

**STATE OF CALIFORNIA**  
**DEPARTMENT OF INDUSTRIAL RELATIONS**

In the Matter of the Request for Review of:

**Michael John Kiwitt, an individual dba  
Kiwitts General Building Contractor**

Case No. 22-0230-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected contractor Michael John Kiwitt, an individual doing business as Kiwitts General Building Contractor (Kiwitts), requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE), dated May 23, 2022, with respect to work performed on the Pacific Plumbing Infrastructure (Project) for the Ventura Unified School District (VUSD or District) in Ventura County. The Assessment indicated that Kiwitts owed \$1,852.50 in unpaid prevailing wages and training fund contributions and \$530 in statutory penalties, for a total amount due of \$2,382.50.

A Hearing on the Merits occurred on December 7, 2023, before Hearing Officer Ann Wu. David Cross appeared as counsel for DLSE. Barbara Kiwitt and Michael Kiwitt appeared for Kiwitts. Deputy Labor Commissioner Deisy Dvorak testified in support of the Assessment. Barbara Kiwitt and Michael Kiwitt testified in opposition to the Assessment.<sup>1</sup> The matter was submitted for decision on January 12, 2024.

Prior to the hearing, the parties stipulated to the following:

- The work subject to the Civil Wage and Penalty Assessment required the payment of prevailing wages and employment of apprentices.
- Kiwitts requested review timely.
- DLSE disclosed its evidence timely.

---

<sup>1</sup> The Hearing Officer admitted into evidence DLSE Exhibit Numbers 1 through 16, and Kiwitts Exhibits E, G, H, and I.

- Kiwitts did not pay back wages and did not make a deposit of the full amount of the Civil Wage and Penalty Assessment with the Department of Industrial Relations.

The issues for decision are as follows:

- Whether DLSE issued the Civil Wage and Penalty Assessment timely.
- Whether Kiwitts paid the required prevailing wages to workers on the project.
- Whether Kiwitts is liable for liquidated damages on wages found due and owing.
- Whether Kiwitts paid the required training fund contributions for all hours worked on the project.
- Whether the Labor Commissioner abused her discretion in assessing penalties pursuant to Labor Code section 1775.
- Whether Kiwitts employed apprentices in the required minimum ratio of apprentices to journeypersons on the project.
- Whether Kiwitts submitted contract award information to all applicable apprenticeship programs in a timely and factually sufficient manner.
- Whether Kiwitts requested dispatch of apprentices to all applicable apprenticeship programs in a timely and factually sufficient manner.
- Whether the Labor Commissioner abused her discretion in assessing penalties pursuant to Labor Code section 1777.7.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE generally carried its initial burden of presenting evidence that provided prima facie support for the Assessment. (See Cal. Code Regs., tit. 8, § 17250, subd. (a).) Kiwitts did not carry its burden of proving that the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, the Director issues this decision affirming the Assessment, as modified.

## FACTS

### The Project.

The Project was for plumbing infrastructure work at Pacific High School in Ventura. (DLSE Exhibit No. 6, p. 40; DLSE Exhibit No. 7, p. 52.) The District advertised the Project for bid beginning on March 12, 2019. (DLSE Exhibit No. 6, pp. 43-45; DLSE Exhibit No. 7, p. 52.) The bid advertisement indicated that the Project was a public work subject to prevailing wage laws and related requirements. (DLSE Exhibit No. 6, p. 45.) The successful bidder was Kiwitts, which entered a contract for \$549,357 with the District on May 29, 2019. (DLSE Exhibit No. 8, pp. 55-59.) The contract incorporated by reference the statutes and regulations covering prevailing wage and apprenticeship requirements. (DLSE Exhibit No. 8, p. 58.) Kiwitts signed an acknowledgment of prevailing wage requirements for the Project. (DLSE Exhibit No. 6, p. 46.)

Kiwitts designated two subcontractors on the Project—M&M Mechanical for gas pipe work, and Venterra Environmental for abatement work. (DLSE Exhibit No. 6, p. 48.) Kiwitts had workers on the Project between June 18, 2019, and August 23, 2019. (DLSE Exhibit No. 16.) The work was completed on October 8, 2019, and the District accepted the work on November 19, 2019. (DLSE Exhibit No. 6, p. 49.)

