STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

To All Interested Parties:

Re: Public Works Case No. 2007-008
Russ Will Mechanical, Inc. – Off-site Fabrication of HVAC Components

The Decision on Administrative Appeal, dated May 3, 2010, in PW 2007-008, Russ Will Mechanical, Inc. -Off-site Fabrication of HV AC Components, was affirmed in a published First District Court of Appeal opinion dated August 27, 2014. (See *Sheet Metal Workers' International Association, Local l04 v. Duncan* (2014) 229 Cal.App.4th 192.)

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL
RE: PUBLIC WORKS CASE NO. PW 2007-008
RUSS WILL MECHANICAL, INC.
OFF-SITE FABRICATION OF HVAC COMPONENTS

I. INTRODUCTION

On November 13, 2008, the Director of the Department of Industrial Relations (the "Department") issued a public works coverage determination (the "Determination") in the above referenced matter finding that, under the facts of the case, certain off-site fabrication work performed in the permanent shop of the on-site heating, ventilating and air conditioning ("HVAC") subcontractor was done in the execution of a contract for public work within the meaning of Labor Code section 1772,[1] and was therefore subject to prevailing wage requirements.

On December 18, 2008, the subcontractor, Russ Will Mechanical, Inc. ("RWM"), timely filed a notice of administrative appeal of the Determination (the "Notice of Appeal"). RWM also requested a hearing on the appeal. At the Department's invitation, on February 13, 2009, RWM filed a supplemental brief stating in further detail the grounds for its appeal. On or before April 17, 2009, responsive papers were submitted by the Division of Labor Standards Enforcement ("DLSE"), and other interested parties as follows: Associated General Contractors of California ("AGC"), Construction Employers Association ("CEA"), Associated Builders and Contractors of California ("ABC"), Precast/Prestressed Concrete Manufacturers Association of California ("PCMAC"), and Association of Engineering Construction Employers, Inc. ("AECE") submitted argument in support of the appeal. Local Union No. 104 of the Sheet Metal Workers' International Association ("Union") submitted argument in opposition to the appeal.

With regard to the request for hearing, California Code of Regulations, title 8, section 16002.5(b) provides that the decision to hold a hearing regarding a coverage appeal is within the

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

Director's sole discretion. Here, the facts set forth in the Determination material to the coverage question are not in dispute. Because the issues raised in the appeal are solely legal, no hearing is necessary. It should, however, be noted that the coverage issue arises in the context of the adjudication of a request for review under section 1742. RWM is entitled to a hearing on its request for review, and it is the responsibility of the hearing officer to define the issues to be heard. Cal. Code Regs., tit. 8, § 17243(d).

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 granted and the Determination is reversed.

II. POSITIONS OF THE PARTIES

A. Arguments In Support Of The Appeal

The arguments of RWM and the interested parties in support of the appeal may be summarized as follows:

1. The Determination is contrary to *O.G. Sansone Co. v. Dept. of Transportation* (1976) 55 Cal.App.3d 434 and other applicable case law;
2. The Determination is contrary to longstanding Department interpretation of the California Prevailing Wage Law (the "CPWL") limiting coverage to on-site construction work;
3. Principles of statutory construction support limiting coverage to on-site work and making the interpretation of the CPWL consistent with the federal prevailing wage law, the Davis-Bacon Act (40 U.S.C.A. § 3142) (the "DBA");
4. The CPWL covers only work required to be performed under a state contractor's license;
5. The Determination is an invalid underground regulation because it was not adopted in conformity with the California Administrative Procedure Act (Govt. Code, § 11340 et seq.) (the "APA");
6. The Determination constitutes a violation of due process by imposing a new enforcement policy retroactively;
7. Article I, section 8, clause 3 of the United States Constitution (the "Commerce Clause") precludes application of the CPWL to out-of-state work; and

8. The Determination is contrary to desirable public policy objectives, and will produce impractical results.

B. Arguments In Opposition To The Appeal[2]

The arguments of DLSE and Union may be summarized as follows:

