STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Danny Lynwood Rockett, an individual doing business as Ironhorse Construction — **Case No. 15-0321-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS AFTER RECONSIDERATION

The Director's Decision on the merits of this case issued on July 29, 2016 (the July 29, 2016 Decision) affirmed in part and modified in part a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on August 11, 2015, with respect to work performed by the affected subcontractor Danny Lynwood Rockett, an individual doing business as Ironhorse Construction (Rockett) on the work of improvement known as the Ana Verde Hills School (Project) performed for the Westside Union School District (District) in the County of Los Angeles. The Assessment determined that $73,544.36 in unpaid prevailing wages, including training fund contributions, $30,920.00 in Labor Code sections 1775 and 1813 statutory penalties ($120.00 per violation for 226 violations under Labor Code section 1775 and 152 violations at $25.00 each under Labor Code section 1813), $26,760.00 in Labor Code section 1777.7 penalties, and $188,000.00 in Labor Code section 1776 penalties were due.[1] Rockett requested review of the Assessment. Rockett did not deposit the Assessment amount for unpaid wages with the Department of Industrial Relations (Department) pursuant to section 1742.1, subdivision (b).

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

Pursuant to written notice, a Hearing on the Merits was held on April 5, 2016, in Los Angeles, California, before Hearing Officer Richard T. Hsueh. David Cross appeared for DLSE. Danny Rockett appeared for himself. Prior to the hearing, the Hearing Officer granted DLSE's written motion to amend the Assessment upward as follows: $82,276.77 for unpaid prevailing wages, including training fund contributions, and $40,575.00 for section 1775 and 1813 statutory penalties.[2] The issues for decision were:

- Whether the Assessment correctly found that Rockett failed to pay the required prevailing wages for all straight time and overtime worked on the Project by its workers;
- Whether DLSE abused its discretion in assessing penalties under section 1775 at the rate of $120.00 per violation;
- Whether Rockett failed to pay the required prevailing wage rate for overtime work and therefore was liable for penalties under section 1813;
- Whether Rockett Construction has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages under section 1742.1;
- Whether Rockett failed to notify the applicable apprenticeship programs of the award of public works construction contracts;
- Whether Rockett failed to contact apprenticeship programs for dispatch of apprentices on public works;
- Whether Rockett failed to employ apprentices on the Project in the minimum ratio required by section 1777.5 (20% of journeyman hours employed);
- Whether DLSE abused its discretion in setting penalties under section 1777.7 at the mitigated rate of $60.00 per violation; and
- Whether Rockett failed to timely submit certified payroll records (CPRs) and is therefore liable for penalties under section 1776.

[2] On or about February 2, 2015, DLSE filed and served a Motion to Amend Assessment.

The July 29, 2016 Decision found that Rockett was liable for $80,386.29 in unpaid prevailing wages, $1,890.48 in training fund contributions, $36,600.00 in section 1775 statutory penalties, $3,975.00 in in section 1813 statutory penalties, $80,386.29 in liquidated damages, and $26,760.00 in section 1777.7 statutory penalties – totaling $229,998.06. The July 29, 2016 Decision further found that Rockett was not liable for any statutory penalties under section 1776.

On August 10, 2016, DLSE applied for reconsideration of the denial of section 1776 statutory penalties. On August 12, 2016, the Director issued the "Order Granting Reconsideration, Rescinding Decision and Vacating Submission" by which the Director granted DLSE's motion for reconsideration, rescinded the July 29, 2016 Decision, and vacated the submission solely to consider the issue of section 1776 penalties. On August 17, 2016, the case was reassigned to Hearing Officer Howard Wien. Neither DLSE nor Rockett ever requested to submit further evidence or argument.

This Decision affirms the July 29, 2016 Decision on all matters except for the issue of section 1776 penalties. With this Decision the Director affirms the findings, based on the admissions and the evidence/testimony presented at the hearing, that Rockett has failed to carry his burden of proving that the basis of the Assessment was incorrect, has failed to carry his burden of proving grounds for waiver of liquidated damages, has failed to properly notify and request dispatch of laborer apprentices from the applicable apprenticeship committees in the geographic area of the Project, and was not excused from the requirement to employ apprentices under section 1777.7.