### The Audit.

DLSE received a complaint that Kiwitts violated prevailing wage and apprenticeship requirements. (DLSE Exhibit No. 5, p. 35; DLSE Exhibit No. 14, p. 129.) In response, DLSE requested information and documents from Kiwitts and the District. (DLSE Exhibit No. 14, p. 129.) Deputy Labor Commissioner Deisy Dvorak (DLSE Investigator) reviewed the complaint and the information and documents received that were in DLSE's file. Also, she determined that there were two applicable apprenticeship programs for Plumber in the geographic area of the project: the Ventura County Plumbing and Pipefitting J.A.C.; and, the Southern California Chapter of the Associated Builders & Contractors, Inc. Plumbers U.A.C. The DLSE investigator found that Kiwitts submitted contract award information to, and requested the dispatch of apprentices

from, the Ventura County Plumbing and Pipefitting J.A.C. (DLSE Exhibit No. 5, p. 37.) However, Kiwitts did not provide DLSE documentation that it submitted contract award information and a request for dispatch of apprentices to the Southern California Chapter of the Associated Builders & Contractors, Inc. Plumbers U.A.C. (DLSE Exhibit No. 5, p. 37, DLSE Exhibit No. 13.)

The DLSE Investigator reviewed the certified payroll records (CPRs) provided by Kiwitts for the Project.<sup>2</sup> The CPRs showed that Kiwitts employed two journey-level Plumbers and a single Plumber apprentice on the Project, Henry Adams.<sup>3</sup> (DLSE Exhibit No. 16.) According to the CPRs, the two journey-level Plumbers worked three hours each on July 22 and six hours each on July 25. The CPRs did not show any other workers classified as journey-level Plumbers on-site on any other day. By contrast, Adams, the apprentice, worked eight hours per day from July 22 through July 26, 2019, and four hours per day on July 29 and July 30, 2019, for a total of 48 hours. Thus, the CPRs showed that Adams worked unsupervised for many hours. Accordingly, the DLSE Investigator upgraded Adams from apprentice-level Plumber to journey-level Plumber for five hours on July 22, eight hours each on July 23 and July 24, two hours on July 25, eight hours on July 26, and four hours each on July 29 and July 30, for a total of 39 hours.

The DLSE Investigator prepared an audit based on the hours listed on the CPRs and the applicable prevailing wage determinations for journey-level and apprentice Plumber.<sup>4</sup> The audit calculated the difference between the actual total hourly rate

---

<sup>2</sup> The DLSE Investigator explained that because the CPRs provided by Kiwitts did not contain any worker addresses, she was unable to send questionnaires to the workers on the Project. (DLSE Exhibit No. 5, p. 35.)

<sup>3</sup> The United Association Local 484 of Plumbers, Pipefitters, Welders and Apprentices dispatched Adams, a first-year apprentice, to Kiwitts. (DLSE Exhibit No. 3, p. 21.)

<sup>4</sup>The prevailing wage determinations at issue are the General Prevailing Wage Determination for Ventura County, VEN-2019-1, and the General Prevailing Wage

Adams was paid as reflected on the CPRs and the required total hourly rate for a journey-level Plumber as set forth on the VEN-2019-1 prevailing wage determination. The audit calculated \$1,820.52 in unpaid prevailing wages and \$31.98 in unpaid training fund contributions. The DLSE Investigator summarized the audit results in the Audit Summary and the Public Works Investigation Worksheet. (DLSE Exhibit No. 1, p. 8; DLSE Exhibit No. 2.)

