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S253574

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

LEOPOLDO PENA MENDOZA, ET AL.,

*Plaintiffs and Appellants,*

v.

FONSECA MCELROY GRINDING CO., INC., ET AL.,

*Defendants and Respondents.*

AFTER A DECISION BY THE NINTH CIRCUIT COURT
OF APPEALS
CASE NO. 17-15221

# RESPONDENTS' ANSWER TO AMICUS CURIAE BRIEF OF DLSE

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COMPANY

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Defendant and respondent Fonseca McElroy Grinding, Co., Inc. and Granite Rock Company ("Respondent") submits this answer to the amicus curiae brief filed by the Division of Labor Standards Enforcement ("DLSE") in support of appellants.

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

The issue before this Court is whether the offsite mobilization work performed by Plaintiffs -- including the transportation to and from a public works site of roadwork grinding equipment—is subject to prevailing wage requirements. The DLSE, the state agency charged with *enforcement* of California's prevailing wage law, has no legitimate interest in the issue before the Court. For this reason alone, the Court should decline to consider the DLSE's amicus curiae brief.

Even in the event the Court considers the DLSE's amicus brief, the DLSE has failed to provide any basis for the Court to find that any of the mobilization tasks at issue are subject to the prevailing wage law. The DLSE relies on the DIR coverage opinions which are non-precedential and inconsistent with applicable law. The DIR has been utterly inconsistent in its approach to determining whether and when off-site equipment hauling is covered prevailing wage work. As such, the DIR's opinions and administrative guidance are entitled to no deference by the Court and should be disregarded.

The DLSE's argument that offsite mobilization work is covered prevailing wage work because it is compensable travel time is both unsupported by the authorities on which the DLSE relies and inconsistent with the framework developed by the courts for determining whether offsite work is subject to the prevailing wage law. The courts have determined that such offsite work is subject to the prevailing wage law only if it is "in the execution of the public works contract," which the District Court properly determined it was not.

## II. LEGAL ARGUMENT

### A. The DLSE Has No Legitimate Interest In The Outcome Of This Matter.

As its name indicates, the Department of Labor Standards Enforcement (DLSE) is the lead agency charged with enforcement of California's labor laws, including the prevailing wage law. Labor Code sections §§ 79, 95, 1741; 8 Cal Code Regs. § 16100(a). The DLSE has no role in determining prevailing wage rates or in determining types of work subject to prevailing wage coverage. Labor Code §§ 1770, 1773, 1773.1, 1773.5(b), 1773.9. It is the Director of the Department of Industrial Relations (DIR) is exclusively tasked with those roles. *Id.* The DLSE's role with respect to the prevailing wage law is limited to enforcement of those laws as determined by the Legislature and the courts, and as interpreted by the DIR in its coverage determinations. Labor Code §§ 95, 1741; 8 Cal Code Regs. § 16100(a).

As the agency charged solely with *enforcement* of the prevailing wage law, the DLSE does not have any proper interest in whether certain types of work, such as the mobilization work at issue here, is subject to the prevailing wage law. The DLSE certainly has failed to set forth any such legitimate interest in its application to file its amicus brief[1], stating only in conclusory fashion that "[a] Court conclusion that offsite mobilization work performed by workers who also perform covered work on a public work project site is not subject to California's prevailing wage law would negatively impact the Labor Commissioner's enforcement, particularly regarding broad categories of work for which the regulated public has historically paid prevailing wages." (DLSE Amicus Curiae Brief, p.2.)

The DLSE provides no explanation whatsoever regarding how a decision by this Court finding that Plaintiffs' offsite mobilization is not

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[1] An application to file an amicus brief must include a statement of "the applicant's interest." Cal. Rule Ct. 8.200(c)(2).

covered prevailing wage work would negatively impact its enforcement efforts. Indeed, it is difficult to fathom how the agency's enforcement efforts would be negatively affected since DLSE is charged solely with enforcement of the law. There is no reason to believe, and the DLSE certainly provides none, that the DLSE could not robustly enforce the law with respect to offsite mobilization work regardless of whether or not the Court determines that work is subject to prevailing wage requirements.

### B. The DIR's Approach To Offsite Equipment Hauling Has Been Inconsistent And Is Entitled To No Deference.

The DLSE argues that the mobilization work at issue constitutes "travel time" for which operating engineers such as Plaintiffs must be paid at the prevailing wage rate, claiming that such a conclusion is consistent with the DIR's longstanding approach to such work. Importantly, the DIR's interpretation of the prevailing wage law is not binding on this Court, which must independently construe the statutory scheme. *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal. 4th 1, 7-8.

