STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Peterson-Chase General Engineering Case No. 21-0042-PWH

From a Notice of Withholding of Contract Payments issued by:

California Department of Transportation

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor Peterson-Chase General Engineering (Peterson-Chase) submitted a timely Request for Review of a Notice of Withholding of Contract Payments (Notice) issued on November 2, 2020, by the California Department of Transportation (Caltrans) with respect to work Crush Materials Corp. (Crush) performed for Peterson-Chase in connection with Peterson-Chase's contract with Caltrans for the Upgrade of Bridge Rails, Install Sidewalk, and Upgrade Curb Ramps project (Project) located in San Diego County. The Notice determined that Crush owed $16,568.18 in unpaid prevailing wages, training fund contributions, and statutory penalties. A Hearing on the Merits commenced via Webex Video Conference, before Hearing Officer Steven A. McGinty on July 30, 2021, and continued November 17, 2021, January 27-28, 2022, April 20, 2022, September 28, 2022, October 26-27, 2022, January 11, 2023, March 22-23, 2023, and April 5, 2023. Thomas W. Kovacich and Kieran D. Hartley appeared as counsel for Peterson-Chase, and Jidi Wong and Jennifer Hunt appeared as counsel for Caltrans.

Prior to the Hearing on the Merits, the parties stipulated as follows:

- The work subject to the Notice was performed on a public work and required the payment of prevailing wages and the employment of apprentices under the California Prevailing Wage Law, Labor Code sections 1720 – 1861.[1]
- The Request for Review was timely.

[1] All further section references are to the California Labor Code, unless otherwise specified.

The parties stipulated that the issues for decision are:

- Whether the Notice was timely served by Caltrans.
- Whether Crush Materials misclassified its employees on the Project.
- Whether Crush Materials underpaid prevailing wages to its employees on the Project.
- Whether all hours worked on the Project by Crush Materials employees were covered by the prevailing wage law.
- Whether Crush Materials paid the correct prevailing wages for all hours worked on the Project.
- Whether Crush Materials paid the required overtime rates to its employees on the Project.
- Whether Crush Materials paid the required training fund contributions for all hours its employees worked on the Project.
- Whether Crush Materials and/or Peterson-Chase is liable for penalties assessed pursuant to sections 1775 and 1813.
- Whether the Labor Commissioner or Caltrans abused their discretion in assessing penalties pursuant to section 1775 against Crush Materials and/or Peterson-Chase.
- Whether Peterson-Chase has met the safe harbor provisions of section 1775, subdivision (b).

For the reasons set forth below, the Director finds that the Notice must be affirmed with substantial modifications.

FACTS

The Project.

The Project involved the upgrade of bridge rails, installation of sidewalks, and upgrade of curb ramps at the Kelton Road Overcrossing in San Diego and the Grove Street Overcrossing in Lemon Grove within San Diego County. (Caltrans Exhibit No. 8,

p. 141.)[2] Caltrans advertised the Project for bids on August 28, 2017. (Caltrans Exhibit No. 4, p. 55.) Caltrans awarded a contract to perform the work to Peterson-Chase on January 10, 2018. (Caltrans Exhibit No. 1, p. 10.) Peterson-Chase subsequently awarded a purchase order to Crush Materials to provide rapid set concrete for the Project. The Project was accepted by Caltrans on October 17, 2019. [3]

The Notice.

Caltrans served the Notice by first-class mail and by overnight delivery or certified mail upon Peterson-Chase and Crush Materials on November 2, 2020. The Notice indicated that Crush Materials, identified as the subcontractor, failed to comply with section 1774 by failing to pay the full prevailing wage rate for the Operating Engineer Group 6 classification, and failed to comply with section 1773.1 by failing to pay the required training fund amounts for the Operating Engineer Group 6 classification. The Notice found that total amount of wages due was $13,523.18, and the total amount of penalties assessed under sections 1775 and 1813 was $3,045.00. (Caltrans Exhibit No. 8, pp. 133-137.)

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[2] Caltrans transmitted to the Lead Hearing Officer a Notice of Transmittal which included the Request for Review submitted by Peterson-Chase, a copy of the Request for Approval of Forfeiture prepared by Caltrans and approved by the Labor Commissioner's Office, a copy of the Notice of Withholding of Contract Payments prepared by Caltrans, and a copy of the Audit Summary Sheet prepared by Caltrans. (Caltrans Exhibit No. 8.) The Director takes official notice of the Notice of Transmittal and all accompanying documents and their content pursuant to California Code of Regulations, title 8, section 17245 (Rule 45).

[3] On July 29, 2021, Caltrans filed a Request for Official Notice asking that official notice be taken, inter alia, that the contract acceptance date was October 17, 2019, and that this information is posted on the Caltrans website at https://misc-external.dot.ca.gov/pets/. Caltrans further requested that official notice be taken that eighteen months from October 17, 2019 is April 17, 2021. The Minutes of Hearing on the Merits for November 17, 2021, state: "The Hearing Officer reserved ruling on Caltrans's request for official notice of the contract acceptance date for Contract No. 11-414404 (Request no. 4) and the length of time between October 17, 2019 and April 17,2019 (request no. 5)." Pursuant to Rule 45, official notice is hereby taken of those matters.

Prior to serving the Notice, Caltrans submitted to the Division of Labor Standards Enforcement (DLSE) a Request for Approval of Forfeiture dated October 12, 2020. On October 19, 2020, DLSE approved the following amounts:

- Wages: $ 13,299.88
- Training: $ 233.30
- LC 1775 Penalties: $ 2,520.00
- LC 1813 Penalties: $ 525.00

TOTAL: $ 16,568.18

(Caltrans Exhibit No. 8, pp. 140-144.)

The Hearing on the Merits.

Caltrans called as its first witness Osman Botani, who testified that he was employed by Caltrans as an Assistant Structure Representative. He served as an inspector on the Project to ensure compliance with specifications. Botani identified the Caltrans Daily Reports (Caltrans Exhibit No. 10) and testified that page 166 contains his notation that at 10:54 a.m. on October 6, 2018, Crush started placing rapid set concrete mix number V75RSC.

Caltrans called as witnesses six former Crush employees. Eric Marquez testified that he worked for Crush "from the very beginning" in 2010, and last worked for Crush on October 31, 2019. His job title was vice president of operations. He served as supervisor or foreman for Crush on the Project, and recorded the hours worked by Crush employees on the Project. He identified Caltrans Exhibit No. 11 as containing the daily wage documentation in his handwriting. The document has separate columns for Start Time, On Deck Time, and Finish Time. Crush President Christine Rush instructed Marquez to record worker time in the separate columns because only on deck time would be paid prevailing wages.

Marquez testified that the shift began at the Coast Aggregate yard in Otay Mesa, near the United States-Mexico border. There the workers tested the equipment and made sure the volumetric mixers were loaded with the correct materials per Caltrans

specifications. Workers would drive the loaded vehicles to the Project site. Thus, the hours worked prior to arrival at the Project site were recorded in the Start Time column.

On Deck Time began once the workers arrived at the Project site to deliver the rapid set concrete. Once their loads had been delivered, the drivers would wash out the equipment and return to the yard for additional loads, and this was included in On Deck Time. Finish time began when the workers had delivered their last loads for the day and were returning to the yard. Once back at the yard, the drivers would use chipping guns to remove pieces of concrete stuck to the augers.

In addition to recording time on the Project, Marquez directed the drivers on where to position their trucks for the delivery of the concrete. He directed them to rev their engines to 1600 revolutions per minute, as that was necessary for the hydraulic systems to function properly. Once the trucks were in place, he positioned the chutes for the pouring of concrete and operated the volumetric mixer controls to produce concrete from the raw materials, and placed it in the forms. He testified that Brian Escalante also performed those tasks when two mixers were being used simultaneously. The drivers remained in their trucks during this process.