As to the issue of section 1776 penalties, this Decision affirms the findings that Rockett is not liable for a penalty under section 1776 in the sum of $188,000.00 or any other sum, but for reasons other than those stated in the July 29, 2016 Decision, as set forth below.

FACTS

Assessment: Rockett was the subcontractor on the Project. The prime contractor was Intertex Inc.[3] Five workers performed work for Rockett under the contract between August 3, 2012, and October 23, 2013. The applicable prevailing wage determinations in effect on the bid advertisement date of May 20, 2012, are as follows: SC-23-102-2-2011-1 (Laborer), with the applicable job classification in Group 2; SC-23-63-2-2011-2 (Operating Engineer), with the applicable job classification in Group 8 (predetermined increase effective after September 1, 2011); and SC-23-261-2-2011-1 (Teamster-Construction Site), with the applicable job classification in Group 3 (predetermined increase effective July 1, 2012.)

Deputy Labor Commissioner Paul Tsan (Tsan) testified as to the preparation of the Assessment and the supporting audit worksheets. He identified Rockett's CPRs and the applicable prevailing wage determinations and apprentice wage rates. Tsan further testified that the Assessment was properly served on Rockett on August 11, 2015. Rockett then submitted a timely request for review received by DLSE on August 27, 2015. Tsang testified that he researched the DAS website and determined the applicable apprenticeship committees in the geographic area of the Project in the trades of Laborers, Operating Engineers, and Teamsters. The applicable apprenticeship committee for the Laborer craft was Laborers Southern California Joint Apprenticeship Committee. The applicable apprenticeship committee for the Operating Engineer craft was Southern California Operating Engineers J.A.C. The applicable apprenticeship committee for the Teamsters craft was Construction Teamsters Apprenticeship Fund of Southern California J.A.C. Tsan also testified that Rockett failed to submit a request for dispatch of laborer apprentices to the applicable apprenticeship committees. Penalties under section 1777.7 were set at the mitigated rate of $60.00 per day for the 446 days that journeymen worked on the Project.

Tsan testified, with reference to the section 1776 penalty discussed in his penalty review report (Penalty Review), that the section 1776 penalty assessment was based on two different

[3] The Assessment was concurrently issued against Intertex, Inc., who also requested a separate review of the Assessment under Case Number 15-0325-PWH. Prior to the Hearing on the Merits, DLSE advised that it had settled with Intertex, Inc. and that the hearing would proceed as to Rockett only.

requests by DLSE for CPRs.[4] As to the first request (July 2014 Request), DLSE did not submit the request as evidence, and there was no testimony or documentary evidence of the content of this request – other than that it requested CPRs. Also, there was no testimony or documentary evidence of how DLSE transmitted this request to Rockett, or whether it was transmitted to Rockett's correct address. Tsan testified in general terms that it was "sent" or "submitted" to Rockett sometime in August 2014. However, in his Penalty Review, Tsan calculated the penalty period as commencing on July 27, 2014 – thereby indicating that DLSE sent the request sometime in July 2014.

Further as to the July 2014 Request, DLSE did not submit any documentary evidence or testimony that Rockett ever received it. The only evidence that arguably touched upon whether or not Rockett received it consisted of Tsan's general statements in the Penalty Review that this request was sent to Rockett, and Rockett produced the same incomplete set of CPRs that Rockett had provided to the prime contractor and awarding body.[5] However, there was no evidence of when Rockett produced the incomplete CPRs (other than that it was some time before August 7, 2014, when Tsan attempted to reach Rockett by telephone to discuss Rockett's incomplete production). Hence there was no evidence whether Rockett produced the CPRs in response to receiving this request, or instead independent of this request.

As to the second request (July 2015 Request), DLSE submitted this request as an exhibit, together with evidence DLSE mailed it to Rockett on July 27, 2015. This request did not contain any statement that Rockett's failure to provide CPRs to DLSE within 10 days of his receipt of this request would subject him to a penalty of $100.00 per day or portion thereof for each worker until strict compliance was effectuated.

Tsan's testimony and the Penalty Review stated that DLSE sent the July 2015 Request because Rockett had previously provided DLSE the same incomplete set of CPRs that Rockett had provided to the prime contractor and awarding body. Tsan testified that Rockett's failure to respond to the July 2015 Request was the basis for the Assessment served on August 11, 2015,

[4] Tsan submitted the Penalty Review to Senior Deputy Labor Commissioner Ken Madu on August 10, 2015, and Madu approved it that day. The Assessment was served the following day.