Further, the DIR' has been entirely inconsistent in its approach to determining prevailing wage coverage of the transport of equipment to and from a public works site. The handful of DIR coverage opinions addressing offsite equipment hauling do not follow any uniform approach or analysis to reach their desired result that the offsite hauling at issue must be paid at the prevailing wage rate. In 1989 and 1990, the DIR issued coverage opinions determining in conclusory fashion that the transport of equipment to and from a public works site is "integral part of the contractor's overall obligations. See, DIR Letter Re: *Redwood Park Bypass Projec*t (Feb. 14, 1989); DIR Letter Re: PW Case No. 90-059 (Dec. 31, 1990) (DLSE Mot. Jud. Not., Exhs. A, B.) A decade later, the DIR found that the hauling of equipment was covered prevailing wage work because it was performed by the Contractor's employees who also performed material hauling. See, DIR Letter Re: PW Case No 99-015 (Sept. 21, 1999) (DLSE

Mot. Jud. Not., Exh. C). In 2002, the DIR determined that truck drivers who hauled architectural and decorative elements to and from the State Capital to the contractor's shop for restoration was subject to the prevailing wage law because "essential performance of the public works contract occurs at both locations and what is being transported are ... existing pieces of the Capital being restored. See, DIR Letter Re: PW Case No. 2002-034, *Sacramento State Capital Exterior Painting Project,* at p. 7 (DLSE Mot. Jud. Not. Exh. D). Thus, in each of these coverage opinions, the DIR applied a different standard to reach its desired result that the prevailing wage law applied to offsite equipment hauling. Although the end result was consistent, the DIR's approach was not.

The DIR's Public Works Manual, relying on the Director's Decision in *Kern Asphalt, infra,* articulates an altogether different standard from that applied in any of its coverage determinations, stating that travel time "*related to a public works project* constitutes "hours worked" on the project, which is payable at not less than the prevailing rate..." (Emphasis added.) ER 168; DLSE Mot. Jud. Not. Exh. G at p.42. No California court has ever applied the DIR's vague "related to a public works project" standard to determine prevailing wage coverage, much less to determine whether offsite mobilization work is subject to the prevailing wage law. There is certainly no legal basis for doing so in this instance where California courts have provided the analytical framework for determining prevailing wage coverage. *See, Williams v. SnSands Corp.* (2007) 156 Cal. App. 4th 742, 749-754; *O.G. Sansome Co. v. Dept. of Transportation* (1976) 55 Cal. App. 3d 434, 443.

The DIR's coverage opinions finding that the transport of equipment must be compensated at the prevailing wage rate also directly conflict with the DIR's own public statements regarding offsite hauling from a public works site. The DIR states on its website, under the heading "Legal

Background Regarding Coverage of Off-Site Hauling, that; "[*o*]*ff-the-site hauling is not generally covered work* but has been found to be covered work in limited and specific circumstances by the Director of Industrial Relations, the courts and where covered by Labor Code section 1720.3." (Emphasis added.) ER 81. This administrative guidance only adds further confusion to the DIR's position with respect to the transportation of equipment such as that here.

The DIR has also demonstrated inconsistency in its approach to both work performed at an offsite facility and off-hauling from a public works site. The DIR issued several coverage determinations in 2003 and 2008 finding that offsite work at a permanent facility was subject to the prevailing wage law before reversing itself in 2010 and finding that such work was not covered. See, Respondents' Supplemental Motion for Judicial Notice (SMFJN) Ex. A, DIR opinion letter Re: PW Case No. 2002-064, *Offsite Fabrication by Helix Electric* (Mar. 4, 2003); SMFJN Ex. B, DIR opinion letter Re: PW Case No. 2000-027, *Cuesta College/Offsite Fabrication of Sheet Metal Work* (Mar. 4, 2003); SMFJN Ex. C, DIR opinion letter Re: PW Case No. 2007-008, *Russ Will Mechanical, Inc. Off-Site Fabrication of HVAC Components*; SMFJN Ex. D, DIR Decision on Admin. Appeal Re: PW Case No. 2007-008, *Russ Will Mechanical, Inc. Off-Site Fabrication of HVAC Components* (May 3, 2010). In 2007, the DIR determined that off-hauling of dredging material from a public works site was not covered by the prevailing wage law but then reversed itself on that finding the very next year. *See,* SMFJN Ex. E, DIR opinion letter *Re: Canyon Lakes Dredging Project Lake Elsinor and San Jacinto Watersheds Authority*, PW Case No. 2005-025 (June 26, 2007); SMFJN Ex. F, DIR Decision on Admin. Appeal Re: PW Case No. 2005-025, *Canyon Lakes Dredging Project Lake Elsinor and San Jacinto Watersheds Authority*

(March 28, 2008). These inconsistent determinations further show that the DIR has had no longstanding approach to coverage of offsite work.