Marquez testified that he had experience in operating ready-mix trucks as well as volumetric mixers. The primary difference is that ready-mix trucks deliver pre-mixed concrete to the jobsite in rotating drums that keep the concrete from setting up before delivery, whereas volumetric mixer trucks deliver raw materials to the jobsite, where they are mixed to produce concrete immediately before it is deposited in place, where it then rapidly hardens.

Former Crush employee Brian Escalante also testified that he sometimes operated the volumetric controls. (Indeed, as discussed below, he did so on February 23, 2018, the only day he worked on the Project.) Escalante corroborated the testimony of Marquez that the drivers normally remained in their trucks while the concrete was being poured.

Joseph Finley testified that he worked for Crush as a "yard man," operating a front loader to load sand and rock into the bins on the volumetric mixer trucks. Once

the trucks left the yard, he would clean up the area. Finley worked only in the yard and not at the Project site.

Lorenzo Taylor testified that he worked for Crush as a driver for approximately ten years, and that he drove a volumetric mixer truck from the yard to the Project site. He also had experience driving a ready-mix truck, which mixes concrete in a liquid state as it is being driven to the jobsite. On the other hand, a volumetric truck delivers materials to the site dry and separate: "You got your separate water tank, you got your separate powder silo, you got your rock and sand on either side so it's not mixed at all. You're taking like dry material to the jobsite. It's kind of like buying a premade cake at the store or going home and making your own cake at home. That's what the difference is pretty much."

Eric Gomez testified that he worked for Crush from 2016 to 2019. He was not given a specific job title, but was "always in the yard," prepping the trucks and getting them ready for pours. He would fill the water tanks, calibrate the mixers, and replace missing or broken truck parts.

Melissa Davis testified that her job title with Crush was "volumetric operator," and subsequently described her job as "volumetric driver-operator." Her job duties included driving, maintenance and repair of the volumetric mixer trucks and calibrating the mixers pursuant to Caltrans requirements. Davis stated that she had driven ready-mix as well as volumetric trucks. The difference was that a ready-mix truck delivers pre-mixed concrete in a liquid state to the jobsite, whereas "the volumetric truck at the jobsite makes the concrete right there." On cross-examination, Davis acknowledged that she had previously told Caltrans representatives that she did not remember this particular Project.

Caltrans employee Monica Corralejo testified that she worked as District 11 compliance manager for approximately ten years, and as such, she investigated this case. She identified documents Crush provided to Caltrans. (Caltrans Exhibit No. 12.) She interviewed Melissa Davis four times regarding this project, and also interviewed one other Crush employee. She determined that the proper classification for the Crush

employees on the Project was Operating Engineer, because that was the only wage determination that "clearly identifies volumetric mixer operator."

Diane Huynh testified that from 2018 to June 2022, she was the wage case administrator for Caltrans. She testified that she determined that all Crush employees were properly classified as Operating Engineers based on the following: (1) the Scope of Work for that classification (Caltrans Exhibit No. 3); (2) the listing in the wage determination of the title "volumetric mixer operator" (Caltrans Exhibit No. 2, at p. 13); and, review of the Certified Payroll Records (CPRs). Huynh was unaware of any DIR or Caltrans opinion regarding use of the Operating Engineer classification for work involving volumetric mixer trucks. She stated that if Crush were a material supplier it would not be subject to prevailing wage requirements.

Caltrans also called Robert Stanley, business manager for Teamsters Local 166. Stanley testified that the Teamsters do not claim jurisdiction over volumetric mixer trucks. Finally, Caltrans called David Sikorski, financial secretary for Operating Engineers Local 12. Sikorski testified that the Operating Engineers do claim work involving volumetric mixer trucks.

Peterson-Chase called as a witness its vice president, Dick Vogels, who testified that he has served in that capacity for 34 years. He testified that he serves as project manager and also oversees human resources, payroll, accounts payable and accounts receivable. He testified that Peterson-Chase has a general engineering contractor's license, which allows it to perform earthwork, concrete, road, and bridge work. Peterson-Chase performs predominantly public works, and 80 percent of its work is as a prime contractor for Caltrans, primarily in Districts 7, 8, 11 and 12.

Vogels testified that he approved the bid on the Project, and that it entailed upgrading bridge rails, installing sidewalk, and upgrading curb ramps as set forth in the contract documents (Caltrans Exhibit 1, at p. 3). The work consisted of demolition of the existing rails and sidewalks, and their replacement. The road needed to be open to traffic each day, so work was performed first on one side of the bridge, and then the

other, and rapid set concrete was required. The bridge was the Grove Street overpass over Highway 94.

Vogels testified that Peterson-Chase's contract with Caltrans included a goal of 14% disadvantaged business enterprise (DBE) participation. Crush was listed on the Caltrans website as a certified DBE material supplier, and thus could be utilized to meet the 14% goal.[4]

Gus Contreras testified that he served as concrete foreman for Peterson-Chase and had worked for the company since 1987. He recalled that the Project entailed three pours of rapid set concrete by Crush. He would contact Eric Marquez, who would coordinate the spacing of Crush's volumetric mixer trucks. Marquez would communicate with the drivers through hand signals to place the concrete where Contreras directed. The drivers rarely got out of their trucks, and he did not observe any loading of material onto the volumetric trucks on the side of the highway.

Peterson-Chase witness Ryan Vanderhook testified that he is president of Short Load Concrete, Inc. (Short Load), which has been in business since 2001. Short Load does not have a contractor's license and supplies concrete for projects under purchase orders. At least 75 percent of the concrete it supplies is rapid set concrete, delivered in volumetric mixer trucks.

Vanderhook identified a letter Short Load sent to Caltrans dated June 6, 2006 (Peterson-Chase Exhibit P) and a response letter from Caltrans to Short Load dated

[4] Vogels identified a cover letter from Caltrans to himself at Peterson-Chase dated March 22, 2018, with an accompanying Good Faith Effort Reconsideration Committee Determination, as well as what appeared to be a fax cover sheet with six pages of attachments—including a completed information request form from Caltrans—Vogels provided to Caltrans on March 2, 2018. (Peterson-Chase Exhibit O.) The Hearing Officer reserved ruling on the admission of Exhibit O. Exhibit O is admitted. (Cal. Code Regs., tit. 8, § 17244, subd. (a) (Rule 44(a)).) Also, Vogels identified several videos, among them Peterson-Chase Exhibits D and E, which the Hearing Officer reserved ruling on their admission. Exhibit D is admitted. The objection to admission of Exhibit E is sustained as irrelevant (Rule 44(a).)

June 16, 2006 (Peterson-Chase Exhibit Q).[5] After this correspondence, Caltrans conducted 10-12 investigations involving Short Load. Between 2006 and 2008, Caltrans required the volumetric control operator to be paid as a "chute man," a Laborer classification, while requiring drivers to be paid as Teamsters. In 2008, Caltrans changed its position and required the operator to be paid as an Operating Engineer. In August 2022, Caltrans took the position in one district that drivers were to be classified and paid as Operating Engineers. However, north of Kern County, Caltrans requires only the operator of the controls to be paid as an Operating Engineer, and the drivers to be paid the Teamster rate.

Applicable Prevailing Wage Determination (PWDs).

Set forth below is the one relevant PWD in effect on the bid advertisement date.[6]

Operating Engineer for San Diego County, SD-23-63-3-2016-1 (Operating Engineer PWD).

The Operating Engineer PWD divides job titles into 25 different classification groups. It includes Volumetric Mixer Operator in Group 6.

