Who is Entitled to Prevailing Wages and Other Enforcement Issues

WORKERS EMPLOYED "IN THE EXECUTION OF THE CONTRACT" ARE ENTITLED TO PREVAILING WAGES

Labor Code § 1772. Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

Labor Code § 1774. The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

Facilities Construction
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AALRR Alert



California Court Sharply Limits Prevailing Wage Obligations for Offsite Fabrication, Manufacturing and Construction

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The most closely watched area in the active public works construction marketplace has long been whether and under what circumstances public works job site wages will extend to work performed off the jobsite.

A variety of different theories have dominated the discussion, ranging from the specifications of work to be performed; whether the work off site was integrated in some way with the jobsite work and thus was performed "in execution" of a public works contract; or whether the "fabricator/contractor" was a "material man" and sold their product to the general public, as opposed to work contracted for on a particular public works project.

Prefabrication of construction components to precise standards has been driven by increasingly high demands for safe and cost effective products. The growth of internet and remote ordering has broadened traditional methods of developing off-site components tailored, in one way or another, to modern construction needs. It is no surprise that a case in the California courts addressing the viability of the "designed to specification" and other analytical approaches should attract national attention from amicus parties representing industries as diverse as precast and pre-stressed concrete and HVAC, as well, of course, of the construction unions and employer associations with the most direct interests in the public works marketplace.

In this context, the decision of the California Court of Appeal for the First District in *Sheet Metal Workers' v. Duncan* (A131489, 8-27-14) ("Russ Will") is a landmark, rejecting most of the theories on which expansion of prevailing wage laws to off-site fabrication claims had been made, holding instead that off-site manufacturers, fabricators and contractors who "fabricate[s] materials for a public works project at a permanent offsite manufacturing facility that is not exclusively dedicated to the [public works] project" are not obligated to pay prevailing wage rates to employees in that facility.

Historical Background of the "Offsite" Rule in California

California's Department of Industrial Relations ("DIR") has long struggled with conflicting demands to expand prevailing wage to private manufacturing and construction. In two pivotal (but now no longer controlling decisions) the DIR sought to establish a rule that if an item was manufactured to jobsite specifications, prevailing wages might apply, regardless of where the work was done or by whom. (http://www.dir.ca.gov/OPRL/PWDecision.asp)

The DIR's "designed to spec" rule sparked national controversy from the moment it was announced. Extensive public hearings gave

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voice to challenges from many different construction and industry associations. Ultimately, the decisions containing the "designed to spec" rule were voluntarily withdrawn by the DIR. (http://www.dir.ca.gov/OPRL/ImportantNoticeOffsite.doc)

AND NOW COMES RUSS WILL

Russ Will Mechanical ("Russ Will") was the air conditioning/HVAC subcontractor on a community college district administration building modernization project. The subcontract provisions were industry standard. The project was to be built to the specifications of the prime contract and Russ Will was to "furnish all labor, materials, equipment, services and supplies to complete" the HVAC work. Ductwork on the project was to be fabricated according to industry standards. The prime contract did not specify who was required to fabricate those materials. The subcontract was a conventional public works prevailing wage contract, such that Russ Will was to "pay not less than the [applicable prevailing wage] to all laborers, workmen, and mechanics employed by him at the project site in the execution of [the work.]" Russ Will did not sell its fabricated materials to the general public but it did have a longstanding permanent offsite facility which it used to fabricate materials for various projects and it used that facility to do fabrication for later installation on the community college project.

A Russ Will employee complained to the Division of Labor Standards Enforcement ("DLSE") that he had not been paid prevailing wage for the fabrication work he performed in the Russ Will fabrication shop related to the public works project. None of his work was done at the project site.

In public works projects, the DIR is empowered to issue coverage determinations as to the scope and application of public works laws. (http://www.dir.ca.gov/OPRL/PubWorkDecision.htm). In these situations, interested industry partners from labor and the construction associations are permitted to participate, in addition to the involved parties. Director John Duncan initially issued a coverage determination that the work performed by the employee *was* subject to the prevailing wage laws, focusing on whether Russ Will had acted as a material supplier. That approach was narrowly construed against Russ Will as it did not sell its materials to the general public. Russ Will filed an administrative appeal and the DIR reversed itself. The new DIR determination looked to the federal Davis-Bacon regulations which are more restrictive in their application to off-site work.

Appeal from final DIR determinations are via petitions for writ in the Superior Court. Sheet Metal Local 104 filed the appeal. The Superior Court granted the writ. This *Russ Will* decision became the basis for the present Court of Appeal case. The trial court rejected the Director's reliance on Davis Bacon law, focusing instead on yet another approach to potential liability, drawing on the decision in *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742 ("*Sands*"). The *Sands* case, relied, in part, on a definitional section of the California Labor Code, Section 1720 which provides, in pertinent part, that " (b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following: (1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works, contractor, subcontractor, or developer; (2) Performance of construction work by the state or political subdivision *in execution of the project.*" (Emphasis supplied)

At the *Russ Will* oral argument, substantial discussion focused on whether *Sands*, a "hauling" case provided effective guidance to the Court in making an off-site fabrication decision in *Russ Will*.

In *Sands*, the Court's intellectual focus had been on whether the phrase "in execution" imposed an obligation to determine whether certain functions are integral to the performance of a public works contract The *Russ Will* court found the "in execution" inquiry in *Sands* was reached in a hauling context that did not provide clear and authoritative guidance concerning the question before it - whether fabrication and manufacturing is subject to the

prevailing wage law when performed in a permanent, offsite facility of a contractor or subcontractor that does not sell supplies to the general public.

As appellant and some amici had expressly argued *Sands* was distinguishable precedent. It was not a typical construction job site case, but involved the independent issue of trucking/hauling in connection with a public works project. Indeed, the California Legislature has followed this same point of view, crafting detailed provisions of the Labor Code dealing with hauling on and off public works. (See *Labor Code* section 1720.3)

The *Russ Will* decision follows this line of analysis, largely rejecting *Sands* as a controlling or even helpful precedent. Vigorous discussion at oral argument led some observers to conclude, as the Court ultimately did, that the phrase "in execution" on which *Sands* relied derives from Labor Code provisions defining the scope of public works law was of little practical guidance in the case at hand.

Petitioners also argued that the analysis should focus on whether the manufactured or fabricated items are standard or customized and if customized to specifications, they would be more closely integrated into the process of construction. The Court found this proposed test unhelpful and a source of confusion since customization could mean a variety of things. At argument the Justices expressly explained their obligation was to derive a clear standard available to permit parties to predict the public-works consequences of their actions. Petitioner's suggestion that a product was not covered if it could be purchased off the rack at Home Depot was not accepted.

Finally, the *Russ Will* Court also rejected the argument that the DIR was not permitted to look to federal prevailing wage laws (also known as Davis-Bacon and related acts) which limited prevailing wage laws to work done "directly on the site," because such language is not included in the California prevailing wage statutes. Supporting the determination of Director Duncan, the Russ *Will* Court held that the *Davis-Bacon Act* was appropriate as guidance on the issue when California authority does not provide clear answers, and, unless Davis-Bacon is fundamentally inconsistent with California law, it can provide useful guidance.

WHAT HAPPENS NEXT?

The *Russ Will* case is ripe for a Petition for Review to the California Supreme Court. The AALRR Public Works team will be actively engaged in following this process and in its active advocacy for the manufacturing and construction industry groups it represented in *Russ Will*. This issue has been active for too long and is far too critical to shaping the public works marketplace to expect it to end here. You may contact Robert Fried for copies of our amicus or Petitioner's filings and Robert Fried or Thomas Kovacich and Andres Hurwitz for updates and application of the decision to individual client issues.

229 Cal.App.4th 192
Court of Appeal,
First District, Division 3, California.

SHEET **METAL WORKERS'** INTERNATIONAL ASSOCIATION, LOCAL 104, Plaintiff and Respondent,
v.
John C. **DUNCAN**, as Director, etc., et al., Defendants and Respondents;
Russ Will Mechanical, Inc., Real Party in Interest and Appellant.

A131489
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Filed 8/27/2014
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Review Denied November 19, 2014

Synopsis

Background: Union filed a petition for a writ of mandate against the Department of Industrial Relations and its Director, challenging the Department's coverage determination that offsite fabrication work performed by subcontractor on public works project was not subject to the prevailing wage law. The Superior Court, City and County of San Francisco, No. 510528, Peter J. Busch, J., granted the petition and directed the issuance of a writ of mandate, and remanded the matter to the Department for reconsideration. Following entry of judgment, subcontractor appealed.

[Holding:] The Court of Appeal, McGuiness, P.J., held that prevailing wage law did not apply to employees of subcontractor who fabricated materials for public works project at a permanent, offsite manufacturing facility that was not exclusively dedicated to the project.

Reversed and remanded with directions.

West Headnotes (19)

[1] **Labor and Employment**
Public contracts, work under

To qualify for the material supplier exemption to the prevailing wage law, the employer must sell supplies to the general public and its fabrication or manufacturing facility must not be established for the particular public works contract or be located at the site of the public work. Cal. Lab. Code § 1771.

Cases that cite this headnote

[2] **Labor and Employment**
Decisions reviewable

Mandamus
Public Improvements

The Department of Industrial Relations' coverage determination with regard to the prevailing wage law constitutes a quasi-legislative act that is subject to review by traditional mandate under the Code of Civil Procedure. Cal. Lab. Code § 1771; Cal. Civ. Proc. Code § 1085.

Cases that cite this headnote

[3] **Administrative Law and Procedure**
Arbitrary, unreasonable or capricious action; illegality

Administrative Law and Procedure
Determination supported by evidence in general

Administrative Law and Procedure
Legislative questions; rule-making

Ordinarily, Court of Appeal's review of an administrative agency's quasi-legislative act is limited to the question of whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support.

Cases that cite this headnote

[4] **Labor and Employment**
Scope of review

Court of Appeal would exercise independent judgment in resolving the purely legal question of whether prevailing wages were required to be paid for work performed by employees at subcontractor's permanent, offsite facility; the

issue on appeal turned on the interpretation of the relevant statutes governing the application of the prevailing wage law, and the parties to the appeal agreed that the relevant facts were undisputed and that the issue on appeal presented a pure question of law. Cal. Lab. Code § 1771.

Cases that cite this headnote

[5] **Mandamus**
Admissibility of evidence

As a general matter, evidence outside the record before the administrative agency is inadmissible in traditional mandate actions challenging quasi-legislative administrative decisions on the ground the agency did not proceed in the manner required by law.

Cases that cite this headnote

[6] **Evidence**
Official proceedings and acts

Labor and Employment
Proceedings for review

On appeal from grant of union's petition for a writ of mandate against the Department of Industrial Relations and its Director challenging the Department's coverage determination with regard to the prevailing wage law, Court of Appeal would grant union's request for judicial notice as to administrative decisions of the department and the agency charged with enforcing prevailing wage laws in the State of Washington; however, Court of Appeal would otherwise deny union's request for judicial notice because the remaining documents were not part of the record before the Department and were not relevant. Cal. Lab. Code § 1771; Cal. Evid. Code § 452(c).

1 Cases that cite this headnote

[7] **Labor and Employment**
Prevailing wages

The purpose of the prevailing wage law is to protect and benefit 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. Cal. Lab. Code § 1771.

Cases that cite this headnote

[8] **Labor and Employment**
Prevailing wages

The prevailing wage law is to be liberally construed, although courts are not empowered to interfere where the Legislature has demonstrated the ability to make its intent clear and has chosen not to act. Cal. Lab. Code § 1771.

Cases that cite this headnote

[9] **Administrative Law and Procedure**
Deference to agency in general

Although the ultimate responsibility for the construction of a statute rests with the court, Court of Appeal accords great weight and respect to the construction of the statute by the agency charged with administering the statute.

1 Cases that cite this headnote

[10] **Administrative Law and Procedure**
Deference to agency in general

Deference to an administrative agency's interpretation of a statute is situational and depends on a complex of factors.

1 Cases that cite this headnote

[11] **Administrative Law and Procedure**
Deference to agency in general

An agency's interpretation of a statute is entitled to greater weight when the agency has special expertise and its decision is carefully considered by senior agency officials.

1 Cases that cite this headnote

[12] **Administrative Law and Procedure**
Consistent or longstanding construction; approval or acquiescence

An agency's interpretation of a statute is given greater credit when it is consistent and longstanding, whereas a vacillating position is not entitled to deference by the courts.

Cases that cite this headnote

[13] **Administrative Law and Procedure**
Consistent or longstanding construction; approval or acquiescence

An agency's longstanding and consistent interpretation of a statute should generally not be disturbed unless it is clearly erroneous.

Cases that cite this headnote

[14] **Administrative Law and Procedure**
Consistent or longstanding construction; approval or acquiescence

Because the Legislature is presumed to be aware of a longstanding administrative practice, the failure to substantially modify a statutory scheme is a strong indication that the administrative practice is consistent with the Legislature's intent.

Cases that cite this headnote

[15] **Administrative Law and Procedure**
Labor, employment, and public officials

Labor and Employment
Scope of review

Although the Department of Industrial Relations has determined that its coverage determinations with regard to the prevailing wage law do not have precedential value, the determinations nonetheless constitute administrative interpretations entitled to considerable deference; the Department has special expertise in administering the prevailing wage law. Cal. Lab. Code § 1771.

Cases that cite this headnote

[16] **Labor and Employment**
Public contracts, work under

Because offsite fabrication was conducted at subcontractor's permanent offsite facility, and that facility's location and continuance in operation were determined wholly without regard to the public works project at issue, the work was not done "in the execution" of the public works contract within meaning of the prevailing wage law. Cal. Lab. Code §§ 1771, 1772.

Cases that cite this headnote

[17] **Courts**
Construction of federal Constitution, statutes, and treaties

Labor and Employment
Prevailing wages

California's prevailing wage law is similar to the federal Davis–Bacon Act and shares its purposes; read as a unit, the prevailing wage law and the Davis–Bacon Act set out two separate, but parallel, systems regulating wages on public contracts, and thus, unless the Davis–Bacon Act is fundamentally inconsistent with the portions of the prevailing wage law that one seeks to interpret, the approach taken under the Davis–Bacon Act may provide useful guidance. 40 U.S.C.A. § 3141 et seq.; Cal. Lab. Code § 1771.

Cases that cite this headnote

[18] **Labor and Employment**
Proceedings for review

On appeal from grant of union's petition for a writ of mandate against the Department of Industrial Relations and its Director challenging the Department's coverage determination with regard to the prevailing wage law, Court of Appeal would take judicial notice of Legislative Counsel's Digest for Assembly bill and Senate bill, which were offered for the purpose of demonstrating that the legislature had been active in amending the prevailing wage law as

necessary to clarify its scope. Cal. Lab. Code § 1771.

Cases that cite this headnote

[19] **Labor and Employment**
Public contracts, work under

Offsite fabrication is not covered by the prevailing wage law if it takes place at a permanent, offsite manufacturing facility and the location and existence of that facility is determined wholly without regard to the particular public works project. Cal. Lab. Code § 1771.

