

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2003-049
WILLIAMS STREET WIDENING, CITY OF SAN LEANDRO

I. INTRODUCTION AND PROCEDURAL HISTORY

In response to a request from the City of San Leandro ("City"), on January 6, 2005, the Director of Industrial Relations ("Director") issued a precedential public works coverage determination ("Determination") in this matter finding that truck drivers engaged to haul material from a public works site to a general use recycling facility were not required to be paid prevailing wages. The Determination also found as a general matter that *bona fide* owner-operator truckers employed in the execution of a public works contract are entitled to be paid prevailing wages when performing public work.

Lemore Transportation, Inc., dba Royal Trucking Company ("Royal"), filed an appeal on March 29, 2005. The Engineering and Utility Contractors Association, the Association of Engineering Construction Employers, and the Associated General Contractors of California filed briefs in support of the appeal. Local 853 of the International

Brotherhood of Teamsters and the State Building and Construction Trades Council of California submitted briefs in support of the Determination's conclusion concerning owner-operator truckers.

In addition to briefly disposing various other arguments made on appeal, this Decision affirms the portion of the Determination finding that generally off-haul trucking from the public works site does not require the payment of prevailing wages. The Decision, however, withdraws that portion of the Determination finding that owner-operator truck drivers are entitled to prevailing wages when performing work in the execution of a public works contract. The Department will consider this issue in the context of a future public works coverage request in which the issue is dispositive to the determination in that case.

II. ISSUES ON APPEAL

This appeal raises two principal issues:¹

¹ The appeals also raise the three following additional issues:

(1) Standing. Two parties responding to Royal's appeal contend that Royal does not have standing to appeal the Determination because it is not aggrieved on the basis that the work performed by Royal that was the subject of the Determination was not found to be covered work and therefore Royal has not suffered any harm. In fact, funds withheld by City were released to Contractor after the initial Determination issued. The Director will entertain the appeal despite this fact because the matter is of substantial interest to the regulated community, as evidenced by the volume of correspondence received subsequent to the issuance of the determination and the multiple appeals, responses and replies received.

(1) Whether and under what circumstances hauling in relation to a public work requires the payment of prevailing wages; and,

(2) Whether *bona fide* owner-operator truckers performing public work are required to be paid prevailing wages.

III. RELEVANT FACTS

City undertook a public works road-widening project on Williams Street within City. As part of the project, Redgwick Construction ("Contractor") was required to grind off the existing roadway surface. Royal, a subcontractor to Contractor, used owner-operator truck drivers to haul the road grindings to Vulcan Materials, an asphalt recycler. At Vulcan, the grindings were recycled and used as fill on the roads around the Vulcan plant. City's specifications for the Project provide: "Grinding residue/excavated material from the roadway shall become the property of the Contractor

(2) Timeliness of Appeal. Responding parties contend that the Appeal is untimely as it was filed more than 30 days after the issuance of the initial determination. Royal, however, was not served with the determination when it issued and became aware of it some time later. Because of this and, as discussed above, the extraordinary interest in and the potential impact of the determination, the Director will entertain the appeal.

(3) Royal's Request for a Hearing. California Code of Regulations, Title 8, section 16002.5 states "[t]he decision to hold a hearing is within the Director's sole discretion." The facts in this matter are not in dispute. Royal does not challenge the determination's finding of facts, but rather the way the law was applied to the undisputed facts. Because the issues to be decided are essentially legal issues, no hearing is necessary.

and shall be removed and legally disposed of by the Contractor" (Contract Book, § 300-2.1.1).