Effective August 22, 2016, the straight time Basic Hourly Rate for Group 6 was $44.63. Required employer payments were as follows: Health and Welfare $11.45, Pension $9.65, Vacation/Holiday $3.45, Training $0.95, and Other Payment $0.39. Thus, the Total Hourly Rate was $70.52.

The Operating Engineer PWD included Special Shift rates, applicable when only one shift is worked and it is outside the regular starting time for shifts. On the Special Shift schedule, the Basic Hourly Rate for Group 6 was $45.13, $0.50 higher than the regular rate. Employer Payments remained the same on the Special Shift schedule.

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[5] The Hearing Officer reserved ruling on the admission of Exhibits P and Q. Both Exhibits are admitted. (Cal. Code Regs., tit. 8, § 17244, subd. (a) (Rule 44(a)).)

[6] Although other classifications were discussed in testimony and briefing, this decision determines that prevailing wages were not required for work arguably falling within those classifications. Accordingly, it is unnecessary to set forth the PWDs for those classifications.

The Operating Engineer PWD also provided for predetermined increases. Effective on July 1, 2017, there was an increase of $2.30, allocated as follows: $2.15 to the Basic Hourly Rate, $0.10 to Vacation/Holiday (Supplemental Dues) and $0.05 to Training. Effective on July 1, 2018, there was an additional increase of $2.30, allocated as follows: $1.30 to the Basic Hourly Rate and $1.00 to Pension (Annuity).

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code section 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects. The purpose of the CPWL was summarized by the California Supreme Court 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*).) A Labor Compliance Program like Caltrans 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." [7] (§ 90.5, subd. (a), and see *Lusardi*, at p. 985.)

[7] DLSE is responsible for enforcing the California prevailing wage laws. (Lab. Code, §§ 90.5 and 1741; Cal. Code Regs., tit. 8, § 16100, subd. (a).) However, there are four legacy labor compliance programs (LCPs) that have been approved by the Director to enforce compliance on their own public works projects. (§ 1771.5; https://www.dir.ca.gov/lcp.asp.) Caltrans has a legacy LCP. When Caltrans determines that a contractor on one of its public works projects has violated the prevailing wage laws, Caltrans prepares a Request for Approval of Forfeiture for review and approval by

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers paid less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions as described in section 1773.1, with the latter paid to the California Apprenticeship Council in accordance with section 1777.5, subdivision (m)(1).

When an enforcing agency, such as Caltrans, determines that a violation of the prevailing wage laws has occurred, a written notice of the withholding of contract payments is issued pursuant to section 1771.6. 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 60 days following service of a notice under section 1771.6.

An affected contractor may appeal that notice by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, Caltrans has the initial burden of producing evidence that "provides prima facie support for the [Notice] …." (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that burden is met, "the Affected Contractor or Subcontractor has the burden of proving that the basis for the [Notice] … is incorrect." (Cal. Code Regs. tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the Notice. (§ 1742, subd. (b).)

Additionally, employers on public works must keep accurate payroll records, recording, among other information, the work classification, straight time and overtime

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the Labor Commissioner's Office (LCO), then once it obtains approval, issues a Notice of the Withholding of Contract Payments to the contractor. (Cal. Code Regs., tit. 8, §§ 16436-16437; Lab. Code, §§ 1771.5, 1771.6.) The Notice must "describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld." (Lab. Code, § 1771.6, subd. (a).)

hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.)

Service of the Notice was Timely.

Section 1741, subdivision (a) is the statute of limitations for service of civil wage and penalty assessments:

> The assessment shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor, subcontractor, and awarding body. The assessment shall advise the contractor and subcontractor of the procedure for obtaining review of the assessment.

Noting that the Notice was dated November 2, 2020, Peterson-Chase points out that since there is no evidence of the recording of a valid notice of completion, acceptance must have occurred on or after April 2, 2019, for service of the Notice to be timely. Peterson-Chase then argues:

> No evidence was submitted to establish acceptance within the meaning of (*Madonna v. State of California* (1957) 151 Cal.App.2d 836, 840), and "[f]ormal acceptance has been defined as that date at which someone with authority to accept does accept unconditionally and completely." (*Id.*, citing *Graybar Electric Co. v. Manufacturers Casualty Co.* (1956) 21 N.J. 517.) There is no evidence in the record that would toll the period of time in which to serve the NOW under Labor Code § 1741.1. Consequently, the NOW has no force or effect and must be dismissed.

(Peterson-Chase Closing Brief at p. 22, ll. 15-21.)

This argument is without merit. The assertion that a notice is untimely under section 1741 is an affirmative defense. The burden of proof on that defense is assigned to the party asserting it. (*Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1310.)

Although it does not cite the applicable regulations, Peterson-Chase essentially argues that Caltrans has the burden of proving that the Notice was timely under California Code of Regulations, title 8, sections 17220 and 17250. Those regulations, however, do not require Caltrans to present prima facie evidence that the Notice was timely. Section 17250, subdivision (a), provides that the enforcing agency has the initial burden of coming forward with evidence that a notice of withholding was served in accordance with section 17220. That section, in turn, provides the required elements for a notice, including description of the nature of the violation and basis for the notice, and the amount of wages, penalties, and liquidated damages determined to be due. Both sections 17220 and 17250 are silent regarding timeliness of the notice. Consequently, the burden to prove that the Notice was untimely rests with the Requesting Party.

Moreover, in arguing that no evidence was submitted establishing the acceptance date, Peterson-Chase failed to address the Request for Official Notice submitted by Caltrans on July 29, 2021. Caltrans requested therein that official notice be taken, *inter alia*, that:

> The contract acceptance date for Contract No. 11-414404 is October 17, 2019. A copy of the Major Construction Payment & Information screenshot for Contract No. 11-414404 is attached hereto as Exhibit 4. This information is can be located at https://misc-external.dot.ca.gov/pets/. This is a publicly accessible website.

Caltrans further requested that official notice be taken that eighteen months from October 17, 2019 is April 17, 2021.

Caltrans noted in its Request that Rule 45, subdivision (a) (Cal. Code Regs., tit. 8, § 17245, subdivision (a)) permits the Hearing Officer to take official notice of "any fact which either must or may be judicially noticed by the courts of this state under Evidence Code sections 451 and 452." Caltrans argued:

> Pursuant to Evidence Code section 452 [subdivision (h)], judicial notice may be taken of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." … [T]he contract

> acceptance for Contract No. 11-414404 is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to a source of reasonably indisputable accuracy, Caltrans' Major Construction Payment and Information website.

In addition to the provision quoted by Caltrans, Evidence Code section 452, subdivision (c) permits judicial notice to be taken of "Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Caltrans is an executive department of the State of California, and its acceptance of the public work is an official act, memorialized on its public website.

Peterson-Chase has neither disputed the accuracy of that memorialization of the acceptance date as October 17, 2019, nor offered any evidence to the contrary. As the prime contractor, Peterson-Chase knew or should have known of the correct acceptance date, but did not meet its burden of proving the date published by Caltrans was incorrect.

In light of the foregoing, official notice is hereby taken that the Project was accepted by Caltrans on October 17, 2019, and that eighteen months thereafter is April 17, 2021. Service of the Notice of Withholding on November 2, 2020, more than five months prior to April 17, 2021, was timely. The result would be no different if official notice was not taken. Peterson-Chase had the burden of proving the Notice of Withholding was untimely but failed to offer any evidence to that effect.

Section 1772 Does Not Provide a Basis for Prevailing Wage Coverage Independent of Section 1720.