See 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 385, 386.

Cases that cite this headnote

**637 City & County of San Francisco, Hon. Peter J. Busch. (City & County of San Francisco Super. Ct. No. 510528)

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No appearance for Defendants and Respondents.

OPINION

McGUINESS, P.J.

***196** California's prevailing wage law generally requires that **workers** employed on public works be paid the local prevailing wage for work of a similar character. (*Lab.Code,* [1] *§ 1771.*) The question presented by this appeal is whether the prevailing wage law applies to an employee of a subcontractor who fabricates materials for a public works project at a permanent offsite manufacturing facility that is not exclusively dedicated to the project. We conclude that California law does not require the prevailing wage to be paid to the employee in this circumstance.

FACTUAL AND PROCEDURAL BACKGROUND

In 2005, a contractor entered into a public works contract with a community college district to modernize an administration building at a community college in Santa Clara County (the project). Real party in interest and appellant Russ Will Mechanical, Inc. (Russ Will), was the subcontractor for the heating, ventilation, and air conditioning (HVAC) component of the project. The subcontract provided that the project was to be built according to the specifications of the prime contract between the contractor and the community college district. Russ Will was required to "furnish all labor, materials, equipment, services and supplies necessary to complete" the HVAC work. The subcontract did not specify whether Russ Will was required to fabricate any material necessary to complete the HVAC work. A lengthy document that was part of the prime contract specified minimum requirements for all trades on the project. The requirements were not specific to Russ Will or any other particular subcontractor. Among other things, the general project requirements specified that ductwork was to be fabricated according to industry HVAC construction standards. The general requirements that formed part of the prime contract did not specify who was required to fabricate HVAC materials. The subcontract provided that the project was subject to prevailing wage requirements and required Russ Will to "pay not less than the [applicable prevailing wage] to all laborers, workmen, and mechanics **638 employed by him at the project site in the execution of work hereunder."

Since 1991, Russ Will has fabricated materials at a permanent offsite facility it operates in Hayward. The offsite facility was not established for the project at issue here but instead has been utilized to manufacture items for various private and public projects. Russ Will does not sell the materials it fabricates to the general public.

Steve Neves, an employee of Russ Will, filed a complaint with the Department of Industrial Relations, Division of Labor Standards Enforcement *197 (DLSE), alleging he should have been paid prevailing wages for work related to the project. The work that Neves performed involved the fabrication of sheet **metal** at Russ Will's Hayward facility in accordance with the plans and specifications set forth in the contract documents for the project. Neves fabricated various ducts, flashing, square to rounds, and fittings for use in the project. There is no indication in the record that Neves ever worked at the site of the project in Santa Clara County. According to Russ Will, at least some of the fabricated sheet **metal** items could have been ordered from standard industry catalogs. Other required sheet **metal** items for the project were considered custom because of the nonstandard dimensions. Russ Will contemplated ordering custom sheet **metal** items from a third party, which in turn was going to order them from a manufacturer. After learning that the price for the custom items would be high, Russ Will ended up fabricating the custom items in its own permanent facility in Hayward.

DLSE issued a civil wage and penalty assessment against Russ Will for failing to pay prevailing wages for the fabrication work performed in its Hayward facility. Russ Will requested a review of the assessment pursuant to section 1742, subdivision (a). At the invitation of DLSE, plaintiff and respondent Sheet **Metal Workers'** International Association, Local 104 (Local 104), expressed an interest in participating in the proceedings and submitted a position statement in support of DLSE's assessment.

[1] The Department of Industrial Relations (department) issued a coverage determination in which it concluded that Russ Will was required to pay prevailing wages for the offsite fabrication work associated with the project. The department's determination turned on whether Russ Will was exempt from the prevailing wage law as a material supplier. To qualify for the material supplier exemption, the employer must sell supplies to the general public and its fabrication or manufacturing facility must not be established for the particular public works contract or be located at the site of the public work. (See *O.G. Sansone Co. v. Department of Transportation (1976) 55 Cal.App.3d 434, 442*, 127 Cal.Rptr. 799 (*Sansone*).) Because Russ Will does not sell supplies to the general public, the department concluded that Russ Will was properly characterized as a subcontractor under section 1722 and was not exempt from the prevailing wage law as a material supplier. Russ Will filed an administrative appeal.

In its decision on administrative appeal, the department reversed its initial coverage determination and concluded that the offsite fabrication performed by Russ Will was not subject to the prevailing wage law. Although the department again concluded that Russ Will was a subcontractor within the meaning of the prevailing wage law and did not qualify for the material supplier exemption, the department explained that this conclusion did not *198 necessarily resolve the question of whether the offsite fabrication was subject to prevailing wage requirements. The department noted that **639 California case law did not specifically address the issue posed by this case—i.e., whether fabrication is subject to prevailing wage requirements when performed in the offsite facility of a subcontractor that does not sell supplies to the general public. In the absence of directly applicable California case law, the department interpreted the prevailing wage law consistent with federal regulations specifying that prevailing wages do not apply to work performed at a permanent fabrication plant when the location and existence of the plant are determined wholly without regard to any particular public works project. Because the project at issue here had no bearing on the location or existence of Russ Will's offsite fabrication facility, the department concluded that fabrication work performed at the offsite facility was not subject to the prevailing wage law.

Local 104 filed a petition for a writ of mandate in the superior court against the department and its director challenging the department's coverage decision.[2] In its petition, Local 104 alleged that, unlike a material supplier that is exempt from the prevailing wage law, Russ Will's offsite facility fabricated customized sheet **metal** items in accordance with the specifications in the project's contract documents. According to Local 104, because the custom fabrication was an integral part of the project and was performed in the execution of a public works contract, the work should have been covered by the prevailing wage law.

The superior court granted the petition and directed the issuance of a writ of mandate. The court reasoned that the department "applied an incorrect legal standard by relying exclusively on federal law." According to the court, the correct legal standard for analyzing whether offsite work is covered by California's prevailing wage law is set forth in *Williams v. SnSands Corp. (2007) 156 Cal.App.4th 742*, 67 Cal.Rptr.3d 606 (*Williams*). The court remanded the matter to the department for reconsideration utilizing the legal standard set forth in *Williams*.

Following entry of judgment, Russ Will filed a timely notice of appeal. Although the department participated in the proceedings before the superior court, it did not participate in this appeal or file any briefs in this court.

*199 DISCUSSION

1. *Standard of Review*

[2] [3] [4] The department's coverage determination constitutes a quasi-legislative act that is subject to review by traditional mandate under *Code of Civil Procedure section 1085*. (*Reclamation Dist. No. 684 v. Department of Industrial Relations (2005) 125 Cal.App.4th 1000, 1004*, 23 Cal.Rptr.3d 269; *McIntosh v. Aubry (1993) 14 Cal.App.4th 1576, 1583–1584*, 18 Cal.Rptr.2d 680.) Ordinarily, our review of an administrative agency's quasi-legislative act is "limited to the question whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support." (*Reclamation Dist. No. 684 v. Department of Industrial Relations, supra, at p. 1004*, 23 Cal.Rptr.3d 269.) Here, however, the issue on appeal turns on the interpretation of the relevant statutes governing the application of the prevailing wage law. The parties to this appeal agree that the relevant facts are undisputed and that the issue on appeal presents a pure question of law. Under these circumstances, we exercise independent judgment **640 in resolving the purely legal question of whether prevailing wages are required to be paid for work performed by employees at Russ Will's permanent offsite facility. (See *City of Long Beach v. Department of Industrial Relations (2004) 34 Cal.4th 942, 949*, 22 Cal.Rptr.3d 518, 102 P.3d 904 (*City of Long Beach*); accord, *McIntosh v. Aubry, supra, at pp. 1583–1584*, 18 Cal.Rptr.2d 680.)

[5] [6] As a general matter, evidence outside the record before the administrative agency is inadmissible in traditional mandate actions challenging quasi-legislative administrative decisions on the ground the agency did not proceed in the manner required by law. (See *Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 576*, 38 Cal.Rptr.2d 139, 888 P.2d 1268.) Consequently, our review is confined to facts established in the administrative record of the proceedings before the department. [3]

*200 2. *Statutory Framework Relevant to Offsite Application of Prevailing Wage Law*

The issue raised on appeal requires us to consider whether and under what circumstances the prevailing wage law extends to work performed away from the site of a public works project. Our starting point is the language of the relevant statutes.

"The primary goal in construing a statute is to ascertain legislative intent so as to effectuate the purpose of the law. [Citation.] To do so, we first examine the language of the statute, giving the words their ordinary, commonsense meaning and according significance to all words used, if possible." (*Friends of Lagoon Valley v. City of Vacaville (2007) 154 Cal.App.4th 807, 825*, 65 Cal.Rptr.3d 251; accord, *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1386*, 241 Cal.Rptr. 67, 743 P.2d 1323.) A specific statutory provision should be construed with reference to the entire statutory scheme in order to harmonize the various elements. (Cf. *Bowland v. Municipal Court (1976) 18 Cal.3d 479, 489*, 134 Cal.Rptr. 630, 556 P.2d 1081.) This principle is particularly apt in the context of the prevailing wage law, portions of which have been described as "hardly a triumph of the drafter's art." (*State Building & Construction Trades Council of California v. **Duncan** (2008) 162 Cal.App.4th 289, 308*, 76 Cal.Rptr.3d 507.)

California's prevailing wage law (§ 1720 et seq.) was originally enacted as an uncodified measure in 1931, at roughly the same time as the enactment of its federal counterpart, the Davis-Bacon Act (**641 *40 U.S.C. §§ 3141–3148*). (*Azusa Land Partners v. Department of Industrial Relations (2010) 191 Cal.App.4th 1, 14*, 120 Cal.Rptr.3d 27; see Stats.1931, ch. 397, p. 910.) The Legislature codified the prevailing wage law in 1937 at the time it created the Labor Code. (Stats.1937, ch. 90, pp. 185, 243-244.)

[7] [8] The purpose of the prevailing wage law is "to protect and benefit employees on public works projects." (*Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 985*, 4 Cal.Rptr.2d 837, 824 P.2d 643.) "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." (*Id. at p. 987*, 4 Cal.Rptr.2d 837, 824 P.2d 643.) The law is to be liberally construed, although courts

are not empowered to " 'interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act.' " (*City of Long Beach, supra, 34 Cal.4th at p. 950*, 22 Cal.Rptr.3d 518, 102 P.3d 904.)

***201** *Section 1771* sets forth the general rule that, with certain exceptions, prevailing wages "shall be paid to all **workers** employed on public works." Section 1774 further provides that "[t]he contractor to whom the [public works] contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen *employed in the execution of the contract*." (Italics added.) Similar to section 1774, section 1772 likewise defines its scope with reference to **workers** employed "in the execution of" a public works contract: "**Workers** employed by contractors or subcontractors *in the execution of any contract for public work* are deemed to be employed upon public work." (Italics added.)

The term "public works" is defined in section 1720. As relevant here, subdivision (a)(1) of section 1720 defines "public works" to include, among other things, "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds...." As used in the statute, " 'construction' includes work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work." (§ 1720, subd. (a)(1).)

Local 104 claims the reach of the prevailing wage law is broad and without geographical limitation because of language in sections 1772 and 1774 extending the law's scope to all those employed "in the execution" of a public works contract. The phrase "in the execution of" is susceptible to an expansive interpretation. For example, in *Williams, supra, 156 Cal.App.4th at page 750*, 67 Cal.Rptr.3d 606, the court concluded the phrase "in the execution of any contract for public work" as used in section 1772 "plainly means the carrying out and completion of all provisions of the contract."[4] In addition, Local 104 focuses on the fact that section 1720, subdivision (a)(1) defines the term "construction" ****642** broadly to include preconstruction activities, urging that the term is commonly understood to include the preconstruction activity of fabricating sheet **metal** for HVAC systems.

For its part, Russ Will contends that Local 104's legal position is based on an unsupported and overly expansive interpretation of the phrase "in the execution of" in sections 1772 and 1774. We tend to agree. Under an expansive interpretation of the phrase "in the execution of" as used in sections 1772 and 1774, nearly any activity related to the completion or fulfillment of a public works contract would be subject to the prevailing wage law, regardless of where it takes place or whether it plays a substantial role in the ***202** process of construction. We do not suggest that Local 104 urges such a broad interpretation, but the fact remains that focusing exclusively on the "in the execution of" language in sections 1772 and 1774 would lead to a potentially overbroad application of the prevailing wage law without some limiting guidelines.

Russ Will argues that the limiting principle is found in statutory language specifying that prevailing wages apply to **workers** "employed *on* public works." (*§ 1771*, italics added.) Russ Will interprets the reference to being employed "on" public works in various sections of the prevailing wage law to mean that employees must be physically present on the site of the public works project to qualify for prevailing wages. (E.g., *§§ 1770, 1722.1, 1775, subd. (b)(1) & (3), 1776, subd. (a)(2), 1781, subd. (c)(2)(A), 1811.*) We are not persuaded that references to being employed "on public works" necessarily connotes a geographical limitation. The reference to being employed "on public works" could just as easily be interpreted to mean working on an activity called for in a public works contract, regardless of whether that activity takes place at the site of the public works project. The language is ambiguous.

Further, the language of California's prevailing wage law differs from the language of the federal Davis–Bacon Act, which plainly imposes a geographical limitation on the application of the federal prevailing wage law. The Davis–Bacon Act applies to "mechanics and laborers employed *directly on the site of the work*." (*40 U.S.C. § 3142(c)(1)*, italics added.) This coverage language has been held to connote a limitation to the geographical confines of the federal project's jobsite. (*Building & Construction Trades Dept. v. Department of Labor (D.C.Cir.1991) 932 F.2d 985, 986, 990.*)

Local 104 claims it is significant that the California Legislature chose not to adopt the Davis-Bacon Act's "directly on the site" coverage language. It relies on the principle that "[t]he omission of a provision contained in a foreign statute providing the model for action by the Legislature is a strong indication that the Legislature did not

intend to import such provision into the state statute." (*J.R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union (1989) 208 Cal.App.3d 430, 442*, 256 Cal.Rptr. 246.) As support for its view, Local 104 cites a litany of out-of-state cases in which courts have concluded that a state prevailing wage law that omits the words "directly" or "at the site of the work" should be interpreted more broadly than the Davis-Bacon Act. (See *Sharifi v. Young Brothers, Inc. (Tx.Ct.App.1992) 835 S.W.2d 221, 223*; *Everett Concrete Products, Inc. v. Department of Labor & Industry (1988)* 109 Wash.2d 819, *748 P.2d 1112, 1115–1116*; *Long v. Interstate Ready–Mix (Mo.Ct.App. 2002) 83 S.W.3d 571, 578.*)

***203** While we agree that some significance should be attached to the fact that the ****643** prevailing wage law does not use the "directly on the site" language employed in the Davis-Bacon Act, we are not convinced it is appropriate to draw the inference that the Legislature specifically rejected a geographical limitation on the application of the prevailing wage law. Among other things, it is not clear that the Davis-Bacon Act served as the model for the prevailing wage law as originally enacted. The two statutory schemes were passed at roughly the same time in 1931.[5] (*Azusa Land Partners v. Department of Industrial Relations, supra, 191 Cal.App.4th at p. 14*, 120 Cal.Rptr.3d 27.) Further, even if the Davis-Bacon Act did serve as a model for California's law, the federal law as originally enacted in 1931 did not contain the "directly on the site" geographical limitation that now appears in the statute. (Davis-Bacon Act, Pub.L. No. 71-798, (Mar. 3, 1931) 46 Stat. 1494.) Instead, the statute referred to "laborers and mechanics employed by the contractor or any subcontractor on the public buildings covered by the contract...." (*Id.*, § 1.) The "site of the work" phraseology first appeared in the Davis-Bacon Act in 1935. (*Ball, Ball & Brosamer v. Reich (D.C.Cir.1994) 306 U.S. App.D.C. 339 [24 F.3d 1447, 1453, fn. 3].*) Consequently, the circumstances surrounding the Legislature's adoption of the prevailing wage law do not support an inference that the Legislature specifically rejected language imposing a geographical limitation on the law's application.

