

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

**RE: PUBLIC WORKS CASE NO. 2012-038
VENICE ISLAND LEVEE REHABILITATION, PHASE 2
LEVEE CROWN RISING PROJECT
ROBERT BURNS CONSTRUCTION, INC./JERICO PRODUCTS, INC.**

I. INTRODUCTION

On May 7, 2013, the Director of the Department of Industrial Relations (“DIR”) issued a public works coverage determination (“Determination”) in the above-referenced matter finding that the unloading of fill material by employees of Jerico Products, Inc. (“Jerico”) from a spud barge to the Venice Island Levee Rehabilitation Project (“Project”) is work done in execution of the public works contract and subject to prevailing wage requirements.

On June 6, 2013, Jerico timely filed an Appeal of the Determination pursuant to section 16002.5(b) of title 8 of the California Code of Regulations (the “Appeal”). All interested parties were given the opportunity to provide position statements concerning the Appeal. None were received.

The arguments submitted by Jerico have been carefully considered. For reasons set forth in the Determination, which is incorporated herein, and for the additional reasons stated below, the Appeal is denied and the Determination affirmed.

II. RELEVANT FACTS AND CONTENTIONS

Apart from how the Director interpreted them, the facts as described in the Determination are undisputed and, to that extent, they are incorporated by reference in this Decision. The Project involves rehabilitating the levee on Venice Island by: raising the levee’s crest elevation to 1.5 feet above the Base Flood Elevation, adding material to the landside slope to maintain the slope ratio, replacing an existing road, and installing

siphons within the levee. Reclamation District 2023 (“District”) awarded the Project to Robert Burns Construction, Inc. (“RBC”), which contracted with Jerico to deliver embankment fill material and aggregate base used in the Project. Jerico obtained the fill and aggregate material from commercial materials suppliers some distance away from Venice Island. Jerico workers loaded the barges with the material, moved the barges to Venice Island, and transferred the material to a smaller spud barge, which contained an excavator and a conveyor belt. Another Jerico employee placed the material onto the excavator and placed the material onto a conveyor belt, which then placed the material directly onto the levee or occasionally into RBC trucks on the levee. The spud barge moved along the levee following the workers from RBC, offloading material to wherever it was needed.

Jerico argues on appeal that its employees fall within the material delivery exemption under *O.G. Sansone Co. v. Department of Transportation* (“*Sansone*”) (1976) 55 Cal.App.3d 434 [127 Cal.Rptr. 799], and, as a result, are not entitled to prevailing wage rates. It contends: (1) the material unloaded from the spud barge to the Project site was “typically” stockpiled and not immediately incorporated into the levee, (2) Jerico employees were not “directly” or “personally” involved in spreading the delivered material on the levee, and (3) the Director improperly relied on *Williams v. SnSands* (2007) 156 Cal.App.4th 742 [67 Cal.Rptr.3d 606] in finding an alternate ground for coverage.

III. DISCUSSION

Under *Sansone*, on-hauling is done in the execution of a contract for public work when it is “functionally related to the process of construction” and “an integrated aspect of the ‘flow’ process of construction.” (*Id.* at p. 444 quoting *Green v. Jones* (1964) 128 N.W.2d 1, 7.) Under *Sansone*, on-hauling workers are not deemed to be employed on public work construction when the material delivered is stockpiled for later re-handling (and therefore exempt from prevailing wage laws). When the material delivered is

immediately incorporated into the public work site, however, compliance with prevailing wage laws is required.

Following *Sansone*, the First District Court of Appeal in *Williams*, concluded:

“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.” (*Williams, supra*, 156 Cal.App.4th at p. 762.)

Williams interpreted the statutory term “execution” to “plainly mean[] the carrying out and completion of all provisions of the contract.” (*Id.* at p. 750.)

A. The Determination Correctly Found That the Unloading of Fill Material by Jerico Employees from Spud Barges is Public Work.

The Determination correctly found public work coverage for Jerico workers unloading fill material from the spud barge to the levee on two grounds: (1) the unloaded material was immediately incorporated at the Project site rather than stockpiled for later re-handling and (2) Jerico’s unloading of material onto the levee was necessary to carry out and complete all provisions of the contract.

1. The Materials Delivery Exemption Does Not Apply Because the Unloaded Material Was Immediately Incorporated Into the Levee.