Crush purportedly paid prevailing wages to its workers for the time they were employed at the Project site but did not pay prevailing wages for offsite work associated with the Project. Caltrans maintained that Crush was obligated to pay prevailing wages for *all* work associated with the Project, irrespective of where it was performed:

> The Crush Materials workforce participated in the construction project as it performed an integral part of the prime contractor's obligation under the contract. Thus, the Crush employees performed construction work under Labor Code 1720. Per Labor Code 1772, workers employed in the

execution of any contract for public work are deemed to be employed upon public work.

To qualify under the materials provider exemption under O.G. Sansone v. Department of Transportation, 55 Cal.App.3d 434, the supplier must meet all four of the following criteria:

1. The supplier must be in the business of selling supplies to the general public.
2. The material source cannot be established specially for the particular project.
3. The material source cannot be located at the site of work.
4. The materials being hauled cannot be immediately incorporated into the project with no re-handling out of the flow of construction.

As Crush's workforce hauled materials that were immediately incorporated into the project with no re-handling out of the flow of construction, they do not qualify under the 4th criteria. Additionally, while they may be in the business of supplying materials, through a Caltrans audit it was determined the materials that were utilized for this project came from other material suppliers. As such, Crush does not meet the *Sansone* exemption.

(Caltrans Post-Hearing Brief at p. 6, ll. 9-24.) *Sansone* did not expressly set forth the four-part test asserted by Caltrans. Rather, it discussed the analyses in two cases from other jurisdictions, *H. B. Zachry Company v. United States* (1965) 344 F.2d 352 and *Green v. Jones*, 23 Wis.2d 551 [128 N.W.2d 1]. As stated in *Williams v. SnSands Corporation*, (2007) 156 Cal.App.4th 742, 752 (hereafter *Williams*):

> *Sansone*'s rationale for exempting the "delivery" of standard commercial building materials from the prevailing wages statute is that the truck driver who delivers the materials is employed by a truly independent materials supplier and does not himself immediately and directly incorporate the hauled material into the ongoing public works project. *Sansone* employed the factors and circumstances present in *Zachry* and *Green* to determine the existence of the "delivery" exemption: Were the materials obtained from an independent material supplier who sells supplies to the general public or to third parties having no relationship to the public works project? (*Sansone, supra,* 55 Cal.App.3d at pp. 442, 443,...) Were the supplied materials taken from sources or locations not adjacent to, or established exclusively to serve, the project site? (*Id*. at p. 442,...) Were the materials supplied pursuant to the prime contractor's

> private borrow contracts designed to supply the public works project exclusively? (*Id*. at p. 443,...) Were the hauled materials directly and immediately distributed by the truck driver into the on-going, on-site project? (*Id*. at p. 444,...)

In *Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 214 (hereafter *Sheet Metal Workers*), the court upheld a Department determination that off-site fabrication was not subject to prevailing wage requirements, holding that:

> Offsite fabrication is not covered by the prevailing wage law if it takes place at a permanent offsite manufacturing facility and the location and existence of that facility is determined wholly without regard to the particular public works project. Because the offsite fabrication at issue here was conducted at Russ Will's permanent offsite facility, and that facility's location and continuance in operation were determined wholly without regard to the project, the work was not done "in the execution" of the contract within the meaning of section 1772.

In reaching that conclusion, the court discussed the factors articulated in *Sansone* and *Williams*:

> [T]he department's coverage determination is consistent with the principles set forth in *Sansone* and *Williams.* Work performed at a permanent, offsite, non-exclusive manufacturing facility does not constitute an integral part of the process of construction at the site of the public work. Fabrication performed at a permanent offsite facility is independent of the performance of the construction contract because the facility's existence and operations do not depend upon a requirement or term in the public works contract. By contrast, a temporary facility set up specifically to service a public works contract could be characterized as an integral part of the construction process. Such a temporary facility's existence and purpose is driven entirely by the needs of the public works project.

(*Id*. at p. 212.) The court rejected the argument that the work should be covered because the items being fabricated were "custom":

> [I]t is unclear why fabricating an item to customized specifications is any more integral to the construction process than fabricating a standard item needed to fulfill a contract. Regardless of whether an item is considered standard or custom, it must be fabricated according to certain specifications. From the perspective of the worker who is fabricating items

> for a particular public works project, the worker's role is no more integral to the process of construction when fabricating items with customized specifications than it is when fabricating items with specifications that are considered standard. Accordingly, we are not persuaded that the focus should be on whether fabricated items are standard or custom.

(*Id.* at p. 213.) Similarly, the court was not persuaded that it mattered whether or not the subcontractor in question sold products to the general public:

> In this case, Russ Will would have qualified as an exempt material supplier but for the fact that it does not sell supplies to the general public. The question arises why coverage under the prevailing wage law in this case should turn on whether Russ Will sells products to the public at large. The sale of products to the public does not bear upon whether the fabrication performed at a permanent facility is integral to the flow of the construction process. If we were to accept Local 104's position, an offsite facility that meets the three-part material supplier test would be exempt from the prevailing wage law but another facility that is similar in all respects except for the sale of supplies to the public would be subject to the requirements of the prevailing wage law. There is no basis to make this distinction if the critical consideration under California law is whether the offsite operation is integral to the construction process.

(Ibid.)

Significantly, for this case, two decisions of the California Supreme Court in 2021 rejected in part the reasoning of *Sansone, Williams, and Sheet Metal Workers.* In the first case, *Mendoza v. Fonseca McElroy Grinding Co., Inc.* (2021) 11 Cal.5th 1118 (hereafter *Mendoza*), heavy equipment operators sought prevailing wages for certain offsite work performed in conjunction with road construction projects:

> Part of the road construction process involves using milling equipment to break up existing roadbeds so that new roads can be built. Plaintiffs are unionized engineers who operate the equipment. Sometimes the heavy milling machines are not kept at the job site but are stored instead at a permanent yard or other offsite location. In such cases, plaintiffs report to the offsite location, load the equipment onto trailers, and bring it to the job site. This preparatory activity and equipment transportation is known as mobilization.

(*Id.* at p. 1122.) Plaintiffs sued in federal court, and the district court ruled for the defendants. On appeal, the United States Court of Appeals, Ninth Circuit

requested that the California Supreme Court decide the question of whether mobilization work was done "in the execution of the contract" under section 1772. That section provides: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon the public work." The California Supreme Court reviewed the legislative history and concluded that "the original function of section 1772 appears to have been simply to ensure that those employed by a contractor or subcontractor were given the same protection as others, including those employed by the government itself." (*Mendoza, supra,* 11 Cal.5th at p. 1129.) Thus, it held:

> The prevailing wage law as written and amended does not support an interpretation of section 1772 that expands the law's scope beyond defined "public works." To the extent *O.G. Sansone Co. v. Department of Transportation* [citation omitted]*, Williams v. SnSands Corp.* [citation omitted], and *Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* [citation omitted] suggest to the contrary or are otherwise inconsistent with this opinion, they are disapproved.

(Id. at p. 1139.) Accordingly:

> In light of our interpretation of section 1772, the answer to the Ninth Circuit's certified question is simple. That statute does not expand coverage to labor not otherwise defined as public work. Unless mobilization qualifies as public work, an employer has no obligation to pay the prevailing wage to those who perform it. Section 1772 cannot independently serve as the basis for concluding that the prevailing wage must be paid for mobilization.

(Id. at p. 1141.) The court went on state:

> Plaintiffs did raise the issue of whether transportation of equipment to the work site should be treated as "travel time," which, they claim, must be compensated at the prevailing wage. To the extent their contention is premised upon the application of section 1772, the argument fails for the reasons articulated above.

(*Id.* at p. 1142.)