1. The Determination is consistent with applicable case law;
2. Past determinations by the Department have concluded that certain off-site work is within the CPWL's ambit;
3. Because the language of the CPWL differs from that of the DBA, coverage under the former is broader than coverage under the latter;
4. Coverage under the CPWL should not be determined by reference to the contractor licensing law because the two statutory schemes have different purposes;
5. The Determination is not an invalid underground regulation because coverage determinations are authorized by the CPWL;
6. RWM has cited no authority for its due process argument, and a similar argument was rejected in *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976;
7. Because section 1773.2 mandates inclusion of prevailing wage requirements in public works contracts, the Commerce Clause does not preclude enforcement of those requirements with regard to work done outside the state "in the execution of" those contracts; and
8. The Determination will not produce impractical results.

III. DISCUSSION

A. The Determination Correctly Found That RWM Was A Subcontractor Within The Meaning Of The Labor Code, And Did Not Meet The Criteria For The Material Supplier Exemption.

Because the case law recognizes an exemption from prevailing wage requirements for bona fide material suppliers, RWM and other parties supporting its appeal contend that RWM performed the off-site fabrication in the capacity of a material supplier. It is therefore necessary to examine RWM's status in light of that case law.

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[2]The arguments enumerated here have been carefully considered. For reasons of brevity and continuity, some sections of this Decision on Administrative Appeal respond to multiple arguments.

The Determination focused on the facts regarding RWM's role in the DeAnza College Administration Building Modernization (the "Project") and carefully analyzed the relevant contract documents. Because RWM entered into a written subcontract with prime contractor Trident Builders, Inc., requiring, among other things, that RWM fabricate and install ductwork needed for the Project, the Determination found specifically that RWM was therefore an on-site contractor. RWM performed the off-site fabrication in question in its own off-site shop, which was not established specially for the Project. This shop did not produce products for sale to the general public. The Determination concluded that under these specific facts, RWM was a subcontractor performing the off-site fabrication work in the execution of a contract for public work within the meaning of section 1772, and that RWM did not meet the criteria for the material supplier exemption recognized in applicable case law.

The central issue in this appeal is whether the Determination correctly interpreted the CPWL in light of existing case law, especially *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, and *O.G. Sansone Co. v. Department of Transportation, supra,* 55 Cal.App.3d 434. In arguing against the Determination, RWM maintains that it performed the off-site fabrication as a material supplier, rather than as a subcontractor.[3] The *Williams* court addressed this distinction, albeit in the context of off-hauling:

> "Contractor" and "subcontractor," for purposes of the prevailing wage law, include "a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works ...." (§ 1722.1.) Workers "employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." (§ 1772.)
>
> Here, we must interpret and apply these statutory provisions to resolve whether workers performing S&S Trucking's agreements to *off*-haul material from a public works site were employed "in the execution" (§ 1772.) of the public works contract.
>
> ...

[3]RWM argues that the terms "contractors" and "subcontractors" in section 1772, "must be defined in accordance with the requirements of the state contractor's license board." Union argues persuasively why those requirements, found in the Business and Professions Code, are not germane to this case. It is unnecessary to resort to the Business and Professions Code, because section 1722.1 defines "contractor" and "subcontractor" more broadly to "include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, *when working on public works* pursuant to this article and Article 2 (commencing with Section 1770)." (Emphasis supplied.) Moreover, it is undisputed that RWM *is* a licensed contractor, and functioned as an on-site subcontractor on this Project. For these reasons and the additional ones stated by Union, RWM's licensing argument is without merit.

> The analysis in [*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.)

Williams, supra, 156 Cal.App.4th at pp. 749-750 (emphasis in original).

Those parties supporting the appeal tend to minimize the significance of *Williams*. AGC argues that *Williams* should be accorded no weight because it was decided without the Department's participation, concerns trucking, and (in AGC's view) applies a flawed analysis. None of these points justifies the Department ignoring a published decision of the Court of Appeal. Unless overruled by the California Supreme Court, the case is binding precedent in identical fact situations.

