

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Ro's Precise Painting, Inc.

Case No. 16-0388-PWH

From a Civil Wage and Penalty Assessment Issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor, Ro's Precise Painting, Inc. (Ro's), submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DSLE) on August 31, 2016, with respect to construction work performed for awarding body Visalia Unified School District on RHS 2-Story Classroom Addition (Project) located in Tulare County. The Assessment determined that Ro's owed \$8,700.00 in penalties under Labor Code section 1777.7.¹ Ro's timely filed its Request for Review of the Assessment on or about September 23, 2016.

Pursuant to written notice, a hearing on the merits took place in Fresno, California before Hearing Officer Neil Robinson on May 31, 2017. Joseph V. Macias, appeared for Ro's and David Cross appeared for DLSE.

At hearing, the parties stipulated that there are no unpaid wages. The parties agreed to the following issues for decision:

1. Did Ro's timely provide contract award information to the applicable apprenticeship committees pursuant to section 1777.5?
2. Did Ro's request dispatch of apprentices for all employed crafts in the applicable geographic area?
3. Did Ro's employ sufficient registered apprentices on the Project?
4. Is Ro's liable for penalties under section 1777.7?

¹ All further statutory references are to the Labor Code unless otherwise specified.

5. If there is a violation of section 1777.5, should Ro's be relieved from the assessed penalties?
6. Does the affirmative defense outlined in California Code of Regulations, Title 8, section 230.1, subdivision (a)² apply to Ro's in this matter?
7. Does the affirmative defense outlined in section 3.3.1.1(4) in the Division of Labor Standards Enforcement, Public Works Manual apply to Ro's in this matter?

In this decision, the Director finds that Ro's failed to request dispatch of painter apprentices from the appropriate apprenticeship committee and did not meet the required ratio of apprentices to journeymen workers required by Labor Code section 1777.5. Ro's is subject to penalties pursuant to Labor Code section 1777.7 although not in the amount found in the Assessment. Therefore, the Director of Industrial Relations issues this Decision affirming the Assessment, as modified.

SUMMARY OF FACTS

These facts are established based on the testimony of Deputy Labor Commissioner Rachel Morton and Corporate Secretary Luz Garza, exhibits 1 through 10 and exhibits A through L. Except for Exhibit I, there were no objections to this evidence. Exhibit I is an excerpt from the Division of Labor Standards Enforcement Public Works Manual, August 2016. The objection to Exhibit I by DLSE was overruled and Exhibit I was entered into evidence during the hearing.

On July 8, 2014, awarding body Visalia Unified School District executed a contract with prime contractor Seals/Biehle, Inc. (Seals/Biehle) for the Project. On July 14, 2014, Seals/Biehle executed a subcontract with Ro's to perform painting services. Ro's began work on the Project during the week of April 11, 2015. Between the weeks of April 18, 2015, and May 30, 2015, no work was accomplished but work resumed during the week of June 6, 2015. From the week of June 6, 2015, through the week of August 8, 2015, work continued. The Notice of Completion is dated August 18, 2015, and was recorded by Tulare County on August 21, 2015. Apprentices worked on the

² All further regulatory references are to California Code of Regulations, title 8, unless otherwise indicated.

Project during the weeks of April 11, 2015, July 18, 2015, July 25, 2015, and August 1, 2015.

On or about August 4, 2014, Ro's sent a Division of Apprenticeship Standards (DAS) Public Works Contract Award Information form (DAS Form 140) to Associated Builders and Contractors (ABC) indicating that it executed a contract on July 14, 2014, for a Project to begin in August of 2014, and that the Project will require an estimated 381 journeyman hours and 76 hours of painter apprentice time. The first box on the bottom of the DAS Form 140 was checked, indicating: "We are already approved to train apprentices by the Associated Builders and Contractors Apprenticeship Committee. We will employ and train under their Standards." On or about July 8, 2015, Ro's sent a DAS Form 140 to District Council 16 Drywall Finisher Joint Apprenticeship Training Committee (Drywall J.A.T.C.) indicating much of the same information provided to ABC except that the commencement date for the Project is July 2015 instead of July 14, 2014. In this instance, the third box on the bottom of the DAS Form 140 was selected, indicating that Ro's would be willing to train apprentices in accordance with California Apprenticeship Council regulations.