Jerico’s first argument that material “typically” sat on the levee for up to an hour and was not immediately incorporated into the levee is not supported by the administrative record. Instead, a reading of Jerico’s declarations together with evidence acquired by DIR during its investigation, including evidence submitted by Operating Engineers Local Union No. 3 (“Operating Engineers”), confirms that the material was immediately incorporated onto the levee, even though at times it sat for a short period. While Jerico points out that its employees gave declarations under penalty of perjury based on personal knowledge, the statements presented by Operating Engineers, without assistance of counsel, were also based on personal knowledge and at least purported to be

sworn. In the context of a coverage determination and its quasi-legislative setting, it would be improper for the Director to ignore the Operating Engineers' evidence. Moreover, it is undisputed that the specifications incorporated into the contract between RBC and District contained a "No Stockpiling" provision that prohibited the stockpiling of the material "unless otherwise approved or designated by the Engineer." (Section 02505B, subsections 4.12 and 4.15.) Jerico's argument notwithstanding, this provision does not permit certain "smaller stockpiles" while prohibiting "huge stockpiles." (See Appeal, p. 3.) Where the prevailing wage law is liberally construed to meet its overarching purpose – to protect and benefit employees on public works projects, see, e.g., *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 949-950 [22 Cal.Rptr.3d 518], the Director's interpretation of the record of a whole must be upheld.

Jerico contends the "requirement that the material be 'immediately' incorporated is not qualified, nor is the word 'immediately' defined." (Appeal, at p. 5.) Relying on a Merriam-Webster dictionary, Jerico asserts that the delivery exemption applies since "any interval of time, including as little as one hour, is too long for the material to be considered 'immediately' incorporated" and the record "establishes the material was usually incorporated within an hour, but sometimes sat overnight." (Appeal, p. 5.) What happened in the usual routine should govern the analysis and undue emphasis should not be placed on what happened "sometimes." Further, Jerico's interpretation relying on a strict dictionary definition ignores the realities of the construction process and is contrary to common sense, since some short passage of time before activities of incorporation occur can be anticipated. Jerico's argument is also unsupported by case authority. (See *Sansone, supra*, 55 Cal.App.3d at p. 444 quoting *Green, supra*, 128 N.W.2d at p. 7, qualifying the word "immediately" by the word "almost".)

2. Jerico's Interpretation That Its Workers Must Be Personally Involved in Spreading the Material for It to Lose the Delivery Exemption is Rejected.

Jerico contends that it is undisputed that Jerico employees “had zero involvement in incorporating the delivered material” because they “remained on the water during all working time and never assisted RBC employees on the levee.” (Appeal, at p. 3.) Jerico further claims its employees must have been “personally involved” in spreading and compacting the material for the unloading of materials to be covered. (*Id.*, at pp. 2-3.) Jerico’s contentions are rejected for reasons explained below.

a. Jerico’s Reliance on Past Determinations and an Enforcement Decision is Misplaced.

Jerico argues its employees must have personally spread the material on the levee to overcome the delivery exemption, relying heavily on two past public works coverage determinations (Decision on Administrative Appeal in *A&A Ready Mix Concrete and Robertson’s Ready Mix Concrete*, Public Works Case No. 99-037 (April 10, 2000) [“*A&A*”] and *Hauling of Fill Material from Bryan Ranch to State Highway 99 Roadway Project, California Department of Transportation*, Public Works Case No. 2009-019 (August 31, 2009) [“*Bryan Ranch*”]), and a prevailing wage enforcement decision issued under Labor Code section 1742 (PW 04-0180-PWH, *Triple E Trucking* (November 10 and 13, 2008) [“*Triple E*”]).¹ This reliance is misplaced. The facts in the prior cases are clearly distinguishable and the results inapposite.

In *Bryan Ranch*, the Director did not reach the question whether the materials were immediately incorporated by delivery employees because another basis for coverage under *Sansone* applied. (See *Bryan Ranch*, at pp. 5-6, finding the material supplier did not qualify for an exemption because it was not a commercial supplier of construction materials.) In *A&A*, the drivers were found not subject to prevailing wages, however,

¹ DIR’s public works coverage determinations are not precedential, and thus are not binding beyond the project that is the subject of the determination. Public notice of the DIR’s September 4, 2007, decision to discontinue the use of precedent decisions can be found at [http://www.dir.ca.gov/oprl/09-06-2007\(pwcd\).pdf](http://www.dir.ca.gov/oprl/09-06-2007(pwcd).pdf). A prevailing wage enforcement decision by its own terms applies only to the review of the particular civil wage and penalty assessment being challenged under Labor Code sections 1741 and 1742.

they did not participate in any on-site work after the concrete was “dumped in one location” at the site. The determination noted that “[i]n less than one percent of the time [did] drivers move from place to place in the dumping of their loads into the forms.” (*A&A*, p. 12 and n. 4.) Based on that limited contact at the site, the delivery exemption under *Sansone* applied.

