STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2011-008

BAY DIVISION PIPELINES RELIABILITY UPGRADE, BAY TUNNEL – OFF-HAUL OF EXCAVATED MATERIAL, SAN FRANCISCO PUBLIC UTILITIES COMMISSION/CITY AND COUNTY OF SAN FRANCISCO

I. INTRODUCTION

On July 7, 2011, the Director of the Department of Industrial Relations (Department) issued a public works coverage determination (Determination) finding that the off-haul and disposal of excavated material by subcontractor S&S Trucking, Inc. (S&S), performed in connection with the Bay Division Pipelines Reliability Upgrade – Bay Tunnel (Project), is subject to prevailing wage requirements.

On August 8, 2011, S&S and J. Higgins Trucking (Higgins) timely filed a notice of appeal of the Determination pursuant to section 16002.5 of title 8 of the California Code of Regulations (the Appeal). On September 2, 2011, the Engineering and Utility Contractors Association (EUCA) submitted a statement in support of the Appeal and on September 7, 2011, the Associated General Contractors of California (AGC) submitted a statement in support of the Appeal. On September 14, 2011, Teamsters Joint Council No. 7 (Teamsters) submitted a statement opposing the Appeal. On October 14, 2011, S&S and Higgins submitted a supplemental statement in support of the Appeal.

All of the submissions have been considered carefully. For the reasons set forth in the Determination, which is incorporated into this decision, and for the additional reasons stated below, the Appeal is denied and the Determination is affirmed.

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II. CONTENTIONS ON APPEAL

The parties supporting the Appeal, S&S, Higgins, EUCA and AGC (collectively the "appealing parties") contend that the off-haul and disposal of excavated material from the Project by S&S is not subject to prevailing wage requirements because the Court of Appeal opinions in *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434 (*Sansone*) and *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742 (*Williams*) are fundamentally flawed; the Determination improperly relied on dicta from *Sansone* and *Williams*; the contracts submitted as evidence in this case do not accurately represent the nature of the work at issue; and, the Determination contradicts the Department's position on off-site hauling that is posted under "Frequently Asked Questions" (FAQ) on the Department's website. Finally, S&S argues that because the definition of "refuse" in Labor Code[1] section 1720.3 was recently amended to include "soil," the off-hauling of soil in this particular case is not subject to prevailing wage requirements because the contracts were executed prior to the amendment and the amended statute is not retroactive.

The Teamsters oppose the Appeal and argue that the Determination correctly applied the holdings in *Sansone* and *Williams* to the facts of this case. Specifically, the portion of the opinion in *Williams* relied on by the Department concerning the definition of "in the execution of" is not dicta because that phrase appears in section 1772 and section 1772 is the statutory basis for requiring prevailing wages for off-hauling. In addition, the Teamsters argue that the Department should not ignore binding legal precedent, as urged by the appealing parties, simply because the appealing parties disagree with the result. Finally, the Teamsters point out that the Department's website is not misleading. The website's FAQ clearly indicates that certain off-haul is subject to prevailing wage requirements.

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

III. DISCUSSION

In response to the appealing parties' argument that the Department should essentially disregard *Sansone* and *Williams* because they are flawed decisions, *Sansone* and *Williams* are the only two published California appellate opinions discussing the scope of the California prevailing wage law (section 1720 et seq.) (CPWL) with respect to the off-site hauling of materials for public works projects. The Courts' interpretation of section 1772 was at the core of both holdings. As such, both *Sansone* and *Williams* are directly relevant to the Determination.

> All trial courts are bound by all published decisions of the Court of Appeal (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937), the only qualifications being that the relevant point in the appellate decision must not have been disapproved by the California Supreme Court and must not be in conflict with another appellate decision. As the Supreme Court said in *Auto Equity Sales* (a case that ought to be covered in the very first weeks of every legal research and writing class in any California law school): "Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. *Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state,* and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction." (*Ibid.,* italics added and original italics deleted.)

