STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Atkinson/Walsh, a Joint Venture and Cotter Water Trucks	Case Nos. 16-0047-PWH 16-0045-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor Atkinson/Walsh, a joint venture (A/W), and affected subcontractor, Cotter Water Trucks (Cotter) (hereafter collectively referred to as the Requesting Parties), submitted a timely joint request for review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the SR-91 Corridor Improvement Project (Project) in Riverside County. The Assessment determined that $168,818.02 in unpaid prevailing wages and statutory penalties was due.

A Hearing on the Merits was conducted on August 8, August 19, October 20, and December 9, 2016, as well as February 3, 2017 (collectively "the Hearing"), in Los Angeles, California, before Hearing Officer John J. Korbol. Thomas W. Kovacich appeared for both of the Requesting Parties, and Abdel Nassar appeared for DLSE. Deputy Labor Commissioner Belle Chen was the sole witness to testify for DLSE; none of the workers at issue appeared or testified in support of the Assessment. The witnesses who testified for the Requesting Parties were Jerry Cotter, sole proprietor of Cotter Water Trucks; Susan Powers, regional business manager for Atkinson Construction, one of the joint venturers on this Project; and Rick Weir, a general superintendent for Atkinson. The

parties were granted leave to file post-hearing briefs. DLSE's brief was submitted March 13, 2017. A/W and Cotter's brief was dated April 12, 2017. The matter was submitted for decision on April 18, 2017.

On December 18, 2018, the Acting Director of the Department of Industrial Relations issued an Order directing that the submission be vacated, and that the matter be remanded to the Hearing Officer for consideration of additional issues. On August 26, 2019, following a period during which the parties were encouraged to consider resolution, the Hearing Officer issued an Order Following Remand Re Additional Briefing, directing the parties to submit additional briefs addressing four specific issues.

After consideration of the additional briefing, and based on the record and findings of the Hearing Officer in this matter, the Director now finds that the Requesting Parties have carried their burden of proving that the basis for the civil wage and penalty assessment as issued by DLSE and as framed and presented for hearing to the Hearing Officer was incorrect. (Lab. Code, § 1742, subd. (b).) As issued by DLSE, and served on the affected subcontractor Cotter and prime contractor A/W, the basis of the Assessment was asserted to be, *inter alia,* the "misclassification" of specified workers, listed as employees in the audit worksheet attached to the Assessment. Labor Code sections 1741 and 1742 required that the Assessment describe the nature of the alleged violation, state the basis, and be "sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing." (Lab. Code, §§ 1741, subd. (a); 1742, subd. (b).) As issued, DLSE described the nature of the violation and the basis of the Assessment as misclassification. As those workers were all classified as independent contractors, the issue presented was necessarily whether the workers had been misclassified as independent contractors rather than employees. The Director finds, however, that subcontractor Cotter demonstrated through evidence presented at the hearing that the workers at

issue (who drove water trucks at the Project site) were independent contractors, not employees, and were not misclassified by Cotter. Therefore, the Director issues this Decision dismissing the Assessment. The Director emphasizes that this Decision does *not* find that independent contractors who perform covered work on a public works project are exempt from prevailing wage requirements; rather, this Decision finds only that the stated basis for this particular Assessment was proven incorrect.

FACTS

The Riverside County Transportation Commission advertised the Project for bid in February of 2013,[1] and awarded the contract to design and construct the State Route 91 Corridor Improvement Project A/W on May 8, 2013. The primary component of A/W's scope of work on the Project was to design and build additional lanes for the highway to serve as HOV or toll lanes. A/W uses about 550 of its own employees on the Project, and approximately 40 subcontractors employ another 500 to 700 workers. A/W uses twenty to thirty water trucks on the Project at any particular time.[2] Water trucks are needed for purposes such as dust control during the construction process, soil compaction, backfill, embankment fill, and occasionally de-watering. Good water truck drivers have experience and skill in working with various materials such as sand or clay because different materials require different amounts of water. Water truck drivers must measure moisture with a gauge, and may use a different gauge to measure dust particles when watering for dust control. Over-watering is to be avoided because it becomes a safety risk and may cause accidents, especially on the haul road. Over- and under-watering during compaction requires the work

[1] The parties did not specify the exact date of the bid advertisement.

[2] As of the last day of the Hearing on the Merits, the Project was still underway and no Notice of Completion had been filed or recorded.

to be done again.

A/W's Use of Water Trucks.

Atkinson Construction is a union signatory with the operating engineers', cement masons', laborers', and carpenters' unions, but not with the teamsters' union. Truckers are hired for the on- or off-hauling of materials such as dirt, aggregate, concrete, and water. Truck drivers do not need to hold a California contractor's license to work on construction projects. For this Project and other public works, A/W hires what it considers to be independent owner-operators of trucks, including water truck drivers. A/W has used 300 to 500 such owner-operators on the Project.

A/W considers some water truck drivers to be direct vendors, such as Cotter, who are hired off a list of previously-approved vendors maintained by A/W. Water truck drivers that are not on the approved vendor list are identified by A/W through job fairs, internet search, word-of-mouth, and referrals from direct vendors, including Cotter. Some experienced and skilled water truck drivers with previous experience with A/W or Atkinson Construction may be contacted directly.