#### The Penalty Review.

The DLSE Investigator summarized her investigation in the Penalty Review.<sup>5</sup> (DLSE Exhibit No. 5.) In addition to the underpaid wages and training fund contributions, and associated penalties reflected in the Audit Summary, the DLSE Investigator determined that Kiwitts failed to submit contract award information to all applicable apprenticeship programs for the Plumber classification, failed to request dispatch of apprentices from all applicable Plumber apprenticeship programs, and failed to employ apprentices in the minimum ratio required on the Project. (DLSE Exhibit No. 5, pp. 36-38.) The DLSE Investigator based these determinations on the documents Kiwitts provided to DLSE. She calculated seven violations of unpaid prevailing wages under Labor Code section 1775 and 46 violations of apprenticeship requirements under Labor Code section 1777.7.<sup>6</sup> (DLSE Exhibit No. 5, p. 37.) Senior Deputy Labor

---

Apprentice Rates for the Plumber classification covering Ventura County, 2019-1. (DLSE Exhibit Nos. 9, 10.)

<sup>5</sup> The DLSE Investigator testified that, at the time she prepared the Penalty Review, she did not have the Notice of Completion which DLSE had requested from the District on July 9, 2020 and May 9, 2022. (DLSE Exhibit No. 6, pp. 40-42.) She testified that she received the Notice of Completion from the District on September 9, 2022. It appears that she also received inspector's daily reports from the District on that date. (DLSE Exhibit No. 5, p. 130.)

<sup>6</sup> The DLSE Investigator explained that she calculated the number of apprenticeship violations for failure to submit contract award information to all applicable apprenticeship programs for the Plumber craft by counting the number of days from the first day that a Plumber worked on the Project to the last day a worker worked on the Project. (DLSE Exhibit No. 5, pp. 36-37.)

Commissioner Fabian Cazares mitigated the penalty rates under Labor Code section 1775 and 1777.7 to \$10 per violation due to the nature of the violations.<sup>7</sup> (DLSE Exhibit No. 5, p. 32.)

The Assessment.

DLSE issued the Assessment against Kiwitts on May 23, 2022. (DLSE Exhibit No. 1, p. 2.) The Assessment was based on DLSE's determination that Kiwitts employed an apprentice Plumber without the supervision of a journey-level Plumber. This resulted in underpayments of the correct prevailing wage rate and the required training fund contributions for journey-level Plumber. The Assessment also found that Kiwitts failed to submit contract award information to all the applicable apprenticeship programs for the Plumber classification and failed to employ apprentices in the required minimum ratio of apprentices to journeypersons on the Project. The Assessment imposed section 1775 penalties for \$70, based on seven violations of prevailing wage requirements assessed at \$10 per violation, as well as section 1777.7 penalties of \$460, based on 46 violations of apprenticeship requirements assessed at \$10 per violation.

Kiwitts' Defense.

Barbara Kiwitt testified that she was responsible for paperwork for Kiwitts, including preparing certified payroll records, accounts payable and accounts receivable, and contracts. She explained that she submitted contract award information and requested the dispatch of apprentices to the Ventura County Plumbing and Pipefitting J.A.C. after the District notified her on June 18, 2019, that Kiwitts was authorized to proceed with the Project. She did not contact any other apprenticeship programs because Ventura County Plumbing and Pipefitting J.A.C. agreed to dispatch an apprentice to the Project. Also, Barbara Kiwitt testified that although the CPRs

---

<sup>7</sup> Kiwitts had no prior violations of prevailing wage or apprenticeship requirements. (DLSE Exhibit No. 5, p. 38.)

attributed Adams with four hours of work on July 29 and 30, 2019, Adams did not perform any work on those days because he claimed an injury from the prior week.<sup>8</sup>

Barbara Kiwitt testified further that Michael Alvarez, doing business as Habanero Plumbing, performed work on the Project as a subcontractor. She explained that Alvarez was not listed as a designated subcontractor in Kiwitts' bid documents, and that Kiwitts brought Alvarez on after the Project was underway to complete the Project timely. According to Barbara Kiwitt, Alvarez was a registered contractor with the Department of Industrial Relations, and he worked on the Project and he submitted eCPRs to the Department.

Michael Kiwitt testified that he hired Alvarez to supervise Adams on the inside plumbing for the Project. He also brought on Alvarez because he wanted to make sure he completed the Project timely. He did not recall whether he notified the District about using Alvarez as a subcontractor on the Project. On cross-examination, Michael Kiwitt admitted that he was not on site at the Project every day, such that he did not see Alvarez supervising Adams for eight hours each day that Adams worked on the Project.