(*Sarti v. Salt Creek Ltd.* (2008) 167 Cal.App.4th 1187.) The Director has the power to determine that a construction project is a public work. (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 989 (*Lusardi*).) It is the courts, however, not the Director, that have the ultimate authority to construe statutes using their independent judgment. (*Plumbers and Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1088-1089.) Although courts may give deference to the Director's determinations (*Ibid.*), the Director's determination is not characterized as "judicial." (*Lusardi, supra* 1 Cal.4th at. p. 993.) Executive branch agencies have a duty to follow judicial precedents to "comply with controlling judicial decisions." (*White v. Davis* (2003) 30 Cal.4th 528, 562; see also

Mandel v. Myers (1981) 29 Cal.3d 531, 547 ["the Legislature enjoys no constitutional prerogative to disregard the authority of final court judgments resolving specific controversies within the judiciary's domain."].) Therefore, there is no basis here for the Department to ignore well established judicial precedents such as *Sansone* and *Williams*.[2]

The appealing parties' contention that *Sansone* is flawed because it "misstates patently [sic] the inquiry of the Wisconsin court" in *Green v. Jones* (1964) 23 Wis.2d 551, 128 N.W.2d 1, 7 (*Green*); and, consequently, *Williams* is also flawed because it relies on *Sansone*'s erroneous analysis of *Green*, are not valid bases to disregard the opinions. Under the doctrine of stare decisis, *Sansone* and *Williams* must be followed even if the decisions contain what the appealing parties describe as flaws and might be decided differently by other justices.

> It is, of course, a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, "is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law." [Citations.]

(*Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 96.) For the above reasons, the appealing parties' arguments urging the Department to disregard *Sansone* and *Williams* are rejected.

The appealing parties also contend that the Department is not bound by what they characterize as dicta from the *Sansone* and *Williams* opinions and, moreover, that the opinions are limited to their facts. In *Krupnick v. Hartford Accident and Indemnity Co.* (1994) 28 Cal.App.4th 185, 199, the court stated that:

> [t]he *ratio decidendi* [holding of case] is the principle or rule which constitutes the ground of the decision, and it is this principle or rule which has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised, to determine (a)

[2] See, *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d. 1279, 1292 at fn. 8 ["We emphasize that our decision should not be construed to imply that an administrative agency may overrule or nullify decisions of appellate courts. Instead, we affirm the obvious rule that administrative agencies may not void the judgment of an appellate court... ."]

> which statements of law were necessary to the decision, and therefore binding precedents, and (b) which were arguments and general observations, unnecessary to the decision, i.e., dicta, with no force as precedents. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 783, p. 753.)]

In interpreting section 1772, the court in *Williams* applied the plain meaning of the statutory language. The Court utilized the dictionary definition of the term "execution" ("...the carrying out and completion of all provisions of the contract") and set forth the following criteria to consider in determining whether the work was performed in the execution of the project.

> The "off-hauling" question must be analyzed anew. Following *Sansone, supra*, 55 Cal.App.3d 434, we consider: 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.

(*Williams, supra*, at pps. 750, 752.) Using the above-referenced criteria, the Court found no evidence that the work was performed "in the execution" of public works contracts.

> In this case, there was no evidence that the terms of the public works contracts governing the projects from which S&S Trucking did the off-haul jobs required the prime contractor to off-haul generic building materials. Nor was there evidence of the nature of the public works projects from which S&S Trucking's off-hauling occurred. Consequently, there was no evidence from which a determination could be made that the off-hauling was "an integrated aspect of the 'flow' process" (Sansone, supra, 55 Cal.App.3d at p. 444, 127 Cal.Rptr. 799) of the project. Thus, there was no evidence that Williams was a subcontractor entitled to prevailing wages.

(*Williams, supra*, at p. 754.) The Court's analysis of section 1772 formed the basis for its holding and is, therefore, not dicta. In addition, because the Court provided guidance in the form of criteria that can be used to analyze other scenarios involving off-site work, the holding is not limited to the facts of the *Williams* case.