On site, water truck drivers are called to the Project site and work at the direction of A/W's field foremen.[3] The foremen determine how many water trucks are needed on a particular day and place. The foremen determine the hours worked by any particular water truck driver, and match each water truck with a crew of five to ten other workers. The foremen tell the water truck drivers and associated crew to go to areas where the water is needed throughout the workday. The foremen are required to sign a daily time ticket for each water truck driver to verify the hours worked.

As an approved vendor, Cotter's services are obtained through a series of

[3] Field foremen do not hire water truck drivers.

purchase orders issued to him by A/W for provision of water trucks with operators at an $80.00 hourly rate,[4] and not to exceed a total of $10,000.00. (Exh. 16, pp. 588-90). Jerry Cotter himself owns a water truck and works as the driver and operator of that truck on the Project. The "not to exceed" dollar amount on the first purchase order reflected A/W's expectation that Cotter would broker the availability of other water trucks and water truck drivers for the Project. If Cotter referred other qualified water truck drivers to A/W, the intention was that Cotter would invoice A/W for the work of those other water truck drivers at the hourly rate specified in Cotter's purchase orders. A/W would pay Cotter for the work done by Jerry Cotter himself and for the work done by the water truck drivers referred to A/W by Cotter, and Cotter would then pay the other water truck drivers. A/W has a system in place to detect and prevent kickbacks by Cotter.

Cotter's Brokerage and Leasing Relationships with A/W and the Water Truck Drivers in the Assessment.

Jerry Cotter operates his own water truck on construction projects, including this one. He considers himself to be an "owner-operator" as that term is used in the construction industry. He is also in the business of being a water truck broker leasing water trucks. Cotter leases water trucks to Albert Bernal, Chris Christensen, William Freier, Maurillo Quiroz, Donald Selters, Allen White, and Earl Jones, all of whom worked on the Project upon referral from Cotter. These were considered by Cotter to be "full service" rentals,[5] with responsibility for insurance, maintenance, tires, and administrative services residing with Cotter as lessor. As lessees, these water truck drivers agreed to pay Cotter hourly lease rates ranging from $42.00 to $50.00. Each water truck driver

[4] The initial hourly rate was $75.00.

[5] A full service rental contrasts with a "bare" rental where a truck is leased and the lessee assumes responsibility for all upkeep, repairs, and insurance.

obtained a Certificate of Title in the water truck driver's name, as the registered owner of the water truck, with Cotter listed as a lien holder. Each water truck driver registered the leased vehicle with the Department of Motor Vehicles (DMV), with each registration card identifying the water truck driver as the registered owner and listing Cotter as a lien holder.[6] The duration of each lease was open-ended, with the exception of the truck leased to William Freier, which was expressly limited to a 48-month term. After 48 months, Cotter gave each lessee driver the option to purchase the truck from Cotter. In the past, three or four lessee drivers opted to do so. Each party to the lease could terminate the lease at any time.

For each water truck driver referred by Cotter pursuant to A/W purchase orders, A/W required a California Department of Transportation (Caltrans) CEM-2510 form: Truck Owner-Operator Certification of Ownership. According to a December 21, 2006, memorandum from Caltrans (Exh. Z), the CEM-2510 form is used to verify the status of "true owner-operators" of trucks as independent contractors. The evidentiary record includes CEM-2510 forms completed by Jerry Cotter, Albert Bernal, Chris Christensen, William Freier, Maurillo Quiroz, Donald Selters, and Allen White. On the CEM-2510 forms, "Cotter's Water Trucks" was listed as the "business name" for the vehicles identified. These forms, along with an insurance certificate, were submitted to A/W by Cotter.

On the Project site, Jerry Cotter and each other water truck driver referred by Cotter obtained a daily time ticket, signed by the A/W foreman, reflecting the hours worked by that particular water truck driver. (Exh. 16.) The daily time tickets were submitted to A/W. Cotter would then invoice A/W for the hours worked by Jerry Cotter and the drivers of the leased trucks. To authorize

[6] The DMV's identification of the lessee drivers as the registered owners of the leased trucks is not determinative of the legal status of the lessee drivers as employees or independent contractors and does not alter the arrangement devised by Cotter, whereby the vehicles were leased for a period until a lessee driver exercised the option to purchase.

payment, A/W would compare the daily time tickets, Cotter's invoice, and Cotter's purchase order. Payment from A/W went directly to Cotter at the purchase order rate of $80.00 per hour. A/W did not negotiate with or pay the water truck drivers referred by Cotter.

