

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Original Sid Blackman Plumbing, Inc.

Case No. 20-0348-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Original Sid Blackman Plumbing, Inc. (OSBP) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on October 20, 2020, with respect to work performed on the Seeley Elementary School New Gymnasium (Project) for the Seeley Union School District (Awarding Body) in Imperial County. The Assessment determined that \$16,560.00 was due in penalties assessed under Labor Code section 1777.7 for apprenticeship violations.¹

Hearing Officer Ann Wu held a Prehearing Conference on August 17, 2021.² Michael Rogers appeared as counsel for OSBP, and Lance Grucela appeared as counsel for DLSE. The parties waived a Hearing on the Merits, and the parties jointly requested that the matter be submitted for decision on stipulated facts, joint exhibits, and the parties' briefs. On August 17, 2021, the parties submitted the Amended Stipulated Facts and Joint Statement of Issues to be Decided by the Director (Stipulated Facts), the Joint Exhibit List, and the Joint Exhibits.³ The Joint Exhibits are admitted as evidence. The parties filed simultaneous closing briefs on October 15, 2021, as well as optional reply briefs on October 29, 2021. The matter was submitted for decision on October 29, 2021.

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

² This Prehearing Conference was converted from a Hearing on the Merits at the request of the parties.

³ On August 23, 201, the parties resubmitted the Joint Exhibit List to reference the Bates numbering of the Joint Exhibits.

As set forth in the Stipulated Facts, the parties stipulated to the following:

- The work subject to the Civil Wage and Penalty Assessment was subject to prevailing wage and apprenticeship requirements.
- The Labor Commissioner timely served the Civil Wage and Penalty Assessment.
- The Request for Review was timely filed.
- The Labor Commissioner timely made its investigative file available to the contractor.

The issues for decision are as follows:

- Whether OSBP submitted the required contract award information to all applicable apprenticeship committees for the Laborer classification in a timely and factually sufficient manner.
- Whether OSBP employed apprentices in the Laborer classification in the required minimum ratio of apprentices to journeypersons on the Project.
- Whether OSBP is liable for penalties assessed pursuant to section 1777.7.
- Whether the Labor Commissioner abused her discretion in setting penalties under section 1777.7.
- Whether the Labor Commissioner correctly calculated the amount of the penalty at the mitigated rate of \$30.00 per violation for 552 violations.

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

FACTS

The Project.

The Awarding Body advertised the Project for bid on January 15, 2018. (Stipulated Fact No. 7.) The notice to contractors calling for bids summarized the work

as follows: "The work consists generally of, but is not limited to, construction of 12,504 sq. ft. Gymnasium. The building shall be constructed of a concrete slab on grade foundation, concrete masonry, steel framed roof system and typical school construction interior and exterior finishes." (Joint Exhibit No. 6, p. 39.) As indicated in the bid notice, the Project was a public works project subject to prevailing wage and apprenticeship requirements. (Stipulated Fact Nos. 5, 6; Joint Exhibit No. 6, p. 40.)

OSBP entered into a contract with the Awarding Body on or about February 27, 2018 in the amount of \$196,947.00 for the plumbing scope of work on the Project. (Stipulated Fact No. 8; Joint Exhibit No. 16, pp. 184-185.) The contract amount was later reduced to \$185,097.00 on April 16, 2018. (Stipulated Fact No. 8; Joint Exhibit No. 7, p. 57.) OSBP had workers on the Project between June 13, 2018 and December 16, 2019, a duration of 552 days. (Stipulated Fact Nos. 10, 19; Joint Exhibit No. 1, pp. 1-2, 7; Joint Exhibit No. 8, pp. 58-159.) OSBP performed work on the Project on 61 of those days. (Stipulated Fact No. 10; Joint Exhibit No. 8, pp. 58-156; Joint Exhibit No. 20, pp. 192-195.) The Awarding Body's estimated completion date of the Project was September 1, 2020. ⁴ (Joint Exhibit No. 5, p. 37.)

