

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Arc Construction Inc.

Case No. 14-0460-PWH

From Determinations of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor ARC Construction Inc. (ARC) submitted a timely request for review of a Determination of Civil Penalty (Determination) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the 2013 pedestrian safety improvements at various locations (Project) performed for the City of Gardena in the County of Los Angeles. The Determination determined that ARC had violated Labor Code section 1777.5 and assessed an aggregate penalty of \$6,300.00 under Labor Code section 1777.7.

Pursuant to written notice, a Hearing on the Merits was held on December 29, 2014, in Los Angeles, California, before Hearing Officer Howard Wien. Counsel David Cross appeared for DLSE. Razmik Hatoomian appeared for ARC as its Vice President.

The issues for decision are:

1. Whether ARC knowingly violated Labor Code section 1777.5 and California Code of Regulations, title 8, section 230, subdivision (a)¹ by not issuing public works contract award information in a DAS Form 140 or its equivalent (DAS 140) to all applicable apprenticeship committees for the apprenticeable craft of cement mason in the geographic area of the Project site.²

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

² The Determination also asserted that ARC violated Labor Code section 1777.5 by failing to issue a request for dispatch of apprentices (DAS Form 142 or equivalent) to all applicable apprenticeship committees for cement

2. Whether ARC violated Labor Code section 1777.5 and section 230.1 by failing to employ registered apprentices in the craft of cement mason in the ratio of one hour of apprentice work for every five hours of journeyman work.
3. Whether the Determination appropriately assessed an aggregate penalty of \$6,300.00 under Labor Code section 1777.7 for ARC's alleged failure to issue a DAS 140 to all applicable apprenticeship committees for the apprenticeable craft of cement mason in the geographic area of the Project site.³

In this decision, the Director finds that the Determination correctly found that ARC knowingly violated Labor Code section 1777.5 and section 230, subdivision (a). The Director further finds that the penalty under Labor Code section 1777.7 shall be \$2,100.00, computed as \$20 per day for the 105-day period from May 14, 2013 to August 27, 2013. Accordingly, the Director affirms the Determination in part and modifies the Determination in part.

FINDINGS OF FACT

1. ARC is a general contracting business based in the City of La Crescenta, California. ARC entered into a written contract with the City of Gardena to perform construction work on the Project. This contract contained the following notice to ARC:

Attention is directed to the provisions of Sections 1777.5 and 1777.6 of the Labor Code concerning the employment of apprentices by Contractor or any Subcontractor under it. Contractor and any Subcontractor under it shall comply with the requirements of said sections in the employment of apprentices.

Prior to the Project, ARC had employed apprentices on other public works projects.

2. ARC employed journeymen workers on the Project in two apprenticeable crafts: laborers and cement masons. As to laborers, on May 23, 2013, ARC sent a DAS 140 to an apprenticeship committee for laborers in the geographic area of the Project site: the Southern California Laborers Joint Apprenticeship Committee (So. Calif. Laborers JAC).

masons in the geographic area of the Project site. However, DLSE withdrew this assertion in the Hearing on the Merits.

ARC subsequently hired apprentice laborers who performed work on the Project.

3. For cement masons, there were two apprenticeship committees in the geographic area of the Project site: (a) the Southern California Cement Masons Joint Apprenticeship Committee, located in the City of Arcadia (So. Calif. Cement Masons JAC/Arcadia), and (b) the Southern California Laborers Cement Masons Joint Apprenticeship Committee, located in the City of Azusa (So. Calif. Laborers Cement Masons JAC/Azusa).

4. On May 24, 2013, ARC sent a DAS 140 to the So. Calif. Laborers Cement Masons JAC/Azusa. This DAS Form 140 (as well as the DAS 140 for laborers that ARC sent on May 23, 2013 to the So. Calif. Laborers JAC) contained the following statement: “Contract award information must be sent to your Apprenticeship Committee if you are approved to train. If you are not approved to train, you must send the information (which may be this form) to ALL applicable Apprenticeship Committees in your craft or trade in the area of the site of the public work.” (Emphasis in original.) ARC was not approved to train cement mason apprentices by any apprenticeship committee in the geographic area of the Project site.

5. When ARC sent its DAS 140 to the So. Calif. Laborers Cement Masons JAC/Azusa on May 24, 2013, ARC knew that the So. Calif. Cement Masons JAC/Arcadia also was an apprenticeship committee for cement masons in the geographic area of the Project site. However, ARC never sent a DAS 140 to the So. Calif. Cement Masons JAC/Arcadia. ARC did not do so even though ARC knew it was required to send a DAS Form 140 to all cement mason apprenticeship committees in the geographic area of the Project site.