Because the DIR's coverage opinions and administrative guidance with respect to the transport of equipment to and from a public works jobsite and offsite work generally have been thoroughly inconsistent and confusing, they are entitled to no deference by this Court in determining whether the mobilization performed by Plaintiffs is subject to the prevailing wage law. *Yamaha Corp. of America, supra,* 19 Cal.4th at 13 (While an agency's interpretation of the law is typically given some credit, "a vacillating position is entitled to no deference by the courts."); *Sheet Metal Workers Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal. App. 4th 192, 207 (same).

Finally, it is important to note that the DIR has been silent regarding prevailing wage coverage of mobilization work performed at a permanent offsite storage yard or other facility. Of course, the DIR has determined that other tasks, such as fabrication work, performed at a permanent offsite facility has been that such work is not entitled to prevailing wages. *See, Sheet Metal Workers, supra*, 229 Cal. App. 4th at 208-209. There is no administrative opinion extending prevailing wage coverage to equipment maintenance or readying work performed at a material supplier's or contractor's permanent yard.

### C. The DIR's Coverage Opinions Are Distinguishable And Do Not Apply The Framework Developed By The Courts.

The DIR itself has determined that its coverage opinions are project specific, advisory only, and not intended to be relied on as precedential. ER ; DLSE Mot. Jud. Not., Exh. G at p.8; *Sheet Metal Workers, supra*, 229 Cal. App. 4th at 207. Indeed, those decisions cannot be applied here because, to the extent they provide any factual basis for the DIR's opinion that prevailing wages should be paid for the offsite transport of equipment, those facts are distinguishable.

The DIR's 1989 and 1990 coverage opinions determine that prevailing wages should be paid for the hauling of equipment to and from the public works site without providing *any* factual basis for those determinations. Both opinions fail to describe the nature of the equipment transported, how it was transported, whether it was transported from a permanent yard or storage facility, or whether the transport was necessary to carry out a term of the public works contract, all of which facts the courts have deemed essential to determining prevailing wage coverage. *See, Williams, supra*, 156 Cal. App. 4th at 752-754; *O.G. Sansome, supra*, 55 Cal. App. 3d at 443; DLSE Mot. Jud. Not. Exh. A, B. As a result, the DIR's conclusory opinion in both matters that the equipment transport was "integral' to the public works contract cannot be relied upon as there are no facts from which to draw any similarities to the mobilization work at issue here.

Moreover, the miniscule facts that are provided in the DIR's 1989 and 1990 coverage opinions show that both opinions address facts that are importantly distinct from those here. In the *Redwood Park Bypass Project* coverage opinion, the DIR's determination addressed "the transport of construction equipment from a storage/service yard *and throughout the project location*" without making any distinction between the onsite and the offsite work. (Emphasis added.) DSLE Mot. Jud. Not. Exh. A. In both its 1990 and 2002 coverage opinions, the DIR determined that prevailing wages must be paid to employees of the contractor or a subcontractor who are delivering and removing construction equipment *and materials* to the jobsite, without making any distinction between the transport of materials and equipment. DLSE Mot. Jud. Not. Exhs. B, C. Here, in contrast to these DIR opinions, the mobilization work performed by Plaintiffs does not involve the delivery or removal of materials or the transport of equipment throughout a public works construction site. Nor is Plaintiffs' mobilization

work akin to the hauling of architectural and decorative elements for the State Capital restoration project since those pieces of the Capital building are not equipment and their transport cannot be considered mobilization work. Further, unlike on the Capital restoration project, here no portion of the public works contract was carried out at the yard or storage facility to and from which Plaintiffs transported the milling machine. See, DLSE Mot. Jud. Not. Exh. D.

### D. Mobilization Work Is Not Subject To Prevailing Wage Coverage Simply Because It Is Compensable Travel Time.

There is no authority for the DLSE's argument that the transport of the milling machine to and from the public works site constitutes travel time which must be paid at the prevailing wage rate. The DLSE's argument rests erroneously on this Court's decision in *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575 and the DIR Director's Decision in *In the Matter of Kern Asphalt Paving & Sealing Co., Inc.*, Case No. 04-1117 PWH (March 28, 2008). *Morillion* is not a prevailing wage case and does not purport to make any holding with respect to prevailing wage coverage. In *Morillion*, this Court held only that employees must be compensated for travel time when their employer requires them to travel to a work site on employer-provided transportation. 22 Cal. 4th at 578, 594. Here, consistent with *Morillion*, Plaintiffs were compensated for their time spent transporting equipment from the yard or storage facility to the job site. ER