The Public Works Complaint.

On March 24, 2020, DLSE received a complaint from Monika Almada of the Labor Management Compliance Council alleging failure to employ registered apprentices in the correct ratio or not at all. (Joint Exhibit No. 3, pp. 20-21.)

The Prevailing Wage Rate Determinations.

OSBP employed journey-level Laborers and Plumbers on the Project.⁵ (Stipulated Fact No. 11; Joint Exhibit No. 8, pp. 58-161.) The prevailing wage determinations (PWDs) at issue in this matter are that of Laborer, SC-23-102-2-2017-2 (Laborer), and that of Plumber, IMP-2017-2. (Stipulated Fact No. 13; Joint Exhibit No. 9, pp. 162-163; Joint Exhibit No. 10, pp. 164-169.) Both of those crafts are apprenticeable. (Ibid.)

⁴ The parties did not submit any evidence of the actual completion date of the Project.

⁵ There is no allegation that OSBP underpaid workers.

The Assessment.

The Assessment found that OSBP failed to submit contract award information to all of the applicable apprenticeship committees in the geographic area of the Project, failed to request dispatch of apprentices, and failed to employ apprentices in the required minimum ratio of apprentices to journeypersons on the Project. (Joint Exhibit No. 2, p. 9.) The Assessment imposed section 1777.7 penalties of \$16,560.00, based on 552 violations assessed at \$30.00 per violation.⁶ (Stipulated Fact No. 19; Joint Exhibit No. 2, pp. 8-9.)

Stipulated Facts and Joint Exhibits.

There are two applicable apprenticeship committees for the Laborer classification for the geographic area of the Project. (Joint Exhibit No. 11, pp. 170-172; OSBP Brief, 2:22-26.) They are the Associated General Contractors of America, San Diego Chapter (AGC Committee) and the Laborers Southern California Joint Apprenticeship Committee (Laborers JAC). (Ibid.)

On May 1, 2018, OSBP submitted contract award information (DAS 140 form) for the Laborer classification to the AGC Committee.⁷ (Stipulated Fact No. 15; Joint Exhibit No. 12, pp. 176-177.) On June 7, 2018, OSBP submitted a request for dispatch (DAS 142 form) to the AGC Committee requesting dispatch of Laborer apprentices to the Project on June 13, 2018. (Stipulated Fact No. 16; Joint Exhibit No. 12, pp. 178-179.) OSBP did not submit the DAS 140 or DAS 142 forms (or the equivalent) to the Laborers JAC. (Stipulated Fact No. 17.) OSBP contends that it was not required to do so because the Laborers JAC is located in Los Angeles County, approximately 200 miles away from the Project location. (Stipulated Fact No. 18.)

As reflected in the Penalty Review, DLSE determined the first and last dates that a journeyperson worked on the Project as June 13, 2018 and December 16, 2019.

⁶ OSBP has no prior history of apprenticeship violations. (Stipulated Fact No. 20; Joint Exhibit No. 1, p. 7.) However, DLSE has pending investigations against OSBP on two other public works projects. (Joint Exhibit No. 1, p. 7.)

⁷ Based on the DAS 140 form, OSBP is not signatory to any apprenticeship committees for the Laborer classification. (Joint Exhibit No. 12, p. 176.)

(Joint Exhibit No. 1, p. 7.) DLSE also determined the total journeyperson hours worked for each classification of worker employed on the Project, and applied the 1:5 ratio of apprentice to journey-level hours to determine the minimum number of apprentice hours required on the Project. (Joint Exhibit No. 1, p. 6.) DLSE determined that OSBP did not employ any apprentices on the Project for the Laborer classification, and that OSBP did not employ sufficient apprentices for the Plumber classification to meet the minimum number of apprentice hours required in the Project. (Joint Exhibit No. 1, pp. 6-8, 14-15.) As set forth in the Penalty Review, DLSE determined that there were 552 apprenticeship violations between June 13, 2018 and December 16, 2019. (Stipulated Fact No. 19; Joint Exhibit No. 1, p. 7.)