## **DISCUSSION**

The California Prevailing Wage Law (CPWL), set forth at Labor Code section 1720 et seq., requires the payment of prevailing wages to workers employed on public works construction projects.<sup>9</sup> The purpose of the CPWL was summarized by the California Supreme Court 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

---

<sup>8</sup> The CPRs contained the notations "Left to Urgent Care" for July 29, 2019, and "Return to work 7/30 Left site" for July 30, 2019. (DLSE Exhibit No. 16, p. 145.) Barbara Kiwitt testified that she included these notations on the CPRs to indicate that Kiwitts paid Adams for the time he spent at the doctor.

<sup>9</sup> All further statutory references are to the Labor Code unless stated otherwise.

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.) 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*, 1 Cal.4th at p. 985.)

Contractors and subcontractors who fail to pay the correct prevailing wage to workers on public works projects, are required to pay the difference between the correct prevailing wage and the amount they paid to the workers. (§ 1775, subd. (a)(2)(E).) In addition, section 1775, subdivision (a) prescribes penalties for failing to pay the correct prevailing wage rate. The prevailing rate of per diem wage includes fringe benefits and training fund contributions pursuant to section 1773.1 and section 1777.5, subdivision (m). Further, section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if the unpaid wages are not paid within 60 days following service of a civil wage and penalty assessment under section 1741.

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 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 . . .”<sup>10</sup> (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When

---

<sup>10</sup> “Evidence’ means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.” (Evid. Code, § 140.) “Prima facie” is defined as: “Sufficient to establish a fact or

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).)

DLSE Issued the Assessment Timely.

Under Labor Code section 1741, subdivision (a), if the enforcing agency determines after investigation that there has been a violation of the California Prevailing Wage Law, section 1720 et seq., it “shall with reasonable promptness issue [an assessment] to the contractor or subcontractor or both.” The statute provides the time for issuing the assessment as follows:

The assessment shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last.

(Lab. Code, § 1741, subd. (a).) A notice of completion is valid if recorded within 15 days after the date of completion. (Civ. Code, § 9204, subd. (a).)

Here, the Project was completed on October 9, 2019, but the Notice of Completion was not signed until November 19, 2019 and there is no evidence that it was recorded with the county recorder. (DLSE Exhibit No. 6.) Thus, there is no valid notice of completion for this Project. Where there is no valid notice of completion, the timeliness inquiry turns on the date of acceptance. (*Department of Industrial Relations, Division of Labor Standards Enforcement v. Fidelity Roof Co.* (1997) 60 Cal.App.4th 411,

---

raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue <a prima facie showing>.” (Black’s Law Dict. (12th ed. 2024).) “Prima facie evidence is that which will support a ruling in favor of its proponent if no controverting evidence is presented. [Citations.] It may be slight evidence which creates a reasonable inference of fact sought to be established but need not eliminate all contrary inferences. [Citation.]” (*Evans v. Paye* (1995) 32 Cal.App.4th 265, 280.) Further, “[a]ll burdens of proof and burdens of producing evidence shall be construed in a manner consistent with relevant sections of the Evidence Code . . .” (Cal. Code Regs, tit. 8, § 17250, subd. (d).)

418.) In the public works context, "acceptance has been defined as that date at which someone with authority to accept does accept unconditionally and completely."

(*Madonna v. State of California* (1957) 151 Cal.App.2d 836, 840 [citation omitted].)

Thus, it appears that this Project was accepted on November 19, 2019, when the District's Assistant Superintendent of Business Services signed the Notice of Completion. Eighteen months from November 19, 2019, is May 19, 2021.

DLSE contends that the time to serve the Assessment was tolled under section 1741.1, subdivision (b)(2), which states in pertinent part:

If the awarding body fails to timely furnish the Labor Commissioner with [a copy of the valid notice of completion for the public work filed in the office of the county recorder, or a document evidencing the awarding body's acceptance of the public work on a particular date], the period for service of assessments under Section 1741 shall be tolled until the Labor Commissioner's actual receipt of the valid notice of completion for the public work or a document evidencing the awarding body's acceptance of the public work on a particular date.

