

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Triple E Trucking**

Case No. 04-0180-PWH

[DLSE Case No.: 40-14751/218]

From an Assessment issued by:

**Division of Labor Standards Enforcement**

**DIRECTOR'S DECISION**

**INTRODUCTION**

Affected subcontractor Triple E. Trucking ("Triple E") requested review of a civil wage and penalty assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("Division") on June 15, 2004, with respect to the Golden Valley High School project ("Project"). A hearing on the merits occurred on October 19, 2006, before appointed Hearing Officer Anthony Mischel after all attempts at developing a complete stipulated record were unsuccessful. William Woolman appeared for Triple E, and Thomas Fredericks appeared for the Division. For the reasons set forth below, there are no prevailing wages due. Therefore the Assessment is dismissed and all other issues are moot.

The sole contested issue in this case is whether the truck drivers who delivered base material and asphalt to the Project are entitled to the payment of prevailing wages.

## FACTS

The parties presented their cases primarily through stipulated facts and largely uncontested testimony.<sup>1</sup>

General contractor, Bowman Asphalt ("Bowman"), contracted with the Kern High School District to perform paving at the Project. Bowman contracted with Vulcan Materials ("Vulcan") to provide base material (in the form of aggregate) and asphalt for the Project. Vulcan's facility is open to the general public and was not created for the purpose of supplying materials to Bowman. Vulcan hired Triple E to deliver the material to the Project; Triple E is an independent trucking company. Work performed by Triple E for Vulcan was paid for by Vulcan.

Because Vulcan could not supply all the base material and asphalt required, Bowman contracted with Granite to provide base material and asphalt, as well. Granite, like Vulcan, is open to the general public, and its facility was not created for the purpose of supplying materials to Bowman. Granite did not provide delivery services for its material. Therefore, Bowman, the general contractor, hired Triple E to pick up and deliver material from Granite to the Project. Work performed by Triple E for Bowman was paid for by Bowman.

How material was delivered by Triple E did not vary by who supplied the material. Base material was delivered differently from asphalt, however.

Base Materials: The Triple E drivers picked up base material from the supplier using a dump truck and drove to the Project. On arrival, the drivers checked in at the entry gate and proceeded to that part of the Project where the base material was needed. They were directed to this place by Bowman employees. A Bowman employee instructed the drivers where to drop the material in the roadbed. A driver drove onto the roadbed as instructed and released the base material directly into the roadbed in a pile approximately 24 inches high and about 18 inches wide (known as a "windrow"). When the truck was empty, the driver left the Project and returned to

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<sup>1</sup> The parties agreed that the Assessment and Request for Review were both timely.

the supplier for another load. On occasion, a driver rarely waited more than ten minutes to deliver the base material. Normally, drivers were at the Project for approximately five minutes per delivery.

Bowman employees sprayed water on the windrow and then spread the base material to approximately 24 inches wide. The base material was not moved from the road bed after the driver delivered it. Bowman employees then used heavy equipment to grade and compress the base material to approximately two inches in height. This work was performed shortly after the Triple E drivers left; it was almost always performed within 30 minutes of delivery. The drivers did not leave the truck cabs while delivering the material.

Asphalt: When drivers delivered asphalt, they used a "belly truck" (which delivers material from the bottom of the truck in a more controlled manner). The drivers brought the heated asphalt to the job site directly from the supplier. As with the base material, the drivers checked in and proceeded to the delivery point as instructed by the Bowman employees. A Bowman employee told the driver where to deliver the asphalt and how quickly it should be delivered. The driver set the rate at which asphalt came out of the truck and drove down the roadbed as instructed by the Bowman employee, dumping the asphalt as he went. When the truck was empty, the driver left the Project and returned to the supplier for more asphalt. Bowman employees would operate a piece of heavy equipment that picked up the asphalt, heated it, and spread it back onto the road bed in approximately the same place where the asphalt had been delivered. The asphalt was then compressed. Usually, this process occurred within a few minutes of delivery. On average, the driver was on-site for less than 10 minutes for each delivery of asphalt. The drivers did not leave the truck cabs while delivering the material.

The total amount of assessed unpaid prevailing wages for all the Triple E drivers' work is \$33,611.91. No evidence was introduced that this figure is incorrect. DLSE assessed 67 occasions on which Triple E drivers worked more than eight hours in a day for work performed under the Bowman contract. DLSE found 222 violations of the obligation to pay prevailing wages. Because of the confusion concerning the obligation to pay prevailing wages and Triple E's lack of any history of prevailing wage violations, DLSE assessed penalties for failing to pay

prevailing wages at \$10.00 per violation.