From the $80.00 hourly payment from A/W to Cotter, Cotter agreed to pay his water truck lessees at the rate of $70.00 per hour for their work on the Project, with the difference representing Cotter's profit as a broker. As lessees, the water truck drivers executed a "Non-Employee Deduction Authorization Agreement" whereby Cotter was authorized to deduct the hourly lease rate from each corresponding $70.00 hourly payment.[7]

Another document involved in this arrangement was the Caltrans CEM-2505 form entitled Owner Operator Listing, each of which covered a one-week pay period for one truck driver. (Exh. 11.) Cotter completed the forms by filling in the hours and dates worked on the Project for each water truck driver listed. The forms are required by "the State"[8] to certify both the payment by Cotter to the other water truck drivers and the fact that no rebate was being taken from the other water truck drivers. Each CEM-2505 form contains the following language at the bottom: "Note: Certification will be accepted only from the contractor employing the owner operator. It will not be accepted from the owner operator his/herself." The completed CEM-2505 forms reveal that Jerry Cotter initially paid himself $75.00 per hour and later increased that payment to $80.00 per hour. As stated above, Cotter paid the other water truck drivers who worked on the Project with the leased water trucks at the hourly rate of $70.00.

Cotter did not pay the water truck drivers any benefits, withhold payroll taxes or make employer contributions, provide medical insurance or take out a

[7] The water truck lessees had the option to decline the deduction authorization and instead pay Cotter a minimum of $1,500.00 per month under the lease.

[8] Per the testimony of Susan Powers. Presumably, she was referring to Caltrans.

worker's compensation insurance policy. He provided the water truck drivers with IRS 1099 forms for tax purposes.

The Assessment.

DLSE served the Assessment on January 6, 2016. The Assessment identifies A/W as the prime contractor and Cotter as a subcontractor. The public works audit worksheet, served with the Assessment, identifies Cotter as the employer, as does DLSE's audit summary. The Assessment and audit asserted various violations, including *inter alia,* "misclassification" of workers, underpayment of wages, overtime violations, failure to pay fringe benefits, failure to employ apprentices, and other apprenticeship related violations. The audit worksheet listed six underpaid "Employees" – Albert Bernal, Chris Christensen, William Freier, Maurillo Quiroz, Donald Selters and Allen White – and also listed Jerry Cotter as an "Employee" for whom training fund contributions were due. As all of these drivers had been classified as independent contractors, the asserted basis of the assessment – misclassification of workers – necessarily referred to the drivers' misclassification as independent contractors rather than employees. The Assessment found a total of $91,118.02 in underpaid prevailing wages, including unpaid training fund contributions. Penalties were assessed under Labor Code sections 1775 and 1813 in the amount of $50,320.00. Further, penalties were assessed under Labor Code section 1777.7 for apprenticeship violations in the amount of $27,180.00.

DISCUSSION

Labor Code sections 1720 and following (the "Prevailing Wage Law") set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. [9] As part of the statutory scheme, section 1771 provides that for all "public works projects" of

[9] All further statutory references are to the Labor Code, unless otherwise specified.

$1,000 or more, "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works." The purpose of the Prevailing Wage Law was summarized by the California Supreme Court in one case as follows:

> 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, 987, citations omitted (*Lusardi*).) DLSE 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." (§ 90.5, subd. (a), and *Lusardi, supra*, at p. 985.) Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a civil wage and penalty assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the

assessment by filing a request for review under section 1742, which will then be set for hearing before a hearing officer appointed by the Director of Industrial Relations. Subdivision (b) of section 1742 provides in part that at the hearing, "[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." The applicable regulations provide that DLSE has the initial burden at the hearing to present evidence providing prima facie support for the assessment, and if this initial burden is met, the affected contractor or subcontractor "has the burden of proving that the basis for the [Assessment] …is incorrect." (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Section 1743 imposes joint and several liability on public works contractors and their subcontractors for final orders or judgments resulting from the Director's decision after a hearing conducted under section 1742.

Issues Presented.

The regulations governing procedures for a review hearing authorize the Hearing Officer to "issue such procedural Orders as are appropriate for the submission of evidence or briefs and conduct of the hearing, consistent with the substantial rights of the affected Parties." (Cal. Code Regs., tit. 8, § 17231, subd. (c).) "Prior to taking evidence, the Hearing Officer shall define the issues and explain the order in which the evidence will be presented; …." (Cal. Code Regs., tit. 8, § 17243, subd. (d).) Section 1741, subdivision (a), requires that an assessment include "the basis for the assessment," and section 1742, subdivision (b), similarly provides that "[t]he assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing."

In this case, the basis for the Assessment as served, and as understood by the parties, was that the water truck drivers at issue were misclassified as independent contractors. In the pre-hearing process, the Hearing Officer conducted five Prehearing Conferences with the participation of all parties. The

Minutes of the March 21, 2016, Prehearing Conference stated: "The parties agreed that there exists a threshold issue as to whether the workers covered by the CWPA were employees of Cotter Water Trucks or independent contractors." Following the July 1, 2016, Prehearing Conference, the Minutes issued by the Hearing Officer stated: "With the concurrence of the parties, the Hearing on the Merits for these two cases will be limited to the threshold issue identified at the March 21, 2016 Prehearing Conference: Whether the workers by the CWPA were employees of Cotter Water Trucks or independent contractors. With this limitation on the scope of upcoming Hearing on the Merits, IT IS ORDERED that the Hearing on the Merits remains on calendar as scheduled." None of the parties objected to the contents of the Minutes from either the March 21 or July 1, 2016 Prehearing Conferences, or to the Hearing Officer's statement of the sole issue to be decided at the Hearing.