[5] Rockett produced CPRs for the period August 12, 2012, to May 4, 2013, but DLSE's investigation showed Rockett had worked on the Project from August 3, 2012, to October 23, 2013.

and that the calculation of the $188,000.00 penalty for the 376 days commencing on July 27, 2014 (with five workers per day) was based on the July 2014 Request.

Two of the affected workers, Espinoza Esteban and Hector Velez, testified with the assistance of a certified interpreter. Both testified regarding their respective job duties, length of time on the job, hours worked, and the wage payments, or the lack thereof, received from Rockett.

In his defense, Danny Rockett testified as to the exhibits he offered and why he did not pay his workers. He did not offer any evidence or testimony as to why he failed to notify the applicable apprenticeship programs of the award of the public works construction contract, failed to contact the applicable apprenticeship programs for dispatch of apprentices on the Project, and failed to employ apprentices on the Project in the minimum ratio required by section 1777.5. He pointed to Exhibit B, a DAS Form 142, that was sent to Stephanie Foster requesting the dispatch of an apprentice asphalt roller as his partial effort to comply. Additionally, Rockett called one of the affected workers, Devon Rockett, who is his son, to testify. Devon Rockett testified regarding his job duties but actually admitted that he was not paid for hours worked from October 3, 2013, through October 25, 2013.

DISCUSSION

A. Prevailing Wage Violations.

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. 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, too, *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a)

provides for the imposition of liquidated damages, essentially a doubling of unpaid wages, if those wages are not paid within sixty days following the service of a civil wage and penalty assessment.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review under section 1742. Subdivision (b) of section 1742 provides, among other things, that the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing. At the hearing the contractor "shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§ 1742, subd. (b).) If the contractor "demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment..., the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages." (§ 1742.1, subd. (a).) As well, DLSE's determination "as to the amount of the penalty shall be reviewable only for abuse of discretion." (§ 1775, subd. (a)(2)(D).)

In this case, the record established the basis for the Assessment. DLSE presented evidence that one worker performed work in the classifications of Laborer, two workers performed work in the classification of Operating Engineer, and two workers performed work in the classification of Teamster. DLSE then presented evidence that Rockett did not pay the five affected workers for all hours worked, including travel time and overtime. There is no evidence of a previous prevailing wage violation.

Rockett did not offer any evidence or testimony to rebut DLSE's evidence. Rockett explained that he was unable to pay his workers, which included his son, because there was a dispute with the general contractor and the general contractor stopped paying him. Despite having no prior experience with public work projects, Rockett admitted that the subcontract agreement between him and Intertex (Subcontract) advised and required compliance with the various provisions of the Labor Code, including sections 1771, 1775, 1776, and 1777.5, and 1815.

Accordingly, DLSE's evidence constitutes prima facie support for the Assessment. Rockett, in turn, failed to meet his burden of proof to disprove the basis for, or accuracy of, the Assessment or to show it had substantial grounds for believing the Assessment was in error to support a waiver of liquidated damages under section 1742.1, subdivision (a). Accordingly, the assessed unpaid wages for five employees on the Project in the aggregate amount of $80,386.29; unpaid training fund contributions in the amount of $1,890.48, a penalty under section 1775 in the amount of $36,600.00 for 305 violations at the mitigated rate of $120.00 per violation; a penalty under section1813 in the amount of $3,975.00 at the statutory rate of $25.00 for 159 violations; and liquidated damages under section 1742.1 in an amount equal to the unpaid wages are affirmed in full.

B. Apprenticeship Violations.

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

Section 1777.5, subdivision (e) 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 submitting a DAS 140 is California Code of Regulations, title 8, section 230, subdivision (a), which 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
> (8) approximate dates apprentices will be employed.

The Division of Apprenticeship Standards (DAS) promulgated a Public Works Contract Award Information form (DAS 140) for contractors' use in notifying applicable apprenticeship committees in the geographic area of the public works project.

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, section 1777.5, subdivision (g) 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.

The governing regulation as to this 1:5 ratio of apprentice hours to journeyman hours is California Code of Regulations, title 8,section 230.1, subdivision (a), which states, in relevant part:

> 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.