*Kern Asphalt* is also inapposite. In *Kern Asphalt*, paving crew members were required to report to the company's shop and then were transported in company vehicles to a public works construction site. Relying on *Morillion*, the Director determined that the travel time was compensable because the employees were required to first report to the shop. The Director then determined the applicable wage rate, stating "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." *Kern Asphalt, supra*, at p. 13. As the District Court properly noted, unlike in *Kern Asphalt*, the question here "is not whether the time spent performing mobilization work is compensable, but rather whether it is subject to the prevailing wage law." ER

Moreover, *Kern Asphalt* is distinguishable in that the workers in that case were not performing any work tasks while in transit, much less any sort of mobilization work, leading the Director to find that the travel time was "incidental" to the workers' regular duties. Here, in contrast, the time spent by Plaintiffs performing their mobilization duties was not incidental to any other duties. Rather, Plaintiffs' mobilization duties were regular core duties required by their position. ER 16.

Further, the DIR itself has determined that the Director's Decision in *Kern Asphalt* has no precedential effect and is advisory only. *State Building & Constr. Trades Council of Cal. V. Duncan* (2008) 162 Cal. App. 4th 289, 300 (DIR determinations must be designated as precedential pursuant to citing Govt. Code 11425.60 in order to be relied upon in subsequent determinations). *See, Director's Prevailing Wage Enforcement Decisions* (Labor Code § 1742) (2007 to present), Dept. of Indust. Relations. http://wwwdir.ca.gov/oprl/PrevWageEncDecision.htm (listing *Kern Asphalt* as among decisions that have not been designated as precedential and therefore "cannot be relied upon as authority in future cases.") The Director has not issued any decision, precedential or advisory, for any of the types of work at issue here. Accordingly, the *Kern Asphalt* decision has no bearing on whether the mobilization tasks performed by Plaintiffs are subject to the prevailing wage law.

The DLSE's reliance on IWC Wage Order 16 to support its position is a red herring. Nothing in Wage Order 16 purports to delineate when

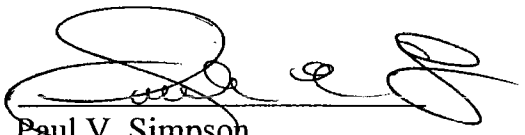
work is subject to the prevailing wage law. See 8 Cal Code Regs., § 11160. In its Public Works Manual, the DIR itself recognizes that Wage Order 16's requirements are separate and distinct from prevailing wage requirements, stating that the obligations of Wage Order 16 "are in addition to any prevailing wage obligations that may apply on the public works project." Thus, the Wage Order's reference to compensating travel time at the employee's "regular rate of pay" does not equate to the prevailing wage rate unless the travel time at issue is "in the execution of' a public works contract." In this instance, the District Court correctly concluded that the mobilization work performed by Plaintiffs was not "in the execution of the public works contract and is not covered by the prevailing wage rate." ER 18.

## III. CONCLUSION

For all the foregoing reasons and the reasons set forth in the Answer Brief on the Merits, this Court should hold that FMG and Granite Rock are not required to pay prevailing wages to Plaintiffs for that work.

Dated: February 13, 2020

SIMPSON, GARRITY, INNES & JACUZZI, P.C.

By: 

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## CERITIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204(c), the attached Respondents' Answer to Amicus Curiae Brief of DLSE is proportionately spaced, has a typeface of 13 points, and contains 4241 words, according to the counter of the word processing program with which it was prepared.

Dated: February 13, 2020

SIMPSON, GARRITY, INNES & JACUZZI, P.C.

By: _____

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## PROOF OF SERVICE

I, Estelle M. Franklin, am employed in the County of San Mateo, California. I am over the age of 18 years and not a party to the within action. My business address is 601 Gateway Boulevard, Suite 950, South San Francisco, California 94080. On February 13, 2020, I served the **RESPONDENTS' ANSWER TO AMICUS CURIAE BRIEF OF DLSE** by mailing a copy by first class mail in separate envelopes addressed as follows:

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Ninth Circuit
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Case No.: 17-15221

Hon. William H. Orrick
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Northern District of California
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I am readily familiar with the practice of this business for collection and processing of documents for mailing with the United States Postal Service. Documents so collected and processed are placed for collection and deposit with the United States Postal Service that same day in the ordinary course of business. The above-referenced document(s) were placed in (a) sealed envelope(s) with postage thereon fully prepaid, addressed to each of the below listed parties and such envelope(s) was (were) placed for collection and deposit with the United States Postal Service on the date listed below at South San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 13, 2020, at South San Francisco, California.

Estelle M. Franklin