The court stated that it expressed "no view concerning whether California's prevailing wage law places a geographic limitation on coverage in relation to the public

works site." (*Mendoza, supra*, 11 Cal.5th at p. 1138, fn. 19.) The prevailing wage law does, however, repeatedly refer to "jobsite" or "site of the public work," suggesting that there is a distinction between work performed on the project site and work done elsewhere. For instance, section 1773.3 requires a public entity awarding a public works contract to provide notice of the project to the Department, including the project's "jobsite location." (§ 1773.3, subd. (a)(3).) The public entity must also post the applicable per diem prevailing wages "at each job site" (§ 1773.2), in addition to other "job site notices" required by regulation. (§ 1771.4, subd. (a)(2).) Section 1777.5, which governs the employment of apprentices on public works, makes several references to the "site of the public work." (§ 1777.5, subds. (d), (e), (f), (m)(1).)

The second case decided by the California Supreme Court the same day as *Mendoza*, *Busker v. Wabtec Corp.* (2021) 11 Cal.5th 1147 (hereafter *Busker*), involved a contract to design, furnish, and install a comprehensive communications network known as Positive Train Control (PTC) for the Southern California Regional Rail Authority. Two aspects of the project were at issue: The first was field work, which included building and outfitting radio towers adjacent to the railroad tracks; the second was onboard work, primarily installing electronic components on locomotives and train cars. Wabtec was the subcontractor for the onboard work. (*Id.* at p. 1154.)

Busker, a Wabtec employee on the project, sued Wabtec in state court for failing to pay prevailing wages. Wabtec removed the case to federal district court and moved for summary judgement on the ground that its onboard work was not subject to prevailing wage requirements. The court granted summary judgment on the ground that only workers "employed on [a] project involving fixed works or realty" are entitled to prevailing wages. It also rejected Busker's argument that the onboard work required prevailing wages under section 1772 as work done "in the execution" of the overall project to install the PTC system. The court reasoned that section 1772 still required the applicable contract to be one for "public work," and the Wabtec subcontract, limited to rolling stock, did not qualify. (*Busker, supra*, 11 Cal.5th at p. 1155.)

Busker appealed, and the United States Court of Appeals, Ninth Circuit asked the California Supreme court to decide the following question of state law: "Whether work installing electrical equipment on locomotives and rail cars … falls within the definition of 'public works' under California Labor code section 1720(a)(1) either (a) as constituting 'construction' or 'installation' under the statute or (b) as being integral to other work performed for the PTC project on the wayside (i.e., the 'field installation work')." (*Busker, supra*, 11 Cal.5th at p. 1155.)

In response to the Ninth Circuit's second question, the California Supreme Court concluded that the onboard installation work was "not transformed into 'public work' merely because the railcar and locomotive components operate together with the towers built on land next to the tracks." (*Busker, supra*, 11 Cal.5th at p. 1168.) The court explained:

> It is true that the components installed on trains partner with the field work, in the sense that they ultimately function together as part of an overall communication system. But that interface does not make the onboard installation integral to the completion of the actual construction work. If "construction" included any activity necessary to the *operation* of a public work, that term would bring within its expansive sweep any activity necessary to make the public work functional, whether or not the activity is related to the construction process. That approach has no discernable limiting principle. Here, the labor of those who wrote the software used in the PTC system, as well as those who manufactured the needed computer chips, could be considered integral to the field work because the overall system would not function without it. For that matter, the towers built on the trackside would be useless without the trains, so arguably the initial building of the railcars would be covered.

(*Id.* at p. 1171.) The court concluded that, under the *Mendoza* reasoning, section 1772 could not be invoked to find coverage of the onboard work:

> In *Mendoza,* a decision filed concurrently with this opinion, we reject the interpretation of section 1772 derived from *Sansone, Williams,* and *Sheet Metal. Mendoza* disapproves those cases to the extent they interpreted section 1772 to expand the statutory definitions of "public works." (Mendoza, supra, 11 Cal.5th at p. 1139.) Section 1772 simply serves to confirm that the protections of the prevailing wage law extend to workers employed by contractors or subcontractors. (*Mendoza,* at p. 1130.) It was

> not intended to define or expand the categories of work that are covered by the prevailing wage law, a function adequately served by the provisions that define "public works." Accordingly, because the onboard installation does not qualify as a defined "public work," it is not subject to prevailing wage requirements under section 1772.

(*Id.* at p. 1169.)

Citing *Mendoza,* Peterson-Chase disputes the Caltrans argument that Crush employees were engaged in the execution of a contract for public work and were therefore entitled to prevailing wages under section 1772. That section, argues Peterson-Chase, does not provide an independent basis for requiring prevailing wages. (Peterson-Chase Closing Brief at pp. 22-23.)

Next, citing *Busker* primarily, Peterson-Chase urges that the work performed by employees of Crush was not covered by any of the categories of public works defined by section 1720 et seq. According to Peterson-Chase, under the facts of this case, an expansive reading of section 1720 would not serve the purpose of the prevailing wage law to protect local labor markets. (Peterson-Chase Closing Brief at pp. 23-26.)

In response, Caltrans argues that *Mendoza* and *Busker* do not apply retroactively to this Project: "They cannot be applied to Caltrans project 11-414404, which was accepted [*sic*] on October 17, 2019. The RAF was accepted by DIR on October 19, 2020, prior to *Busker* (August 16, 2021), *Mendoza* (August 16, 2021) and AB 1851 (January 1, 2023)." (Caltrans Reply Brief at p. 4, ll. 10-12.) Caltrans cites no legal authority for this assertion and offers no further explanation as to why the Director should disregard the California Supreme Court's interpretation of the statute—section 1772—Caltrans relies upon.

Another recent decision by that court makes clear why the Director *must* decide this case in conformity with *Mendoza* and *Busker*. In *Vazquez v. Jan-Pro Franchising International, Inc.* (2021) 10 Cal. 5th 944, (hereafter *Vazquez*) the court held that its decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*) applied retroactively. In *Dynamex*, the court articulated a test for determining whether workers are employees or independent contractors for purposes of

this Department's wage orders. In *Vazquez*, the court explained that applying *Dynamex* retroactively was consistent with the general rule that judicial decisions are given retroactive effect:

> The *Dynamex* decision constitutes an authoritative judicial interpretation of language . . . that has long been included in California's wage orders to define the scope of the employment relationships governed by the wage orders. Thus, under well-established jurisprudential principles, our interpretation of that language in *Dynamex* applies retroactively to all cases not yet final that were governed by wage orders containing that definition. (See *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978 (*Newman*) ["The general rule that judicial decisions are given retroactive effect is basic in our legal tradition"]; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 24 (*Waller*) ["[T]he general rule [is] that judicial decisions are to be applied retroactively"].) As the United States Supreme Court observed in *Rivers v. Roadway Express, Inc.* (1994) 511 U.S. 298, 312–313: "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." In *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 474, this court, after quoting the foregoing passage from *Rivers v. Roadway Express, Inc.*, observed: "This is why a judicial decision [interpreting a legislative measure] generally applies retroactively." (See *Woolsey v. State of California* (1992) 3 Cal.4th 758, 794 (*Woolsey*) ["'Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim'"].)
>
> As past cases have explained, the rule affirming the retroactive effect of an authoritative judicial decision interpreting a legislative measure generally applies even when the statutory language in question previously had been given a different interpretation by a lower appellate court decision.

(*Vasquez, supra,* 10 Cal.5th at p. 951.) The court elaborated on this latter point about how its authoritative judicial decision interpreting a statute applied retroactively even when the statutory language in question had been given a different interpretation by a lower appellate court:

> In *Woolsey*, *supra*, 3 Cal.4th 758, 794,… we reaffirmed the principle that "[t]he circumstance that our decision overrules prior decisions of the Courts of Appeal does not in itself justify prospective application." We

> elaborated: "An example of a decision which does not establish a new rule of law is one in which we give effect 'to a statutory rule that courts had heretofore misconstrued [citation].'" (*Ibid.*) Such a decision applies retroactively, we concluded, because there is no material change in the law. (*Ibid.*)

(*Id.* at p. 952.)