While the CPWL lacks any express exclusion for material suppliers, the courts have interpreted the statutory use of the terms "contractor" and "subcontractor" to exclude bona fide material suppliers when the work performed is "truly independent of the performance of the general contract for public work," and was not "integral to the performance of that general contract." *Williams, supra,* 156 Cal.App.4th at p. 752. In applying the criteria for the exemption articulated in *H.B. Zachry Co. v. United States* (Ct.Cl. 1965) 344 F.2d. 352, and adopted in *Sansone*, the *Williams* court explained: "To qualify for the exemption, the material suppliers had to be selling supplies to the general public, his plant could not be established specially for the particular public works contract, and his plant could not be located at the project site." *Williams, supra*, 156 Cal.App.4th at pp. 750-751.

CEA argues that RWM functioned in a dual capacity, serving as both a subcontractor performing on-site construction, and a material supplier fabricating products in its off-site shop. CEA finds support for this argument in a passage from *Zachry, supra,* 344 F.2d at p. 360:

> [T]he Solicitor has introduced a functional distinction between "materialmen" and "subcontractors", or has separated work involved in the materialman's function from work done under the contract. In two opinions, he has held that where a contractor covered by the statute is also an established materialman selling to the general public, the employees of his supply operation, including those who are engaged in the delivery of materials to the federal construction project, are not subject to the Davis-Bacon Act.[4]

[4]The Solicitor opinions discussed by the *Zachry* court are Op. Sol. Lab. to Alex M. Barman, Jr., October 6, 1960; Op. Sol. Lab. to Charles A. Horsky, November 27, 1957; see also Op. Sol. Lab. No. DB-36, June 24, 1963.

CEA argues that, with respect to the off-site fabrication, RWM was a material supplier selling to the general public, drawing an analogy to PW 2009-035, *Sunset Garden Apartments, Imperial County Housing Authority* (May 28, 2008). The analogy, however, is imprecise. In *Sunset Garden*, as CEA notes, a company engaged in the off-site prefabrication of roof trusses and other products for sale to contractors and builders was determined to be a material supplier. The firm in question performed no on-site work and did, in fact, sell its products to the on-site contractor (which happened to be a related company) as well as to other customers in the construction industry. Here, in contrast, RWM performed on-site work, did not sell its products to an on-site contractor, and, does not sell products to the "general public."

Sunset Garden did not address the question presented in this case: whether RWM's use of such a permanent off-site facility for its fabrication work qualifies it for the material supplier exemption irrespective of its lack of sales to the general public. There is no California case law suggesting that an entity may be a bona fide material supplier in the absence of sales to the general public, and the Director will not speculate whether sales to the general public is an optional criterion for qualifying as a material supplier. Accordingly, it is unnecessary to determine whether, as CEA, argues there are circumstances in which an entity may function in a dual capacity as subcontractor and material supplier for the same project.

For the reasons discussed above, the Determination was correct in characterizing RWM as a subcontractor on the Project. As discussed below, however, it does not necessarily follow from this characterization that the off-site fabrication was subject to prevailing wage requirements.

B. While Prevailing Wages Have Been Required For Certain Off-Site Work Done At A Temporary Site Specially Established For A Public Works Project, Prevailng Wages Have Not Been Required For 0ff-Site Work Done In The Permanent Shop Of A Subcontractor.