Moreover, Local 104's contention that the prevailing wage law contains no geographical restriction is belied by references in various statutes to the jobsite or the site of the public work. For example, section 1773.2 requires a public agency to post the applicable per diem prevailing wages "at each job site." It would make little sense to require the public agency to post notices at offsite locations that may be distant from the site of the public work and that are under the control of a contractor or subcontractor. Indeed, in many cases—including this one—the public agency may not even be aware that fabrication work is being performed at permanent offsite locations. Thus, a reasonable reading of this statute suggests that the "job site" is the site of the public works project and not any site, wherever located, at which a **worker** is employed in the execution of some aspect of the public works contract. Section 1777.5 contains even more direct references to the site of the work. That section addresses a contractor's obligation to utilize apprentices on public works and makes repeated references to the site of the public work. (See § 1777.5, subds. (e), (f), (m)(1).)

***204** Although the Legislature saw fit to use terms of geographical limitation in selected provisions of the prevailing wage law, these limited examples do not compel a conclusion that the Legislature intended the prevailing wage law to be restricted to **workers** employed at the site of the public work. On the other hand, for reasons we have explained, we do not agree with Local 104 that we are obliged to conclude that the Legislature necessarily rejected any geographical limitation on the application of the prevailing wage law. We are left to conclude that the Legislature's intent concerning geographical limitations on the application of the prevailing wage law ****644** is ambiguous. In order to resolve the ambiguity we have identified, we next turn to the California case law that bears upon the offsite application of the prevailing wage law.

3. *California Case Law Addressing Offsite Work—Sansone and Williams*

Our analysis is guided by two published California decisions that address whether an employee is entitled to prevailing wages for work performed away from the site of the public work—*Sansone, supra, 55 Cal.App.3d 434*, 127 Cal.Rptr. 799, and *Williams, supra, 156 Cal.App.4th 742*, 67 Cal.Rptr.3d 606. As Russ Will points out, these are "hauling" cases, which means they involve drivers who haul materials to or from the site of a public works project. They do not involve the manufacture or fabrication of materials at a permanent offsite facility.

In *Sansone,* the court addressed whether drivers who hauled materials onto a public works site should be treated as subcontractors and therefore subject to the prevailing wage law. (*Sansone, supra, 55 Cal.App.3d at p. 441*, 127 Cal.Rptr. 799.) In determining that the drivers were entitled to prevailing wages, the court was guided by the reasoning

applied in the context of the Davis-Bacon Act by the United States Court of Claims in *H.B. Zachry Co. v. U.S. (Ct.Cl.1965) 344 F.2d 352* (*Zachry*). (*Sansone, supra, at p. 442*, 127 Cal.Rptr. 799.) The court in *Zachry* noted that bona fide material suppliers (also referred to as "materialmen") that sell building materials to a contractor engaged in a public works project had long been excluded from coverage under the Davis-Bacon Act. (*Zachry, supra, at p. 359.*) To qualify for this material supplier exemption, the material suppliers had to be selling supplies to the general public, the plant could not be established specially for the particular public works contract, and the plant could not be located at the project site. (*Ibid.*) The *Zachry* court concluded that a trucker's employees that delivered building materials to a project site were not covered by the Davis-Bacon Act because the function the trucking company performed—the delivery of standard materials—was a "function which is performed independently of the contract construction activities." (*Zachry, at p. 361.*) The court reasoned that its decision was a "logical extension" of the congressional intent to exclude material suppliers from coverage under the Davis-Bacon Act. (*Zachry, at p. 361.*)

***205** In contrast to the facts in *Zachry,* the delivery drivers in *Sansone* hauled construction materials—aggregate subbase for a highway—from a dedicated location adjacent to and established exclusively to serve the project site. (*Sansone, supra,* 55 Cal.App.3d at p. 443, 127 Cal.Rptr. 799.) The contract required the drivers who delivered the aggregate subbase to spread and compact the materials at the project site. (*Ibid.*) The *Sansone* court analogized the situation to the facts in a Wisconsin case in which the delivery of materials that were distributed over a roadway under construction was deemed to be an " 'integrated aspect of the "flow" process of construction.' " (*Id. at p. 444*, 127 Cal.Rptr. 799.) The court concluded that the drivers were not material suppliers or employees of material suppliers but instead performed "an integral part" of the contractor's obligation under the public works contract. (*Id. at p. 445*, 127 Cal.Rptr. 799.)

Whereas *Sansone* concerned "on-hauling" materials onto the site of public works project, the other relevant California case, *Williams, supra, 156 Cal.App.4th at page 749*, 67 Cal.Rptr.3d 606, specifically addressed removing or "off-haul[ing]" construction materials from a site. (Italics omitted.) The *Williams* court focused on the meaning of ****645** the "in the execution of" language in section 1772 and primarily relied upon the analysis in *Sansone* and the cases relied upon by that decision. (*156 Cal.App.4th at pp. 749–752*, 67 Cal.Rptr.3d 606.) The court noted that the critical factor in the analysis was whether a trucking company was "conducting an operation truly independent of the performance of the general contract for public work, as opposed to conducting work that was integral to the performance of that general contract." (*Id. at p. 752*, 67 Cal.Rptr.3d 606.) The *Williams* court held that the off-haul work at issue in that case was not covered by the prevailing wage law, reasoning that it was not integrated into the flow process of construction. (*Id. at p. 754*, 67 Cal.Rptr.3d 606.) Among other things, the court emphasized that the trucking company off-hauled "generic materials to a locale bearing no relation to the public works project site" (*id. at p. 753*, 67 Cal.Rptr.3d 606) and that the prime contract did not require the contractor to off-haul general building materials from the site (*id. at p. 754*, 67 Cal.Rptr.3d 606). According to the court, the off-hauling of generic materials was no more an integral part of the construction process than the delivery of generic materials by a bona fide material supplier. (*Id. at p. 753*, 67 Cal.Rptr.3d 606.)

There is substantial disagreement concerning the role that *Sansone* and *Williams* should play in our analysis. Russ Will dismisses them as "hauling cases" that are limited to their facts. Similarly, although the department considered *Sansone* and *Williams* in reaching its decision, it noted that the decisions did not address the specific issue posed by this case. By contrast, the superior court concluded that the proper legal standard for analyzing this dispute is set forth in *Williams,* and Local 104 contends that any attempt to discount *Sansone* or *Williams* simply as a hauling case is myopic.

Sansone and *Williams* are relevant to our analysis to the extent they set forth a general framework for considering whether certain functions are ***206** integral to the performance of a public works contract. Of particular importance to the issue posed here is whether an operation is truly independent of the contract construction activities—i.e., whether it is integrated into the flow process of construction. (See *Sansone, supra, 55 Cal.App.3d at pp. 444–445*; *Williams, supra, 156 Cal.App.4th at p. 751*, 67 Cal.Rptr.3d 606.)

The specific factors considered by the courts in *Sansone* and *Williams* are less helpful to our analysis. In *Sansone,* the court's decision turned on factors specific to the delivery of materials onto a jobsite. (See *Williams, supra,* 156 Cal.App.4th at p. 752, 67 Cal.Rptr.3d 606 [setting forth factors considered in *Sansone,* including whether hauled materials were immediately distributed onto the jobsite].) Although the court in *Williams* cited the factors relied upon

by *Sansone,* it determined that the "off hauling" question had to be considered anew. (*Williams, supra,* at p. 752, 67 Cal.Rptr.3d 606.) The court set forth the following three factors to be considered in assessing off-hauling activities: "whether the transport was required to carry out a term of the public works contract; whether the work was performed on the project site or another site integrally connected to the project site; whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract." (*Ibid.*)

The three factors cited by the *Williams* court have a more general application than the ones relied upon by the *Sansone* court. Nevertheless, the factors arose and were applied in the context of off-hauling and necessarily were tailored to that activity. ****646** Hauling and fabrication are distinct activities that give rise to different concerns in the context of the prevailing wage law. Among other things, hauling activities necessarily have at least a limited geographical connection to the public works site. By contrast, offsite fabrication could theoretically take place anywhere in the world. Further, fabrication could take place in a permanent offsite facility that has an existence and operation wholly independent of the public works project, or it could take place in a facility specifically designed for the project. These facts bear upon whether a particular operation forms an integral part of the flow of the construction process. The factors cited in *Williams* do not necessarily address issues unique to offsite fabrication.

Moreover, Local 104's application of the factors in *Williams* demonstrates their limitations in the context of offsite fabrication. Local 104 seems to ignore the first two factors —which presumably are not satisfied under the facts of this case—and instead focuses almost exclusively on the third—whether offsite work was "necessary to accomplish or fulfill the contract." (*Williams, supra, 156 Cal.App.4th at p. 752,* 67 Cal.Rptr.3d 606.) Considered alone, this factor provides little or no more guidance than the language of section 1772, which provides that **workers** employed "in the execution" of a public works contract are considered to be employed upon public work. A task that could be ***207** considered necessary to fulfill a contract might nonetheless have little relation to the flow of the construction process.

While we conclude that *Sansone* and *Williams* contain useful general guidelines for considering whether offsite work is covered under the prevailing wage law, the specific concerns addressed in those cases are not dispositive of the issue raised here.

4. *The Department's Long-standing Approach to the Issue of Offsite Fabrication*

[9] **[10]** **[11]** Although the ultimate responsibility for the construction of a statute rests with the court, we accord great weight and respect to the construction of the statute by the agency charged with administering the statute. (*Sharon S. v. Superior Court (2003) 31 Cal.4th 417, 436,* 2 Cal.Rptr.3d 699, 73 P.3d 554; *Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 12,* 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Deference to an administrative agency's interpretation is situational and depends on a complex of factors. (*Yamaha Corp. of America v. State Bd. of Equalization, supra, at p. 12,* 78 Cal.Rptr.2d 1, 960 P.2d 1031.) An agency's interpretation is entitled to greater weight when "the agency has special expertise and its decision is carefully considered by senior agency officials...." (*Sharon S. v. Superior Court, supra, at p. 436,* 2 Cal.Rptr.3d 699, 73 P.3d 554.)

[12] **[13]** **[14]** An agency's interpretation is also given greater credit when it is consistent and long-standing, whereas a vacillating position is not entitled to deference by the courts. (*Yamaha Corp. of America v. State Bd. of Equalization, supra, 19 Cal.4th at p. 13,* 78 Cal.Rptr.2d 1, 960 P.2d 1031.) A long-standing and consistent interpretation should generally not be disturbed unless it is clearly erroneous. (*Id. at p. 21,* 78 Cal.Rptr.2d 1, 960 P.2d 1031 (conc. opn. of Mosk, J.).) Because the Legislature is presumed to be aware of a long-standing administrative practice, the failure to substantially modify a statutory scheme is a strong indication that the administrative practice is consistent with the Legislature's intent. (*Id. at p. 22,* 78 Cal.Rptr.2d 1, 960 P.2d 1031 (conc. opn. of Mosk, J.).)

[15] The department's interpretation of the law as it relates to offsite fabrication ****647** arises in the context of coverage determinations under the prevailing wage law. Although the department has determined that its coverage determinations do not have precedential value, the determinations nonetheless constitute administrative interpretations entitled to considerable deference. As the superior court recognized, the department has special expertise in administering the prevailing wage law. Coverage determinations typically result from adversarial proceedings, and the determinations—which are issued by the director of the department—are plainly the product of careful

consideration by senior members of the administrative agency.

As early as 1984, the department determined that offsite fabrication work performed at a permanent facility was not subject to prevailing wage ***208** requirements. In a coverage determination issued in *Russell Mechanical, Inc.* (Sept. 17, 1984), the department concluded that the offsite fabrication of a custom fume recovery hood for a nuclear powerplant by a supplier of sheet **metal** products was not subject to prevailing wage requirements.[6] The department reasoned that offsite fabricators are more like material suppliers than onsite construction **workers**. The department noted that extending coverage to offsite fabrication would not significantly protect local labor markets, because fabrication does not necessarily take place in the local labor market. The department also reasoned that, because offsite fabrication facilities could be located anywhere in the country, expanding the law to offsite fabrication would frustrate the law's administration and adversely affect enforcement by greatly expanding the reach of the prevailing wage law. The department concluded it was "highly unlikely that the Legislature could have intended such an application of jurisdiction without expressly so stating." In an opinion on reconsideration affirming its determination, the department discounted the argument that the fume recovery hood was a custom product made to the specifications of the contract, pointing out that it could have been made anywhere in the world and shipped to the nuclear powerplant. The department also applied the analysis in *Sansone, supra, 55 Cal.App.3d 434*, 127 Cal.Rptr. 799, and concluded that the sheet **metal** supplier was exempt from the prevailing wage requirements as a material supplier because it was a standard supplier of sheet **metal** products to the general public, its facility existed long before the public works contract, and the facility was not located on or near the site of the public work.

More recently, in 2008, the department determined that the prevailing wage law did not apply to modular units to be installed at a school site, because the units were fabricated at a permanent offsite facility that was not integrally connected to the project site. (*Wasco Union High School Dist.* (May 5, 2008) Dept. Pub. Works, case No. 2007-009.) Likewise, in another 2008 decision, the department determined ****648** that the prevailing wage law did not apply to the fabrication of construction materials at a permanent offsite facility. (*Sunset Garden Apartments* (May 28, 2008) Dept. Pub. Works, case No. 2008-008.) In both cases, the offsite facility also sold supplies to other contractors.