Caltrans has offered no reason why the rule articulated in *Vasquez* would not be applicable here. Caltrans merely states that the Project was accepted on October 17, 2019, but that fact is immaterial to the question of whether *Mendoza* and *Busker* apply retroactively. What matters is that this case is "not yet final" within the meaning of *Vasquez.* Indeed, this case was not ripe for judicial review prior to this Decision. Under *Vasquez* and the cases cited therein, this Department's interpretation of section 1772 must be consistent with the *Mendoza* and *Busker* holdings. This is especially so since the interpretation applied by Caltrans in this case is itself a departure from prior Caltrans policy regarding volumetric mixers. Thus, for the foregoing reasons, section 1772 does not provide a basis for prevailing wage coverage for the work at issue here.

Crush Materials Was Not Exempt from Prevailing Wage Obligations When Workers Directly Engaged in Construction.

Caltrans maintained throughout this case that Crush was a subcontractor and not a material supplier. Peterson-Chase argues that Crush was a material supplier, and as such was not subject to the PWL. (Peterson-Chase Closing Brief at pp. 27-29.) Caltrans urges that "the indisputable facts presented at the merits hearing . . . were that Crush Materials ordered the materials from other sources and had them delivered to a specific location where its workforce performed the labor associated with operation of equipment and laying of rapid-set concrete." (Caltrans Post Hearing Brief at p. 6, ll. 5-8.)

Caltrans cites no authority for its suggestion that obtaining materials from a third party precludes a company from being a material supplier, and that proposition is clearly without merit. Material suppliers routinely rely on third parties for items they

provide to contractors. Just as the local lumberyard does not log distant forests, a supplier of concrete need not mine the sand and rock needed to make the concrete.

Caltrans is correct, however, in suggesting that an entity that supplies materials—and may be a "material supplier" in the colloquial sense—is not exempt from prevailing wage obligations when its employees perform construction. When the entity's employees perform construction, the entity is a subcontractor.

As the court noted in *Mendoza:* "Under the federal scheme, a supplier of standard building materials, referred to as a 'bona fide' materialman or material supplier, is not considered a subcontractor. A bona fide material supplier is therefore exempt from the obligation to pay its employees, including truck drivers, the prevailing wage." (*Mendoza, supra,* 11 Cal.5th at 1135.) However, federal regulations provide that a supplier of materials is considered to be a subcontractor when its employees are engaged in construction directly on the construction site. Part 5,[8] section 5.2 of the Department of Labor regulations, (29 C.F.R. (1993)), in defining material supplier, indicates that, "(2) If an entity, in addition to being engaged in the activities described in paragraph (1)(i) of the definition, *also engages in other construction, prosecution, completion, or repair work at the site of the work, it is not a material supplier*."[9] (Emphasis added.) Further, Part 1926, section 1926.13(c) (29 C.F.R. (1979)) provides in part:

> The term subcontractor under section 107 is considered to mean a person who agrees to perform any part of the labor or material requirements of a contract for construction, alteration or repair. Cf. MacEvoy Co. v. United States, 322 U.S. 102, 108–9 (1944). A person who undertakes to perform a portion of a contract involving the furnishing of supplies or materials will

[8] "LABOR STANDARD PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT."

[9] See also, U.S. Department of Labor, Wage and Hour Division, Field Operations Handbook – Chapter 15, Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act (2016), section 15e16(c).

> be considered a "subcontractor" under this part and section 107 if the work in question involves the performance of construction work and is to be performed: (1) Directly on or near the construction site, or (2) by the employer for the specific project on a customized basis.

The *Mendoza* analysis emphasizing the importance of the definitions set forth in section 1720 suggests that an employee of an entity that supplies materials to the site of a public works project should be entitled to prevailing wages when that employee is performing actual construction at the public works site. In this regard, it is significant that Crush maintained CPRs and purported to pay prevailing wages for onsite work, apparently believing that the PWL required it to do so.

Crush Materials Was Not Required to Pay Prevailing Wages For Offsite Work.

As discussed *ante*, the holdings in *Mendoza* and *Busker* preclude finding coverage under section 1772. Caltrans does not articulate any other basis for finding the work performed by Crush employees covered. Thus, if such coverage is to be found, it must be as either "[c]onstruction . . . done under contract" within the meaning of section 1720, subdivision (a)(1), or "[s]treet . . . or other improvement work done under the direction and supervision or by the authority of an officer or public body of the state . . ." within the meaning of section 1720, subdivision (a)(3). The majority of the work in question was performed offsite and does not fit within either of those definitions of "public works."

The Labor Code does not provide an overall definition of "construction," although section 1720, subdivision (a)(1) provides that "'construction' includes work performed during the design, site assessment, feasibility study, and other preconstruction phases of construction, including, but not limited to, inspection and land surveying work . . .." In the absence of a statutory definition, case law provides some guidance: "As one thinks of 'construction' one ordinarily considers the entire process, including construction of basements, foundations, utility connections and the like, all of which may be required in order to erect an above-ground structure." (*Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756.)

While section 1720 does not expressly limit coverage to the project site, each aspect of the process discussed in *Priest* would normally occur onsite. Additionally, in *Sheet Metal Workers*, the court noted that various provisions of the prevailing wage law refer to the site of the public work:

> For example, section 1773.2 requires a public agency to post the applicable per diem prevailing wages "at each job site." It would make little sense to require the public agency to post notices at offsite locations that may be distant from the site of the public work and that are under the control of a contractor or subcontractor. . . . Thus, a reasonable reading of this statute suggests that the "jobsite" is the site of the public works project and not any site, wherever located, at which a worker is employed in the execution of some aspect of the public works contract. Section 1777.5 contains even more direct references to the site of the work. That section addresses a contractor's obligation to utilize apprentices on public works and makes repeated references to the site of the public work. (See § 1777.5, subds. (e), (f), (m)(1).)

(*Sheet Metal Workers, supra,* 229 Cal.App.4th at p. 203.)

Nonetheless, the court found that "these limited examples do not compel a conclusion that the Legislature intended the prevailing wage law to be restricted to workers employed at the site of the public work." (*Id.* at p. 204.) Rather, it concluded that "the Legislature's intent concerning geographical limitations on the application of the prevailing wage law is ambiguous." (*Ibid.*) To resolve the ambiguity the court turned to *Sansone* and *Williams*, as discussed *supra.* Additionally, the court found that in its coverage determinations, the Department "has followed a consistent and longstanding practice" of determining that "fabrication work performed at a permanent, offsite facility not exclusively dedicated to the public works project is not covered by the prevailing wage law . . .." (*Id.* at p. 209.)

The *Sheet Metal Workers* court found that: "Work performed at a permanent, offsite, and non-exclusive manufacturing facility does not constitute an integral part of the process of construction at the site of the public work." (*Id.* at p. 212.) It held that such work therefore is not covered by the prevailing wage law.

In *Mendoza,* the California Supreme Court disapproved *Sansone, Williams* and *Sheet Metal Workers* "to the extent they interpreted section 1772 to expand the statutory definitions of 'public works.'" (*Mendoza, supra,* 11 Cal.5th at p. 1139.)