6. ARC’s failure to send a DAS 140 to the So. Calif. Cement Masons JAC/Arcadia was not due to any circumstances beyond ARC’s control.

7. On May 3, 2013 and June 5, 2013, ARC sent a Request for Apprentices (DAS Form 142) to the So. Calif. Laborers Cement Masons JAC/Azusa. As a result, ARC hired cement mason apprentices who performed 48 hours of cement mason work on the Project.

³ The Determination also asserted that this penalty was assessed for ARC’s alleged failure to employ registered apprentices in the craft of cement mason in the ratio of one hour of apprentice work for every five hours of journeyman work. However, DLSE withdrew this assertion in the Hearing on the Merits.

Journeymen cement masons that ARC provided to the Project worked a total of 317 cement mason hours.

8. The first day that ARC worked on the project was April 23, 2013; this was work done solely by laborers. ARC provided cement masons to work on the project commencing on May 13, 2013. The Notice of Completion of the Project was recorded with the County of Los Angeles on August 27, 2013.

9. The Determination assessed penalties under Labor Code section 1777.7, subdivision (a)(1) at the rate of \$60.00 per day. The Determination computed the number of days that ARC was in violation of Labor Code section 1777.7 as 105 days, commencing with the second day that ARC employed cement masons on the Project on May 14, 2013, and running to the recordation of the Notice of Completion of the Project with the County of Los Angeles on August 27, 2013.

10. DLSE timely served the Determination upon ARC. ARC timely filed its Request for Review of the Determination.

11. Although DLSE has issued determinations asserting that ARC has violated Labor Code 1777.5 with regard to other public works projects, all such cases were designated “open” in DLSE’s Public Works Tracking database as of the date of hearing.

DISCUSSION

Labor Code 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. Section 227 provides that the regulations “shall govern all actions pursuant to ... Labor Code Sections 1777.5 and 1777.7.”

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

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

The governing regulation for issuing DAS 140s is section 230, subdivision (a). Section 230, subdivision (a) specifies the requirement for contractors who are already approved to train by an apprenticeship program sponsor in the apprenticeable craft or trade, and the requirement for those contractors who are not so approved. Section 230, subdivision (a) states:

(a) Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. This contract award information shall be in writing and may be a DAS Form 140, Public Works Contract Award Information. The information shall be provided to the applicable apprenticeship committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work.... The DAS Form 140 or written notice shall include the following information, but shall not require information not enumerated in Section 230:

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

In addition to the requirement to issue a DAS 140, Labor Code section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeymen in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). In this regard, Labor Code section 1777.5, subdivision (g) provides:

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

hour of apprentice work for every five hours of journeyman work.

The governing regulation as to this 1:5 ratio of apprentice hours to journeyman hours is section 230.1, subdivision (a), which states:

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

In the review of a determination as to both the DAS 140 requirement and the 1:5 ratio requirement, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (Labor Code section 1777.7, subdivision (c)(2)(B).)

Here, cement mason was the apprenticeable craft at issue in the Determination. ARC was not approved to train cement mason apprentices by any apprenticeship committee in the geographic area of the Project site. So under section 230, subdivision (a), ARC was required to submit a DAS 140 to all cement mason apprenticeship committees in that geographic area. ARC knew there were two such committees, but ARC submitted a DAS 140 to only one. Accordingly, the record establishes that ARC violated Labor Code section 1777.7 and section 230, subdivision (a).

With respect to the 1:5 ratio of apprentice hours to journeyman hours, the journeymen cement masons that ARC provided to the Project worked a total of 317 hours. So the 1:5 ratio required 63.4 hours of apprentice cement mason work. However, ARC's cement mason apprentices on the Project worked a total of 48 hours, resulting in a shortfall of 15.4 hours. Accordingly, the record establishes that ARC also violated Labor Code section 1777.5 and section 230.1.

As to the penalty for non-compliance, if a contractor "knowingly violated Section 1777.5" a civil penalty is imposed under Labor Code section 1777.7. Here, DLSE assessed a

penalty against ARC under the following portion of Labor Code section 1777.7, subdivision (a)(1):

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

The phrase quoted above -- “knowingly violated Section 1777.5” -- is defined by section 231, subdivision (h) as follows:

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

Here, the Director will not address whether ARC “knowingly violated” the requirement of a 1:5 ratio of apprentice hours to journeyman hours for cement apprentices, in view of DLSE’s withdrawal of its assertion that the penalty is assessed on this ground.