The DLSE Investigator testified that she did not receive the Notice of Completion from the District until September 9, 2022, after the Assessment was issued on May 23, 2022.

Kiwitts offered no evidence to controvert the DLSE Investigator's testimony.

Accordingly, the tolling provision in section 1741.1, subdivision (b)(2) tolled the 18-month limitations period of section 1741, subdivision (a), through the date the Assessment issued. Thus, the Assessment issued timely.

Kiwitts Underpaid Required Prevailing Wages to One Worker on the Project.

"[A]pprentices employed on public works must at all times work with or under the direct supervision of journey[[person]/[persons]." (Cal. Code Regs., tit. 8, § 230.1, subd. (c); see also § 210 ["Apprentices shall work under and with competent journeyworkers and/or instructors and shall be assigned to work and learning tasks so that they obtain the diversified training on-the-job provided for in the apprenticeship standards."].) DLSE established a prima facie showing that Adams was not supervised by a journey-level Plumber for 39 of the hours he worked on the Project. DLSE further established a prima facie showing that Kiwitts underpaid Adams the required total

prevailing wages for those hours he worked on the Project without the supervision of a journey-level Plumber. DLSE relied on the CPRs provided by Kiwitts to calculate the hours Adams worked unsupervised, as well as the applicable prevailing wage determination for the Plumber classification to calculate the required total hourly rate. Based on the worker classifications and hours listed on the CPRs, DLSE upgraded Adams from Plumber apprentice to journey-level Plumber for the 39 hours he worked on those days when the CPRs did not show a journey-level Plumber working on the Project.

Kiwitts offered no credible evidence to counter DLSE's prima facie showing that Kiwitts underpaid Adams for the hours when he was not supervised by a journey-level Plumber, which the exception of Barbara Kiwitt's testimony that she incorrectly listed Adams on the CPRs as working four hours on July 29 and July 30, 2019, for the time he spent seeking medical treatment for his injury. Michael Kiwitt testified that he hired Alvarado to supervise Adams on the Project. Kiwitts provided eCPRs submitted by Alvarado for his work performed on the Project. However, Kiwitts did not list Alvarado on the Designation of Subcontractors. Nor did Kiwitts provide evidence that the District consented to Alvarado working as a subcontractor on the Project. (See Pub. Contract Code, § 4107.) Likewise, Kiwitts did not provide a written subcontract between Kiwitts and Alvarado that detailed Alvarado's scope of work on the Project. Kiwitts did not elicit the testimony of Alvarez. For these reasons, Kiwitts did not meet its burden to show that the DLSE Investigator upgraded Adams from Plumber apprentice to journey-level Plumber incorrectly for 31 of the 39 hours identified in DLSE's audit. Thus, Kiwitts is liable for unpaid prevailing wages in the amount of \$1,447.08.

Kiwitts Underpaid Required Training Funds on behalf of One Worker on the Project.

Section 1777.5, subdivision (m)(1), requires contractors on public works projects who employ journeypersons or apprentices in any apprenticeable craft to pay training fund contributions to the California Apprenticeship Council or to an apprenticeship committee approved by the Division of Apprenticeship Standards (DAS). For the same

reason that Adams was underpaid required prevailing wages, Kiwitts failed to meet its burden to show that the Assessment was incorrect as to Kiwitts' underpayment of training fund contributions on behalf of Adams for the 31 hours he was unsupervised by a journey-level Plumber. Therefore, Kiwitts is liable for unpaid training fund contributions in the amount of \$25.42.

Kiwitts Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, as follows:

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

At the time the Assessment issued, the statutory scheme regarding liquidated damages provided contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case or settling the case with enforcing agency agreeing to waive liquidated damages). Under section 1742.1, subdivision (a), the contractor has 60 days to decide whether to pay the workers all or a portion of the wages assessed in the notice and thereby avoid liquidated damages on the amount of wages so paid. Under section 1742.1, subdivision (b), a contractor may entirely avert liquidated damages if, within 60 days from issuance of the notice, the contractor deposits with the Department of Industrial Relations the full amount of the assessed unpaid wages, including all statutory penalties.

