer, who was not qualified to supervise soft floor layer apprentices, and the hours performed by the apprentices themselves over the term of the subcontract. Based on the 1,038.5 hours worked by the soft layer journeymen, the 1:5 ratio by the end of the subcontract would have required 207.7 apprentice hours, not 235.8 hours.

East Bay did request and employ an apprentice who started August 6, 2012, and worked for 31.5 hours that week until being laid off along with the journeyman crew. On January 22, 2013, East Bay again requested dispatch of an apprentice to report on January 29, but the JATC failed to timely respond. Instead, the JATC sent an apprentice who reported on February 4, 2013, a week later than requested, working 18.5 hours. After another crew layoff and recall, on April 24, 2013, East Bay submitted its last dispatch request to the JATC for an apprentice to report on April 29. No apprentice was dispatched, or at least one never arrived to work.

The JATC's tardiness and non-response brings into play the part of section 230.1, subdivision (a) that affects East Bay's liability to comply with the 1:5 ratio requirement. Section 230.1, subdivision (a) holds that if "no apprenticeship committee dispatches, or agrees to dispatch any apprentice to a contractor ... within 72 hours of such request," the contractor "shall not be considered in violation of this section as a result of failure to employ apprentices for the remainder of the project, provided that the contractor made the request in enough time to meet the above-stated ratio."

The parties differ on whether, under the forgiveness provision of section 230.1, subdivision (a), East Bay sent the JATC its dispatch requests in enough time to meet the 1:5 ratio by the end of the subcontract work. East Bay argues that its January 2013 and April 2013 requests were made in enough time and, had the JATC timely dispatched apprentices, it could have complied with the 1:5 ratio requirement. East Bay figures that had apprentices been timely

dispatched in response to its January 2013 and April 2013 requests and worked to the end of the subcontract, it could have logged a total of 277.5 apprentice hours, which includes the 50 apprentice hours actually worked and 227.5 more apprentice hours that could have been worked in 2013. East Bay concludes that if 235.8 apprentice hours were required as DLSE says, it would have been 41.7 hours over the minimum required 1:5 ratio and, hence, not in violation.

DLSE disagrees, but focuses solely on the April 2013 failure of the JATC to respond to a dispatch request and the 7 journeyman days left on the Project, during which apprentices could have worked, citing the rule that apprentices must be supervised by journeymen at all times (§ 230.1, subd. (c)). DLSE also cites the regulation (see § 230.1(a)) and the DAS 142 form that require an apprentice be dispatched for no less than 8 hour increments. Assuming an 8-hour workday for apprentices, DLSE's count starting the week ending May 5, 2013, would result in no more than 45.5 more apprentice hours in addition to the 50 apprentice hours worked by two apprentices in August 2012 and February 2013. The total apprentice hours to be worked from the week ending to the end of the subcontract would have been 95.5. Asserting 1,179 journeyman hours, DLSE states to meet the 1:5 ratio, East Bay needed 207.7 apprentice hours. By the April 2013 failure of the JATC to dispatch pursuant to East Bay's request, DLSE asserts, it was too late for East Bay to meet the 1:5 ratio and East Bay cannot avail itself of the forgiveness provision of section 230.1, subdivision (a).

The problem with DLSE's argument is that the regulation absolves a contractor of the ratio requirement after a late dispatch response, one not given "within 72 hours" of a request, not just a total failure to dispatch. On January 24, 2013, East Bay requested an apprentice be dispatched to report January 29. The JATC's dispatch response resulted in an apprentice reporting for work on February 4, 2013, a week late. Hence, the effect of both the late response to the January 2013 dispatch request and the total failure to respond to the April 2013 dispatch requests must be considered in order to answer whether East Bay made its dispatch request "in enough time to meet the above-stated [1:5] ratio." (§ 230.1, subd. (a).)[8] The journeyman hours

[8] East Bay also sent a request for an apprentice on April 24, 2013, to the San Francisco hiring program, and no apprentice arrived to work in response to that request despite one having been identified and dispatched. The effect

worked from and after the week ending February 5, 2013, must be calculated to determine if, along with apprentice hours actually worked, East Bay could have logged enough apprentice hours as of the January 2013 dispatch request in order to meet the 1:5 ratio.

As stated above, the total number of hours worked on the Project by East Bay journeymen were 1,038.5, which would call for 207.7 apprentice hours under the 1:5 ratio. East Bay used apprentices for 50 hours until the week ending February 3, 2013. Had the JATC timely responded to the January 2013 and April 2013 dispatch requests, based on the 23 journeyman days worked from the week ending February 3, 2013, until the end of East Bay's subcontract (not counting the 3 days in the week of February 4 that an apprentice showed up late), East Bay could have worked apprentices for another 184 hours, assuming an 8-hour workday for apprentices on days that journeymen were present to supervise[9]. Along with the 50 apprentice hours worked in August 2012 and February 2013, East Bay's record of apprentice hours would have totaled 234, meeting the 207.7 total apprentice hours based on the 1:5 ratio. Being more than the required 1:5 ratio, East Bay can take advantage of the regulation's forgiveness provision for the remainder of the project. (§ 230.1, subd. (a).)

While East Bay does not stand in violation for the remainder of the project, the regulation does not expressly forgive failure to employ apprentices in the 1:5 ratio for the period of work up to that point in time. A failure to meet the 1:5 ratio, however, is not measured in the middle of a project for purposes of determining non-compliance. A failure, and its characterization as non-compliance with the ratio and subject to penalty, can only be determined as of the end of the

of the failure to report, if any, is merely cumulative of the effect of the JATC's failure to respond to the April 24 dispatch request and need not be further discussed.

[9] Other hypothetical ways exist to count the apprentice hours that could have been logged, such as assuming the 7-hour days suggested by DLSE and limiting potential apprentice hours to the hours worked by journeymen on crews where the journeymen worked less than 8 hours. Even accepting the latter proposition, East Bay's record entitles it to forgiveness under the regulation. However, when considering the seriousness of a monetary penalty and the ramifications of having a record of violating apprentice requirements, speculative scenarios should be avoided. The regulation and DAS 142 form suggest an 8 hour day, and that is an objective measure to use when calculating whether a subcontractor made a request for apprentice dispatch "in enough time" to meet the 1:5 ratio by the end of the subcontract.

project, or in this case, at the end of the subcontract work. This observation flows directly from the statutory language, which states: "The contractor shall employ apprentices for the number of hours computed ... before the end of the contract or, in the case of a subcontractor, *before the end of the subcontract*." (§ 1777.5, subd. (h) (emphasis added.) Similarly, the regulation requires "the contractor [to] employ apprentices for the number of hours [pursuant to the 1:5 ratio] before the end of the contract." (§ 230.1, subd. (a).)

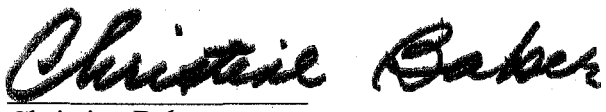
FINDINGS

East Bay timely requested the dispatch of soft floor layer apprentices for the Project and could have satisfied the one apprentice to five journeymen ratio required by section 1777.5, had apprentices timely been dispatched, thereby avoiding liability for penalties under section 1777.7 for failure to satisfy the ratio requirement.

ORDER

The Determination of Civil Penalty is dismissed 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: 7/18/17



Christine Baker
Director of Industrial Relations