Pursuant to the Hearing Officer's Order, the parties submitted a joint statement of the issue to be tried at the Hearing on the Merits.[10] The Requesting Parties adopted the Hearing Officer's statement of the issue. DLSE, however, asserted at that time that the issue would be "whether the workers covered DLSE's (*sic*) CWPA were employed upon a public work pursuant to Labor Code § 1742." This broad and essentially noncommittal statement parroted language from the statute without identifying any specific issue to be resolved (i.e., whether the project was a public work, or whether the work was performed in the execution of the project, or whether employees were misclassified, etc.) Although the statement suggested the possibility of additional theories other than the misclassification of employees as independent contractors, the parties also took the opportunity in the Joint Statement to further articulate their respective positions, and in so doing, DLSE simply raised the misclassification issue again, asserting that "Cotter and Atkinson will not be able to show that

[10] Dated August 1, 2016.

these workers were independent contractors because Cotter and/or Atkinson had the right to and/or controlled the manner and means by which the workers accomplished their work on the project." DLSE also argued that "secondary factors" would weigh against a finding that the water truck drivers were independent contractors. Thus, notwithstanding its broad and opaque statement on the issue presented, DLSE once again articulated its position that the drivers were misclassified as independent contractors, and failed to give fair notice to the Requesting Parties or even to the Hearing Officer that it intended to present any additional or alternate theories or bases for the Assessment. Accordingly, as determined by the Hearing Officer through consultation with the parties in the pre-hearing conference process, and as articulated by the parties themselves, the issue presented for resolution at the Hearing in this matter was whether the water truck drivers identified in the Assessment were employees of Cotter, or alternatively, independent contractors.

On the first day of the Hearing, the Hearing Officer reiterated that the sole issue presented for decision was whether the water truck drivers listed on the Assessment were employees of Cotter or independent contractors with Cotter's brokerage business. In a colloquy with counsel, DLSE asserted for the first time that even if the water truck drivers were deemed not to be employees of Cotter, under section 1772 they should still be considered "employed upon public work," and should have been paid at prevailing wage rates. In response, the Requesting Parties objected to this "secondary issue," and also argued that there was no Assessment against any of the water truck drivers for allegedly failing to pay themselves prevailing wages. The Hearing Officer disallowed the raising of these additional issues and theories on the first day of testimony, and proceeded with the Hearing on the sole issue of employment as framed by the parties in the pre-hearing conference process.

Additional Post-Remand Briefing

Following the initial submission of this matter after the Hearing, and given the manner in which the issues had been presented, the Acting Director issued an Order on December 18, 2018, vacating the submission and remanding the matter to the Hearing Officer. The Order directed that additional issues presented by the underlying circumstances should be considered, including whether the water truck drivers were entitled to be compensated at prevailing wage rates regardless of whether they were employees of Cotter or independent contractors; if so, which party, if any, was liable for any underpayment of wages and the associated penalties; and whether the issues as presented and framed by DLSE in the Assessment and pre-hearing proceedings, were sufficient to provide fair notice to the Requesting Parties of the basis of the Assessment if the water truck drivers were not employees.

Subsequently, and following a period of months during which the parties explored the possibility of negotiated resolution, the Hearing Officer issued an Order Following Remand Re: Additional Briefing, directing the parties to address specific additional issues, including those identified in the Acting Director's prior Order referenced above. Specifically, the parties were directed to address, among other issues: 1) whether the water truck drivers at issue were entitled to be compensated at prevailing wage rates regardless of whether they were employees of Cotter as alleged by DLSE, or independent contractors; 2) if the drivers were entitled to prevailing wage rates even if they were independent contractors, who was liable for the assessed unpaid prevailing wages and penalties; and 3) was the Assessment as issued and presented by DLSE in the pre-hearing proceedings, and at the Hearing, sufficient to provide fair notice and to establish the liability of A/W as prime contractor and/or of Cotter as subcontractor for unpaid prevailing wages and penalties if the drivers

independent contractors? The parties were also allowed to address any additional legal or factual issues they contended should be considered.

Notwithstanding the express direction of the Hearing Officer, none of the parties squarely addressed the issues they were instructed to address in their supplemental post-remand briefs. For its part, DLSE's post-remand brief focused almost entirely on new arguments that the subcontracting arrangements on the Project were invalid under provisions of the Public Contract Code, and that the drivers at issue were required to be licensed under the Business and Professions Code. Its discussion of the issues specified by the Hearing Officer was perfunctory and without any substantial analysis. For their part, the Requesting Parties quibbled with the questions posed, largely repeated prior arguments concerning the independent contractor status of the drivers, and also argued that the drivers were, in fact, paid at prevailing wage rates. Accordingly, notwithstanding the opportunity presented to the parties to address additional issues implicated by the circumstances, the matter ultimately remained presented to the Hearing Officer largely as originally framed by the Assessment.