In this case, Kiwitts did not pay wages due, nor did it deposit with the Department the full amount of the assessed wages and statutory penalties. Accordingly, Kiwitts is liable for liquidated damages under section 1742.1 for the unpaid prevailing wages found in this Decision in the amount of \$1,447.08.

The Labor Commissioner Did Not Abuse Her Discretion in Assessing Penalties Under Section 1775.

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

- (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
- (2) (A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
  - (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
  - (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
- (B) (i) The penalty may not be less than forty dollars (\$40) . . . unless the failure of the contractor . . . to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor . . .
- (ii) The penalty may not be less than eighty dollars (\$80) . . . if the contractor . . . has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
- (iii) The penalty may not be less than one hundred twenty dollars (\$120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.<sup>11</sup>

---

<sup>11</sup> Section 1777.1 defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

. . .

- (D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

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

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day considering prescribed factors. DLSE assessed section 1775 penalties at the rate of \$10 for seven prevailing wage violations on the Project. However, section 1775, subdivision (a)(2)(B)(i), does not allow penalty rates less than \$40 unless the contractor made a good faith mistake and promptly and voluntarily corrected the failure to pay the correct prevailing wage rate. Here, even if Kiwitts made a good faith mistake in misclassifying Adams, it did not promptly or voluntarily correct the error after the Assessment was issued. Accordingly, DLSE's imposition of penalties under section 1775 at the rate of \$10 per violation appears not to be consistent with the statute.

However, DLSE's action in setting the penalty rate lower than the statutorily prescribed amount favored the contractor such that the contractor cannot be heard to complain of having to pay a penalty of less than \$40 per violation. Thus, the penalty rate of \$10 is affirmed as to the five violations found, in the total amount of \$50.<sup>12</sup>

Kiwitts Failed to Comply with Apprenticeship Requirements.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. The apprenticeship requirements apply to public works contracts of \$30,000 or more. (§ 1777.5, subd. (o).)

---

<sup>12</sup> Due process considerations prevent the Director from substituting her own judgment that the punishment appears to be too lenient.

These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. (Cal. Code Regs., tit. 8, §§ 227 to 230.2.)

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, 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 dispatched 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 Plumber craft is apprenticeable. (DLSE Exhibit No. 9.) Here, DLSE established a prima facie case based on the documentation in its investigation file that Kiwitts submitted contract award information to, and requested the dispatch of apprentices from, only one of the two applicable apprentice programs. Kiwitts admitted that it did not submit the required forms to the second applicable apprentice program because the Ventura County Plumbing and Pipefitting J.A.C. agreed to dispatch a Plumber apprentice to the Project. DLSE also established a prima facie case based on

the CPRs that Kiwitts did not meet the minimum ratio requirement for apprentice to journeyman hours due to DLSE's reclassification of Adams to journey-level Plumber for those hours he was not supervised by a journey-level Plumber. As discussed above, Kiwitts did not meet its burden to show that DLSE was incorrect in upgrading Adams from Plumber apprentice to journey-level Plumber. Accordingly, Kiwitts violated the ratio requirement of section 1777.5 subdivision (g), as well as the notice and dispatch requirements of section 1777.5, subdivision (e), and the related regulations, sections 230 and 230.1, for the Plumber craft.

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

Section 1777.7 provides, in relevant part:

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 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 former regulation, section 231, subdivision (h)—in effect at the time of the pendency of the Project as well as the Hearing on the Merits, 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.