## DISCUSSION

Labor Code sections 1720 and the following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects.<sup>2</sup>

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* (1992) 1 Cal.4th 976, at 987 [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.” (Lab. Code, § 90.5(a), and *see, Lusardi, supra.*)

Upon determining that a contractor or subcontractor has violated prevailing wage requirements, the Division issues a civil wage and penalty assessment, which an affected contractor or subcontractor may appeal by filing a request for review under section 1742. In such an appeal “[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (§ 1742(b).)

### The Triple E Drivers Are Not Entitled To Prevailing Wages Because They Were Not Engaged In The Direct And Immediate Incorporation Of The Material They Hauled.

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

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<sup>2</sup> All statutory citations are to the Labor Code, unless otherwise indicated.

works contractor shall ensure that all workers engaged in “the execution of the contract” receive the prevailing wage. (§ 1774.)

These sections state the general rule that all workers employed in the execution of a public works contract by a construction contractor or subcontractor are entitled to the payment of prevailing wages. *O.G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434 establishes a “delivery exemption” for truck drivers employed by entities other than the on-site construction contractors who do not perform work “in the execution of the contract.” (See, also *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, 752.) This exemption applies when “the delivery of standard materials [from a facility open to the public] to the site [is] a function which is performed independently of the contract construction activities.” However, where “the delivery of materials was an integrated aspect of the 'flow' process of construction” prevailing wages are required. (*Sansone, supra*, 55 Cal.App.3d 443, 444 (internal quotations and citations omitted).) Thus, the “delivery exemption” for drivers employed by independent trucking companies has two requirements: the truck driver is hauling materials from a bona fide materials supplier **and “does not himself immediately and directly incorporate** the hauled material into the ongoing public works project.” (*Williams, supra*, 156 Cal.App.4th at p. 752, emphasis added.) If these conditions are present, the exemption applies; and the on-haul delivery is not subject to the payment of prevailing wages.

The parties stipulated that the drivers were employed by an independent trucking company and were not the employees of an on site construction contractor or subcontractor. The parties also stipulated that the hauled materials came from material suppliers open to the general public and from sites that were not created solely for this contract. Triple E therefore meets the first criterion for the exemption (employed by bona fide materials supplier). The question is whether the work the drivers performed meets the second criterion (direct and immediate incorporation).

The *Williams* court described five “factors and circumstances” to consider in determining whether a driver is entitled to prevailing wages. The only applicable factor here is the court’s final one: “Were the hauled materials directly and immediately distributed by the truck driver

into the on-going, on-site project?" (*Williams, supra*, 156 Cal.App.4th at 752). There is no California authority that defines the phrase "immediate and direct incorporation."<sup>3</sup> The facts in *Sansone* and in *Williams* do not provide sufficient guidance for clear standard either. The *Williams* court's phrase, "the driver himself," however, indicates the court's belief that the driver has to do more than drive onto the job site and deliver material as directed by the construction supervisor to be part of the "immediate and direct incorporation" of the material. Rather, "the driver himself" must actually leave their truck and do more than just deliver materials.

Because the drivers employed by Triple E did not leave their trucks, they are not entitled to prevailing wages.

Other Issues Are Moot.

Because of the resolution of the issue of entitlement to prevailing wage, all other issues are dismissed as moot.

**FINDINGS**

1. The Project was a public work. The drivers, however, are not employees of a public works contractor or subcontractor and are not entitled to prevailing wages.
2. All other issues are moot.

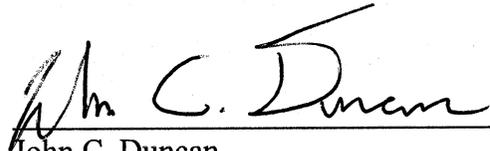
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<sup>3</sup> The parties cite to public works coverage determinations issued by the Director of Industrial Relations and previously designated as precedential under Government Code section 11425.60. While this matter was pending, the Department decided it would no longer designate public works coverage determinations as "precedential." Public notice of the Department's decision to discontinue the use of precedent decisions can be found at [www.dir.ca.gov/DLSF/09-06-2007\(pwcd\).pdf](http://www.dir.ca.gov/DLSF/09-06-2007(pwcd).pdf). Accordingly, they may not be relied on in these proceedings. (See, Gov. Code, § 11420.10(a)(7).)

ORDER

Therefore, the Assessment is dismissed. The Hearing Officer shall issue a Notice of the Findings, which shall be served with the Decision on the parties.

Dated: 11/13/08

  
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John C. Duncan  
Director of Industrial Relations