***209** The department has reached a different conclusion in cases in which offsite fabrication takes place in a temporary facility established specifically for the public works project instead of at a permanent offsite facility. Thus, in *Imperial Prison II, South* (Apr. 5, 1994) Dept. Public Works, case No. 92-036, the department determined that prevailing wage requirements applied to the offsite fabrication of concrete panels at a yard established exclusively for the public works project. The department reasoned that, consistent with *Sansone,* its "past coverage determinations have consistently held that the off-site fabrication of materials at a site whose sole purpose is the fabrication of those materials for a public works site, is a public works itself." The department reached a similar conclusion in *San Diego City Schools, Construction of Portable Classrooms.* (June 23, 2000) Dept. Public Works, case No. 1999-032 . There, again in reliance on *Sansone,* the department concluded that the offsite construction of portable classrooms was subject to prevailing wage requirements where the work was performed at a facility set up solely to service the public works project.

These coverage determinations as well as others cited by the parties to this appeal establish that the department has followed a consistent and long-standing practice with regard to offsite fabrication. The department has determined that fabrication work performed at a permanent offsite facility not exclusively dedicated to the public works project is not covered by the prevailing wage law, whereas fabrication work performed at a temporary facility that is dedicated to the project is covered. Local 104 argues that the department's prior decisions on offsite fabrication turn on an application of the three-part material supplier exemption and do not address the specific issue here—i.e., whether an employee who fabricates materials at a permanent offsite facility is covered by the prevailing wage law when the employer does not sell supplies to the general public and therefore does not satisfy one of the criteria to qualify for the material supplier exemption. We agree that the prior determinations of the department do not address this specific issue or involve a fact pattern identical to the one presented here. Nonetheless, the department's coverage determinations establish a consistent pattern of exempting fabrication work performed at permanent offsite facilities from the scope of the prevailing wage law.

Local 104 contends the department's interpretation is entitled to no deference because the department has been inconsistent in its approach to the issue of offsite fabrication. We

disagree. Local 104 cites the fact that the department initially determined in this case that Russ Will was required to pay prevailing wages for the offsite fabrication work associated with the project. Of course, that decision was overturned on appeal. Local 104 also relies on two coverage determinations from 2003 in which the department concluded that offsite fabrication at a permanent facility was covered by the prevailing wage law. (See *Cuesta College* (Mar. 4, 2003) Dept. Pub. Works, case No. 2000-027 *Helix Electric* (Mar. 4, 2003) ***210** Dept. Pub. Works, case no. 2002-064.) Those decisions, too, were appealed and ultimately withdrawn. Consequently, it is not the case that the department has been inconsistent in its *final* determinations ****649** on coverage for offsite fabrication.[7] It is not correct to say the department has been inconsistent in its approach when any inconsistencies have been corrected or resolved before a determination is final.

5. *Assessing Whether the Department's Coverage Determination Was Erroneous*

[16] Our analysis to this point leads us to the same conclusion reached by the department—that there is a lack of clear and authoritative guidance concerning whether fabrication is subject to the prevailing wage law when performed in a permanent offsite facility of a contractor or subcontractor that does not sell supplies to the general public. The statutory framework, existing case law, and prior coverage determinations do not provide a definitive answer to this question.

In determining that the offsite fabrication performed by Russ Will was not subject to the prevailing wage law, the department reasoned that the existence and location of Russ Will's permanent offsite shop did not turn on a particular public works contract or project. As support for its conclusion, the department relied upon a federal regulation defining the "site of the work" as used in the Davis-Bacon Act. The relevant regulation provides that the "site of the work" under the Davis–Bacon Act does not include "permanent ... fabrication plants ... of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project." (*29 C.F.R. § 5.2(l) (3)* (2014).) The department concluded it was appropriate to turn to the federal regulation for guidance in the absence of legislative or judicial guidance on the factual scenario presented by Russ Will.

Local 104's primary complaint on appeal is that the director erred in relying on a federal regulation instead of applying the standard set forth in ***211** *Sansone* and *Williams*. According to Local 104, because the scope of coverage under the prevailing wage law is broader than that provided by the Davis-Bacon Act, it is inappropriate to assess coverage with the guidance of a federal regulation implementing the Davis-Bacon Act. We disagree with Local 104. As explained below, the department's reliance on a federal regulation for guidance in assessing the scope of coverage was not unreasonable under the circumstances presented here. Moreover, the department's coverage determination is consistent with *Sansone* and *Williams*.

[17] In assessing the scope of coverage under the prevailing wage law, California courts have turned to the Davis–Bacon Act for guidance on issues not clearly answered by California authority. (See ****650** *City of Long Beach, supra*, 34 Cal.4th at p. 954, 22 Cal.Rptr.3d 518, 102 P.3d 904.) As our Supreme Court has stated, "California's prevailing wage law is similar to the federal act and share its purposes." (*Ibid.*) "Read as a unit [the prevailing wage law] and [the Davis-Bacon Act] set out two separate, but parallel, systems regulating wages on public contracts." (*Southern Cal. Lab. Management Etc. v. Aubry* (1997) 54 Cal.App.4th 873, 883, 63 Cal.Rptr.2d 106.) Thus, unless the Davis-Bacon Act is fundamentally inconsistent with the portions of the prevailing wage law that one seeks to interpret, the approach taken under the Davis–Bacon Act may provide useful guidance.

Local 104 claims that such an inconsistency exists here because the Davis-Bacon Act limits its application to the site of the work whereas the prevailing wage law contains no such geographical limitation. We are not convinced that any such difference precludes turning to the Davis-Bacon Act for guidance, at least with respect to the treatment of work performed at permanent offsite fabrication facilities. As explained above, the prevailing wage law is ambiguous concerning its geographic scope. There is no clear indication the Legislature rejected some geographical restriction on its application, particularly in the face of statutes that refer to the site of the work. Moreover, the case law that Local 104 claims provides the standard for assessing offsite work —*Sansone* and *Williams* —is premised in significant part upon the material supplier exemption under the Davis-Bacon Act. (*Sansone, supra*, 55 Cal.App.3d at pp. 442–443, 127 Cal.Rptr. 799; *Williams, supra*, 156 Cal.App.4th at pp. 750–751, 67 Cal.Rptr.3d 606.) The material supplier exemption derives from the legislative history of the Davis–Bacon Act

and not from any specific statutory authority in the prevailing wage law. (See *Zachry, supra,* 344 F.2d at p. 358.) In addition, the material supplier exemption turns on the geographic location of the plant. (*Id.* at p. 359 ["the plant is not located at the site of the work"].) Thus, California law already relies upon the Davis-Bacon Act for guidance concerning offsite work and also incorporates criteria based upon the site of the work. Furthermore, the approach taken under federal law to permanent offsite fabrication facilities is consistent with the long-standing ***212** position of the department with respect to such facilities. Under the circumstances, the department did not err in turning to the Davis-Bacon Act for guidance. [8]

Wholly apart from the question of whether the department properly relied upon a federal regulation promulgated under the Davis-Bacon Act, the department's coverage determination is consistent with the principles set forth in *Sansone* and *Williams.* Work performed at a permanent, offsite, nonexclusive manufacturing facility does not constitute an integral part of the process of construction at the site of the public work. Fabrication performed at a permanent offsite facility is independent of the performance of the construction contract because the facility's existence and operations do not depend upon ****651** a requirement or term in the public works contract. By contrast, a temporary facility set up specifically to service a public works contract could be characterized as an integral part of the construction process. Such a temporary facility's existence and purpose is driven entirely by the needs of the public works project.

Local 104 urges that the focus for purposes of deciding whether offsite fabrication is subject to the prevailing wage law should be upon whether the fabricated items are standard or customized. Presumably, Local 104 would argue that items fabricated to custom specifications are more closely integrated in the process of construction than standard items. The facts of this case demonstrate why an attempt to distinguish between customized and standard items may produce greater confusion than clarity. According to Russ Will, it could have purchased at least some of the fabricated sheet **metal** items from standard industry catalogs. Other items were considered custom because of the nonstandard dimensions. Plainly, the standard items are not considered custom simply because Russ Will chose to fabricate them in-house instead of purchasing them from an outside supplier. Further, if the determination of coverage under the prevailing wage law turns on whether fabricated items are custom or standard, the question remains whether the fabrication work is subject to the prevailing wage law simply because some portion of the fabricated items is made to custom specifications. In short, determining whether fabricated items are custom or standard may prove to be a difficult task and may have little bearing on whether fabrication is integrated into the flow of construction.

***213** Moreover, it is unclear why fabricating an item to customized specifications is any more integral to the construction process than fabricating a standard item needed to fulfill a contract. Regardless of whether an item is considered standard or custom, it must be fabricated according to certain specifications. From the perspective of the **worker** who is fabricating items for a particular public works project, the **worker's** role is no more integral to the process of construction when fabricating items with customized specifications than it is when fabricating items with specifications that are considered standard. Accordingly, we are not persuaded that the focus should be on whether fabricated items are standard or custom.

In this case, Russ Will would have qualified as an exempt material supplier but for the fact that it does not sell supplies to the general public. [9] The question arises why coverage under the prevailing wage law in this case should turn on whether Russ Will sells products to the public at large. The sale of products to the public does not bear upon whether the fabrication performed at a permanent facility is integral to the flow of the construction process. If we were to accept Local 104's position, an offsite facility that meets the three-part material supplier test would be exempt from the prevailing wage law but another facility that is similar in all respects except for the sale of supplies to the public would be subject to the requirements of the prevailing wage law. There is no basis to make this distinction if the critical consideration under ****652** California law is whether the offsite operation is integral to the construction process.

The position taken by the department here provides certainty and clarity. As the court explained in *McIntosh v. Aubry, supra, 14 Cal.App.4th at page 1593,* 18 Cal.Rptr.2d 680, "[p]arties must be able to predict the public-works consequences of their actions under reasonably precise criteria and clear precedent." A nebulous standard or set of factors governing whether offsite work is covered by the prevailing wage law would create confusion and uncertainty.

[18] If Local 104 seeks to expand the coverage of the prevailing wage law, the issue and the associated public policy questions are best left to the Legislature. As explained

by the department in the action below, "the California legislature has long been aware of the industry custom and administrative interpretation [governing offsite fabrication], and has not seen fit to mandate coverage for off-site fabrication in permanent shops, despite numerous *214 amendments to the [prevailing wage law] over the past quarter-century." The Legislature is in the best position to judge the effects of extending the prevailing wage law and has done so when appropriate. [10]

[19] We conclude that the department did not err in issuing the coverage determination in this case. Offsite fabrication is not covered by the prevailing wage law if it takes place at a permanent offsite manufacturing facility and the location and existence of that facility is determined wholly without regard to the particular public works project. Because the offsite fabrication at issue here was conducted at Russ Will's permanent offsite facility, and that facility's location and continuance in operation were determined wholly without regard to the project, the work was not done "in the execution" of the contract within the meaning of section 1772.

In light of our conclusion, it is unnecessary to address any additional contentions that Russ Will raises in its appeal.

DISPOSITION

The judgment is reversed and the matter is remanded with directions to enter a new order denying the petition for writ of mandate. Appellant shall recover its costs on appeal.

We concur:

Pollak, J.

Jenkins, J.

All Citations

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Footnotes

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

2 We refer to the department and its director collectively as the department, unless the context requires further specificity.

3 Local 104 seeks judicial notice of 17 items that it claims are relevant to the issues raised on appeal. We grant the request as to administrative decisions of the department and the agency charged with enforcing prevailing wage laws in the State of Washington. (*Evid.Code, § 452, subd. (c)*.) We otherwise deny Local 104's request for judicial notice because the remaining documents were not part of the record before the department. To the extent that Local 104 seeks to supplement the factual record considered by the department, the documents are inappropriate for judicial notice on appeal. In any event, the documents are not relevant to our analysis. (See *Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal.4th 1057, 1063*, 31 Cal.Rptr.2d 358, 875 P.2d 73 [matters subject to judicial notice must be relevant to issues raised on appeal], overruled on another ground in *In re Tobacco Cases II (2007) 41 Cal.4th 1257, 1276*, 63 Cal.Rptr.3d 418, 163 P.3d 106.) For example, Local 104 requests judicial notice of an online edition of a career guide issued by the United States Department of Labor for the purpose of demonstrating that a federal agency considers fabrication to be encompassed within the definition of construction. We do not dispute that construction activities may include fabrication.

4 The *Williams* court went on to set forth factors to consider in assessing coverage under the prevailing wage law and specifically noted that an activity is not necessarily subject to the prevailing wage law simply because a term in a contract requires a subcontractor or contractor to carry out that activity to fulfill the contract. (*Williams, supra, 156 Cal.App.4th at pp. 752, 754 & fn. 4*, 67 Cal.Rptr.3d 606.)

5 The prevailing wage law was first passed as an uncodified measure in 1931 and was approved by the Governor on May 25, 1931. (Stats.1931, ch. 397, p. 910.) At the time of its enactment, the law contained the "in the execution of" language that remains in sections 1772 and 1774 today. (Stats.1931, ch. 397, § 1, p. 910.) The Davis-Bacon Act was approved just a few months earlier, on March 3, 1931. (*Davis-Bacon Act*, Pub.L. No. 71-798 (Mar. 3, 1931) 46 Stat. 1494.)

6 All further references to coverage determinations and public works cases are to decisions of the department. Although the administrative record contains a copy of the *Russell Mechanical* determination (dated Sept. 17, 1984) as well as the department's opinion on reconsideration in that case (dated Sept. 11, 1985), the materials provided to this court do not include any documentation containing an administrative case number for the coverage determination. None of the parties that cited that coverage determination—including the department in its decision on administrative appeal—referred to a case number associated with *Russell Mechanical*. Because there appears to be no dispute that the *Russell Mechanical*

coverage determination contained in the administrative record is an authentic record of action taken by the department, we cite to the determination despite the absence of an administrative case number.

7 As further support for its contention that the department has not taken a consistent position, Local 104 cites a 2002 coverage determination in which the prevailing wage law was applied to restoration work performed at a permanent offsite shop. (*Sacramento State Capitol Exterior Painting Project* (July 18, 2002) Dept. Pub. Works, case No. 2002-034.) In that case, decorative cast iron elements were removed from the State Capitol building and restored at the offsite shop. The coverage determination is inapposite because it involved *repair* or *alteration* instead of *fabrication* of materials for incorporation in a construction project. In distinguishing restoration work from fabrication work performed by a material supplier, the department reasoned that the company performing the restoration work did not fabricate "newly manufactured products" for delivery to a construction site but instead applied labor to cast iron pieces that were already public property. Consequently, the coverage determination is not relevant to the department's approach to offsite *fabrication*.

8 Our conclusion concerning the propriety of relying on the Davis-Bacon Act for guidance is limited to the question of coverage for work performed at permanent offsite fabrication facilities. We do not suggest that the department would be justified in turning to the Davis-Bacon Act as the basis for a coverage determination involving a temporary fabrication facility established to serve a particular public works project. That issue is not before us. Moreover, our analysis should not be interpreted to mean that the prevailing wage law limits coverage to the site of the public work in the same manner as the Davis-Bacon Act other than with respect to permanent fabrication facilities.