Failure to provide a contract award notice is a continuing violation for the duration of the work, starting no later than the first day on which the contractor has workers employed upon the public work, and ending when a notice of completion is filed by the awarding body. (§ 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 . . .” (§ 1777.7, subd. (a)(1).) The determination of the Labor Commissioner as to the penalty is reviewable only for abuse of discretion. (§ 1777.7, subd. (d).) A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment, namely, the affected contractor has the burden of proving that the basis for assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

As discussed above, Kiwitts did not submit contract award information to all applicable Plumber apprenticeship programs, nor did Kiwitts employ registered apprentices in the required 1:5 ratio of apprentice to journey person hours. Kiwitts “knowingly violated” the ratio requirement because there is an irrebuttable presumption that Kiwitts knew or should have known that the apprenticeship requirements of section 1777.5 applied because the contract documents for the Project notified the contractor and its subcontractors of their obligations to comply with prevailing wage and apprenticeship requirements. (DLSE Exhibit No. 8, p. 58.) As Kiwitts knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a penalty rate of \$10 per violation for Kiwitts’ apprenticeship violations, which is less than the statutory maximum. DLSE calculated 46 calendar days of noncompliance for the number of days between the first day a Plumber worked on the Project and the last day work was performed on the Project, which is less than the statutory maximum. (DLSE Exhibit No. 5, pp. 36-37.) Kiwitts did not show an abuse of discretion under section 1777.7, subdivision (d), as to either the penalty rate or those number of days of violations as found in the Assessment. Accordingly, section 1777.7 penalties at the rate of \$10 for 46 days in the amount of \$460 are affirmed.

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 served the Civil Wage and Penalty Assessment timely.
3. Michael John Kiwitt, an individual doing business as Kiwitts General Building Contractor, filed the Request for Review timely.
4. The Labor Commissioner disclosed its evidence timely.
5. No back wages have been paid and no deposit made with the Department of Industrial Relations as a result of the Civil Wage and Penalty Assessment.
6. Michael John Kiwitt, an individual doing business as Kiwitts General Building Contractor, underpaid required prevailing wages to worker Henry Adams on the Project in the amount of \$1,447.08.
7. Michael John Kiwitt, an individual doing business as Kiwitts General Building Contractor, is liable for liquidated damages on wages found due and owing in the amount of \$1,447.08.
8. Michael John Kiwitt, an individual doing business as Kiwitts General Building Contractor, underpaid required training fund contributions on behalf of worker Henry Adams in the amount of \$31.98.
9. The Labor Commissioner did not abuse her discretion in assessing penalties pursuant to Labor Code section 1775.
10. Michael John Kiwitt, an individual doing business as Kiwitts General Building Contractor, is liable for penalties assessed pursuant to section 1775 in the amount of \$50.

11. Michael John Kiwitt, an individual doing business as Kiwitts General Building Contractor, failed to employ apprentices in the required minimum ratio of apprentices to journeypersons on the Project.
12. There were two applicable apprenticeship programs in the geographic area of the Project: the Ventura County Plumbing and Pipefitting J.A.C.; and, the Southern California Chapter of the Associated Builders & Contractors, Inc. Plumbers U.A.C.
13. Michael John Kiwitt, an individual doing business as Kiwitts General Building Contractor, failed to submit contract award information for the Project to all applicable apprenticeship programs in a timely and factually sufficient manner.
14. Michael John Kiwitt, an individual doing business as Kiwitts General Building Contractor, failed to request the dispatch of apprentices for the Project to all applicable apprenticeship programs in a timely and factually sufficient manner.
15. The Labor Commissioner did not abuse her discretion in assessing penalties pursuant to Labor Code section 1777.7.
16. Michael John Kiwitt, an individual doing business as Kiwitts General Building Contractor, is liable for penalties assessed pursuant to section 1777.7 in the amount of \$460.

The amounts found due under the Assessment, as affirmed and modified by this

Decision, are as follows:

<b>Basis of the Notice</b>	<b>Amount</b>
Wages Due:	\$ 1,447.08
Liquidated damages:	\$ 1,447.08
Training Fund Contributions Due:	\$ 25.42
Penalties under section 1775:	\$ 50.00
Penalties under section 1777.7:	\$ 460.00
<b>TOTAL:</b>	<b>\$ 3,429.58</b>

In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

The Civil Wage and Penalty Assessment is affirmed and modified 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: 5/28/26



---

**Jennifer Osborn, Director**  
California Department of Industrial Relations