The asserted basis of the Assessment was that Cotter was the alleged employer of the six water truck drivers who leased water trucks from Cotter. The Assessment, if upheld, would make Cotter responsible as an employer for an employer's obligations under the prevailing wage law (see a summary of the Assessment, above). As noted in the Director's prior Order in this matter, the underlying circumstances do implicate the question of whether workers on a public works project (here, water trucks drivers) who are independent contractors are entitled to compensation at prevailing wage rates. It has long been the enforcement position of DLSE and the interpretation of the Director in reviewing assessments that independent contractors who work on public works contracts are indeed entitled to be paid the prevailing wage rate even though

they are not employees.[11] In this case, however, DLSE did not issue the Assessment on these grounds, did not present this issue in any clear or discernable manner in the pre-hearing conference process such that the Requesting Parties and Hearing Officer were on notice of the issue prior to the Hearing, and did not address the issue squarely, and with analysis and authority, in the post-remand briefing.

Accordingly, the undersigned has determined that it is appropriate to review the Assessment solely in relation to the asserted basis of misclassification of the workers as independent contractors.

The Test for Employee Status.

During the Hearing, the Hearing Officer informed the parties that the issue of independent contractor vs. employee issue would be decided under the analytical framework set forth in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*). There was no objection by the parties. In DLSE's post-Hearing brief, it argues that *Borello* compelled the conclusion that the water truck drivers were employees of Cotter. The Requesting Parties argue that the reasoning of *Borello* leads to the opposite conclusion when applied to the facts of this case.

While this Decision was pending, the California Supreme Court handed down its decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County* (2018) 4 Cal.5th 903 (*Dynamex*). In the context of a wage and hour class action, the Court decided that the common law test for distinguishing between employees and independent contractors as embodied in *Borello* does not control with respect to obligations imposed by California wage orders. Instead, when assessing a worker's status as an independent contractor or

[11] See, e.g., *In re the Request for Review of DMR Team, Inc.,* Case No. 15-0227 PWH, issued July 21, 2016, at pp. 4-5; *In re the Request of Review of United Steel Industries, Inc.,* Case No. 09-0217 PWH, issued July 21, 2010, at p. *In re the Request for Review of Angeles Contractor,* Case No. 08-0224 PWH, issued September 15, 2009, at p. 9.

employee for purposes of the obligations imposed by a wage order, the "to suffer or permit to work" standard, as applied in conjunction with the "ABC test" set forth in the *Dynamex* decision, will apply. (*Dynamex, supra,* 4 Cal.5th at p. 957.) This case is distinguishable from *Dynamex* because it involves the minimum wage obligations under the Prevailing Wage Law and the Director's prevailing wage determinations, not the wage and hour requirements imposed by a wage order. The Court's decision in *Dynamex* was addressed to the wage order context. (*Dynamex, supra,* 5 Cal.5th at pp. 916, 948.)

Subsequently, in the 2019 legislative session, the Legislature enacted Assembly Bill No. 5 ("AB 5"), codified as new Labor Code section 2750.3, effective on January 1, 2020. Section 2750.3 codifies the "ABC test" for employment status under circumstances as specified and with a number of exceptions as specified in the statute.

Given that the hearing in this matter proceeded under the *Borello* standard, prior to the issuance of *Dynamex* and prior to the enactment of section 2750.3, and given that no party has argued that *Borello* does not apply, this decision finds the matter should be resolved by the application of *Borello* instead of a different test. (See *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530-32.)

Under that standard, there exists a rebuttable presumption affecting the burden of proof that a person rendering service for another is an employee. The party asserting otherwise, that the presumed employee is, rather, an independent contractor, bears the burden of proof on the issue. (*Linton v. DeSoto Cab Company, Inc.* (2018) 15 Cal.App.5th 1208, 1220-1221.) Here, the Requesting Parties shoulder the burden of establishing that the drivers who worked on the Project are independent contractors and not employees of Cotter.

In determining whether a particular worker or group of workers should be legally classified as employees or independent contractors, the *Borello* Court

stated that the central inquiry is what is generally known as the "right to control" test. Courts must evaluate whether the person to whom service is rendered held the right to control the details of the work, or in other words, the manner and means of accomplishing the results desired. (*Borello, supra,* 48 Cal.3d at p. 350.) Although a degree of freedom may be granted to a worker or may be inherent in the work involved, the key inquiry is how much control the alleged employer has the right to exercise in the context of the service relationship. (*Linton, supra,* 15 Cal.App.5th at p. 1222.)

Borello also enunciated a number of secondary factors that must be considered, henceforth known as the *Borello* factors. These factors include: (1) whether there is a right to terminate the relationship at will without cause (which *Linton* characterizes as "ultimate control" and "the strongest evidence of control," *Linton*, *supra,* 15 Cal.App.5th at p. 1222 [quoting *Ayala, supra,* 59 Cal.4th at p. 539]); (2) whether the one performing services is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is a part of the regular business of the principal; (9) whether or not the parties believe they are creating an employer-employee relationship; (10) whether the classification of independent contractor is bona fide and not a subterfuge to avoid employee status; (11) the hiree's degree of investment other than personal service in his or her own business and whether the hiree holds himself or herself out to be in business with an independent business license; (12) whether the hiree has employees; (13) the hiree's opportunity for profit or loss depending on

his or her managerial skill; and (14) whether the service rendered is an integral part of the alleged employer's business.