When Ro's queried the Internet website of the Department of Industrial Relations (Department), the following three painting apprenticeship programs within the geographic region of Project appeared: (1) Drywall J.A.T.C., (2) Painters & Decorating J.A.T.C. of the Bay Area Inc. (Painters & Decorating J.A.T.C.), and (3) Traffic Control Painter Automotive Marine & Specialty Painters Local #1175 (Traffic Control Painter Committee). All three committees have the same address posted on the Department's website: 2020 Williams Street, Suite A, San Leandro, CA 94577, the same telephone number, and the same contact person, Alex Beltran, Director of Training. Two of the three committees had the same email address with the Traffic Control Painter Committee having a unique email address. ABC is not listed on the Department's website as an approved apprenticeship program for Tulare County.

Ro's sent two Requests for Dispatch of Apprentice, DAS Form 142s, to two different apprenticeship committees. The first was sent on April 15, 2015, to "ABC Northern California Chapter." This DAS Form 142 specifies "use of current apprentice" where the number of apprentices is ordinarily placed on the form and requests that the

dispatched apprentice report to work on April 20, 2015. On or about July 8, 2015, Ro's submitted another DAS Form 142 to Drywall J.A.T.C., indicating that one apprentice was needed commencing July 13, 2015. No apprentices were dispatched by any of the three identified apprenticeship committees.

Ro's employed journeymen painters during the Project for a total of 387.5 hours over 30 days³ between April 10 and August 5, 2015. Ro's employed apprentices for seven days during the Project for 46 hours. Garza testified at hearing that she did not intend to send the DAS Form 142 to Drywall J.A.T.C., but instead intended to send it to Painters & Decorating J.A.T.C. who clearly dispatches painters. Garza stated that in the past when an error like this occurred she was notified by Drywall J.A.T.C. of the error and instructed to refile the DAS Form 142 identifying the correct apprenticeship committee. In this case Garza was not notified about the error. Garza also stated that at the time the Project was ongoing, Ro's was engaged in 30 public works jobs.

DLSE has cited Ro's for prior apprentice violations. All of the alleged prior violations involving Ro's were settled informally by the parties without a request for review and related decision of the Director. DLSE presented a list of prior apprentice violations, without the underlying CWPAs or other documentation, as follows:

- DLSE Case. No. 44-32925/132 -- Failure to hire apprentices on a public works project which commenced on November 18, 2011, and for which a Notice of Completion was filed on August 10, 2012. A Determination of Civil Penalty (DOCP) was issued on June 25, 2013, and the case resolved by settlement on October 17, 2013.
- DLSE Case. No. 44-35830/522 -- Failure to submit DAS 140 and DAS 142 in a timely manner and failure to hire apprentices. The work began on August 22, 2012, and took place in 2012. A DOCP was issued on September 6, 2013, and the case resolved by settlement on February 20, 2014.

³ The Assessment indicates that Ro's journeymen worked for 29 days before completing the Project. However, upon analyzing the payroll documents in Exhibit 10, it is clear that the actual number of days Ro's journeymen worked on the Project is 30. The error apparently occurred as to the payroll information for the week ending July 25, 2015, located in Exhibit 10, where DSLE had determined that Ro's workers were present only three days; however, the accurate number is four days.

- DLSE Case. No. 40-45142/148⁴ – Failure to employ apprentices in the required ratio for a project that went from July 5, 2014, to March 7, 2015. A CWPA issued on June 23, 2015, and the case settled sometime thereafter.⁵

DISCUSSION

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 and enforced by DLSE. California Code of Regulations, title 8, section 227⁶ provides that the regulations “shall govern all actions pursuant to ... Labor Code Sections 1777.5 and 1777.7.

Section 1777.5, subdivision (e) states that “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.” Section 230, subdivision (a) requires contractors that are not approved to train apprentices by an apprenticeship program sponsor to also submit contract award information to all applicable apprenticeship committees in the geographical area that includes the public works. Section 230, subdivision (a) additionally specifies that contractors must submit the DAS Form 140 to applicable apprenticeship committees “within 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 Division of Apprenticeship Standards (DAS) has prepared form DAS 140 that a contractor may use to submit contract award information to an applicable

⁴ Ro’s Exhibit A discloses the information presented in this DLSE case.

⁵ DLSE Exhibit 5 shows that DLSE case no. 44-44705/522 has identical facts to DLSE case no. 44-32925/132. For purposes of this Decision, there is no reason to repeat the identical facts that are already recited in reference to DLSE case no. 44-32925/132 since section 1777.7, subdivision (a) only requires one instance of a prior violation within a three-year period prior to the current violation for an elevated daily penalty of \$300.00.