The offsite work performed by Crush employees is analogous to the mobilization work at issue in *Mendoza.* The loading and hauling of raw materials to the construction site are activities that do not directly involve construction work, and therefore are not "construction" within the meaning of section 1720, subdivision (a)(1). Nor is maintenance of the equipment used by Crush "construction." By the same reasoning, such work cannot be considered "[s]treet, sewer, or other improvement work" within the meaning of section 1720, subdivision (a)(3). Caltrans does not contend that this provision offers a basis for coverage,

While *Busker* refers to delivery of concrete being covered by section 1720.9 (*Busker, supra,* 11 Cal.5th at p. 1168), that section is of no avail here because it specifies "the hauling and delivery of ready-mixed concrete to carry out a public works contract." Crush was not hauling or delivering ready-mixed concrete, but rather the raw materials needed to produce rapid set concrete on the jobsite, and thus the work does not fall within the scope of section 1720.9.[10] Thus, for the foregoing reasons, the offsite work performed by Crush employees was not subject to prevailing wage requirements.

Only Two Crush Employees Were Entitled to Prevailing Wages for Work Performed Onsite.

Of the Crush employees who performed work on the jobsite, seven were truck drivers. They normally remained in their trucks and waited until it was time to position their trucks for the mixing and pouring of the concrete. Two workers, Eric Marquez and Brian Escalante, directed the drivers as to where to position their trucks, operated the

[10] In 2022, the Legislature amended section 1720.3, subdivision (a) to cover the "on hauling of materials used for paving, grinding, and fill onto a public works site, if the individual driver's work is integrated into the flow process of construction." (Chapter 764, Statutes of 2022.) This provision is inapplicable to the present Project, since it was not enacted until long after the Project was completed and the Hearing on the Merits had begun.

controls on the volumetric mixers at the back of the trucks, positioned the chutes, and poured the mixed concrete into the forms for Peterson-Chase workers to spread and level. In other words, Marquez and Escalante actually made concrete from raw materials at the job site and immediately poured it onto the roadbed. Thus, they were not only directly involved in the construction process, but themselves were performing construction within the meaning of section 1720, subdivision (a). Therefore, they were entitled to prevailing wages for this work under the reasoning of *Busker.*

The drivers, on the other hand, were simply delivering raw materials and were not actively engaged in the construction process. Therefore, while Crush purportedly paid prevailing wages for their time at the jobsite, it was not legally required to do so.

The Correct Classification for the Crush Workers Who Operated Volumetric Mixers was Operating Engineer Group 6.

Crush classified Eric Marquez and Brian Escalante as Operating Engineer Group 8, Joseph Finley, Martin J. Ryan III, and Eric Gomez as Laborer Group 1, and Terry Tooles, James Navarette, Derrick Hills, Lyle Herring, Melissa Davis, Lorenzo Taylor, and Jonathan Pete as Teamster Group 5. (Caltrans Exhibit No. 9, pp. 154, 157, 160.) Caltrans contends that every worker should have been classified as Operating Engineer Group 6, which includes Volumetric Mixer Operator.

Caltrans relies on the Operating Engineers Scope of Work, which, it acknowledges, "encompasses a very broad range of work: '. . . the assembly, operation, maintenance and repair of all equipment, vehicles and other facilities, including helicopters, used in conjunction with the performance of the aforementioned work and services . . ..' (Caltrans Post-hearing Brief at p. 2, ll. 20-22.) Caltrans additionally relies upon the testimony of two witnesses: Ronald Sikorski, Business Manager of International Union of Operating Engineers Local Union 12, testified that his union claimed jurisdiction over Volumetric Mixer Operators; Robert Stanley of Teamsters Local 166 testified that his union did not claim such jurisdiction.

As discussed *ante,* the only Crush employees who performed work requiring prevailing wages on this Project were Marquez and Escalante, as only they performed

construction tasks. They operated the volumetric mixers on the jobsite and Caltrans is correct that their proper classification was Operating Engineer, Group 6. Crush classified them instead as Operating Engineer, Group 8, but this in itself did not result in underpayment of wages because the basic hourly wage for Group 8 is eleven cents higher than that for Group 6. Thus, Crush's misclassification of Marquez and Escalante did not result in prevailing wage violations.

Since the other Crush workers did not perform any covered work on the Project, they were not entitled to prevailing wages and their classifications are immaterial. For that reason, the testimony of Sikorski and Stanley is also immaterial.[11]

Crush Did Not Pay the Correct Prevailing Wages for All Hours Worked on the Project.

As discussed *ante*, only Marquez and Escalante performed work covered by the PWL. They were entitled to be paid prevailing wages for work performed on the site of the Project. Marquez testified that he recorded the employee hours worked onsite under the heading "deck time" on the timesheets included in Caltrans Exhibit No. 11, "Crush Foreman's Logs," pages 183, 185, and 187. These hours correspond to the hours shown for Marquez and Escalante on Crush's CPRs. (Caltrans Exhibit No. 9, pp. 154, 157, and 160.) Marquez worked all three days, while Escalante worked only one day, February 23, 2019.

Crush's CPR shows that on October 6, 2018, Marquez was paid at the rate of $74.28 per hour for 4.75 straight time hours, and at the rate of $96.65 for 0.5 overtime hours for a daily total of $401.16.

According to the Operating Engineers PWD, after July 1, 2018, the total hourly straight time rate for Group 6 was $75.12, less $1.00 for the Training Fund contribution not paid directly to the worker, or $74.12. For overtime, the total hourly rate was $99.16, less $1.00, or $98.16. Thus, the minimum required straight time pay for

[11] Moreover, the Department is responsible for interpreting its own Prevailing Wage Determinations and accompanying Scopes of Work. Testimony as to which union claims particular work is not material to the Department's interpretations.

Marquez's 4.75 hours was $352.07, and the minimum required overtime pay for 0.5 hours was $49.08, resulting in a daily total of $401.15. Hence, there was no net underpayment of total wages for Marquez on that date. However, because Crush did not pay the required overtime rate of $98.16, there was a total overtime underpayment of $0.75 for the day.[12]

A review of the relevant statutes demonstrates why Crush is liable for underpayment of overtime wages. Section 1771 requires:

> Except for public works projects of one thousand dollars ($1,000) or less, 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.

Section 1815 additionally provides:

> Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than $1^1/_2$ times the basic rate of pay.

Thus, there is a statutory obligation to pay overtime at not less than 1.5 times the basic rate of pay independent of section 1771's requirement to pay the general prevailing rate. Accordingly, while Crush paid Marquez slightly more than the prevailing straight time rate, it is nonetheless liable for the $0.75 underpayment for overtime.

Crush's CPR shows that on March 1, 2018, Marquez was paid at the rate of $74.28 per hour for 2.5 straight time hours, and at the rate of $96.65 for 2.33 overtime hours for a daily total of $410.89. At the PWD rate of $74.12 the minimum required straight time pay for Marquez's 2.5 hours was $185.30. At the PWD rate of $98.16, the minimum required overtime pay for 2.33 hours was $228.71, resulting in a daily total of $414.01. Again, there was no net underpayment of total wages for Marquez on March

[12] $98.16 x .5 = $49.08. $96.65 x .5 = $48.33. $49.08-48.33 = $0.75

1, 2019. However, because Crush did not pay the required overtime rate, there is liability for a total overtime underpayment of $3.52 for the day.

Crush's CPRs that for February 23, 2019, both Marquez and Escalante were paid at the rate of $74.28 per hour for 3.5 hours of straight time, for a total of $259.98 each. Both were paid at the rate of $96.65 for overtime hours. Marquez was paid a total of $370.17 for 3.83 hours of overtime; Escalante was paid a total of $362.44 for 3.75 hours of overtime. Total daily pay was $630.15 for Marquez and $622.42 for Escalante.

The Operating Engineer PWD provides for a "Special Shift" rate that is $0.50 per hour greater than the regular hourly rate. The PWD specifies that the rate is applicable "only when one shift is working at it is outside the regular starting time for shifts." (Exhibit 1 to Caltrans Request for Official Notice at p. 16.) "The starting time of single shifts shall be 6:00 A.M., 6:30 A.M., 7:00 A.M., 7:30 A.M. or 8:00 A.M., Monday through Sunday." (Exhibit 2 to Caltrans Request for Official Notice at p. 50.)