Assessment of Penalties under Section 1777.7.

Following review by the Senior Deputy Labor Commissioner, the Labor Commissioner assessed a section 1777.7 penalty of \$30.00 per violation for 552 violations, for a total penalty amount of \$16,560.00. (Stipulated Fact No. 19; Joint Exhibit No. 1, pp. 1-2; Joint Exhibit No. 2, p. 9.) This was based on OSBP's failure to submit contract award information and request for dispatch of apprentices to all applicable apprenticeship committees for both the Laborer and Plumber classifications, and OSBP's failure to employ the required ratio of apprentices for the Laborer and Plumber classifications. (Joint Exhibit No. 1, pp. 5-6.)

DISCUSSION

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

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, supra*, at p. 985.)

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).) DLSE has the initial burden of presenting evidence that “provides prima facie support for the Assessment . . .” (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that burden is met, “the Affected 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).)

OSBP Failed to Comply with the Apprenticeship Requirements of Section 1777.5.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. (Cal. Code Regs., tit. 8, §§ 227 to 231.)

In general, and unless an exemption applies, section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five

hours of work performed by journeypersons in the applicable craft or trade. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. (§ 1777.5, subd. (e).) “The information shall be provided to the applicable committees “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 . . .” (Cal. Code Regs., tit. 8, § 230, subd. (a).) The Division of Apprenticeship Standards (DAS) has prepared a form, the DAS 140 form, that a contractor may use for that purpose.

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio if it has properly requested 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. The request for dispatch must be made by “written notice of at least 72 hours (excluding Saturdays, Sundays, and holidays) before the date on which one or more apprentices are required.” (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DAS has prepared another form, the DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees.

The record demonstrates that OSBP violated the apprenticeship requirements with regard to the Laborer classification.⁸ The Laborer classification is an apprenticeable craft, and OSBP did not employ any Laborer apprentices. (Stipulated Fact No. 13; Joint Exhibit No. 9, pp. 162-163.) Therefore, the question is whether OSBP properly requested dispatch of Laborer apprentices. OSBP searched the DAS website for

⁸ The parties stipulated that OSBP complied with the apprenticeship requirements for the Plumber classification. (Stipulated Fact No. 12.) This stipulation is inconsistent with the other evidence submitted and the conclusion in the Penalty Review that OSBP failed to submit contract award information and request for dispatch of apprentices to all applicable apprenticeship committees for the Plumber classification, and that OSBP violated the ratio requirement for Plumber apprentices. (Joint Exhibit No. 1, pp. 5-7; Joint Exhibit No. 11, pp. 173-175.) For this reason, OSBP’s argument that it did not violate apprenticeship requirements for the Laborer classification because the parties stipulated that it complied with the apprenticeship requirements for the Plumber classification (when the evidence shows otherwise) must be discounted.

applicable apprenticeship programs when it was awarded the Project. (OSBP Brief, 2:14-16.) The results of its search is documented in Joint Exhibit 18, and it shows the two applicable apprenticeship programs for the Laborer classification. (OSBP Brief, 2:14-17; Joint Exhibit 18, p. 189.) The parties agree that there are two applicable apprenticeship committees for the Laborer classification, the AGC Committee and the Laborers JAC. (OSBP Brief, 2:20-27; Stipulated Fact Nos. 14-17.) Although OSBP submitted contract award information and request for dispatch of apprentices to the AGC Committee, OSBP did not do the same for the Laborers JAC. (Stipulated Fact Nos. 15-17.)