A contractor shall not be considered in violation of the regulation, however, if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) According to that regulation, a contractor properly requests the dispatch of apprentices by doing the following:

> ...[r]equest 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. If the apprenticeship committee from which apprentice dispatch(es) are requested does not dispatch apprentices as requested, the contractor must request apprentice dispatch(es) from another committee providing training in the applicable craft or trade in the geographic area of the site of the public work, and must request apprentice dispatch(es) from each such committee either consecutively or simultaneously, until the contractor has requested apprentice dispatch(es) from each such committee in the geographic area. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email....

(Cal. Code Regs., tit. 8, § 230, subd. (a).) DAS has prepared a form, DAS 142, which a contractor may use to request dispatch of apprentices from apprenticeship committees.

When DLSE determines that a violation of the apprenticeship laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1777.7. In the review of an assessment as to 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." (Former § 1777.7, subdivision (c)(2)(B).)

1. Rockett Failed to Submit Contract Award Information to an Applicable Apprenticeship Program

Contractors must notify applicable apprenticeship programs or committees of the public works project, including expected work start date and estimated journeyman hours. (Cal. Code

Regs., tit. 8, § 230, subd. (a) and DAS 140.) Laborers, Operating Engineers, and Teamsters were the three apprenticeable crafts at issue in the Assessment. There is no evidence that Rockett submitted DAS 140 or its equivalent to the applicable apprenticeship committee for each craft involved. Hence, Rockett violated section 1777.5, subdivision (e) and California Code of Regulations, title 8, section 230.1, subdivision (a).

2. Rockett Failed To Properly Request The Dispatch Of Laborer Apprentices.

All requests for dispatch of apprentices must be in writing and provide at least 72 hours' notice of the date on which one or more apprentices are required. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) Rockett admitted that he did not request the dispatch of laborer apprentices in compliance with the regulation. Hence, Rockett violated California Code of Regulations, title 8, section 230.1, subdivision (a).

3. Rockett Failed To Employ Laborer, Operating Engineer and Teamster Apprentices.

Having failed to notify applicable apprenticeship committees of contract award information as required by section 1777.5, subdivision (e), and having failed to request dispatch of apprentices for each craft working on the Project, Rockett employed no apprentices on the Project. Accordingly, the record establishes that Rockett violated the requirement of section 1777.5, subdivision (g) and California Code of Regulations, title 8, section 230.1, to employ apprentices in a ratio of one hour to each five hours of journeyman work on the Project.

4. The Penalty for Noncompliance.

If a contractor "knowingly" violates section 1777.5, a civil penalty is imposed under section 1777.7. Here, DLSE assessed a penalty against Rockett under the following portion of former section 1777.7, subdivision (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

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 contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects, ...

Rockett "knowingly violated" the apprenticeship requirements to notify applicable apprenticeship committees of contract award information, to request apprentices from those committees, and to employ apprentices at a 1:5 ratio of apprentice hours to journeyman hours in the crafts of Laborer, Operating Engineer, and Teamster. Rockett did not offer any defense regarding his failures to abide by apprenticeship requirements. Further, Exhibit K of the Subcontract between Rockett and Intertex, which Rockett had initialed, reinforced the apprenticeship obligations under the law. That document specifically referenced section 1777.5. As admitted by Rockett, he was plainly on notice of his apprenticeship obligations and knew of the requirements. Hence, the conclusion is drawn that Rockett knowingly violated the apprenticeship requirements and is liable for penalties under section 1777.7.

Rockett failed to meet his burden of proof by providing evidence of compliance with section 1777.5. Under limited circumstances beyond the contractor's control as defined in the regulation, a contractor may be excused from meeting the 1:5 ratio of apprentice hours to journeyman hours. (See Cal. Code Regs., tit. 8, § 230.1, subd. (a).) To show that his failure to employ apprentices was due to circumstances beyond his control, Rockett had to demonstrate that he properly requested the dispatch of laborer apprentices from the applicable committee and that no apprentices were dispatched. The record establishes that Rockett not only failed to submit the contract award information, he also failed to request the dispatch of apprentices in any of the applicable crafts.

Under the version of section 1777.7 applicable to this case[6], upon a request for review the Director decides the appropriate penalty de novo. In setting the penalty, the Director considers all of the following circumstances:

(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.