Parties seeking reversal of the Determination contend that the Department previously has not required payment of prevailing wages for off-site work under circumstances similar to the facts of this case. It is therefore necessary to examine the Department's past determinations, although such determinations do not have precedential effect.[5]

[5]As was noted in the Determination here at issue, while this matter was pending, the Department decided it would discontinue its prior practice of designating certain public works coverage determinations as "precedential" under Government Code section 11425.60. Public notice of the Department's decision to discontinue the use of

The Department has consistently required prevailing wages to be paid in limited circumstances when the work did not qualify for the material supplier exemption under *Sansone.* In past determinations finding such work to be covered, the off-site fabrication was performed at a temporary yard established specially for the project in question, not in a subcontractor's own permanent shop.[6] Thus, in PW 92-036, *Imperial Prison II, South* (April 5, 1994), the Department determined that prevailing wage requirements applied to the off-site fabrication of concrete panels at a yard established exclusively for the public works project. Similarly, in PW 99-032, *San Diego City Schools, Construction of Portable Classrooms* (June 23, 2000), the Department determined that the off-site construction of portable classrooms was subject to prevailing wage requirements because the work was performed in a dedicated yard, and the employer was therefore a contractor and not a material supplier.

On the other hand, as early as 1984, the Department has determined that off-site work done by a bona fide material supplier is not subject to prevailing wage requirements. CEA cites the determination in *Russell Mechanical, Inc.,* dated September 17, 1984, together with the Opinion on Reconsideration in that case, dated September 11, 1985. In that case, the Department determined that the off-site fabrication of a fume recovery hood for the Rancho Seco Nuclear Power Plant, by a "standard supplier of sheetmetal products to the public at large," was not subject to prevailing wage requirements. The Opinion on Reconsideration at page 4 applied the *Sansone* analysis and found that "Russell is a standard supplier of sheetmetal products to the public at large, that Russell has long been such a vendor independent of the SMUD Rancho Seco project, and that Russell Mechanical is not located on or near the site of the SMUD project." Similarly, in PW 2005-037, *Jurupa Unified School District-Glen Avon High School* (January 12,

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precedent decisions can be found at www.dir.ca.gov/DLSF/09-06-2007(pwcd).pdf. Consequently, prior determinations are discussed herein only for purposes of addressing the arguments raised by the parties, and are not cited as precedent.

[6]In 2003, the Department did issue two determinations finding off-site fabrication by subcontractors in their permanent shops to be covered. PW 2000-027, *Cuesta College/Offsite Fabrication of Sheet Metal Work* (March 4, 2003); PW 2002-064, *Off-Site Fabrication by Helix Electric, City of San Jose/SJSU Joint Library Project* (March 4, 2003). On May 3, 2004, however, the Department issued Decisions on Appeal in both cases, stating that: "[E]ffective immediately, the determinations are withdrawn. The prior precedential public works coverage determinations and decisions on appeal concerning the issues in these determinations control. (See, *Imperial Prison II, South,* PW 92-036 (April 5, 1994) and *San Diego City Schools/Construction of Portable Classrooms,* PW 1999-032 (June 23, 2000).)"

2007), prevailing wages were not required for the testing of materials done off-site in a structural steel supplier's shop.

In *Imperial Prison II* and *San Diego City Schools,* as in *Russell Mechanical* and *Jurupa Unified School District*, the Department applied the *Sansone* test, albeit with different results. Thus, the Department has consistently applied the *Sansone* analysis in determining whether off-site work is subject to prevailing wage requirements. The outcomes have varied because of the facts of the individual cases. The problem is that neither *Sansone*, *Williams*, nor any other California case has addressed the specific issue posed by this case, i.e., whether fabrication is subject to prevailing wage requirements when done in the permanent off-site shop of a subcontractor who is not selling materials to the general public. To answer this question, it is therefore necessary to look beyond state court decisions and administrative determinations.

C. In The Absence Of Legislative Or Judicial Guidance, It Is Appropriate To Interpret The CPWL Consistently With Federal Regulations Applicable To Shop Work Performed By Subcontractors.

Parties seeking reversal of the Determination argue that the CPWL should be interpreted consistently with the federal Davis-Bacon Act. In the absence of contrary authority, there is merit in this argument.

In *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882-883, the court stated: "The PWL and DBA each carry out a similar purpose. ... Read as a unit PWL and DBA set out two separate, but parallel, systems regulating wages on public contracts. The PWL covers state contracts and DBA covers federal contracts." *Accord, City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 954. The parallels between the two statutory schemes are exemplified by section 1773, which requires that: "In determining the [prevailing wage] rates, the Director of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements *and the rates that may have been predetermined for federal public works*, within the locality and in the nearest labor market area." (Emphasis supplied.)