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

apprenticeship committee that can supply apprentices to the public works site in compliance with the statute. (§ 1777.5, subd. (e); Cal.Code Regs, tit. 8, § 230(a).)

1. Ro's Did Not Timely Provide Contract Award Information to Applicable Apprenticeship Committees.

The contract information notice is due within ten days from the execution of the subcontract, "but in no event later than the first day in which the contractor has workers employed upon the public work." (§ 230, subd. (a).) Ro's executed the subcontract with Seals/Biehle on July 14, 2014. Ro's employees began Project on April 10, 2015. The DAS Form 140 sent to ABC on August 4, 2014, was not sent within the ten-day period. Additionally, the August 4, 2014, DAS Form 140 sent to ABC is irrelevant because it was not sent to one of the three identified committees providing painter apprentices within the Tulare area.

Nor was the second DAS Form 140 sent in compliance with the regulation. The Project began during the week ending April 10, 2015. Ro's did not send the DAS Form 140 to the Drywall J.A.T.C. until July 8, 2015. Therefore this DAS Form 140 is also untimely.⁷

2. Ro's Did Not Request Dispatch Of Painter Apprentices From The Applicable Apprenticeship Committee.

Section 1777.5 and the applicable regulations require a contractor and subcontractor to employ 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).

The governing regulation as to the required ratio of apprentice hours to journeyman hours is section 230.1, subdivision (a). That regulation provides that a contractor properly requests the dispatch of apprentices by doing the following:

⁷ Although there is clearly a violation of the requirement to provide timely contract information, DLSE assessed no penalty for this violation or for a violation for failing to properly request dispatch of a painter apprentice (see *infra*). Instead of assessing for those violations, DLSE assessed penalties for failing to employ the correct ratio of apprentices to journeymen.

...[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 dispatches 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.

DAS has prepared a form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).)

Section 230.1, subdivision (a) also provides that:

...if in response to a written request no apprenticeship committee dispatches, or agrees to dispatch during the period of the public works project any apprentice to a contractor ... within 72 hours of such request (excluding Saturdays, Sundays and holidays) the contractor shall not be considered in violation of this section as a result of failure to employ apprentices for the remainder of the project, provided that the contractor made the request in enough time to meet the above-stated ratio. If an apprenticeship committee dispatches fewer apprentices than the contractor requested, the contractor shall be considered in compliance if the contractor employs those apprentices who are dispatched

(§ 230.1, subd. (a).)

Garza testified that she queried the Department website for the County of Tulare to identify the apprenticeship committees that dispatched painter apprentices. Three apprenticeship committees resulted from Garza's query: (1) Drywall J.A.T.C., (2) Painters & Decorating J.A.T.C., and (3) Traffic Control Painter Committee.⁸

⁸ Printouts from the Department website were admitted as Exhibits 8 and J.

On the DIR website, each of the queried apprenticeship committees are hyperlinked so that when a user clicks on one of the three committees they are taken to a page that displays more information about that committee. Exhibit J contains extended information for each of the three committees resulting from Ro's inquiry. Only one of the three apprenticeship committees, Painters & Decorating J.A.T.C., clearly dispatches painters. After the heading, "Trade or occupation" for that committee, "painter" is listed. The other two apprenticeship committees identified in Garza's Internet query did not show that they dispatched painters. Instead, the Drywall J.A.T.C. lists a trade or occupation of "Drywall Finisher," and the Traffic Control Painter committee lists "Traffic Control Painter" as the trade or occupation.

Garza testified that on July 8, 2015, she emailed a DAS Form 142 (Exhibit 8) to Drywall J.A.T.C. requesting one painter apprentice to commence work on July 13, 2015. Garza also noted in her testimony that all of the three apprenticeship committees have identical contact information including the same contact person, telephone number, mailing address and email address with the exception of the Traffic Control Painter Committee that posted a unique email address.