(§ 1777.7, subd. (f)(1).)

Applying the de novo standard in effect for this case, factors "A", "D" and "E" support a penalty rate of $60.00 for the 446 days that journeymen worked on the Project. Having been on notice of the apprenticeship requirements by virtue of the contract documents, Rockett is irrebuttably presumed to have engaged in knowing violations of the statutes and regulations cited above that required him to notify applicable apprenticeship committees, request apprentices, and maintain legally sufficient apprenticeship hours. Those knowing violations can only be viewed as intentional under factor "A." As to factors "D" and "E," the violations clearly resulted in lost training opportunities in the form of fewer hours for apprentice training and, thus, harm to the apprenticeship programs in the three crafts at issue. Factor "B" does not apply, since the Project constituted Rockett's first public work subcontract. Factor "C" is neutral in this case, since no evidence shows that before the Assessment, Rockett was made aware of the allegations to be lodged.

In conclusion, on this de novo review the Director selects the same penalty rate used in the Assessment, and assesses the section 1777.7 statutory penalty at the daily rate of $60.00 for 446 days that journeymen worked on the Project, for a total of $26,760.00.

[6] The law applicable to this case is dependent on when the bid advertising issued place on May 20, 2012, is applicable to this case. Section 1777.7, subdivision (f)(1) and (2) in effect on that date requires the Director to assess section 1777.7 penalties de novo. (Stats. 2012, ch. 46, § 96.)

C. Section 1776 Penalty Assessment.

Employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) The contractor's and subcontractor's duty to create and maintain the payroll records, certify them as true and accurate, and make them available to DLSE and others for inspection are stated in section 1776, subdivisions (a) and (b):

> (a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:
>
> > (1) The information contained in the payroll record is true and correct.
> >
> > (2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.
>
> (b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:
>
> > (1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.
> >
> > (2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations. . . .

The contractor's and subcontractor's duty to produce copies of CPRs to DLSE in response to DLSE's request, and the penalty for failing to do so timely, are stated in sections 1776, subdivisions (d) and (h):

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that request the records within 10 days after receipt of a written request.

* * *

(h) In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars ($100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated.

The above-quoted provision that no penalty can be assessed unless and until the contractor or subcontractor fails to comply within ten days "after receipt" of DLSE's written request is further addressed in the applicable regulation, California Code of Regulations, title 8, section 16400, subdivision (d). Given the critical importance of the date of receipt, this regulation states that DLSE's request must be in a ". . . form and/or method which will assure and evidence receipt thereof." (Emphasis added.)

This regulation also requires that DLSE's request for CPRs contain a conspicuous notice of the penalty for noncompliance:

(d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:

(1) Specify the records to be provided and the form upon which the information is to be provided;

(2) Conspicuous notice of the following:

* * *

(B) that failure to provide certified copies of the records to the requesting public entity within 10 working days[7] of the receipt of the request will subject the contractor to a penalty of twenty-five

[7] California Code of Regulations, title 8, section 16400, subd. (d)(2)(B) states the period as "within 10 working days" whereas section 1776 subdivision (h) states the period as "within 10 days" and omits the word "working". This distinction is immaterial in this case given the evidentiary record discussed *infra*.

($25.00)[8] dollars per calendar day or portion thereof for each worker until strict compliance is effectuated; . . .

(Cal. Code Regs., tit. 8, § 16400, subd. (d), emphasis added.)

When DLSE determines after an investigation that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review under section 1742.

As stated above, Tsan testified that Rockett's failure to respond to the July2015 Request was the basis for the Assessment served on August 11, 2015, and DLSE's calculation of the $188,000.00 penalty for the 376 days commencing on July 27, 2014, was based on the July 2014 Request. Accordingly, this Decision addresses both requests.

Sufficient grounds exist to show the July 2014 Request and the July 2015 Request do not support any penalty under section 1776. As to the July 2014 Request, DLSE offered no evidence that this request contained the requisite notice to Rockett stating the penalty for non-compliance. DLSE also offered no evidence that it made this request by form or method assuring Rockett's receipt thereof and, in the absence of an applicable presumption of receipt, DLSE offered no evidence that Rockett received this request. As to the July 2015 Request, it did not contain the requisite notice to Rockett stating the penalty for non-compliance.