9 At oral argument on appeal, counsel for Local 104 stated that an additional reason preventing Russ Will from being considered an exempt material supplier was its custom fabrication of items for the public works project. We disagree. The purportedly custom nature of the fabricated items was not a basis for the department's determination that Russ Will did not qualify as a material supplier. Instead, the determination turned on the fact that Russ Will did not sell products to the general public.

10 At the request of Russ Will and amici curiae Air Conditioning Trade Association et al., we take judicial notice of (1) the Legislative Counsel's Digest ofAssembly Bill No. 514 (2011-2012 Reg. Sess.), and (2) the Legislative Counsel's Digest ofSenate Bill No. 136 (2011-2012 Reg. Sess.). (*Evid.Code, § 452, subd. (a)*.) Russ Will and amici curiae offer these documents for the purpose of demonstrating that the Legislature has been active in amending the prevailing wage law as necessary to clarify its scope.

End of Document

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Index 2013-1 Statewide basic trade journeyman rates

General prevailing wage determinations made by the director of industrial relations

Pursuant to California Labor Code part 7, chapter 1, article 2, sections 1770, 1773, and 1773.1

Download all statewide basic trade determinations (pages 1-2L)

Page	Determination	Holidays, scope of work, travel & subsistence	Predetermined increase
1	Boilermaker-Blacksmith	Select One	Increase
2	Iron Worker	Select One	Increase
2A	Electrical Utility Lineman (a)	Select One	Increase
2A-1	Electrical Utility Lineman (c)	Select One	No increase *
2B-2B2	Telecommunications Technician	Select One	No increase *
2B3	Telephone Installation Worker	Select One	No increase *
2D-2F	Tree Trimmer	Select One	Increase
2H	Stator Rewinder	Select One	No increase *
2I	Electrical Utility Lineman (b)	Select One	No increase *
2J	Metal Roofing	Select One	Increase
2K-2L	Driver (On/Off-Hauling To/From Construction Site)	Select One	No increase *

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+ Includes shift pay determinations.

* A single asterisk after the expiration date of a determination indicates that no increase is required for projects advertised while that determination is in effect. The determination remains in effect until it is canceled, modified, or superceded by a new determination by the Director of Industrial Relations. A new determination will become effective 10 days after it is issued. Contact the Office of the Director - Research Unit at (415) 703-4774 after 10 days from the expiration date, if no subsequent determination is issued.

a. State of California, except Del Norte, Imperial, Inyo, Kern, Los Angeles, Modoc, Mono, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Siskiyou, Tulare and Ventura.

b. Includes Del Norte, Modoc and Siskiyou Counties.

c. Imperial, Inyo, Kern, Los Angeles, Mono, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa

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Barbara, Tulare and Ventura.

To view the above current prevailing wage determinations, current predetermined increases, and the current holiday, advisory scope of work, and travel and subsistence provisions for each craft, you must first download a free copy of the Adobe Acrobat Reader available by clicking on the icon below:

Director's Office of Policy, Research and Legislation
Statewide provision selection page

General prevailing wage determinations made by the director of industrial relations

Pursuant to California Labor Code part 7, chapter 1, article 2, sections 1770, 1773, and 1773.1

Craft: Driver (On/Off Hauling to/from Construction Site)

Page	Classification	Holidays, scope of work, travel & subsistence	Predetermined increase
2K	Mixer Trucks	Select One	No increase *
2L	Dump Trucks	Select One	No increase *

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Driver (mixer trucks) determination and provision selection page

General prevailing wage determinations made by the director of industrial relations

Pursuant to California Labor Code part 7, chapter 1, article 2, sections 1770, 1773, and 1773.1

Craft: Driver (on/off hauling to/from construction site) - Mixer Trucks

Page	Counties	Determination	Holidays, scope of work, travel & subsistence	Predetermined increase
2K-1	Alameda, Contra Costa, Marin, Napa, Solano, and Sonoma Counties	C-MT-261-X-265	Select One	No increase *
2K-2	Alpine, Amador, Calaveras, San Joaquin, and Tuolumne Counties	C-MT-830-261-5	Select One	No increase *
2K-3	Butte, Colusa, El Dorado, Placer, Sacramento, Sutter, Yolo, and Yuba Counties	C-MT-261-150-53	Select One	No increase *
2K-4	Del Norte, Humboldt, and Mendocino Counties	C-MT-261-624-17	Select One	No increase *
2K-5	Fresno, Madera, Mariposa, Merced, and Stanislaus Counties	C-MT-830-261-4	Select One	No increase *
2K-6	Glenn, Lassen, Modoc, Plumas, Shasta, Siskiyou, Tehama, and Trinity Counties	C-MT-830-261-2	Select One	No increase *
2K-7	Imperial and San Diego Counties	C-MT-261-36-95	Select One	No increase *
2K-8	Inyo, Mono, and San Bernardino Counties	C-MT-830-261-12	Select One	No increase *
2K-9	Kern, Kings, and Tulare Counties	C-MT-261-87-119	Select One	No increase *
2K-10	Lake County	C-MT-261-624-18	Select One	No increase *
2K-11	Los Angeles, Orange, and Ventura Counties	C-MT-261-X-258	Select One	No increase *
2K-12	Monterey, San Benito, San Francisco, San Mateo, Santa Clara, and Santa Cruz Counties	C-MT-830-261-3	Select One	No increase *
2K-13	Nevada and Sierra Counties	C-MT-830-261-1	Select One	No increase *
2K-14	Riverside County	C-MT-830-261-11	Select One	No increase *
2K-15	San Luis Obispo County	C-MT-830-261-6	Select One	No increase *
2K-16	Santa Barbara County		Select One	No increase *

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C-MT-261-186-15 Select One

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GENERAL PREVAILING WAGE DETERMINATION MADE BY THE DIRECTOR OF INDUSTRIAL RELATIONS PURSUANT TO CALIFORNIA LABOR CODE PART 7, CHAPTER 1, ARTICLE 2, SECTIONS 1770, 1773 AND 1773.1 FOR COMMERCIAL BUILDING, HIGHWAY, HEAVY CONSTRUCTION AND DREDGING PROJECTS

CRAFT: DRIVER (ON/OFF-HAULING TO/FROM CONSTRUCTION SITE)

Determination: C-MT-261-X-258-2009-2
Issue Date: August 22, 2009
Expiration date of determination: June 30, 2010* Effective until superseded by a new determination issued by the Director of Industrial Relations. Contact the Division of Labor Statistics and Research at (415) 703-4774 for the new rates after 10 days from the expiration date, if no subsequent determination is issued.
Localities: All localities within Los Angeles, Orange and Ventura Counties.

		Employer Payments					Straight-Time		Overtime Hourly Rate		
Classification	Basic Hourly Rate	Health And Welfare	Pension	Vacation And Holiday[d]	Training	Other	Hours	Total Hourly Rate	Daily (1½ X)	Saturday/ Holiday (1½ X)	Sunday[e] (2 X)
Ready Mix Driver[a]	$21.25	$4.60[b]	$3.44	$0.41[c]	-	-	8.0	$29.70	$40.33	$40.33	$50.95

[a] New hires will be subject to employment at hourly rates that are four dollars ($4.00) less, three dollars ($3.00) less, two dollars ($2.00) less, and one dollar ($1.00) less than the straight time hourly rate for time periods of twelve (12) months each until they reach the Journeyman basic hourly rate.
[b] The contribution applies to all hours until $796.50 is paid for the month.
[c] $0.98 after 4 months of service
$1.39 after 1 year of service
$1.80 after 7 years of service
$2.21 after 14 years of service
[d] Includes $0.57 for Holidays after four (4) months, which would be deducted from the Vacation/Holiday rate if you choose to adopt the paid days off enumerated in the Holiday Provisions.
[e] Emergency work and breakdown on Sundays shall be paid at time and one-half (1½x) the straight time rate.

RECOGNIZED HOLIDAYS: Holidays upon which the general prevailing hourly wage rate for Holiday work shall be paid, shall be all holidays in the collective bargaining agreement, applicable to the particular craft, classification, or type of worker employed on the project, which is on file with the Director of Industrial Relations. If the prevailing rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided in Section 6700 of the Government Code. You may obtain the holiday provisions for the current determinations on the Internet at http://www.dir.ca.gov/DLSR/PWD. Holiday provisions for current or superseded determinations may be obtained by contacting the Prevailing Wage Unit at (415) 703-4774.

TRAVEL AND/OR SUBSISTENCE PAYMENT: In accordance with Labor Code Sections 1773.1 and 1773.9, contractors shall make travel and/or subsistence payments to each worker to execute the work. You may obtain the travel and/or subsistence requirements for the current determinations on the Internet at http://www.dir.ca.gov/DLRS/PWD. Travel and/or subsistence requirements for current or superseded determinations may be obtained by contacting the Prevailing Wage Unit at (415) 703-4774.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *GOVERNOR*
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STATISTICS & RESEARCH
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

ADDRESS REPLY TO:
P.O. Box 420603
San Francisco CA 94142-0603

SCOPE OF WORK PROVISION

FOR

READY MIX DRIVER

IN

LOS ANGELES, ORANGE AND VENTURA COUNTIES

The information in this packet is not based on a collective bargaining agreement.

C-MT-261-X-258

DICTIONARY OF OCCUPATIONAL TITLES (4th Ed., Rev. 1991) -- OCCUPATIONAL GROUP ARRANGEMENT

900 CONCRETE-MIXING-TRUCK DRIVERS

This group includes occupations concerned with driving a truck and controlling a mounted concrete mixer to mix concrete and transport it to construction sites and dumping mixed concrete into chutes leading to forms.

900.683-010 CONCRETE-MIXING-TRUCK DRIVER (construction) alternate titles: batch-mixing-truck driver; moto-mix operator; ready-mix-truck driver; transit-mix operator

Drives truck equipped with auxiliary concrete mixer to deliver concrete mix to job sites: Drives truck under loading hopper to receive sand, gravel, cement, and water and starts mixer. Drives truck to location for unloading. Moves levers on truck to release concrete down truck chute into wheelbarrow or other conveying container or directly into area to be poured with concrete. Cleans truck after delivery to prevent concrete from hardening in mixer and on truck, using water hose and hoe. May spray surfaces of truck with protective compound to prevent adhering of concrete. May assemble cement chute.
GOE: 05.08.03 STRENGTH: M GED: R3 M1 L1 SVP: 3 DLU: 86

Driver (dump trucks) determination and provision selection page

General prevailing wage determinations made by the director of industrial relations

Pursuant to California Labor Code part 7, chapter 1, article 2, sections 1770, 1773, and 1773.1

Craft: Driver (on/off hauling to/from construction site) - Dump Trucks

Page	Counties	Determination	Holidays, scope of work, travel & subsistence	Predetermined increase
2L-1	Alameda, Contra Costa, Del Norte, Humboldt, Lassen, Modoc, San Francisco, San Mateo, Santa Clara, Shasta, Siskiyou, and Trinity Counties	C-DT-830-261-7	Select One	No increase *
2L-2	Alpine, Amador, Calaveras, El Dorado, Fresno, Kings, Madera, Mariposa, Merced, Nevada, Placer, Sacramento, San Joaquin, Sierra, Stanislaus, Sutter, Tulare, Tuolumne, and Yuba Counties	C-DT-830-261-5	Select One	No increase *
2L-3	Butte, Colusa, Glenn, Lake, Mendocino, Plumas, and Tehama Counties	C-DT-830-261-8	Select One	No increase *
2L-4	Imperial, Inyo, Los Angeles, Mono, Orange, Riverside, San Bernardino, and San Diego Counties	C-DT-830-261-10	Select One	No increase *
2L-5	Kern, Monterey, San Luis Obispo, Santa Barbara, Ventura Counties	C-DT-830-261-6	Select One	No increase *
2L-6	San Benito and Santa Cruz Counties	C-DT-830-261-9	Select One	No increase *
	Marin, Napa, Solano, Sonoma, and Yolo Counties	Important Notice February 22, 2009		

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CRAFT: DRIVER (ON/OFF-HAULING TO/FROM CONSTRUCTION SITE)

Determination: C-DT-830-261-10-2009-1
Issue Date: February 22, 2009
Expiration date of determination: March 3, 2010* Effective until superseded by a new determination issued by the Director of Industrial Relations. Contact the Division of Labor Statistics and Research at (415) 703-4774 for the new rates after 10 days from the expiration date, if no subsequent determination is issued.
Localities: All localities within Imperial, Inyo, Los Angeles, Mono, Orange, Riverside, San Bernardino and San Diego Counties.

		Employer Payments					Straight-Time		Overtime Hourly Rate	
Classification	Basic Hourly Rate	Health And Welfare[a]	Pension	Vacation And Holiday[b]	Training	Other	Hours	Total Hourly Rate	Daily (1½ X)[c]	Sunday/ Holiday (1½ X)
Driver: Dump Truck	$17.00	$2.05	$0.085	$0.33	-	-	8.0	$19.465	$27.965	$27.965

[a] The contribution applies to all work up to $355.00 per month.
[b] $0.65 after 2 years of service
$0.98 after 5 years of service
$1.31 after 9 years of service
[c] Rate applies to work in excess of eight (8) hours daily and forty (40) hours weekly.
*There is no predetermined increase applicable to this determination.

RECOGNIZED HOLIDAYS: Holidays upon which the general prevailing hourly wage rate for Holiday work shall be paid, shall be all holidays in the collective bargaining agreement, applicable to the particular craft, classification, or type of worker employed on the project, which is on file with the Director of Industrial Relations. If the prevailing rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided in Section 6700 of the Government Code. You may obtain the holiday provisions for the current determinations on the Internet at http://www.dir.ca.gov/DLSR/PWD. Holiday provisions for current or superseded determinations may be obtained by contacting the Prevailing Wage Unit at (415) 703-4774.

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DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STATISTICS & RESEARCH
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San Francisco, CA 94102

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ADDRESS REPLY TO:
P.O. Box 420603
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SCOPE OF WORK PROVISIONS

FOR

DRIVER:
DUMP TRUCK

IN

IMPERIAL, INYO, LOS ANGELES, MONO, ORANGE, RIVERSIDE, SAN BERNARDINO AND SAN DIEGO COUNTIES

The information in this packet is not based on a collective bargaining agreement.

DICTIONARY OF OCCUPATIONAL TITLES (4th Ed., Rev. 1991) -- OCCUPATIONAL GROUP ARRANGEMENT

902 DUMP-TRUCK DRIVERS

This group includes occupations concerned with driving a dump truck to transport sand, gravel, coal, and similar cargo.