Ro's contends that it is unnecessary to send a DAS Form 142 to all of the committees listed on the Department's website when they share the same contact information: that sending a request for the dispatch of apprentices to one is the same as sending the request to all of the committees. That contention is rejected. Each of the committees, as the links on the Department's website show, provided apprentices in different crafts. The applicable craft in this case is painter and only the Painters & Decorating J.A.T.C. could respond to a dispatch request for a painter apprentice. (See § 230.1, subd. (a), dispatch request must be for a "required apprentice from the apprenticeship committees providing training in the applicable craft or trade") Garza sent the DAS Form 142 to the committee dispatching drywall finishers although she intended, but failed, to request painters from the only committee that clearly dispatched them.⁹ Hence, Ro's did not request dispatch of painter apprentices from the only

⁹ Garza's testimony to the effect that in the past when she requested apprentices from the wrong committee that committee would inform her about the mistake does not establish a cognizable excuse from the statutory requirement to request a dispatch from the applicable committee.

applicable apprenticeship committee in the geographical region that includes the site of the public work, in violation of section 230.1, subdivision (a).

3. Ro's Did Not Employ Apprentices in the Correct Ratio.

As stated above, section 1777.5 and the applicable regulations require contractors and subcontractors to employ apprentices in a craft or trade at a ratio of one hour of work by apprentices for every five hours of work by journeymen.¹⁰ 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.

Section 1777.5, subdivision (h), provides:

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

According to the uncontroverted penalty review provided by the DLSE (Exhibit 5), Ro's employed journeymen for 367.5 hours for duration of Project. Twenty-percent of 367.5 hours is 77.5 hours representing the minimum number of hours Ro's was obligated to employ apprentices. Ro's employed apprentices for only 46 hours, thus falling short of its obligation to provide the correct ratio of apprentice hours to

¹⁰ The law applicable to this case is dependent on when the bid advertising issued. The bid advertisement here issued on June 10, 2014, and the prime contract was executed on July 8, 2014 (Exhibit 5, page 4). Thus, the law in place in 2014 is applicable to this case. Sections 1777.5 and 1777.7 at that time were effective June 27, 2012, to December 31, 2014 (stats. 2012, ch. 46, § 96 [Sen. Bill 1038].) In that version, section 1777.7, subdivision (f)(1) and (2) required the Director to decide section 1777.7 penalties de novo.

journeymen hours. Thus, Ro's did not employ apprentices in the legally required ratio, in violation of section 1777.5, subdivision (g).

4. Ro's Is Liable For Payment Of Penalties.

If a contractor knowingly violates section 1777.5, a civil penalty is imposed under section 1777.7 in an amount not exceeding \$100.00 for each full day of noncompliance. (§ 1777.7, subd. (a)(1).) However, the penalty may be increased up to \$300.00 for each full day of noncompliance under the following circumstances:

A contractor or subcontractor that knowingly commits a second or subsequent violation of Section 1777.5 within a three-year period, where the noncompliance results in apprenticeship 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).)

As used in the above provisions, a “knowing” violation 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 contractor had previously been found to have violated that Section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects, or the contractor had previously employed apprentices on a public works project.

In the Assessment, Ro's was determined to be in violation of section 1777.5 for 29 days and was assessed a penalty of \$300.00 per day for a total penalty amount of \$8,700.00. To analyze whether the penalty is correctly calculated, under the version of section 1777.7 applicable to this case, 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 (which also guide DLSE's Assessment):

- (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.

DLSE calculated the total number of days that journeymen were performing work on the Project and then assessed a penalty for each of those days (Exhibit 5, page 6). When considering the data used to calculate the penalty (Exhibit 10), it is clear that journeymen were on the job 30 days instead of 29 days. The Assessment of penalties under section 1777.7, however, will not be increased accordingly, because a de novo review of the rate, see *infra*, requires a reduction of the penalty amount, as follows.

The Assessment calculates penalties at \$300.00 a day for each day of noncompliance. DLSE provided evidence of four instances (Exhibit 5, pages 6 and 7) where Ro's had been cited for section 1777.5 violations purportedly within the past three years. Employing the above-stated factors in a de novo review, it is found that a mitigated penalty rate should apply.

First, the question whether a "knowing" violation occurred must be answered in the affirmative. Considering the irrebuttable presumption of section 231, subdivision (h), as stated above, the subcontract entered into between Ro's and the prime contractor, Seals/Biehle (Exhibit 6, Page 9), contains a paragraph stating that subcontractor will comply with "provisions of California Labor Code Section[] ...1777.5." Thus, DLSE has established sufficient facts for application of the irrebuttable presumption that Ro's knew or should have known about the requirements of section 1777.5, satisfying the first prong for the enhanced penalty rate under section 1777.7, subdivision (a) ("knowingly commits" a subsequent violation).