However, the Director will address whether ARC “knowingly violated” the requirement that it submit the DAS 140 to all the cement mason apprenticeship committees in the geographic area of the Project site. The record establishes that this violation was “knowingly committed.”

First, under section 231, subdivision (h), there is an irrebuttable presumption that ARC knew or should have known of this requirement because: (a) ARC’s contract with the City of Gardena for the Project notified ARC of the obligation to comply with Labor Code provisions applicable to public works projects, and (b) ARC had previously employed apprentices on public works projects. Further supporting the application of this irrebuttable presumption is the fact that the DAS 140 that ARC did send to one of the two cement mason apprenticeship

committees clearly stated, “If you are not approved to train, you must send the information (which may be this form) to ALL applicable Apprenticeship Committees in your craft or trade in the area of the site of the public work.” (Emphasis in original.)

Second, ARC’s failure to send the DAS 140 to one of the two applicable apprenticeship committees was not due to any circumstances beyond ARC’s control. The testimony of ARC’s Vice President Hatoomian on this issue was entirely contradictory and not credible. Mr. Hatoomian initially testified that ARC did not send the DAS 140 to the So. Calif. Cement Masons JAC/Arcadia because that committee was “not approved.” Then he testified that ARC’s failure to send the DAS 140 to that committee was a “mistake” due to time pressures. He then testified that ARC did not send the DAS 140 to that committee in reliance upon communications from the cement masons union. Mr. Hatoomian’s testimony failed to establish any circumstances beyond ARC’s control that prevented ARC from sending the DAS Form 140 to the So. Calif. Cement Masons JAC/Arcadia.

Since ARC knowingly violated the requirement to send the DAS 140 to one of the two cement mason apprenticeship committees in the geographic area of the Project site, a penalty must be assessed under Labor Code section 1777.7. Under Labor Code section 1777.7, subdivision (f)(2), upon the contractor’s request for review of the penalty, the Director decides the appropriate amount of the daily penalty de novo. In making this decision, the Director is to consider the factors stated in Labor Code section 1777.7, subdivision (f)(1), stated as follows:

- (A) Whether the violation was intentional.
- (B) Whether the party has committed other violations of Section 1777.5.
- (C) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.
- (D) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.
- (E) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

Here, two of the factors favor a high penalty. Under factor “A,” the evidence addressed above establishes that the violation was intentional: ARC knew it was required to send the DAS Form 140 to both committees, but chose to send it to only one committee. Under factor “C” there is no evidence that ARC took any steps to remedy this violation.

The other three factors, however, favor a low penalty. Under factor “B,” although DLSE issued determinations in other cases asserting ARC violated Labor Code 1777.5 in other public works projects, all such cases are designated “open” in DLSE’s Public Works Tracking database; accordingly, DLSE failed to establish that ARC has in fact been found to have committed other violations. Under Factors “D” and “E,” the evidence establishes that the violation resulted in only a minor loss of 15.4 hours of apprenticeship training (i.e., the difference between the 48 hours of cement mason apprentice hours worked on the Project and the 63.4 hours required by the 1:5 ratio). Other than this loss of 15.4 hours, there is no evidence of any lost training opportunities for apprentices or other harm to apprentices or apprenticeship programs.

In applying these factors, the Director concludes that a daily penalty of \$20.00 is the appropriate penalty under Labor code section 1777.7.

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

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

Here, DLSE correctly computed the number of days as 105, commencing with the second day ARC had cement masons working on the Project, May 14, 2013, to the recording of the Notice of Completion on August 27, 2013. Accordingly, the aggregate penalty assessed under Labor Code section 1777.7, as modified by this Decision, is \$2,100.00 for 105 days at the rate of \$20.00 per day.

FINDINGS

1. Affected contractor ARC Construction Inc. knowingly violated Labor Code section 1777.5 and section 230, subdivision (a) by not issuing public works contract award information in a DAS Form 140 or its equivalent to all applicable apprenticeship committees for the apprenticeable craft of cement mason in the geographic area of the Project site.

2. Affected contractor ARC Construction Inc. violated Labor Code section 1777.5 and section 230.1 by failing to employ registered apprentices in the craft of cement mason in the ratio of one hour of apprentice work for every five hours of journeyman work on the Project.

3. Under Labor Code section 1777.7, a penalty is assessed upon affected contractor ARC Construction Inc. in the amount of \$2,100.00, computed as \$20 per day for the 105 days commencing on May 14, 2013 and ending on August 27, 2013.

ORDER

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

Dated: 3/2/15



Christine Baker
Director of Industrial Relations