OSBP argues that it was not required to contact the Laborers JAC because the Laborers JAC is not located "in the area of the site of the public works project" as set forth in Cal. Code Regs., tit. 8, section 230, subd. (a), since the Laborers JAC is located in Azusa approximately 200 miles away from the Project site. (OSBP Brief, 3:5-7; OSBP Reply Brief, 2:12-16; Stipulated Fact No. 18.) Section 230, subdivision (a), states in relevant part:

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 . . .

Here, OSBP was not approved to train apprentices by an apprenticeship committee. (Joint Exhibit 12, p. 176.) Thus, OSBP was required to provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation included the area of the public works project. (Cal. Code Regs., tit. 8, § 230, subd. (a).)

Contrary to OSBP's assertion that a "contractor must use some discrimination and common sense when using the [DAS] website" (OSBP Reply Brief, 2:7-9), the DAS regulations do not give OSBP discretion to determine "the geographic area of operation" of the apprenticeship programs. The "geographic area of operation" of an

apprenticeship program is defined as “the geographic area in which the program regularly operates and trains apprentices.” (Cal. Code Regs., tit. 8, § 205, subd. (n).) Likewise, the DAS regulations do not allow OSBP to ignore those apprenticeship committees that it believes are too far from the Project site. As indicated in the DAS regulations:

The administration and operation of apprenticeship programs shall be supervised by an apprenticeship program sponsor which shall approve apprenticeship agreements, adjust disputes and perform such other functions and duties as are agreed to in the apprenticeship standards. *An apprenticeship program is not restricted to a local area of coverage and may provide for local, regional or statewide coverage in its standards.*⁹

(Cal. Code Regs., tit. 8, § 218, emphasis added.) The Parties’ Joint Exhibit 11 showed that there were two apprenticeship programs that regularly operated and trained apprentices for Imperial County: (1) the AGC Committee in San Diego; and, (2) the Laborers JAC in Azusa. There is no legal support for OSBP’s contention that it may pick and choose, based on distance to the Project site, which of the applicable apprenticeship committees to contact.

Accordingly, the record establishes that OSBP violated the ratio requirement of section 1777.5 subdivision (g), the notice requirement of section 1777.5, subdivision (e), and the related regulations, sections 230 and 230.1, and is therefore subject to penalties under section 1777.7.

OSBP Failed to Prove the Labor Commissioner Abused Her Discretion in Assessing Penalties Under Section 1777.7.

If a contractor “knowingly violate[s] Section 1777.5” a civil penalty is imposed under section 1777.7. Section 1777.7 provides, in relevant part:

(a) (1) If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5, the contractor and any subcontractor responsible for the violation shall forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than one

⁹ In this regard, a DAS approved apprenticeship program must establish written apprenticeship standards that cover all work processes within the apprenticeable occupation. (Cal. Code Regs., tit. 8, §§ 212 and 212.2, subd. (a).)

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. A contractor or subcontractor that knowingly commits a second or subsequent violation within a three-year period, if the noncompliance results in apprentice training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars (\$300) for each full calendar day of noncompliance.

(§ 1777.7, subd. (a)(1).) The phrase quoted above -- "knowingly violated Section 1777.5" -- is defined by the regulation, section 231, subdivision (h), as follows:

For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control. There is an irrebuttable presumption that a contractor knew or should have known of the requirement 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.¹⁰

Failure to provide a contract award notice is a continuing violation for the duration of the work, starting no later than the first day in which the contractor has workers employed upon the public work, and ending when a notice of completion is filed by the awarding body. (Cal. Code Regs., tit. 8, § 230, subd. (a).) Penalties for that failure, as well as failure to meet the required 1:5 ratio, can be assessed "for each full calendar day of noncompliance . . ." ¹¹ (§ 1777.7, subd. (a)(1).) The determination of the Labor Commissioner as to the penalty 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

¹⁰ Section 231, subd. (h) has not been repealed, contrary to OSBP's assertion otherwise. (See OSBP Reply Brief, 2:24-25.)