Further, to the extent that *Williams*, as well as the Determination, rely on the *Sansone* opinion,[3] the reliance is justified. Similar to *Williams*, the Court in *Sansone* analyzed whether off-site hauling work was performed in the execution of a contract for public work. (*Sansone* at p. 445 [the court found that the work was an "….integral part of plaintiffs' obligation under the prime contract.") Ultimately, the court in *Sansone* found that the trucking company was a subcontractor under California law (§§ 1772, 1774) using reasoning that it gleaned from *Green* and *H. B. Zachry Company v. United States* (1965) 344 F.2d 352 (*Zachry*). The analysis of *Green* and *Zachry* regarding whether work was "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction" guided the court's decision under California law (§ 1772) and, therefore, is not dicta.

Appealing parties also contend that the contracts relied upon by the Department do not support the conclusion that off-site hauling is integral to the execution of the public works contract for the Project. Appealing parties contend that the contracts merely demonstrate compliance with environmental and other laws governing hauling and disposal of materials.

The Project involves the excavation of dirt and installation of an underground pipe.[4] The prime public works contract calls for the removal of soil from the site. S&S anticipates off-hauling a total of approximately 225,000 cubic yards of excavated material from the Project to an off-site location. The appealing parties' argument that off-haul of this nature is not integral to the Project is contrary to common sense. Consistent with the court's analysis in *Williams*, even though the work was performed off-site, the

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[3] Appealing parties claim that statements by the court in *Sansone* that were subsequently adopted by the court in *Williams*, concerning whether work is "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction" are dicta. Appealing parties also claim that the court's conclusion in *Sansone* that a trucking company is a subcontractor under the CPWL because it qualifies under Wisconsin law is dicta and an erroneous conclusion of law.

[4] The Determination is consistent with PW 2000-078, *Rosewood Avenue/Willoughby Avenue Sewer Interceptor, City of Los Angeles* (*Rosewood*), discussed with approval by the court in *Williams*. In *Rosewood*, a city awarded a contract for installation of sewer pipe. "To properly execute its part of the contract", contractor was required to remove excess dirt displaced by installation work. Appealing parties' contention that *Rosewood* is distinguishable because some of the excavated dirt was stockpiled on site to dry before it was off-hauled is rejected. Rosewood's conclusion that the off-hauling was covered was based on the integral nature of the hauling with respect to the prime public works contract. The basic facts are otherwise the same. The prime contractor subcontracted with a trucking company to remove excess dirt from an underground pipe installation project.

hauling and disposal work was necessary to fulfill contract requirements (i.e., the work S&S was contractually required to perform had to be performed off-site). In addition, *Williams* does not require that the contract describe the precise manner in which a term of the contract is to be performed or the identity of the off-site disposal location. It is sufficient that the off-hauling requirement is an express term of the public works contract, as it is here. Accordingly, appealing parties' argument that the public works contract does not support the Determination is rejected.

The appealing parties further contend that the information posted on the Department's website under the title, "Frequently asked questions – Off-Site Hauling,[5]" contradicts the Determination, is misleading and, therefore, the Determination should be reversed. S&S's argument is based on the following statement from the website: "Off-site hauling is not generally covered work but it's been found to be covered work in limited and specific circumstances by the Director of Industrial Relations..."

A thorough review of the FAQs at issue reveals that the information on the Department's website provides accurate guidance on the issue of prevailing wage requirements for off-site hauling. The website states:

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

Listed on the Department's website are the citations to the *Sansone* and *Williams* appellate decisions as well as four prior administrative decisions issued by the Director concerning off-site hauling. Three out of the six above-referenced judicial and administrative decisions found off-site hauling work to be subject to prevailing wage requirements. Therefore, the Department's website is not misleading and does not provide a basis for reversing the Determination.[6]

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[5] See, http://www.dir.ca.gov/dlsr/FAQ_Hauling.html.

[6] It should also be noted that S&S was the defendant in the *Williams* case. It is therefore well aware of the issues surrounding prevailing wage liability for off-site hauling. To the extent that the appealing parties contend that the Determination is inconsistent with *Williams* and the Department's prior public works coverage determinations, for the reasons stated herein, that contention is incorrect.

