

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.<sup>1</sup>

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

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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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<sup>2</sup> 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.

<sup>3</sup> All statutory references hereinafter are to the Labor Code, unless otherwise indicated.

<sup>4</sup> 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.

<sup>5</sup> 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.<sup>6</sup> 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).<sup>7</sup> 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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<sup>6</sup> Ward acknowledged that the "No Punch-in No Pay" sign was probably for him.

<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> 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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<sup>8</sup> 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.

<sup>9</sup> Eichenhorst did not start working for Kern Asphalt until near the end of the Tehachapi Project.

<sup>10</sup> 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:

<u>Employee</u>	<u>Unpaid Wages</u>	<u>\$1775 penalties</u>	<u>\$1813 penalties</u>
<b>Truck Drivers:</b>			
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.	\$ <u>237.21</u>	\$ <u>100</u>	\$ <u>25</u>
<i>Truck Driver subtotals</i>	<i>\$20,119.58</i>	<i>\$6,300</i>	<i>\$2,250</i>

**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
<i>Paving Crew subtotals</i>	<i>\$51,297.59</i>	<i>\$26,400</i>	<i>\$12,900</i>

**TOTALS<sup>11</sup>                      \$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.

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<sup>11</sup> 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 Asphalt'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*.<sup>12</sup>

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-

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<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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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<sup>13</sup> 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].)

<sup>14</sup> 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.<sup>15</sup>

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:		
$1325 \div 2 = 662.5$	X (\$37.88 - 30.08)	= \$ 5,167.50
Overtime:		
$453.25 \div 2 = 226.625$	X (\$51.39 - 40.13)	= \$ 2,551.80
Double time:		
$11.5 \div 2 = 5.75$	X (\$65.49 - 50.18)	= \$ <u>88.03</u>
Total Reduction in Unpaid Wages		= \$ 7,807.33 <sup>16</sup>

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.

<sup>15</sup> 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.

<sup>16</sup> 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 it 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 in 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
	<i>(\$6,300.00 remanded)</i>
Penalties under Labor Code §1813	\$ 15,150.00
Liquidated Damages under Labor Code §1742.1	<u>\$ 42,490.26</u>
TOTAL	<b>\$146,650.10</b>

### 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

  
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John C. Duncan  
Director of Industrial Relations