¹¹ There is no legal support for OSBP's assertions that the penalty for a ratio violation is limited only to those days that a Laborer was on site, or that the penalty for failure to submit contract award information ends on the first day of the Project. (OSBP Brief, 5:10-14; OSBP Reply Brief, 3:12-28.)

contractor has the burden of proving that the basis for assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) OSBP did not submit contract award information or request for dispatch of apprentices to all of the applicable apprenticeship committees for the Laborer classification, and OSBP did not employ any Laborer apprentices on the Project.

DLSE calculated the calendar days of noncompliance with the ratio requirement based on the number of journeyman calendar days of work on the Project. OSBP “knowingly violated” the requirement of a 1:5 ratio of apprentice hours to journeyman hours because it employed no Laborer apprentices. The irrebuttable presumption that OSBP knew or should have known of the apprenticeship requirements of section 1777.5 applies because the notice of bid notified OSBP of its obligation to comply with the prevailing wage requirements. (Joint Exhibit No. 6, p. 39-40.) In addition, OSBP had actual knowledge of the apprenticeship requirements because it did submit DAS 140 and 142 forms to the AGC Committee for the Laborer classification. Because OSBP was aware of its obligations under the law yet failed to contact the other applicable apprenticeship committee, the Laborers JAC, OSBP failed to meet its burden of proof by providing evidence of compliance with section 1777.5. Since OSBP knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a mitigated penalty rate of \$30.00 per violation for 552 calendar days of noncompliance, based on “the first day in which the contractor has workers employed upon the public work,” to the last day the contractor had a worker on site.¹² (Cal. Code Regs., tit. 8, § 230, subd. (a); Joint Exhibit No. 1, p. 7; Joint Exhibit No. 8, pp. 58, 156.) OSBP did not show an abuse of discretion under section 1777.7, subdivision (d), as to either the mitigated penalty rate or that number of days of violation as found in the Assessment. Accordingly, section 1777.7 penalties at the rate of \$30.00 for 552 days in the amount of \$16,560.00 is affirmed.

¹² DLSE could have assessed section 1777.7 penalties for the failure to provide contract award information for more than 811 days up to the filing of a Notice of Completion. (DLSE Reply Brief, 3:22-4:11.) However, DLSE did not assess penalties past OSBP’s last day on the Project. (Joint Exhibit No. 1, p. 7.)

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

FINDINGS AND ORDER

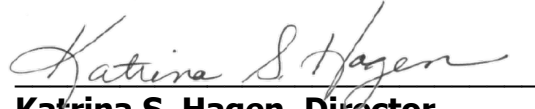
1. The work subject to the Civil Wage and Penalty Assessment was performed on a public work and required the employment of apprentices and the payment of prevailing wages under the California Prevailing Wage Law, Labor Code sections 1720 through 1861.
2. The Labor Commissioner timely served the Civil Wage and Penalty Assessment.
3. The Request for Review was timely filed.
4. The Labor Commissioner’s enforcement file was requested and produced in a timely fashion.
5. OSBP did not submit the required contract award information to all applicable apprenticeship committees for the Laborer classification in a timely and factually sufficient manner.
6. OSBP did not employ apprentices in the Laborer classification in the required minimum ratio of apprentices to journeypersons on the Project.
7. OSBP is liable for penalties assessed pursuant to section 1777.7.
8. The Labor Commissioner did not abuse her discretion in setting penalties under section 1777.7.
9. The Labor Commissioner correctly calculated the amount of the penalty at the mitigated rate of \$30.00 per violation for 552 violations.

The amount found due under the Assessment is as follows:

Basis of the Assessment	Amount
Penalties under section 1777.7:	\$16,560.00
TOTAL:	\$16,560.00

The Civil Wage and Penalty Assessment is affirmed 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: 8-12-22

A handwritten signature in cursive script that reads "Katrina S. Hagen". The signature is written in black ink and is positioned above a horizontal line.

Katrina S. Hagen, Director

California Department of Industrial Relations