The *Borello* factors "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." (*Borello, supra,* 48 Cal.3d at p. 351.) Application of the *Borello* factors "is fact specific and qualitative rather than quantitative. Right of control retains significance, but is no longer determinative." (*State Compensation Ins. Fund v. Brown* (1995) 32 Cal.App.4th 188, 202 (*Brown*).)

In the present case, the "right of control" test, as well as the balance of the secondary *Borello* factors, compels the conclusion that the drivers named in the Assessment were independent contractors in relation to Cotter, not employees, and second-tier subcontractors to A/W.

Right of Control.

Functioning as a water truck broker, Cotter was a pre-approved "direct vendor" of water truck services to A/W on the Project. Cotter performed this service under a purchase order from A/W whereby Cotter referred experienced water trucks and operators to A/W. A/W negotiated with Cotter, its subcontractor, an hourly price ($75.00 and later $80.00 per hour) for these services. Cotter agreed to refer, and did refer, water trucks and operators to A/W. There was no evidence that Cotter dispatched the drivers to the Project site on day-to-day basis. Cotter subcontracted with the drivers of the water trucks (which were leased to them by Cotter) to work at a negotiated hourly rate ($70.00 per hour) that provided a profit margin for Cotter as water truck broker. For work performed on this Project, A/W paid Cotter, and Cotter paid himself and his lessee drivers.

Nothing in the lease agreements prevented the drivers from working on other construction projects or for other brokers or contractors. They were free

to accept or reject the referral to A/W if they preferred to work elsewhere.[12] Nothing in the lease agreements referred to A/W or to this Project. Cotter did not guarantee that work would be provided to the drivers.

A/W was free to accept or reject any of Cotter's referrals. A/W held the right to decline any of Cotter's referrals if a particular driver did not perform to the satisfaction of an A/W foreman, without input or clearance by Cotter. The drivers drove their own leased trucks, but nothing in the lease agreement prohibited them from hiring other drivers, although no evidence shows that they did. By choosing to make lease payments by the hour, and by choosing the "full service" lease rather than a "bare" rental, the drivers chose to pay Cotter for truck maintenance and repairs through their lease payments.

Cotter did not control which of the referred drivers got called in to work on the Project, or when or how often they worked on the Project. Cotter did not control how they performed their work, their hours, break times, or reporting or quitting times. These aspects of the work were controlled by A/W, as A/W needed to coordinate the provision of water with the progress of construction on an as-needed basis and because the water truck drivers had to be integrated into a larger A/W crew.[13] Once the trucks were leased to the drivers, Cotter's participation was limited to referring the drivers to A/W, collecting the lease payments, and upon proof of hours worked as evidenced in the daily time

[12] The daily time tickets and the weekly Owner-Operator Listing filled out by Cotter reveal that there were no weeks when all seven drivers named in the Assessment were on the Project, and there were several weeks when none of drivers were needed. While work on construction projects is necessarily staged and certain crafts or tasks are not needed while other crafts are working, in the absence of any testimony from the drivers, it is reasonable to infer that the drivers worked on other construction projects during the time period covered by the Assessment.

[13] Jerry Cotter testified that he did not arrange for the drivers to obtain loads of water for the leased trucks. Otherwise, there was no testimony or documentary evidence bearing on the manner in which the drivers obtained their water or the manner in which the loads were transported.

tickets, paying the water truck drivers from the proceeds of A/W's payment to Cotter as a direct vendor.

Right to Discharge at Will.

Both Cotter and the drivers had the right to revoke the lease agreements at any time, apparently without notice and for any reason. As noted in the *Brown* decision, this mutuality "is consistent either with an employment-at-will relationship or parties in a continuing contractual relationship." (*Brown*, *supra*, 32 Cal.App.4th at p. 203.) Jerry Cotter and Rick Weir, general superintendent for A/W, testified that A/W, not Cotter, held the right to use or not use any particular driver, based on the quality of work. There was no evidence that the lease would be terminated by Cotter if a driver declined to work with A/W, or indeed that there would be any reprisal for declining work of any kind.

Distinct occupation.

The uncontradicted testimony from the Requesting Parties' witnesses was that, as of that time, it was custom and practice in the construction industry to use independent "owner-operators" to provide water on construction projects. For this Project, A/W tried to use only skilled and experienced water truck drivers that had been referred or recommended by brokers or other water truck drivers that A/W is familiar with. A/W required that those drivers referred by Cotter provide a CEM-2510 form and that payment to Cotter be processed using the CEM-2505 forms, both Caltrans forms for "owner-operators." This is consistent with Cotter acting as a water truck broker, a distinct occupation from that of being a water truck driver/owner-operator.

A lease agreement with a defined term is an indicator of a true independent contractor relationship, as opposed to an indefinite term, which confers a permanence to the relationship associated with employment. (See *Brown, supra,* 32 Cal.App.4th. at p. 203.) Here, the record is mixed. The truck leased by Cotter to William Freier included an addendum limiting the duration of

the lease to 48 months, and giving Freier the option to purchase the truck at the end of that period for the pre-determined price of $50,000.00. Leases with the other lessee drivers did not include such an addendum, nor did they otherwise state the duration of the lease. Even so, Jerry Cotter testified that he gave other lessee drivers an option to purchase the leased trucks after 48 months, and a few of his lessees exercised that option and became *de facto* competitors.