The language of the CPWL differs in some respects from its federal counterpart. Thus, for purposes of state prevailing wage requirements, section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon the public work." The DBA requires prevailing wages for "all

mechanics and laborers employed directly upon the site of the work ... ." 40 U.S.C.A. § 3142(c)(1). Union argues that the Department should follow the lead of courts in other states that have cited similar differences in statutory language as a basis for extending coverage under state prevailing wage laws to off-site work that would not be covered under the DBA.[7]

Decisions from the courts of other states, while not binding precedent, may nonetheless be instructive. The problem with Union's argument, however, is that the California courts have not interpreted the CPWL more broadly than the DBA on the basis of out-of-state authority. Instead, they have relied upon federal cases interpreting the DBA, resulting in interpretations of the CPWL that are in harmony with the DBA.[8] Moreover, the California Supreme Court looked to federal regulations defining the scope of the DBA in construing the CPWL: "Although the Legislature was free to adopt a broader definition of 'construction' for projects that state law covers, certainly the fact that federal law generally confines its prevailing wage law to situations involving actual construction activity is entitled to some weight in construing the pre-2000 version of the statute." *City of Long Beach, supra,* 34 Cal.4th at p. 954.

Accordingly, it is appropriate to consider the federal regulation defining "site of the work" as used in the DBA. Code of Federal Regulations, title 29, section 5.2 provides in part:

> (3) *Not included in the site of the work are permanent* home offices, branch plant establishments, *fabrication plants*, tool yards, etc., *of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project.* In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract. (Emphasis supplied.)

Thus, the Department of Labor has by regulation established a test for off-site work by contractors and subcontractors similar to the *Sansone-Williams* test for off-site work by material

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[7]The cases cited by Union are *State of Nevada v. Granite Constr. Co.* (Nev. 1992) 40 P.3d 423, 427; *Everett Concrete Prods., Inc. v. Dep't of Labor & Industrial Relations* (Wash. 1988) 748 P.2d 1112, 1113-1115; *Long v. Interstate Ready-Mix, L.L.C.* (Mo. App. W.D. 2002) 83 S.W.3d 571, 578.

[8]This Department has also looked to relevant federal authorities in interpreting the CPWL. See, e.g., PW 2008-022, *On-Site Heavy Equipment Upkeep and Repair for the Interstate 80 Soda Springs Improvement Project, State of California Department of Transportation* (November 13, 2008).

suppliers, in that to be exempt from coverage, the work must be done away from the public works site at a permanent facility. As neither the legislature nor the courts of California have formulated any other test to be applied to factual situations such as the one at hand, it is appropriate to look to the above federal test for guidance. This has the practical advantage of promoting harmony between the federal and state statutory schemes, and thus is in the spirit of the California cases discussed above.

The off-site fabrication at issue here was done in the permanent shop of RWM, a subcontractor, and that shop's location and continuance in operation were determined wholly without regard to a particular public works contract or project. Therefore, contrary to the conclusion reached in the Determination, the off-site fabrication was not done in the execution of the contract for public work within the meaning of section 1772.

D. Because The Determination Was Not A Standard Of General Application, It Was Not An Underground Regulation And The Rulemaking Procedures Of The Administrative Procedure Act Are Inapplicable.

RWM contends that the Determination was an invalid underground regulation as it was not adopted in conformity with the APA. Government Code section 11340.5, subdivision (a) provides that: "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation ... , unless the ... rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." Government Code section 11340.9, subdivision (i) provides that: "This chapter does not apply to ... A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state." Thus a principal identifying characteristic of a rule subject to the APA is that it must be intended to apply generally, rather than only in a specific case. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

Here, the Determination lacked that fundamental identifying characteristic of a regulation subject to the APA in that it was not intended to apply generally, but rather only to a specific case. It was directed to a specifically named legal person, RWM, and thus was exempted from APA rulemaking requirements by Government Code section 11340.9, subdivision (i).