Continuing to apply the de novo standard in effect for this case, factor “A” supports a penalty rate of \$100.00. Ro’s argues that its failure to contact the one apprenticeship committee that clearly dispatches painters was inadvertent, harmless and unintentional. However, despite Ro’s mistake it is irrebuttably presumed to have engaged in a knowing violation resulting in legally insufficient apprenticeship hours. This violation clearly resulted in lost training opportunities in the form of fewer hours for apprentice training and thus some harm to the apprenticeship program in the painting trade.

Factors “D” and “E” inquire as to the “extent” of the lost training opportunity and harm to the apprenticeship program. The evidence shows Ro’s did use apprentices on seven of the days on which journeymen were present on the Project. Ro’s effort in that regard, then, reduced the lost opportunity and harm sufficient to mitigate the penalty rate to \$75.00.

On July 22, 2015, during a time-period that apprentices were actually employed on the Project and 14 days after the DAS Form 142 was submitted to Drywall J.A.T.C., Ro’s employee Garza emailed Jamie Calderon at that committee to inquire why no apprentices had been dispatched (Exhibit L). Garza started her inquiry by stating, “I emailed you DAS 140 and 142 forms for some projects on 07/07/15, however, no apprentices have been dispatched.” Calderon responded on the same day stating that the dispatching of apprentices is done by local unions under Drywall J.A.T.C. and that “There may have not had any available apprentices for the project.” The DAS Form 142 related to the Project was dated July 8, 2015. Garza testified at hearing that Ro’s at the time of the Project was working on 30 public works projects. Waiting for 14 days to inquire why apprentices were not dispatched and emailing an inquiry about the dispatching of apprentices that do not clearly and specifically relate to Project are both reasons why factor “C” supports a \$100.00 penalty rate.

As for factor “B,” whether the party has committed other violations, the de novo review analysis involves determining whether there is sufficient evidence in this record of prior violations for DSLE to meet its requirement to demonstrate a prima facie showing of prior violations. Under section 1777.7, subdivision(c)(2)(B) in effect at the time the

Assessment was issued by DLSE,¹¹ the affected contractor shall have the burden of providing evidence of compliance with section 1777.5. Section 232.50, titled “Burdens of Proof on Wages and Penalties,” provides:

(a) The Chief DAS has the burden of coming forward with evidence that the Affected Contractor, Subcontractor, or Responsible Officer (1) was served with a Determination of civil penalty or debarment in accordance with Rule 20 [Section 232.20]; (2) was provided a reasonable opportunity to review evidence to be utilized at the hearing in accordance with Rule 24 [Section 232.24]; (3) that such evidence provides prima facie support for the Determination of civil penalty or debarment; (4) where the civil penalty is set above zero, that the Chief DAS has considered all of the circumstances listed in Labor Code section 1777.7(f); (5) where debarment is sought, that the violation is serious, and that the Chief DAS has considered all of the circumstances listed in Labor Code section 1777.7(f); and, (6) where a Determination has issued against a prime contractor for the violations of a subcontractor, that the evidence provides prima facie support to show knowledge of the prime contractor or failure by the prime contractor to comply with requirements as listed under Labor Code section 1777.7(d).

(b) If the Chief DAS meets its initial burden under subpart (a), the Affected Contractor, Subcontractor, or Responsible Officer has the burden of producing evidence to disprove a knowing violation of Labor Code section 1777.5, to disprove the circumstances relied on by the Chief DAS under Labor Code section 1777.7(f), and to disprove knowledge of the prime contractor or failure of the prime contractor to comply with the requirements as listed under Labor Code section 1777.7(d).

Clearly, the preliminary requirement of section 232.50 is for DSLE to produce evidence “that provides prima facie support for the Determination of civil penalty or debarment.” (Cal. Code Regs., tit. 8, § 232.50, subd. (a)(3).) Without evidence that

¹¹ Senate Bill 1038 in 2012 changed the duty to enforce sections 1777.5 and 1777.7 from the Chief of DAS to the Labor Commissioner. (Stats. 2012, ch. 46, § 96, enacting § 1777.7, subd. (a)(1).) Section 1777.7 had another amendment in 2014 that maintains the enforcement role by the Labor Commissioner. (Stats 2014, ch. 297, § 3, eff. Jan. 1, 2015 [Assem. Bill 2744].) This change in enforcement by the Chief of DAS to the Labor Commissioner does not alter the analysis in this case.

supports a penalty determination, there can be no prima facie showing and thus no requirement for Ro's to prove why a penalty determination is unwarranted.