Work under principal's direction or without supervision.

As already discussed, Cotter did not dispatch the drivers, assign their jobs, set their hours, or provide any guarantee of future work. Cotter did not provide training, conduct performance reviews, or exercise authority to grant leave or other time off. Nor did Cotter supervise or direct the movements or activities of the drivers on the Project site. Pursuant to the water truck leases, Cotter asked the drivers to take care of the trucks and to make their lease payments. Cotter told them to complete the necessary paperwork to enable Cotter to pay them. There is an absence of evidence that the drivers worked under Cotter's direction.

Skill Required.

The work performed by the drivers required specialized knowledge and skill, as noted above. Although water truck deliveries on the construction site were directed by A/W, this was necessary to coordinate the flow and processes of the construction, rather than to supervise the work of individual drivers. Here again, the *Brown* decision is instructive as to when a lack of direct supervision is indicative of independent contractor status: "The lack of supervision is not a function of the unskilled nature of the job (as in *Borello*) because truck driving - while perhaps not a skilled craft - requires abilities beyond those possessed by a general laborer (or, indeed, possessors of ordinary driver's licenses), and the manner in which the services are provided require a greater exercise of the driver's discretion than the near ministerial tasks of watering, weeding, and picking." (*Brown, supra,* 32 Cal.App.4th at pp. 202-203.) This holds true in the

present case, especially when one considers the unrebutted testimony that water truck operators are expected to possess an ability to use specialized gauges and to be familiar with the water-retention quality of various soils.

Instrumentalities, Tools, and Place of Work.

Cotter did not provide the drivers with any tools (other than the trucks that were leased from him). He did not provide them with a place of work. He did not provide the water needed for the water tanks on the trucks. There was no testimony about where the water trucks were parked overnight or on days when they were not in use. The drivers were registered owners of the leased water trucks, and as such could have used the water trucks for other jobs on other projects. Through their lease payments, the drivers paid Cotter for maintenance, insurance, and repairs on the water trucks.

Payment by Time or by the Job.

The drivers here were paid weekly, with the payment for work on the Project having been calculated by the hour at an hourly rate. This *Borello* factor tends to indicate an employment relationship rather than that of independence. The payments, however, were associated with the hourly lease rate used by Cotter on his "full service" truck leases. The hourly rates negotiated by Cotter, to be paid by A/W, were intended to cover the mileage put on the water trucks and the additional services provided by Cotter, as well as to provide an income to the drivers and a profit to Cotter for his services as a broker. There was no evidence that the hourly rates paid to the drivers were dictated to them on "take it or leave it" terms dictated by Cotter.

Work as Part of Principal's Regular Business.

Depending upon how one defines Cotter's business, the work performed by the drivers on the Project could be considered a tangential, rather than a core, aspect of Cotter's leasing business because the individual drivers were free to operate on any construction project during the term of their lease; nothing in

the truck lease tied the truck or the driver to this Project or obligated the drivers to work only on this Project. Alternatively, the work can be seen as an integral part of Cotter's provision of brokerage services, since Cotter had an agreement with A/W to refer experienced water truck drivers to the Project and in fact profited from doing so. As such, this is not a strong factor either way. (*Brown*, *supra*, 32 Cal.App. 4th at p. 203.)

Parties' Belief.

Cotter believed that he was forming an independent contractor relationship with what both Requesting Parties regarded as "owner operators." There was no oral testimony from any of the drivers covered by the Assessment. Four of them, Donald Selters, Allen White, William Frier, and Chris Christensen, signed declarations under penalty of perjury (as part of Exhibits B, C, D and E, respectively) asserting that they did not consider themselves to be employees and that they did consider themselves to be independent owner-operators running their own business.[14] The declarants all asserted that they advertised their availability on the side of their trucks, they used business cell phone numbers, and they distributed their own business cards.[15] Although these declarations are hearsay subject to the DLSE's objection and Rules 34 and 44 (Cal. Code Regs., tit. 8, §§ 17234 and 17244), the contents of the declarations are not contradicted by the other testimony or documentary evidence adduced in the case, and in fact confirm the lease agreements where two of the other

[14] Another such declaration was submitted by driver Earl Jones (Exh. A), even though he was not one of the workers listed in the Assessment. His omission is perhaps due to the fact that he was contacted to work on the Project directly by A/W and was not one of Cotter's referred drivers. Another water truck driver, whose name appears in the record but was not named on the Assessment, was Mark Halote.

[15] Cotter submitted copies of the business cards from Earl Jones and William Freier.

drivers identify themselves as owner-operators.[16] Accordingly, the declarations are given some weight as corroborative evidence. Jerry Cotter and each of the other drivers also signed a form entitled "Non-Employee Deduction Authorization Agreement." (Exhs. B through G.) Without countervailing testimony from any of the drivers at issue, the weight of the evidence is that they understood their work to occur in independent contractor status.

Other Evidence.