1. No Evidence of the Requisite Warning on Penalty for Noncompliance with July 2014 Request

The July 2014 Request does not appear as an exhibit of record. Such an exhibit could have shown whether the July 2014 Request contained the required notice that Rockett's failure to timely provide CPRs to DLSE within ten working days of his receipt of this request would subject him to a penalty of $100.00 per day per worker until strict compliance was effectuated, as required by California Code of Regulations, title 8,

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[8] When this regulation was promulgated, section 1776 stated the penalty rate as $25.00. After section 1776 was amended to increase the penalty rate to $100.00 effective January 1, 2012 (stats. 2011, ch. 677, § 2.5), the $25.00 sum in the regulation was not amended. Nevertheless, under section 1776, the penalty rate stands at $100.00.

section 16400, subdivision (d).[9] This regulation states that a request for CPRs "shall" state this notice, and that this notice must be "conspicuous." Neither the Penalty Review nor any other exhibit of DLSE stated that the July 2014 Request contained this notice. There was no testimony that the July 2014 Request contained this notice.

2. No Evidence Shows that the July 2014 Request was in a Form or Method Assuring and Evidencing Receipt by Rockett, and No Evidence that Rockett Received this Request.

No evidence appears in the record to show compliance with the requirement of California Code of Regulations, title 8, section 16400, subdivision (d) that DLSE's request for CPRs "shall be in any form and/or method which will assure and evidence receipt thereof."

No evidence discloses the method by which DLSE transmitted the July 2014 Request to Rockett. For example, there was no testimony, and no documentary evidence, as to whether the July 2014 Request was mailed by first class or registered mail to Rockett, or hand-delivered to him, or transmitted to him by some other means that would "assure and evidence receipt thereof." No proof of service exists to contribute to a presumption of receipt, nor any fax transmittal sheet that may have been used for the request to Rockett.[10] The Penalty Review and Tsan's testimony only used the vague terminology that DLSE "submitted" or "sent" this request to Rockett. There was no evidence that the DLSE employee who did the actual submission or sending of this request used Rockett's correct address.

In absence of an applicable presumption of receipt, no evidence exists to show Rockett's receipt of the July 2014 Request. For example, no return receipt for certified mail, or any record of any tracking of the delivery by the U.S. Postal Service or any private carrier or messenger service appears in the record. No testimony states that

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[9] As addressed *infra*, DLSE did submit as an exhibit the July 2015 Request, but it did not contain the required notice of penalty for noncompliance.

[10] If evidence showed the request was mailed to Rockett at his correct address, the presumption of Evidence Code section 641 might apply: "A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." Since no evidence of mailing appears in the record, this presumption is inapplicable here.

Rockett had received the July 2014 Request: Tsan did not testify on this matter, and DLSE did not call Rockett as a witness. In Rockett's brief testimony on his own behalf, he did not address the July 2014 Request or any other matters regarding DLSE's requests for CPRs.

DLSE's sole evidence possibly relating to whether Rockett received the July 2014 Request consists of three statements by Tsan in the Penalty Review vaguely indicating Rockett had produced his incomplete CPRs to DLSE sometime after DLSE had sent the July 2014 Request, thereby implying Rockett produced those CPRs after receiving the July 2014 Request.[11] Since none of those statements – nor any other evidence of DLSE – states the date that Rockett produced those incomplete CPRs to DLSE, there is no evidence that Rockett submitted those CPRs to DLSE in response to having received the July 2014 Request rather than independent of the July 2014 Request. For all these reasons, the July 2014 Request cannot support a penalty under section 1776.

3. The July 2015 Request Does Not Support the Assessment of Any Penalty Under Section 1776.

The July 2015 Request does not support the section 1776 penalty in the sum of $188,000.00 or any other sum, because it was invalid under California Code of Regulations, title 8, section 16400, subd. (d). This request did not contain the requisite notice that Rockett's failure to provide CPRs to DLSE within 10 working days of his receipt of this request would subject him to a penalty of $100.00 per day or portion thereof for each worker until strict compliance was effectuated. (Cal. Code Regs., tit. 8, § 16400, subd. (d).) That regulation clearly states that a request for CPRs "shall" provide such notice, and this notice must be "conspicuous." Also, DLSE calculated the penalty sought, $188,000.00, based on the First

[11] The three statements were:
(1) "The subcontractor was not corporative [*sic*] in giving me the information I requested. The CPRs that were provided was [*sic*] incomplete."
(2) "When I send [*sic*] my request for all CPRs to the subcontractor, I also requested time records and canceled check [*sic*] for this project. The subcontractor only submitted to [*sic*] the same sets of CPRs that was provided to the prime contractor. I called the subcontractor on 8/7/14 to check why not all CPRs were provided, but never reached [*sic*] a reply."
(3) "Was never able to contact the subcontractor. Only was able to send the initial package and request for supporting documents, but did not received [*sic*] the complete CPRs."