902.683-010 DUMP-TRUCK DRIVER (any industry)

Drives truck equipped with dump body to transport and dump loose materials, such as sand, gravel, crushed rock, coal, or bituminous paving materials: Pulls levers or turns crank to tilt body and dump contents. Moves hand and foot controls to jerk truck forward and backward to loosen and dump material adhering to body. May load truck by hand or by operating mechanical loader. May be designated according to type of material hauled as Coal Hauler (any industry); Dust-Truck Driver (any industry); Mud Trucker (steel & rel.). May be designated according to type of equipment driven for off-highway projects as Dump-Truck Driver, Off-Highway (any industry).
GOE: 05.08.01 STRENGTH: M GED: R3 M1 L1 SVP: 2 DLU: 80

Frequently asked questions - Off-Site Hauling

Legal Background Regarding Coverage of Off-Site Hauling

Off-the-site hauling is not generally covered work but has been found to be covered work in limited and specific circumstances by the Director of Industrial Relations, the courts and where covered under Labor Code section 1720.3. The following rate setting questions and answers assume that the prevailing wage requirements apply to the hauling work being performed. (For questions concerning the applicability of the prevailing wage requirements to the off-site hauling work, please see the Director's prevailing wage coverage determinations posted at http://www.dir.ca.gov/dlsr/PubWorkDecision.htm).

Actual coverage of workers is determined by coverage decisions and enforcement decisions by the Director of Industrial Relations as well as judicial opinions. These include:

- O. G. Sansone v. Department of Transportation (1976) 55 Cal.App.3d 434
- Williams v. SnSands Corporation (2007) 156 Cal.App.4th 742

Public Works Case No. 99-037, Alameda Corridor Project, A&A Ready Mix Concrete and Robertson's Ready Mix Contract (April 10, 2000) (finding delivery drivers of ready mix suppliers not subject to prevailing wage requirements).

PW Case 2002-016, Materials Hauling - Clear Lake Basin 2000 Northwest Regional Wastewater Treatment Facility Project - Lake County Sanitation District, (8/12/02), (drivers are covered when hauling from a dedicated yard)

Public Works Case No. 2008-027, On-Haul and Off-Haul to and from the Friendly Senior Center-Abatement and Demolition Project-City of Morgan Hill (10/31/08), discussing when off and on hauling is deemed covered work)

04-0180 PWH, Triple E Trucking (11/13/2008), (requiring the hauler himself to engage in immediate incorporation to be entitled to prevailing wages.)

Prevailing Wage Questions and Answers Regarding Off-Site Hauling

Q. Will the new Driver (On/Off Hauling To/From Construction Site) rates replace the Teamster (construction site) rates and the superseded six county Driver determinations as the default rate for off the site hauling as of March 4, 2009?

A. Yes. In the absence of trucking rates for other types of materials or for different types of trucks involving On/Off Hauling To/From the Construction site, the off-the-site rates apply. For covered work that was advertised for bid prior to March 4, 2009, the on-site rate will apply except for the six counties that had an off-site rate (Labor Code section 1773.6). The new On/Off Hauling rates are not applicable to projects advertised for bids prior to March 4, 2009.

The date of notice or call for bids also referred to as the bid advertisement date is defined as the date the first notice inviting bids was published in a newspaper of general circulation or promulgated in a legally sufficient manner which results in a contract being awarded with or without competitive bidding (Title 8, California Code of Regulations section 16000).

Q. Will the Driver (On/Off Hauling To/From Construction Site) rates apply to truck drivers operating trucks in addition to dump trucks and ready mix trucks?

A. Yes. The dump truck rates at their minimums will apply to other types of trucks performing off-the-site hauling (to or from a construction site) except for ready mix trucks which have their own prevailing wage determination.

Q. Will the Driver (On/Off Hauling To/From Construction Site) rates apply to drivers when they perform hauling to or away from the job site while working for an on-site contractor?

A. Yes. The off-site hauling rate(s) is the minimum rate of pay required for this type of work. In support of the off-site rate being paid, contractors are required to maintain documentation including the hours worked for each worker regarding the craft, classification or type of work being performed.

Q. What rate (the on-site or the off-site) applies to drivers who pick up materials from a dedicated material supply source that was specified in the construction contract documents?

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A. This question will require the Director to determine coverage of the work and the appropriate rate to be paid based on specific facts and circumstances such as the actual location of the dedicated facility and other relevant information. At this time, it is not possible to answer this question in a general manner.

Q. Will the Driver (On/Off Hauling To/From Construction Site) rate(s) apply to drivers who haul refuse from the construction site?

A. Yes. The Driver (On/Off Hauling To/From Construction Site) rate(s) will apply to drivers who haul refuse away from the construction site. See Labor Code section 1720.3; PW Case 2006-017, Off-hauling of Contaminated and Clean Soil - Long Beach Unified School District, Avalon School, (6/26/07), (explaining that off-haul of contaminated soil to a land fill is covered public work under Labor Code section 1720.3); Public Works Case No. 2008-027, On-Haul and Off-Haul to and from the Friendly Senior Center-Abatement and Demolition Project-City of Morgan Hill (10/31/08).

Q. What rate (on-site or off-site) applies to a driver who performs off-the-site hauling for:

- 1. Material supply company?
- 2. For-hire trucking company?
- 3. A construction company who also operates a legally separate and independent material supply company and does not interchange the drivers between the two companies?

A. The answer to all the questions above is the off-site rate but only when the work itself is covered.

Q. What rate (the on-site or the off-site) applies when a driver who works for a construction company who uses the same driver to haul material on the site of construction and also perform work off the site that is covered by prevailing wages?

A. The off-site rate will be the minimum rate of pay for workers employed by contractors and subcontractors when those workers are performing covered off-site work. The on-site activities by these workers would require the on-site rate.

Q. Do the dump truck rates apply to all trucks delivering or picking up materials to and from a construction site irrespective of their size or tonnage, or the material being hauled or the type of truck?

A. The answer is yes until rates for these other types of trucks or sizes or types of material differentials are published as prevailing. Note that mixer truck has its own prevailing wage rate.

Q. What location determines the appropriate rate of pay (job site, material supply source, off-the-site delivery point, employer's off-the-site yard or shop, etc.)?

A. The geographic location of the covered job site determines the county or area rate to be applied.

Q. Does the geographic location of the job site prevail when the driver drives through different counties with different rates?

A. Yes. The rate is determined by the location of the job site.

Q. What Prevailing Wage Rate applies when the driver picks up material from a covered job site in one county and delivers it to another covered job site that has a different county rate?

A. The employer should pay the off-site rate required by the job site where the public works construction contract requires the removal of the material (originating site) to be delivered to the second covered site.

Q. Is an employee driving for an intrastate or interstate trucking company entitled to prevailing wages when performing covered work?

A. Yes. Such drivers are subject to all the prevailing wage requirements including the overtime rates. The Prevailing Wage determinations set forth the overtime rates and requirements but only when the work itself is deemed to be covered. Wage and hour exemptions that may be otherwise applicable are not available for covered public works.

Q. May an employer pay more than the indicated health & welfare, pension, vacation & holiday rates and other such employer payments?

A. Yes, the employer may pay higher rates. The prevailing wage rates are minimums. The employer may pay lower benefit rates than indicated on the determination and transfer the difference to the basic hourly rate. In no case can the total compensation be less than the total hourly rate which includes the total of the basic hourly rate and the employer payments (Labor Code sections 1771 and 1774). There are two caveats: (1) The employer may not pay less than the specified published basic hourly rate (the wage rate). (2) The other employer payments must be legitimate meaning that they must be irrevocably paid to third person or trustee pursuant to a plan, fund or program for the benefit of the employee (Labor Code section 1773.1).

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STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Kern Asphalt Paving & Sealing Co., Inc. Case No. 04-0117-PWH

From an Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Kern Asphalt Paving & Sealing Company (hereinafter "Kern Asphalt") timely requested review of a civil wage and penalty assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("Division") with respect to the New Tehachapi High School Project ("Project"). A hearing on the merits was conducted on October 13 and 14, 2004, and on June 15 and 16, 2005, in Bakersfield, California, before Hearing Officer John Cumming. Kern Asphalt appeared through attorney Ray T. Mullen. The Division appeared through attorneys Melanie V. Slaton and Thomas R. Fredericks. The parties presented evidence and arguments and filed post-hearing briefs. Now for the reasons set forth below the Director of Industrial Relations issues this decision modifying and affirming the Assessment in part and remanding it in part.

FACTS AND PROCEDURAL HISTORY

This case arose out of the construction of a new high school in the City of Tehachapi in Kern County. The Tehachapi Unified School District contracted with Kern Asphalt to do paving on the Project, which involved grading the site and obtaining, applying, and grading paving materials at the site. Kern Asphalt used about 20 employees over the course of a year to perform this work. The Assessment concerns two groups of workers: truck drivers who picked up asphalt and base materials from a commercial supplier and delivered those materials to the Project site, and paving crew members who did grading and paving at the construction site. These groups raise two distinct sets of issues. For the truck drivers, the question presented is whether their

work was subject to prevailing wage requirements. For paving crew members, the questions presented are whether they are entitled to prevailing wages for travel time between Kern Asphalt's shop in Bakersfield and the Project site, and whether they are entitled to additional wages for time that management deducted from hours reported on time cards. Also at issue are the proper work classification and pay rates due to paving crew member Kenneth McLey and the propriety of penalties and liability for liquidated damages as to all assessed wages and violations.

Truck Drivers: The contract between the Tehachapi School District and Kern Asphalt required in part that Kern Asphalt provide the materials and transportation services for the paving work. Kern Asphalt originally intended to use its own base material made by company president C. J. Watson. However, because that material was not suitable for use on this Project, Kern Asphalt instead had to obtain asphalt and base materials from Granite Construction, a commercial supplier in Arvin who sold such materials to the general public. For the most part, Kern Asphalt used its own employees and trucks to pick up the materials from Granite Construction and deliver them to the job site.[1]

Kern Asphalt's drivers would pick up their trucks in the morning at Kern Asphalt's shop in Bakersfield and then drive to Granite Construction in Arvin to pick up asphalt or base materials. From there they drove to the Project site, a distance of about 26.5 miles that required between 45 minutes and 1.25 hours in driving time. The materials would be unloaded at the site and, most of the time, applied immediately rather than stockpiled for later use. In most instances, once a truck was unloaded, the driver would return to Granite Construction, repeating this cycle up to five or six times in a day.

Truck driver Wayne Caldwell testified that he customarily hauled the materials in a "belly dump" truck that opened from the bottom for unloading and could be adjusted to allow for a precise flow of materials as the truck moved over the area where those materials were being applied. Kern Asphalt's drivers occasionally got out of their trucks to assist paving crew members with the spreading and applying of materials. At times, material would be stockpiled (that is left in one pile) if there was no place ready for it to be applied. In those instances, one driver

[1] Kern Asphalt used other subcontract haulers to deliver materials to the site. The subcontract haulers were not covered in the Division's Assessment and, as seen below, would present a different analysis.

would remain at the site to operate a small dump truck to move the materials where needed by the paving crew, while other drivers returned to Arvin for additional loads. Kern Asphalt's daily time cards include some references to drivers spending time moving dirt or operating other equipment at the construction site.[2] However, there is no detailed or consistent pattern of reporting to show how much time drivers actually spent on the construction site or what they specifically did while there.

Kern Asphalt paid its own truck drivers their usual rate of $12.00 or $13.00 per hour for their on-haul work. Kern Asphalt did not regard this work as subject to prevailing wage and did not include the drivers who performed this work on the certified payroll records the company was required to prepare pursuant to Labor Code section 1776.[3] In its Assessment, the Division found that these drivers were entitled to the prevailing wage rate for Teamsters for all hours worked, at a total straight-time rate of $34.11 per hour through June 30, 2002, and $34.96 per hour thereafter.[4] Kern Asphalt presented no evidence that a different prevailing wage rate should apply. The Division used the hours shown on time cards and payroll journal entries in determining prevailing wage liabilities for the truck drivers.[5]

Reporting and Travel Time: The parties agree that paving crew members would, on most days, report first to Kern Asphalt's shop in Bakersfield, where they were required to punch in on a time clock and then were transported in company vehicles to the construction site. The parties dispute whether the company required the workers to report first to the shop or whether this was a voluntary accommodation for workers who did not want to drive to the construction site on their own.

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[2] A comparison of the time cards and Kern Asphalt's certified payroll records shows that at times truckers were paid prevailing wage rates for some but not all reported hours of on-site work.

[3] All statutory references hereinafter are to the Labor Code, unless otherwise indicated.

[4] Both total hourly rates include the training fund contribution required under section 1777.5(m), although no separate liability for training fund contributions is stated in the Division's audits.

[5] The records apparently did not include additional time that Caldwell said he spent inspecting his truck and sometimes loading equipment before the official start of the work day. The Division also accepted Kern Asphalt's regular deduction of one-half hour for lunch, even though individual trip records suggest that drivers did not always have time for a full half hour off-duty break. (*See*, §512(a) and Wage Order No. 9-2001, §11 [Cal.Code Regs., tit.8, §11090(11)(C)].)

It is undisputed, however, that employees were required to punch in on the time clock or have someone punch in for them. A sign posted above the time clock stated "No punch-in, no pay." Employees typically punched in upon arrival and then drank coffee and talked or did preliminary work activities such as loading equipment on trucks while waiting for the start of regular work day at 7:00 a.m. Company vice president Jayson Watson testified that workers would be briefed on the day's activities and then dispatched to their job sites at this time.

In addition to punching in, workers customarily would write in their starting work times (usually 7:00 a.m.) and later their stopping times on the front of their time cards. Kern Asphalt usually paid workers for the hours written on their time cards (rather than time clock punch-in and punch-out times). Kern Asphalt regularly deducted a half hour from the reported total for an unpaid lunch break and occasionally deducted other time based on some discrepancy between reported hours and what management believed an employee had actually worked. Kern Asphalt paid straight time prevailing rates for up to eight hours per day for work performed at the Project site. Any hours over eight in connection with the Project (whether before, after, or while on site) was regarded as travel time, which Kern Asphalt paid at the employees' regular, non-prevailing wage, overtime rates. According to Jayson Watson, Kern Asphalt did not regard the travel time as compensable work time but paid it as an additional benefit to workers.

The driving distance from Kern Asphalt's shop to the job site in Tehachapi was just over 46 miles; witnesses estimated the average round trip travel time was between 1.5 to 3 hours. While some time cards recorded up to 13 or more hours in a given day, all hours in excess of eight were designated as breaks or travel time for pay purposes. Jayson Watson testified that employees were not permitted to work overtime without prior authorization, and that very little overtime was required for the work on the Project.

Terry Ward and Kenneth McLey were the two-man crew that did most of the paving work. They rode together to the site in a company truck driven by Ward, who was also McLey's foreman. Ward testified that sometimes he would pick up McLey at his home on the way to the Project and, on those occasions, would punch in McLey's time card. Ward also testified that the two sometimes would stop for breakfast on their way to the site after they had reported and were on company time. However, McLey testified that he could not recall being picked up at home by

Ward, and said instead that it was he who would punch in Ward's card when Ward was late.[6] McLey testified that they were required to punch in at the yard and were supposed to be there and ready to leave for the job site at 7:00 a.m. McLey testified that he worked until Ward said it was time to stop work.