In *Triple E*, to off-load base and asphalt materials, the delivery drivers were normally at the project for approximately five to ten minutes per delivery. The grading, heating, and spreading of material by the other site employees did not occur until after the drivers left. (*Triple E*, at p. 3.) In contrast, Jerico employees worked from the spud barge but in tandem with RBC employees. Jerico employees worked in ten to fourteen hour shifts, using the excavator and conveyor on the barge to off-load fill material to locations on the levee as indicated by RBC employees, with the spud barge moving along the levee to deposit the material where RBC employees needed it in order to spread the material. For the aggregate material, Jerico employees similarly used the excavator and conveyor on the barge to off-load fill material to locations on the levee as indicated by RBC employees, or to trucks used to make it easier to be spread on the levee. Triple E drivers did not have the level of engagement in the incorporation process that Jerico employees had.

b. Jerico’s Interpretation of *Williams* to Require Jerico Workers to Personally Spread and Compact the Unloaded Material is Rejected.

Jerico also relies on a single sentence from the *Williams* case that states: “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 p. 752 citing *Sansone, supra*, 55 Cal.App.3d at p. 444.) This selected sentence in *Williams* does not support Jerico’s position that the “direct incorporation” element requires Jerico workers personally and apart from RBC workers to have spread or compacted the unloaded material on the levee. (See Appeal, at p. 3.) Indeed, it supports the contrary finding of coverage for Jerico’s workers.

The sentence excerpted from *Williams* cites to page 444 of the *Sansone* decision. Page 444 of the *Sansone* decision, in its entirety, is a discussion of *Green*, 128 N.W.2d 1, in which a Wisconsin court held that the Wisconsin prevailing wage law applied to a trucking company that delivered roadbed material which was immediately distributed over the roadway surface. (*Sansone*, supra, 55 Cal.App.3d at p. 444; *Green*, supra, 128 N.W.2d at p. 7.) The following excerpt from *Green* appears on page 444 of the *Sansone* opinion:

In the instant case, although the drivers hauled materials from both commercial and 'ad hoc' pits, such materials were immediately distributed over the surface of the roadway. The drivers' tasks were functionally related to the process of construction. The crushed base for the first layer of the highway above the ground was dumped or spread by the drivers and immediately leveled by graders under the supervision of the general contractor. The crushed base and granulated subbase for shoulder material was dumped on the highway and immediately pushed onto the shoulder and leveled by the general contractor's graders. The aggregate, utilized as filler in the concrete, was dumped adjacent to a ready-mix concrete set up. The aggregate was immediately mixed with cement, and the concrete was then immediately laid upon the highway strip. (Fn. omitted.) () Clearly, the materials were applied to the process of highway improvement, almost immediately after the drivers arrived at the site. The delivery of materials was an integrated aspect of the 'flow' process of construction. The materials were 'distributed over the surface of the roadway' with no 'rehandling' out of the flow of construction. (*Sansone*, supra, 55 Cal.App.3d at p. 444 quoting *Green*, supra, 128 N.W.2d at p. 7.)

As is plain from this recitation, there is no requirement in *Green* (whose rationale was adopted by the *Sansone*) that the deliverymen personally spread or compact the material in order to overcome the delivery exemption. This inquiry does not depend on whether the Jerico workers personally spread and compacted the material on the levee, alone and without the assistance of RBC workers. Rather, the question is whether Jerico workers' tasks were "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction." (*Sansone*, supra, 55 Cal.App.3d at p. 444 quoting *Green*, supra, 128 N.W.2d at 7.) Due to the particular nature of the Project, where the public work consisted of raising the levee's slope ratio and level by

virtue of the material provided by Jerico, the actions of Jerico workers in moving the spud barge along the levee depositing the material to points where RBC employees needed and used it were an integrated aspect of the flow process of construction. Further, it is beyond dispute that without the off-loading of the materials by the Jerico workers, “the project would grind to a halt.” (11/16/12 Pickens letter).

B. The Determination Correctly Found That Jerico’s Unloading of Material Onto the Levee was Necessary to Carry Out and Complete All Provisions of the Contract Within the Meaning of Labor Code Sections 1772 and 1774.