Request, which was invalid for the reasons stated above. Accordingly, there is no support for any penalty under section 1776.

FINDINGS AND ORDER

1. Affected contractor Danny Lynwood Rockett, an individual doing business as Ironhorse Construction, filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Rockett underpaid five employees on the Project in the aggregate amount of $80,386.29.

3. Rockett failed to make required training fund contributions in the amount of $1,890.48.

4. Penalties under section 1775 are due in the amount of $36,600.00 for 305 violations at the mitigated rate of $120.00 per violation and DLSE did not abuse its discretion in setting penalties at that rate.

5. Penalties under section 1813 are due in the amount of $3,975.00 at the statutory rate of $25.00 for 159 violations.

6. There was one applicable apprenticeship committee in the geographic area of the Project in the craft of Laborer, one applicable apprenticeship committee in the geographic area of the Project for Operating Engineers, and one applicable apprenticeship committee in the geographic area of the Project for Teamsters.

7. Rockett violated section 1777.5 by failing to employ Laborer, Operating Engineer, and Teamster apprentices on the Project in the minimum ratio required by the law.

8. Rockett failed to properly inform the applicable apprenticeship committees in the geographic area of the Project of contract award information and request the dispatch of Laborer, Operating Engineer, and Teamster apprentices from the applicable apprenticeship committees, and he was not excused from the requirement to employ apprentices under section 1777.7.

9. Rockett is liable for penalties under section 1777.7 in the aggregate

amount of $26,760.00, assessed at the mitigated rate of $60.00 per day for the 446 days that journeyman Laborers, Operating Engineers, and Teamsters worked on the Project.

10. On an unknown date in July 2014, DLSE sent to Rockett by unknown means a request for certified payroll records (CPRs). This Decision finds that this request does not support the Assessment of the Labor Code section 1776 penalty in the sum of $188,000.00 or any other sum, because no evidence shows that this request contained the notice to Rockett that his failure to timely comply with the request would subject him to a penalty at the rate of $100.00 per day per worker until strict compliance was effectuated, as required by California Code of Regulations, title 8, section 16400, subdivision (d); no evidence shows that this request was made "in any form and/or method which will assure and evidence receipt thereof" as required by California Code of Regulations, title 8, section 16400, subdivision (d); and no evidence shows that Rockett received this request.

11. On July 27, 2015, DLSE transmitted to Rockett by U.S. First Class mail and by Certified Mail a written request for CPRs and other payroll records. This request was invalid under California Code of Regulations, title 8, section 16400, subdivision (d) because it did not contain the requisite notice to Rockett that his failure to timely comply with the request would subject him to a penalty at the rate of $100.00 per day per worker until strict compliance was effectuated. Accordingly, this Decision finds that this request does not support the Assessment of the Labor Code section 1776 penalty in the sum of $188,000.00 or any other sum.

12. In light of the Findings above, Rockett is not liable for a penalty under Labor Code section 1776 in the sum of $188,000.00 or any other sum.

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

Wages:	$80,386.29
Training fund contributions:	$1,890.48
Penalties under section 1775, subdivision (a):	$36,600.00
Penalties under section 1813:	$3,975.00
Liquidated damages:	$80,386.29
Penalties under section 1777.7:	$26,760.00

TOTAL **$229,998.06**[12]

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

All assessments stated in the Civil Wage and Penalty Assessment – other than the Labor Code section 1776 penalty – are affirmed and modified as set forth in the above Findings. The assessment of the Labor Code section 1776 penalty is dismissed in its entirety as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 8/11/2017

Christine Baker
Director of Industrial Relations

[12] DLSE may credit the amount paid by Intertex Inc. toward the wages and training fund contributions.