Kenneth McLey's Duties on the Project: Kern Asphalt classified McLey exclusively as a Laborer for all but one day of work, while it classified Ward as an Operating Engineer for all but three days. The Division classified both McLey and Ward as Operating Engineers for all work performed on the Project, with the exception of three days in late December 2002, for which it accepted the Laborer classification for both.

McLey characterized his own role as helping Ward. Ward more typically operated the heavy equipment with McLey doing laborer work on the ground. However, they agreed that McLey spent a considerable amount of time operating heavy equipment on the Tehachapi Project. McLey testified that he operated the same equipment used by Ward on the Project, with the exception of the motor grader.

Ward estimated that McLey spent about 25 percent of his time on the Project as an operating engineer and the other 75 percent as a laborer. However, Ward also estimated that McLey operated a skip loader about 25 percent of the time, without disputing that McLey may also have operated other equipment. McLey offered the opposite ratio as his estimate (*i.e.* that he spent about 75 percent of his time as an operating engineer and 25 percent as a laborer).[7] McLey testified in response to a specific question that he probably spent about 10 percent of his time with a shovel, noting that there was not a lot of "dirt work" on this Project. However, he gave no estimate of the time he spent checking grade while Ward operated the motor grader.

Caldwell testified that he saw McLey on equipment "every day" and also saw both Ward and McLey on the ground with a shovel. The time records offer no meaningful information

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[6] Ward acknowledged that the "No Punch-in No Pay" sign was probably for him.

[7] The same ratio is reflected in an Employee Questionnaire and in the Division's notes from a May 2004 telephone interview with McLey.

about the type of work being performed on any given day.[8]

Other Issues: On the fronts of their time cards, workers would write in the date, their starting and stopping times, and some notation about the jobs they were working on, which usually included a job number. Some cards included notations about time taken off for lunch while others did not. Most workers also totaled their hours for the day. Time cards later would be checked by someone in management, who would write a different total at or near the bottom of the card, usually with a circle around it. The worker then would be paid for the circled number of hours, which was often just the net total after deducting a half-hour for lunch from the worker's total. However, sometimes the circled total reflected a further deduction that could not be attributed to anything appearing on the face of the card.

Jayson Watson and company controller Sandra Eichenhorst testified that the hours shown on the cards would be reviewed with workers and adjusted if there was some clear discrepancy between what the worker wrote down and what was indicated by other information such as time clock punch times, what a co-worker reported for the same job, or what they understood the day's work should have entailed.[9] Kern Asphalt offered no clearer explanation for why any adjustment was made.

In auditing Kern Asphalt's compliance with prevailing wage requirements, the Division relied on the information shown on the fronts of daily time cards provided by Kern Asphalt.[10] The Division identified weekend and holiday work that was not reported as such on Kern Asphalt's certified payroll records or compensated at the required prevailing rates. The Division also identified work which it believed was performed on the Project but was not reported as such by Kern Asphalt. However, Kern Asphalt presented evidence that it had worked on another non-

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[8] A typical entry for McLey was "graded Tehachapi," while Ward's cards would typically say "grade by the hour" or sometimes "grade base on contract" or very occasionally state that they graded a specific part of the Project, such as tennis courts.

[9] Eichenhorst did not start working for Kern Asphalt until near the end of the Tehachapi Project.

[10] The hearing testimony establishes that employees were paid based on the information on the front of the cards, with the time-clock notations used to verify that employees were actually reporting to work by the scheduled start time. The company may have used the time-clock information to reduce hours recorded by a worker on the front of a card, but ultimately the Division based its audit on the time recorded on the front. Neither party offered the back of any card to rebut what was recorded on the front.

public works project in the town of Tehachapi, and it offered a reconciliation of dates and work erroneously attributed to the Project that was largely accepted by the Division.

The Assessment, Penalties, and the Parties' Contentions: The Division received complaints from Caldwell concerning his failure to receive prevailing wages and from McLey concerning his misclassification and failure to receive overtime or holiday pay for work performed on this Project. Following an investigation by Deputy Labor Commissioner Sherry Gentry, the Division issued its Assessment dated May 19, 2004, which found Kern Asphalt liable for back wages and penalties under sections 1775 and 1813. The Assessment was adjusted downward during the course of the hearing proceedings, primarily in response to additional information presented by Kern Asphalt.

The Division assessed penalties under section 1775 at the maximum rate of $50 per violation, citing the extent of hours "shaving (*i.e.* paying for less than reported by a worker), the failure to report and pay prevailing rates to the truck drivers, the amount of underpaid wages, and the apparent willfulness demonstrated by the travel time deductions. The Division did not consider any prior history of violations when setting the penalty amount, though it offered testimony regarding prior assessments during the hearing. Kern Asphalt acknowledged past experience with public works but did not admit any prior violations.

The Division also assessed penalties under section 1813 at the prescribed statutory rate of $25 per violation for all days in which workers failed to receive the prevailing overtime rates for overtime hours worked, which were most of the days covered in the Assessment.

Based on the Division's amendments and the parties' stipulations, the amounts at issue when this matter was submitted were as follows:

Employee	Unpaid Wages	§1775 penalties	§1813 penalties
Truck Drivers:			
Black, Larry	$ 3,781.23	$ 850	$ 300
Fenn II, Jeffrey	$ 324.87	$ 250	$ 125
Pettit, Rodney	$ 5,601.25	$ 2,550	$ 750
Wagner, Danny	$ 2,166.30	$ 450	$ 200
Williams, Dwight	$ 4,243.13	$ 1,000	$ 400
Caldwell, Wayne	$ 2,337.82	$ 650	$ 275

Black, Don	$ 1,427.77	$ 450	$ 175
Taylor, J.	$ 237.21	$ 100	$ 25
Truck Driver subtotals	*$20,119.58*	*$6,300*	*$2,250*
Paving Crew:			
Black, Kevin	$ 180.76	$ 100	$ 50
Brown, John	$ 286.45	$ 250	$ 125
Cardona, Francisco	$ 1,271.76	$ 550	$ 225
Cervantes, Carlos	$ 2,445.44	$ 1,700	$ 800
Cuevas, Juan	$ 549.47	$ 400	$ 175
Flores, Daniel	$ 227.49	$ 250	$ 125
Frye, Duane	$ 3,531.08	$ 1,850	$ 900
Harms, Marvin	$ 1,171.87	$ 350	$ 125
Hiler, Danny	$ 992.45	$ 450	$ 225
Hood, Alexander	$ 657.44	$ 550	$ 275
McLey, Kenneth	$29,179.88	$ 9,650	$ 4,775
Stevens, Larry	$ 566.98	$ 450	$ 200
Ward, Terry	$10,236.52	$ 9,850	$ 4,900
Paving Crew subtotals	*$51,297.59*	*$26,400*	*$12,900*
TOTALS[11]	$70,417.17	$32,700	$15,150

Kern Asphalt's positions with respect to the violations were that (1) it was under no legal obligation to pay prevailing wages to its truck drivers who essentially were functioning as material suppliers; (2) Kern Asphalt was under no obligation to pay its other workers for travel time because they were not required to ride to the job site in company vehicles, (3) McLey was properly paid as a Laborer or at most spent 10 to 15 percent of his time performing work as an Operating Engineer; and (4) it had identified numerous specific errors in the Assessment, which the Division conceded. Kern Asphalt asserted that there was no evidence it either willfully or intentionally sought to evade prevailing wage requirements. Kern Asphalt also argued that there could be no separate penalty assessment under section 1813, since any overtime hours were for travel time, which it was not required to pay.

[11] These figures are based on the Revised Audit dated 6/17/05 that was attached as Appendix 1 to the Division's Opening Post-Hearing Brief as further modified with respect to Danny Wagner in footnote 1 of the Division's Reply Brief filed on March 3, 2006.

There is no evidence that any of the unpaid wages assessed by the Division have been paid by Kern Asphalt, making Kern Asphalt liable for liquidated damages in an amount equivalent to the back wages found due. No additional evidence or argument pertaining to the imposition or waiver of liquidated damages was offered by Kern Asphalt.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction contracts.

> 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*, 1 Cal.4th 976 at 987 (1992) [citations omitted].)

The Division 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(a), and *see Lusardi, supra.*)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate, and section 1775(a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1(a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within 60 days following service of a civil wage and penalty assessment under section 1741.

When the Division determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor

shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect."

Kern Asphalt's Truck Drivers Are Entitled To Prevailing Wages For Work Performed On The Tehachapi Project.

In the recent decision, *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, the Court of Appeal said the right to be paid prevailing wages is governed by the plain meaning of sections 1771, 1772 and 1774. Section 1771 requires the prevailing wage be paid to "to all workers employed on public works." Section 1772 provides: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." A public works contractor shall ensure that all workers engaged in "the execution of the contract" receive the prevailing wage. (§1774.) *Williams* began its analysis by interpreting the statutory term "execution":

> In determining legislative intent, courts are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations and quotation marks omitted.] The familiar meaning of "execution" is "the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment" (5 Oxford English Dict. (2d ed.1989) p. 521); "the act of carrying out or putting into effect," (Black's Law Dict. (8th ed.2004) p. 405, col. 1); "the act of carrying out fully or putting completely into effect, doing what is provided or required." (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, the use of "execution" in the phrase "in the execution of any contract for public work," plainly means the carrying out and completion of all provisions of the contract.
>
> (*Williams, supra,* 156 Cal.App.4th at 749- 750.)

Critical to the determination of a right to receive the prevailing wage under sections 1771, 1772 and 1774 is the determination of whether a worker is employed by a contractor or subcontractor:

> The analysis in *O.G. Sansone Co. v. Department of Transportation, supra,* 55 Cal.App.3d 434 (*Sansone*) of who is, and who is not, a subcontractor obligated to comply with the state's prevailing wage law also informs our assessment of the intended reach of the prevailing wage law to "[w]orkers employed ... in the execution of any contract for public work." (§1772.)
>
> (*Ibid.*)

Here, the drivers subject to the Assessment were employed directly by the public works contractor, Kern Asphalt, to perform a function required by the contract, the delivery of acceptable road bed material to the job-site. As such, by the plain meaning of the statute the drivers are employees of a contractor or subcontractor obligated to comply with the state's prevailing wage law. Also, the drivers are performing work "in execution of" of the public works project because the "carrying out and completion of all provisions of the contract" includes the delivery of paving materials to the project site to be used by the paving contractor *Williams, supra.*

Kern Asphalt's challenge to the wages assessed for its truck drivers rests upon two key distinctions found in *Sansone*: (1) Kern Aphalt's drivers hauled materials from a commercial site that was not adjacent to the Tehachapi Project, which is undisputed; and (2) the principal function of Kern Asphalt's drivers was to deliver materials to the site, and they were not involved in the on-site application of those materials, which is disputed. Kern Asphalt argues that these distinctions made its drivers the functional equivalent of independent material suppliers who would not be covered by prevailing wage requirements under the rubric of *Sansone.*[12]

> Critical to *Sansone's* analysis of whether the truck drivers ... were employed "in the execution of [a] contract for public work" (§1772) was whether the trucking companies were bona fide material suppliers conducting an operation truly independent of the performance of the general contract for public work, as opposed to conducting work that was integral to the performance of that general contract. We conclude that what is important in determining the application of the prevailing wage law is not whether the truck driver carries materials *to* or *from* the public works project site. **What is determinative is the role the transport of the materials plays in the performance or "execution" of the public works contract.**
>
> (*Ibid,* 156 Cal.App.4th at 752 (emphasis added).)

Thus, *Sansone*, as interpreted by *Williams,* establishes a "delivery exemption" for employees of bona fide material suppliers. (*Ibid,* 156 Cal.App.4th at 752.) This exemption applies where the truck driver, employed by an independent trucking company, is hauling materials from a bona fide materials supplier **and** the hauled material is "not immediately and directly incorporate" into the ongoing public works project. If either of these conditions is not present, the ex-

[12] Kern Asphalt's supplemental brief also makes an argument about off-hauling work, that is, carrying dirt or refuse from the project site to some other location. However, the Assessment in this case did not involve any off-hauling.

emption does not apply, and on-haul driving is subject to coverage as performed by employees of a contractor or subcontractor obligated to comply with the state's prevailing wage law and as performed in "the execution of the public works contract" as that phrase was interpreted by *Williams*. (Lab. Code, §§1772, 1774.)

As *Williams* now makes clear, Kern Asphalt's truck drivers were entitled to prevailing wages, regardless of whether they assisted the paving crew or whether the materials were immediately used, because they were not employed by a truly independent materials supplier. They were employed directly by Kern Asphalt and they were performing work "in the execution of [Kern Asphalt's] contract for public work" with the Tehachapi Unified School District. (§1772.) There is no argument or evidence that Kern Asphalt itself was operating as a bona fide material supplier independent of its performance of this contract. That ends the inquiry in this case.

Kern Asphalt's Other Workers Were Entitled To Prevailing Wages For All Hours Worked Including Time Designated As Travel Time.

"'Hours worked' means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Cal.Code Regs., tit. 8, §11160.2(J) [governing on-site construction work].) This definition includes "certain periods of time that may not ordinarily be thought of as work-time[.]" 1 Wilcox, *California Employment Law*, section 3.07[1][a][i] (p. 3-57).

In *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, an agricultural employer required employees to meet at designated assembly points from which they were bused in company vehicles to and from the actual work site. No work activity was required, and the bus trip to the fields where the work was performed was likened to an ordinary commute. A unanimous court held:

> When an employer requires its employees to meet at designated places to take its buses to work and prohibits them from taking their own transportation, these employees are "subject to the control of an employer," and their time spent traveling on the buses is compensable as "hours worked." (22 Cal.4th at 587.)

Kern Asphalt distinguishes *Morillon* based on the fact that its employees were free to use any means to get to the construction work site and could stop for breakfast along the way if they

chose, a point not disputed by the Division. This distinction misses the essential point of *Morillon*. The key factor is whether the workers are "subject to the control of [the] employer" rather than whether the employer does or does not require a particular means of transit.

Kern Asphalt's own policy and practice required employees to be at the shop by 7:00 a.m., and Kern Asphalt considered all time thereafter to be paid time. The company had a particular purpose for this requirement, which was to give the workers instructions and dispatch them to their jobs at that time. Thus, all of the time after 7:00 a.m. was subject to Kern Asphalt's control and was compensable. If Kern Asphalt had changed its requirements so that the workers only had to report to the construction site by a certain time, then the travel time might have constituted non-compensable commute time. (*See* §§510(b) ["Time spent commuting to and from the first place at which an employee's presence is required by the employer shall not be considered to be a part of a day's work, ..."].) However, those are not the facts here.[13]

The other question raised is what rate applies to the travel time. The relevant prevailing wage determinations contain no special rate for travel time. In the absence of any evidence to the contrary, the required travel time must be regarded as incidental to the workers' regular duties and payable at the same prevailing rates that apply to the classification associated with those duties.[14] Kern Asphalt has presented no argument or evidence supporting a different rate outside of its contention that it was not obligated to pay for the travel time at all.