In the Penalty Review document (Exhibit 5, page 6) there are four prior assessments against Ro's for alleged violations of section 1777.5 that are summarized by the DLSE's Morton. According to this summarization, all four cases were informally resolved by settlement agreements. The underlying civil wage and penalty assessments, the requests for review, and the actual settlement agreements or terms are absent from this record. Morton testified on cross-examination she did not recall reviewing the terms of the settlements cited to prove previous violations and she could not say whether or not exculpatory non-admissions language was included in the informal resolutions. The summaries of alleged prior violations are incomplete and unreliable hearsay that has not been corroborated by other evidence. Thus, DLSE has failed to present evidence sufficient to create a prima facie showing of the existence of prior violations. Without sufficient prima facie evidence, Ro's burden of rebuttal under section 252.50, subdivision (a) is not invoked and, under the de novo standard applicable in this case, factor "B" favors a mitigated penalty rate.

For the same reason the \$300.00 penalty rate must be denied. As stated above, the statutory language provides for that enhanced rate when the contractor "knowingly commits a second or subsequent violation within a three-year period, if the noncompliance results in apprenticeship training not being provided." (§ 1777.7, subd. (a)(1).) For the reasons stated in the preceding paragraph, DLSE has not shown the existence of prior violations within the three-year period.

Given that DLSE failed to present sufficient evidence to establish that Ro's had committed other violations under section 1777.5, when considering all five factors on de novo review, the evidence supports a penalty rate of \$75.00 for each violation.

The total penalty calculated at \$75.00 for each full day of noncompliance of 30 days is \$2,250.00.

5. Ro's Ratio Violation Cannot Be Excused Under Section 230.1, Subdivision (a).

Ro's contends that pursuant to section 230.1, subdivision (a) it is excused from failing to employ apprentices for 20 percent of the hours journeymen are employed on a public work. Section 230.1, subdivision (a) provides:

Contractors who are not already employing sufficient registered apprentices (as defined by Labor Code Section 3077) to comply with the one-to-five ratio must request the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays and holidays) before the date on which one or more apprentices are required.

...

Conversely, if in response to a written request no apprenticeship committee dispatches, or agrees to dispatch during the period of the public works project any apprentice to a contractor who has agreed to employ and train apprentices in accordance with either the apprenticeship committee's standards or these regulations within 72 hours of such request (excluding Saturdays, Sundays and holidays) the contractor shall not be considered in violation of this section as a result of failure to employ apprentices for the remainder of the project, provided that the contractor made the request in enough time to meet the above-stated ratio.

As stated above, on July 8, 2015, Ro's transmitted a DAS Form 142 to Drywall J.A.T.C. requesting a painter apprentice to commence work on July 13, 2015. Also as discussed above, Ro's contacted the incorrect apprenticeship committee for the dispatch of painters. Ro's contends that sending a request for the dispatch of apprentices to one apprenticeship committee is the same as sending a request to all committees because the contact information for each is essentially the same. Inconsistently, Ro's concedes that transmitting a request for apprentices should be made to the one apprenticeship committee that clearly dispatches painters. Ro's, however, requested an apprentice dispatch from the very committee that it claims was inappropriate to dispatch painters,

the Drywall J.A.T.C. Thus, without a clearly appropriate dispatch request, there can be no defense pursuant to section 230.1, subdivision (a).¹²

6. Section 3.3.1.1(4) In The Division Of Labor Standards Enforcement Public Works Manual Cannot Be Used By Ro's To Create A Defense To The Civil Wage And Penalty Assessment.

The Division of Labor Standards Enforcement Public Works Manual (Manual) contains an introduction that clearly describes its intended purpose. The introduction, beginning with Section 1.1 states clearly specifies that the manual is a “training tool for the Division of Labor Standards Enforcement ...staff to better understand the Division’s functions in carrying out its responsibilities to conduct investigations and undertake enforcement actions...” The introduction continues to clarify the purpose of the Manual: “The Manual’s text, standing alone, is therefore not binding on the enforcement activities of the Division, or the Department of Industrial Relations (‘DIR’), in subsequent proceedings or litigation, or on the courts when reviewing DIR proceedings under the prevailing wage laws.” Thus, defenses to assessments are derived from court precedent, the Labor Code and the California Code of Regulations, title 8 and not the Manual.