Asserting as it must that Jerico workers’ “delivery” function was “performed independently of the contract construction activities,” (*Sansone, supra*, 55 Cal. App. 3d at p. 444), Jerico complains the Determination “appears to base coverage entirely on the ‘execution’ language in the *Williams* decision” and engaged in improper “cherry picking [of] broad dicta out of [*Williams*] to justify an end.” (Appeal, at p. 4.) The Determination did no such thing. With reference to use of the “execution” language, the Determination makes clear that the *Williams* court addressed the “in the execution” language as part of the court’s statutory analysis, which included consideration of the delivery exception. In fact, the Determination as a whole discloses that the textual basis for coverage is found in the phrase at it appears in Labor Code sections 1772 and 1774. As to the alleged used of dicta in *Williams*, it is correct that the *Williams* discussion of the statutory term occurred in the context of analyzing whether prevailing wage laws applied to the off-hauling of materials off of a public works jobsite. Yet, this does not undermine the validity of the *Williams* court’s observation that “what is important ... is not whether the truck driver carries material *to* or *from*” a public work site, but rather “the role the transport of the materials plays in the performance or ‘execution’ of the public works contract.” (*Id.* at p. 752, italics in original.) Here, as in *Sansone*, the role of the transport was sufficient to render the delivery exemption inapplicable.

Jerico apparently takes exception to the Determination’s reliance on *Williams*’ interpretation of the statutory term “in the execution of” to “plainly mean[] the carrying out and completion of all provisions of the contract.” (See *Williams, supra*, 156

Cal.App.4th at p. 750). As explained in the Determination, the Project specifically requires applying fill and aggregate material to raise the levee's crest elevation and adding the material to the landside slope to maintain the slope ratio. No party disputes that the Project work is done under a public work contract between District and RBC. Further, the contract between District and RBC requires RBC to "Import Levee Embankment Fill" and specifies the amounts of fill and aggregate material to be provided. (See contract between RBC and District, July 29, 2012, p. 1.) The specifications incorporated into that contract similarly require RBC to provide particular aggregate and fill material. (See specifications section 02220H, subsections 1.01, 1.02, and 2.01-2.11, as well as subsection 4.04 ["Contractor shall deliver levee embankment fill material to the levee..."].) Jerico delivered and unloaded onto the levee the material necessary to carry out and fulfill these express contract requirements, among others.²

IV. REQUEST FOR HEARING

With regard to Jerico's request for a hearing, section 16002.5(b) of title 8 of the California Code of Regulations provides that the decision whether to hold a hearing is within the Director's sole discretion. Here, Jerico presents no new facts with its Appeal. The facts set forth in the Determination that are material to the coverage question are not

² An alternative basis for coverage is Labor Code section 1720, subdivision (a)(2). Subdivision (a)(2) expressly defines "public works" to mean: "[w]ork done for irrigation, utility, reclamation, and improvement districts, and other districts of this type" and provides public works coverage for any type of work done for a listed district, even work not necessarily covered under section 1720, subdivision (a)(1). (See *Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal. App. 4th 1, 20 ["Although the type of governmental entity for whom the infrastructure work may be performed under subdivision (a)(2) is more limited than the entities for whom work may be done under subdivision (a)(1), the range of tasks covered by (a)(2) is broader. Subdivision (a)(1) requires that: (1) construction, alteration, demolition, installation or repair work be performed, (2) "under contract" (i.e., not by the public entity's own employees), and (3) the work be paid for wholly or in part out of public funds. Subdivision (a)(2) has no similar limitation as to the type of work that may be performed for improvement districts." *Ibid.*]. Here, Jerico's unloading work done for Reclamation District 2023 constitutes public work under section 1720(a)(2). (See also *Reclamation Dist. No. 684 v. State Dept. of Industrial Relations* (2005) 125 Cal.App.4th 1000 [23 Cal.Rptr.3d 269] [maintenance work done on a levee to protect an island from flooding was a public work project subject to the prevailing wage laws].)

in dispute. Jerico disputes the Director's interpretation of the law in light of the facts. In this situation the issues raised in the appeal are basically legal in nature and, therefore, no hearing is necessary. For that reason the request for a hearing is denied.

V. CONCLUSION

In summary, for reasons set forth in the Determination, as supplemented by this Decision on Administrative Appeal, the Appeal is denied and the finding that prevailing wages are required for the unloading of fill and aggregate material by Jerico employees from a spud barge to the Project is affirmed. This decision constitutes the final administrative action in this matter.

Dated: 5/7/2014



Christine Baker, Director