Kenneth McLey's Back Pay Entitlement Must Be Reduced.

The Division had no reasonable basis for classifying McLey exclusively as an Operating Engineer for all but three days of work on the Techachapi Project. McLey never said that he worked only as an equipment operator, and no other evidence supports such a determination.

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[13] An employer cannot legitimize its violations after the fact by showing how it could have altered the compensation or other employment conditions to make its pay scheme legal. (*See Hodgson v. Baker* (9th Cir. 1976) 544 F.2d 429, 432-3, *citing Overnight Motor Transportation Co. v. Missel* (1942) 316 U.S. 572, 577; and *see also Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 725-6 [employee's weekly salary compensated him for regular work hours and cannot be redefined after the fact to encompass additional overtime hours].)

[14] Because the workers were entitled to the same prevailing wage rates for travel time as for their other work, it is not necessary to determine which overtime hours at the construction site were improperly attributed to travel (as opposed to actual overtime work on-site) as a rationale for not paying the prevailing overtime rate.

The Division's attempt to defend its determination based on the burden shifting rule of *Hernandez v. Mendoza, supra*, overstates the scope of that holding and its applicability to this case.

The rule in *Hernandez* derives from an earlier U.S. Supreme Court decision in *Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, in which the Court found that an employer's violation of its record keeping responsibility should not have the effect of preventing employees from proving a claim for unpaid wages. The Court then fashioned the following rule.

> In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. (*Id.* at 687-88.)

An aggrieved worker therefore may use imprecise evidence to prove the extent of unpaid wages when the employer fails to keep required records that would show the precise number of hours worked. However, there still must be "sufficient evidence to show the amount and extent of [uncompensated or under-compensated] work as a matter of just and reasonable inference." (*Andersen, supra*, 328 U.S. at 687.) Where a public works employer wants to pay an employee multiple rates based on the work performed, it is the employer's obligation to keep accurate time records. (Lab. Code, §1776(a).)

McLey estimated that he spent 75 percent of his time operating equipment in his original communications with the Division. He repeated this estimate at the hearing but seemed less certain in light of questions that attempted to break the estimate down further by particular work activity. His working partner, Ward, estimated 25 percent of McLey's time was spent operating heavy equipment and 75 percent was spent as a Laborer.

McLey and Ward were clearly the most percipient witnesses of how McLey spent his time, and there is no evidence to suggest that either was testifying dishonestly or trying to contradict the other. It appears far more likely that both offered honest but exaggerated estimates based on their own subjective perceptions and recollection of McLey's work. The same split of

opinion was reflected in McLey's and Ward's opposite estimates of the travel time from the shop to the Tehachapi Project.[15]

It is unlikely that either estimate is accurate. Rather it appears that the most reasonable estimate of McLey's time operating equipment (or of average travel time) lay in the middle between their extreme individual estimates. This leads to the inference and conclusion that McLey likely spent about 50 percent of his time operating heavy equipment on all but the three days in December 2002, when it is undisputed that McLay and Ward only worked as laborers. In light of this conclusion, McLey's back wage entitlement must be adjusted as follows:

Half of total Operating Engineer 2 hours	Diff. between total hourly rates for Op.Eng. 2 and Laborer 1	= (Reduction in entitlement)
Straight time:		
1325 ÷ 2 = 662.5	X ($37.88 – 30.08)	= $ 5,167.50
Overtime:		
453.25 ÷ 2 = 226.625	X ($51.39 – 40.13)	= $ 2,551.80
Double time:		
11.5 ÷ 2 = 5.75	X ($65.49 – 50.18)	= $ 88.03
	Total Reduction in Unpaid Wages	= $ 7,807.33[16]

With this adjustment, the total of unpaid wages due to McLey is $21,376.55. All other wage issues were resolved by stipulation or were unchallenged by Kern Asphalt. Accordingly, the total wages due under the Assessment, as modified and affirmed by this Decision, is $62,609.84.

Kern Asphalt Is Liable For The Full Amount Of Section 1775 Penalties Assessed For Underpayments To Paving Crew Members; But The Division Must Reconsider Penalties Assessed For Underpayments To Truck Drivers.

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[15] McLey seemed quite certain that they regularly covered the 46 mile distance (which included four miles of city streets and traffic lights on the Bakersfield end) in 45 minutes, while Ward, who drove the truck in which McLey rode, thought it took an hour and a half each way.

[16] Since credits for all compensation paid by Kern Asphalt were already reflected in the audit, this is the only adjustment required in McLey's wage entitlement. However, if any party believes a different adjustment is warranted, it may challenge this figure by way of a request for reconsideration under Rule 61 [Cal.Code Regs., tit. 8, §17261].

Section 1775(a) provides in relevant part as follows:

> (1) 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 fifty dollars ($50) 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 ....
>
> (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 ... 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) Whether the contractor ... has a prior record of failing to meet its prevailing wage obligations.
>
> * * *
>
> (D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

Under Rule 50(c) [Cal.Code Regs. tit. 8 §17250(c)], the affected contractor has "the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." Abuse of discretion is established if the Labor Commissioner "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." Code Civ. Proc. §1094.5(b). In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment "because in [his] own evaluation of the circumstances the punishment appears to be too harsh." *Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95 at 107.

The final adjusted total of $32,700.00 in penalties under section 1775 is based on 654 violations assessed at the maximum rate of $50.00 per violation. One hundred twenty-six of the section 1775 violations concern the truck drivers for whom there is no basis to reduce the number of violations. Five hundred twenty-eight violations totaling $26,400.00 in penalties apply to the failure to pay travel time for the paving crew at the prevailing wage. The only change in the wages owed a member of the paving crew is the reduction of McLey's wage entitlement by

about one-fourth. This does not reduce the number of violations because McLey was still underpaid each day because of Kern Asphalt's failure to pay the prevailing wage rate for travel time. The remaining issue is whether the Division abused its discretion in setting the amount of each violation at $50.00. This must be discussed separately for the truck drivers and the paving crew members.

The question of the proper application of sections 1772 and 1774 to the on-haul work performed by Kern Asphalt's truck drivers was recently clarified in *Williams, supra*. The clarification does not excuse Kern Asphalt's failure to pay prevailing wages nor justify a determination by the Director to eliminate the section 1775 penalties altogether. While the failure to pay prevailing wage rates was a good faith mistake, it was not promptly corrected when brought to Kern Asphalt's attention by the Division, which has argued for the current interpretation from the time is served the Assessment. However, this recent clarification in *Williams* may justify a downward adjustment of the penalty amount by the Division. Therefore, the 126 penalties assessed for underpayments to truck drivers at the rate of $50.00 per violation are remanded to the Division for reconsideration and redetermination of the amount only. The Hearing Officer shall retain jurisdiction to hear any timely appeal of the redetermined amount.

The same reasoning does not apply to the remaining penalties, which were also assessed at the maximum rate of $50.00 per violation. In the Division's view, Kern Asphalt deliberately paid for less than all reported work hours, deliberately regarded all overtime hours as "travel" time, and deliberately paid far less than the prevailing rate for the so-called travel time, all with an intent to evade or limit its prevailing wage obligations rather than based on any good faith mistake. Aside from its arguments on the merits, Kern Asphalt challenges this penalty assessment based on the audit errors identified by Eichenhorst, which resulted in reductions of about $4,000.00 in the total wage assessment and another $1,000.00 in penalties prior to the hearing.

Substantial evidence supports the Division's determination, and Kern Asphalt has failed to carry its burden to show that the Division abused its discretion is setting the penalty amount. To the extent Eichenhorst's reconciliation resulted in a reduction in the number of violations, it also eliminated any penalties associated with those violations. However, the bulk of violations remains, and the aggregate numbers and types of violations provide grounds for concluding that

Kern Asphalt deliberately sought to evade some of its prevailing wage obligations at the expense of its workers. In particular, Kern Asphalt always paid prevailing wages at regular non-overtime rates, while paying reduced overtime rates for work performed both *before* and after the eight hours attributed to work on the Tehachapi Project. In all but a handful of instances Kern Asphalt also refused to recognize that workers worked more than eight hours at the Project site, automatically attributing any excess reported hours to travel time without any evidence that travel on a particular day was extended. This attribution appears to have been for the purpose of justifying the payment of lower rates. Kern Asphalt also offered no defense to the Division's determination that it under-reported work hours and failed to compensate workers properly for a number of instances of holiday and weekend work.

The assertion that the Division waived penalties when settling a companion case is not evidence of an abuse of discretion in this one. Whatever reasons the parties may have had for that settlement were not shown and, as a general rule, would not be relevant or admissible here. (*See* Evid. Code, §1152 and *Brown v. Pacific Electric Ry. Co.* (1942) 79 Cal.App.2d 613.)

Kern Asphalt Is Liable For All Penalties Assessed Under Section 1813.

Section 1813 states as follows:

> The contractor ... shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the ... contractor ... for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. ...

The term "provisions of this article" in section 1813 above refers specifically to sections 1810 through 1815, which pertain to working hours on public works projects. Section 1810 specifies that eight hours of labor is "a legal day's work," and section 1811 limits work to eight hours in a day or 40 hours in a week "except as ... provided ... under Section 1815." Section 1815 states as follows:

> Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in ex-

cess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1½ times the basic rate of pay.

The failure to pay required prevailing overtime rates constitutes a distinct violation under section 1813, even though the contractor may also have been penalized under section 1775 for paying less than the required prevailing rate. Overtime requirements serve a distinct purpose from minimum wage requirements. (*See Overnight Motor Transportation Co. v. Missel, supra*, 316 U.S. at 577-78; and *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, 37.)

Unlike penalties assessed under section 1775, the Division has no discretion to vary the amount of section 1813 penalties assessed for each violation of overtime requirements. Kern Asphalt's only defense to these penalties is its position on the merits with respect to travel time. However, that time was compensable under the facts of this case, and prevailing overtime rates were required at the point that workers crossed the eight-hour daily threshold regardless of what kind of work they were doing before or after.

There is no argument or evidence that the Division miscalculated the number of violations or amount of penalties assessed under section 1813. Accordingly, these penalties also must be affirmed.

Kern Asphalt Is Entitled To Waiver Of Some But Not All Liquidated Damages.

Section 1742.1(a) provides in pertinent part as follows:

After 60 days following the service of a civil wage and penalty assessment under Section 1741 ..., the affected contractor ... shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment ... subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor ... demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment ... to be in error, the director shall waive payment of the liquidated damages.

Rule 51(b) [Cal.Code Regs. tit. 8 §17251(b)] states as follows:

To demonstrate "substantial grounds for believing the Assessment ... to be in er-

> ror," the Affected Contractor ... must establish (1) that it had a reasonable subjective belief that the Assessment ... was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment ... .

In accordance with the statute, Kern Asphalt is liable for liquidated damages only on the wages found due in the Assessment as modified by this Decision, which with the reduction in McLey's entitlement, total $62,609.84. Since those wages remain unpaid, liquidated damages are due unless Kern Asphalt demonstrated substantial grounds for believing the Assessment to be in error.

As with the section 1775 penalties, the distinct issues raised in connection with the two groups of workers compel different results. In the case of the truck drivers, the proper application of *Sansone* to that work has been in dispute and in flux throughout this proceeding. Kern Asphalt had a reasonable subjective belief and objective basis for arguing that all or most of the truck driving work was not subject to prevailing wage requirements based on *Sansone* and public works coverage determinations issued by this Department. Had Kern Asphalt's position prevailed, it would have eliminated most of this portion of the wage assessment. Accordingly, liquidated damages are waived as to the $20,119.58 in wages due to the truck drivers.

Kern Asphalt has not established an objective basis in law or fact for failing to pay prevailing rates for travel or other overtime hours for the other workers nor for failing to pay McLey as an Operating Engineer for a substantial portion of his work. It is also doubtful that Kern Asphalt had a reasonable subjective belief that its practices were proper given its manipulation of time to avoid paying any overtime rates for work on this Project in all but a few instances. Thus there can be no waiver of the remaining liquidated damages totaling $43,490.26 in connection with these errors.

FINDINGS

1. Affected contractor Kern Asphalt Paving & Sealing Co. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the New Tehachapi High School Project.

2. Kern Asphalt's truck drivers were entitled to be paid prevailing wages for all work performed on the Project. Kern Asphalt's paving crew members also were entitled to be paid prevailing wages for all work performed on the Project, including time designated as travel time between Kern Asphalt's shop and the construction site. Employee Kenneth McLey was entitled to be paid the prevailing rate for the classification of Operating Engineer 2 for some but not all of his work, as specified above in the body of this Decision. The amount of unpaid wages due to Mr. McLey is $21,376.55.

3. Kern Asphalt is liable for all wages due in accordance with Finding No. 2 above and for all other wages found due in the final amended and adjusted Assessment. In light of these findings, the net amount of wages due under the Assessment is $62,609.84.

4. The record establishes 654 violations under section 1775. The $6,300.00 in penalties assessed for 126 wage violations for underpayments to truck drivers is remanded to the Division for reconsideration of the penalty amount in light of the uncertainty of the law with respect to that work that was only recently clarified. The Division did not abuse its discretion in setting the penalty for the remaining 528 violations at the maximum rate of $50 per violation, and consequently Kern Asphalt is liable for those penalties in the total amount of $26,400.00.

5. The record establishes 606 violations under section 1813. Kern Asphalt is liable for penalties at the rate of $25 per violation for a total of $15,150.00 in penalties under section 1813.

6. In light of Finding No. 3 above, the potential liquidated damages due under the Assessment is $62,609.84. No part of these back wages was paid within 60 days following service of the Assessment. Kern Asphalt has demonstrated substantial grounds for believing the Assessment to be in error as to the $20,119.58 in wages assessed for the truck drivers, and accordingly liquidated damages are waived as to that amount. Kern Asphalt has not demonstrated substantial grounds for believing the balance of the Assessment to be in error, and accordingly is not entitled to waiver and remains liable for the remaining liquidated damages in the total amount of $42,490.26.

8. The amounts found due in the Assessment as modified and affirmed by this Deci-

sion are as follows:

Wages Due:	$ 62,609.84
Penalties under Labor Code §1775(a)	$ 26,400.00
	($6,300.00 remanded)
Penalties under Labor Code §1813	$ 15,150.00
Liquidated Damages under Labor Code §1742.1	$ 42,490.26
TOTAL	$146,650.10

ORDER

The Civil Wage and Penalty Assessment is modified and affirmed in part and remanded in part 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.

The Division shall have thirty (30) days from the date of service of this Decision to reconsider and redetermine the remanded portion of the penalty assessment under section 1775. Should the Division issue a new penalty assessment, Kern Asphalt shall have the right to request review in accordance with Labor Code section 1742, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for this purpose.

Dated: 3/28/08

John C. Duncan
Director of Industrial Relations