DLSE makes much of the fact that the daily time tickets bear the name "COTTER" in large bold print on the top. However, Jerry Cotter and Susan Powers, regional manager of Atkinson Construction, explained that Cotter's daily time tickets were used merely to tabulate and then verify the hours for those drivers who were going to be paid under Cotter's purchase order with A/W. The name was necessary for bookkeeping purposes.

DLSE also seizes on the fact that CEM-2505 form for the "Owner Operator Listing" states, in boilerplate at the bottom of the page: "Certification will only be accepted from the contractor employing the Owner Operator." Although this is some, albeit slight, evidence of an employment relationship, it does not constitute an admission of employment by Cotter given that Jerry Cotter did not sign these forms. Considering the weight of the other evidence supporting Cotter's position that the drivers were independent, the CEM-2505 form cannot be treated as decisive or determinative. Lastly, DLSE points to the CEM-2510 forms, which all list the business name as "Cotter's Water Trucks." This form was required by A/W before it would use the drivers referred by Cotter, and Cotter's name had to be on the form because A/W's contractual relationship was directly with Cotter, not the individual drivers. The main purpose of the form is to provide certification to A/W concerning ownership of the water truck. All of

[16] Of the six water truck drivers who leased trucks from Cotter and worked on the Project, Allen White, Albert Bernal, and Maurillo Quiroz identify themselves as owner-operators next to their signatures on their respective leases.

the water trucks leased from Cotter were registered with DMV in the names of the lessee drivers. Cotter's name on this form does not compel the conclusion that he was an employer of the lessee drivers.

Overall and viewed as a whole, the unrebutted testimony and other evidence at the Hearing established that Cotter was a subcontractor to A/W in his capacity as a broker or referral source for experienced water truck drivers, and that the drivers who he referred to A/W for work on the Project, and who leased trucks from him, were also independent contractors, rather than Cotter's employees. None of the drivers listed in the Assessment provided testimony at the Hearing, or otherwise submitted any evidence in support of the Assessment or in contradiction of or rebuttal to the testimony and evidence of Requesting Parties. Although some of the *Borello* factors were a close call or may have weighed in favor of employee status, the Hearing Officer found that Cotter did not exercise or retain the right to control the manner and means by which the drivers accomplished their work on the Project such that the drivers would be deemed employees rather than independent contractors. And, as a whole, the evidence was sufficient to show that in this particular case the drivers were properly classified as independent contractors.

CONCLUSION

In the unique circumstances of this case, and under the law applicable at the time of Hearing, this Decision finds that the evidence presented at Hearing was sufficient to demonstrate that the water truck drivers whose compensation was at issue were properly classified as independent contractors, rather than employees. Because DLSE issued the Assessment in this matter on the basis that the drivers were misclassified by Cotter as independent contractors rather than employees, and identified this as the issue to be determined at Hearing, Requesting Parties have met their burden of establishing that the basis for the

Assessment was incorrect. (See § 1742, subd. (b).) The Director emphasizes again that this Decision does not find that the drivers were exempt from the Prevailing Wage Law; nor does it find that prevailing wage rates were not required for the work they performed on the Project. To the contrary, in general, prior decisions have held that compensation at prevailing wage rates is required for covered work on public works projects, regardless of employee or independent contractor classification. In the particular circumstances of this case, however, the Requesting Parties have carried their burden of proving that the basis of the Assessment as issued was incorrect.[17]

FINDING

Considering the totality of the evidence, as evaluated in light of *Linton*, *Borello,* and the cases cited by the parties in their post-hearing and post-remand briefs, the undersigned finds that the drivers covered by the Assessment were independent contractors, not employees of Cotter Water Trucks.

[17] Given this outcome after a full hearing on the merits, it is not necessary for the Hearing Officer to rule on Cotter's oral motion to dismiss the Assessment on the ground that DLSE did not come forward with evidence providing prima facie support for the Assessment under Rule 50(a). In addition, there were a number of evidentiary disputes that arose before and during the Hearing. Some of those matters were taken under submission. To complete the record, the rulings on the matters are as follows: Requesting Parties objected to the admission of DLSE Exhibits 24 and 25, and the DLSE's motion to have these documents admitted was taken under submission by the Hearing Officer. Those Exhibits are hereby admitted. Requesting Parties also objected to the admission of DLSE Exhibits 26, 27, and 28, on the ground of hearsay and the additional ground that these documents were not timely identified pursuant to the Hearing Officer's pre-hearing Order requiring the exchange of Exhibits at least three weeks before the Hearing commenced, and ought to be excluded under Rule 24, subdivision (d). The objection to Exhibits 27 and 28 is overruled as these same documents are included in Requesting Parties' Exhibit D, which was ruled admissible during the Hearing. The objection to DLSE Exhibit 26 is overruled and that document is admitted into evidence, but due to its hearsay nature, the hearsay testimony of Belle Chen about the document, and the fact that the hearsay testimony contradicts the declaration included within Exhibit D (which is also hearsay), Exhibit 26 has been given no weight by the Hearing Officer.

ORDER

The Civil Wage and Penalty Assessment is dismissed, without prejudice, as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: March 22, 2020

__/s/ Victoria Hassid _____

Victoria Hassid
Chief Deputy Director[18]
Department of Industrial Relations

[18] See Gov. Code sections 7 and 11200.4.