IV. DISCUSSION

1. Whether and under what circumstances hauling in relation to a public work requires the payment of prevailing wages.

Several parties to the appeal have advanced the position, late in the appeal process, that no hauling work of any kind is covered for purposes of the California Prevailing Wage Law ("CPWL") and that only on-site work should be covered under the statutory scheme. These parties advance several rationales for this argument, including that California should look to the federal Davis-Bacon Act in interpreting the CPWL and that, absent clear legislative guidance, the Department should not find any hauling work to be covered based solely on the holding in *O.G. Sansone Company v. Dept. of Transportation* (1976) 55 Cal.App.3d 434, 127 Cal.Rptr. 799.²

As discussed in the initial Determination and implicitly acknowledged by Royal, on-hauling and intra site-hauling have been covered under the CPWL for decades. See, *People v. Miles & Sons Trucking Service, Inc.* (1968) 257 Cal.App.2d 697, 702, 65 Cal.Rptr. 465; *O.G. Sansone Company*

² These parties analogize this situation to *City of Long Beach, v. Department of Industrial Relations* (2005) 34 Cal. 4th 942, 22 Cal.Rptr.4th 518, claiming that case controls under the facts here.

v. Dept. of Transportation, *supra*: Public Works Case No. 99-066; Oakley Union School District/RGW Construction, (December 13, 1999); Public Works Case No. 99-037, Alameda Corridor Project A&A Ready Mix Concrete and Robertson's Ready Mix Concrete, (April 10, 2000); Public Works Case No. 00-075, Caltrans I-5/Redmond's Concrete and Materials, (August 15, 2001).

These parties asked that DIR reconsider all its hauling cases and that it either eliminate all coverage for hauling work of what ever kind by whomever performed or that it "clarify" its off-hauling determinations because the exceptions discussed in the Determination may "swallow the rule." No party has *actually challenged* the finding of non-coverage made in the context of the Determination. Moreover, DIR cannot, in the context of this case, where no coverage was found for the off-haul described in the Determination, reassess its historical position regarding on-haul trucking work when that was not an issue in the underlying case. Such a decision would violate the proscription in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 59 Cal.Rptr.2d 186, wherein the California Supreme court found that a state agency could not make generally applicable policy pronouncements in the course of enforcing its responsibilities without following procedures set forth in the Administrative Procedure Act.

Here, the underlying case has to do with off-hauling not hauling in general and there is no occasion brought forth by the underlying Determination for DIR to reexamine its policy regarding hauling to public works sites in general. *Tidewater* makes clear that such an action is not within the limited circumstances in which public agencies may provide case specific advice to the regulated public. As noted by the Supreme Court in *Tidewater*:

Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases. . . . Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations. (*Id.* at 571, internal citations omitted.)

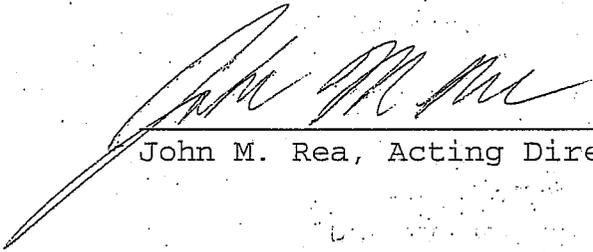
Here, the determination and decision on appeal must be decided on the issues presented and not become a vehicle for rulemaking, as some parties advocate. A determination saying that no hauling work is covered without the context of a specific case would be at odds with at least modest judicial precedent and clearly violate the proscription in *Tidewater* against rulemaking outside the administrative process required of all state agencies. As no party has challenged the Determination finding the off-hauling work performed by Royal not to be covered work for purposes of the CPWL, the Determination is affirmed as to this issue.

2. Whether *bona fide*³ owner-operator truckers performing public work are required to be paid prevailing wages.

In this case, the finding that the off-hauling was not a public work disposed of the public works coverage request in its entirety. The portion of the Determination finding that owner-operator truckers performing public work must be paid prevailing wages was not necessary to the disposition of the underlying coverage request and is hereby withdrawn. The Department will consider this issue in the context of a future public works coverage request in which the issue is dispositive to the determination in that case.

This decision constitutes the final administrative action in this matter.

Dated: 23 Aug 05



John M. Rea, Acting Director

³ This discussion assumes that, as a factual matter, the truckers at issue are *bona fide* owner-operators.