7. Ro's Should Not Be Relieved From The Penalties Assessed.

Ro's contends that it should be relieved of all penalties because it acted in good faith, was not grossly negligent, willful or engaged in fraud. Support for this contention is found in *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976, 997 (*Lusardi*), which states that “courts refuse to impose civil penalties against a party who acted with

¹² On the day of hearing, the evidentiary record was complete when both parties rested their respective cases after having an opportunity to discuss and object to proposed evidence before that evidence was accepted into the record. Additional time for argument in the form of post-hearing briefs was allowed, with a submission of the case for decision ordered the day following the final day the parties were ordered to exchange and file briefs, June 20, 2017. On June 19, 2017, counsel for Ro's filed a brief with an attachment that was not entered into evidence at the hearing in the form of an email exchanged between Garza and a Drywall J.A.T.C. representative beginning on June 1, 2017. On June 21, 2017, counsel for DLSE objected to the inclusion of this additional evidence into the evidentiary record. Ro's counsel made no showing why the late evidence could not have been presented at the hearing. Because the attachment to Ro's post-hearing brief is evidence filed after the closure of the hearing, accepting it would not be just and, hence, it will not be entered into evidence. Even if the attachment were considered evidence, it would not support Ro's contention that it properly requested the dispatch of apprentices.

good faith and reasonable belief in the legality of his or her actions.” In *Lusardi*, a contractor had to pay the difference between wages paid and the prevailing wage, but not the associated penalties because it acted in good faith when contracting with the awarding body, a hospital district, who erroneously represented to the contractor that the project was private and not public work. (*Id.*, at p. 996.) Here, Ro’s had extensive experience in public work, having as many as 30 public works projects ongoing simultaneously. No evidence shows Ro’s was unaware that the Project was for public work, or that it relied on a representation by the awarding body that the Project was not a public work. Therefore, the situation here stands in contrast to that present in *Lusardi*. Further, as addressed above, Ro’s is irrebuttably presumed to have known that it violated section 1777.5 by failing to correctly contact the applicable apprenticeship committees for the dispatch of apprentices. Not only is there no basis for equitable estoppel that would prevent the imposition of penalties, as was the case in *Lusardi*, there is a finding that Ro’s knowingly violated the law. A knowing violation cannot be in good faith; therefore, the penalty relief sought by Ro’s is unavailable.

FINDINGS

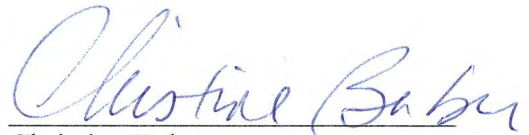
1. Ro’s did not provide contract award information to applicable apprenticeship committees as required by Labor Code section 1777.5 and section 230, subdivision (a).
2. Ro’s did not request dispatch of painter apprentices from the applicable apprenticeship committee in geographical region where the public work is located in contravention of Labor Code section 1777.5 and section 230.1, subdivision (a) of title 8, California Code of Regulations.
3. Ro’s did not employ apprentices in the ratio of one apprentice hour for each five journeymen hours as required by Labor Code section 1777.5, subdivision (k).
4. DLSE did not prove that Ro’s had prior violations within a three-year period. Ro’s cannot be penalized at the maximum rate of \$300.00 for each day in violation as DLSE contends, but instead is subject to a penalty of \$75.00 for each day in violation pursuant to Labor Code section 1777.7, subdivision (a). The total penalty is \$2,250.00 for 30 days in violation of Labor Code section 1777.5.

5. Ro's penalties are not relieved pursuant to section 230.1, subdivision (a) since it did not request apprentices from the correct apprenticeship committee.
6. The Division of Labor Standards Enforcement Public Works Manual does not create an affirmative defense available to Ro's because it is for instructional purposes and cannot supplant court precedent, the California Labor Code and the California Code of Regulations, title 8.
7. Ro's cannot be relieved of penalties because as an entity who knowingly engaged in a violation of Labor Code section 1777.5, it cannot claim to have acted in good faith.

ORDER

The Assessment of Civil Penalty is modified as set forth in the above Findings.
The amount of penalty is amended to reflect a total amount of \$2,250.00.

Dated: 8/23/2017


Christine Baker
Director of Industrial Relations