Moreover, the authority of the Director to make coverage determinations was upheld in *Lusardi, supra*, 1 Cal.4th at p. 989. In the numerous court challenges to coverage determinations since, no court has ever found that authority lacking, or suggested that it is subject to the APA.

For these reasons, the Determination was not subject to the APA rulemaking requirements and was not an underground regulation.

E. The Determination Did Not Enforce A New Rule Retroactively So As To Deny RWM A Property Interest Without Due Process Of Law.

Article 1, section 7 of the California Constitution provides that: "A person may not be deprived of life, liberty, or property without due process of law ... ." In its Notice of Appeal RWM asserts, without authority, that: "The coverage determination constitutes a violation of due process by imposing a new DIR coverage policy retroactively ... ." RWM did not expand on this argument when given a chance to do so.

The California Supreme Court rejected a similar argument when it held that a prevailing wage coverage determination is not "an 'adjudication' resulting in a deprivation requiring procedural due process." *Lusardi, supra,* 1 Cal.4th at p. 990. The Court of Appeal rejected a similar argument in *Sansone, supra,* 55 Cal.App.3d at p. 455: "An involuntary burden was not placed upon plaintiffs by virtue of the legislation reviewed herein. Plaintiffs' execution of the contract with knowledge of the penalties to be imposed if they or their subcontractors failed to pay the prevailing wages required under the contract was voluntary, and constituted consent to the provisions now challenged." The holding in *Lusardi* requires rejection of RWM's due process argument, which, in any case, is rendered moot by this Decision.

F. The Determination Does Not Infringe Upon The Commerce Clause.

The Commerce Clause provides that: "Congress shall have Power ... [t]o regulate Commerce ... among the several States." CEA asserts that attempts to apply the CPWL to out-of-state workers would pose potential violations of the Commerce Clause, citing the plurality opinion in *Edgar v. MITE Corp.* (1982) 457 U.S. 624, 642-643 ["The Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside the state's borders, whether or not the commerce has effects within the state."].

Edgar has no bearing on the facts of this case, which involve only activities wholly within California, and indisputably subject to California labor standards. Rather, CEA's argument entails hypothetical efforts to impose California prevailing wages on out-of-state

employers. Given that the Determination in question was limited to the specific facts this case, speculation regarding hypothetical attempts to apply the CPWL extraterritorially is beyond the scope of this appeal. For these reasons, CEA's Commerce Clause argument would be without merit even if it were not moot.

G. Social And Economic Policy Decisions Are The Province Of The Legislature, Not The Department.

Several interested parties argue that implementation of the Determination would lead to a host of impractical or undesirable consequences. Typical of such arguments are the assertions by PCMAC that requiring prevailing wages for off-site fabrication would impair the emerging "green or sustainable building movement," which favors the use of pre-fabricated components. PCMAC further contends that the Determination, if affirmed, would "even threaten the very viability of industries like ours while favoring out-of-State and out-of-Country manufacturers who are not subject to California prevailing wage rules and enforcement."

These arguments are erroneous for at least two reasons. First, they incorrectly assume that the Determination announced a rule of general application requiring prevailing wages for off-site fabrication in all cases, when in reality it was limited to the specific facts of this case. Second, the role of the Department is limited to interpreting and enforcing the Labor Code as enacted by the legislature. It would be an improper usurpation of the legislative function for the Department to impose its own social and economic policy judgments under the guise of statutory interpretation. See, *State Building Trades, supra*, 162 Cal.App.4th at p. 324 ["These are issues of high public policy. To choose between them, or to strike a balance between them, is the essential function of the Legislature, not a court."].

IV. CONCLUSION

For the reasons set forth in the Determination and in this Decision on Administrative Appeal, the appeal is granted and the Determination is reversed. This Decision constitutes the final administrative action in this matter.

Dated: 5/3/10

John C. Duncan, Director