Finally, S&S alleges that the Legislature's recent amendment to section 1720.3 (Assembly Bill (AB) 514 (Stats. 2011, ch. 676) effective January 1, 2012),[7] concerning "refuse hauling" expands the application of prevailing wage requirements to include for the first time the off-haul of excavated material, including soil, and that this expansion is indicative of the Legislature's belief that this type of off-hauling was not covered under existing law. As such, S&S argues that the Determination must be reversed.

Assuming S&S is correct that AB 514 is an expansion of existing law, the amended version of section 1720.3 would apply prospectively to projects advertised for bid after December 31, 2011. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475 ["Generally, statutes operate prospectively only."].) As such, it would not apply to the Project at issue. S&S relies on the Legislative Counsel's Digest to argue that AB 514 expanded public works coverage. Other legislative history indicates that AB 514 is merely a clarification of existing law.[8] It is unnecessary, however, to decide this issue because the work is independently subject to prevailing wage requirements under section 1772 pursuant to the holdings in *Williams* and *Sansone*. Although section 1720.3 provides an independent basis for coverage of certain types of off-hauling and may overlap to some degree with prevailing wage obligations under section 1772, this is permissible so long as the interpretation of section 1772 is not so broad as to render section 1720.3 surplusage. (*Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 22, ["...subdivision '(a)(2) *must* be given meaning separate and apart from 1720(a)(1).' Nevertheless, the fact that some infrastructure is encompassed by more than one subdivision does not negate the viability of either one or

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[7] Section 1720.3 of the Labor Code is amended to read:

1720.3. (a) For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state.

(b) For purposes of this section, the "hauling of refuse" includes, but is not limited to, hauling soil, sand, gravel, rocks, concrete, asphalt, excavation materials, and construction debris. The "hauling of refuse" shall not include the hauling of recyclable metals such as copper, steel, and aluminum that have been separated from other materials at the jobsite prior to transportation and that are to be sold at fair market value to a bona fide purchaser.

[8] See Assembly Floor Analysis of AB 514 (2011-2012 Reg. Sess.) August 31, 2011, p.1.

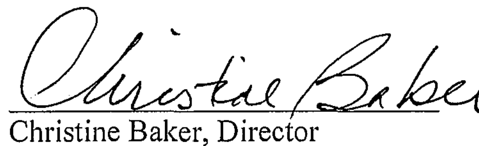
the possibility that, in another case, other improvements would be considered public work under one provision, but not both."].)

Reliance on section 1772 as the basis for prevailing wage requirements for off-hauling work is consistent with both case law (see discussion of *Sansone* and *Williams*, *supra*) and the Department's prior public works coverage determinations.[9] Section 1720.3 provides an independent basis for coverage of refuse hauling from a public works site to an outside disposal location such as a landfill and includes hauling work that may not meet the criteria established in *Williams* under section 1772 regarding prevailing wage requirements for hauling work performed on public works.[10] Therefore, S&S is incorrect that the Legislature's amendment of section 1720.3 supports a reversal of the Determination that was properly based on section 1772. AB 514 makes no difference to the Determination because prevailing wage requirements under sections 1772 and 1720.3 permissibly overlap.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination, as supplemented by this Decision on Administrative Appeal, the Appeal is denied and the determination that prevailing wages are required for the off-haul and disposal of excavated material is affirmed. This decision constitutes final administrative action in this matter.

Dated: 1/17/2012


Christine Baker, Director

[9] See, PW 2008-027, *On-Haul and Off-Haul to and from the Friendly Inn/Senior Center – Abatement and Demolition Project – City of Morgan Hill* (October 31, 2008) [some of the off-site hauling was independently defined as public work under section 1720.3 while other off-site hauling was found to be subject to prevailing wage requirements under section 1772.] See also, PW 2004-013, *Dry Creek Joint Elementary School District Coyote Ridge Elementary School – On-site Heavy Equipment Upkeep* (December 16, 2005) [prevailing wage requirements under section 1772 were not limited to off-site hauling; on-site upkeep of heavy equipment was found to be subject to prevailing wage requirements under section 1772.]

[10] See *Williams, supra*, at pps. 750, 752 ["...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."]