On February 23, 2019, Crush employees began working onsite at 4:30 a.m. (Caltrans Exhibit 11 at p. 185.) Thus, the Special Shift rate applied. For Group 6, the total hourly rate for straight time was $75.62, less the $1.00 Training Fund Contribution, or $74.62. The total hourly overtime rate was $99.91, less Training Fund, or $98.91.

Marquez was entitled to be paid for 3.5 hours of straight time at the rate of $74.62, for a total of $261.17; and, 3.83 hours of overtime at the rate of $98.91, for a total of $378.83. Thus, Marquez was entitled to be paid $640.00 for the day. He was paid only $630.15, an underpayment of $9.85.

Escalante was entitled to be paid for 3.5 hours of straight time at the rate of $74.62, for a total of $261.17; and, 3.75 hours of overtime at the rate of $98.91, for a total of $370.91. Thus, Escalante was entitled to be paid $632.08 for the day. He was paid only $622.12, an underpayment of $9.66.

Thus, Crush underpaid the required prevailing wages by a total of $19.51. The Notice must be modified accordingly.

Crush Did Not Underpay Training Fund Contributions.

Caltrans argues: "Due to misclassification and the failure to pay prevailing wages for the entire shift, Crush Materials failed to pay the required training fees for all hours its employees worked on the subject project." (Caltrans Post Hearing Brief at p. 7, ll. 10-12.) For the reasons discussed above, however, Caltrans is mistaken as to both premises. Crush was not obligated to pay prevailing wages for the entire shift, but only for work defined by section 1720 as "public works." The only such work performed by Crush employees on this Project was the onsite work performed by Marquez and Escalante. Both workers were correctly classified as Operating Engineers. While their work fell within Group 6, and Crush listed them as Group 8 on its CPRs, the required training fund contribution was the same for both groups, $1.00 per hour.

Caltrans Exhibit No. 11, titled "Crush Foreman's Logs," includes time sheets recorded by Marquez, according to his own testimony. Those time sheets show a total of 24.66 hours of "deck time," i.e., onsite time, worked by Marquez and Escalante. Crush's CPRs (Caltrans Exhibit No. 9, at pp. 154, 157, and 160) show the same hours worked for the two as the deck time hours entered on the timesheets. Caltrans Exhibit No. 12, at pages 206-207, shows that Crush made two payments to the California Apprenticeship Council for Operating Engineer training fund contributions on this Project, $5.25 on November 16, 2018, and $19.41 on September 21, 2019. The sum of the two payments is $24.66, indicating that Crush correctly paid $1.00 for each onsite hour worked by Marquez and Escalante. Thus, according to Caltrans's own evidence, Crush paid all training fund contributions required for this Project. The Notice must be modified accordingly.

Penalty Assessment Under Section 1775.

Section 1775, subdivision (a), states in relevant part:

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars ($200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as

determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B) (i) The penalty may not be less than forty dollars ($40) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.

(ii) The penalty may not be less than eighty dollars ($80) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty dollars ($120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1. [13]

Abuse of discretion by the Enforcing Agency is established if the "agency's non adjudicatory action … is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or

[13] The citation in section 1775 to section 1777.1, subdivision (c) is mistaken. Section 1777.1, subdivision (e), as it existed on the contract date, defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or deliberately refuses to comply with its provisions."

her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107**.**)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

Caltrans recommended section 1775 penalties at the mitigated rate of $120.00, stating:

> The subcontractor has failed to provide requested information and evidence to Caltrans in a timely manner to clear the underpayments, therefore, Caltrans considers this a willful violation of prevailing wage requirements. Caltrans recommends a penalty of $120 per employee, per day, *for underpayment of straight time prevailing wages* and a penalty of $25 per employee, per day, for underpayment of overtime prevailing wages.

(Request for Approval of Forfeiture, Caltrans Exhibit No. 8, p. 143, emphasis added.) DLSE approved section 1775 penalties at the $120.00 rate. (Disposition of the Case by the Labor Commissioner, Caltrans Exhibit No. 8, p. 140.)

Peterson-Chase proved that Crush was not required to pay prevailing wages, except for the onsite work performed by two workers, Marquez and Escalante. Both were underpaid for straight time hours worked on February 23, 2019, and Crush thus incurred two section 1775 penalties for that date. Escalante did not work on October 6, 2018, or March 1, 2019. Marquez did work those dates and was underpaid for his overtime hours, but not for his straight time hours or his total hours worked for the day. Thus, Crush did not incur section 1775 penalties for those dates.[14] Since the remaining

[14] Caltrans acknowledged that the section 1775 penalties were for underpayment of straight time prevailing wages, while the section 1813 penalties were for underpayment of overtime prevailing wages. (Request for Approval of Forfeiture, Caltrans Exhibit No. 8, p. 143.)

Crush employees did not perform work requiring prevailing wages, there were no underpayments to them. Accordingly, the number of section 1775 penalties must be reduced from 21 to two.

The burden was on Peterson-Chase to prove that Caltrans and DLSE abused their discretion in setting the penalty amount under section 1775. Despite proving that the number of section 1775 penalties assessed was incorrect, Peterson-Chase did not prove an abuse of discretion as to the penalty rate. Caltrans reduced the rate from the maximum $200.00 per violation to $120.00 per violation, a 40 percent reduction, and the statutory minimum for willful violations. Peterson-Chase has shown no abuse of discretion as to that rate. Accordingly, the Notice is affirmed as to the $120 rate, but modified to reduce the number of violations from 21 to two, with the resulting reduction in the total amount of section 1775 penalties owed from $2,520.00 to $240.00.

Peterson-Chase and Crush Are Jointly and Severally Liable for the Penalties Assessed Under Section 1775.

The prime contractor and the subcontractor are jointly and severally liable for penalties under section 1775. (See § 1743, subd. (a); *Violante v. Southwest Communities Dev't and Constr. Co*. (2006) 138 Cal.App.4th 972, 979.) The prime contractor can avoid liability if it satisfies the following requirements of section 1775, subdivision (b):

> If a worker employed by a subcontractor on a public works project is not paid the general prevailing rate of per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:
>
> (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of this section and Sections 1771, 1776, 1777.5, 1813, and 1815.
>
> (2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the

employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(§ 1775, subd. (b); see § 1742, subd. (b) [contractor bears burden to prove basis for assessment is incorrect]; Cal. Code Regs., tit. 8, § 17250, subd. (c).)

Essentially, section 1775, subdivision (b), creates a "safe harbor" for the prime contractor. To qualify for the safe harbor, the prime contractor must comply strictly with the requirements of the subdivision. The prime contractor's knowledge of the subcontractor's failure to pay prevailing wage rates, or alternatively the failure on the part of the prime contractor to establish four specific requirements, results in the prime contractor's liability.

Although Peterson-Chase stipulated that one of the issues to be decided herein was whether it met the above safe harbor requirements, it offered no argument in its post hearing brief that it did. In its post hearing brief, Caltrans argued that Peterson-Chase failed to satisfy the statutory requirements. It asserts that it "provided Peterson Chase with written notice that Crush Materials had failed to pay the specified prevailing rates of wages to its employees on the subject project [but] Peterson Chase did not diligently take corrective action …." (Caltrans Post Hearing Brief at p. 8, ll. 13-15.) Caltrans cited the testimony of Peterson-Chase Vice President Dick Vogels, who acknowledged receipt of correspondence from Caltrans regarding its investigation of Crush. Vogels testified that he contacted Crush President Christine Rush to make sure

she had received the correspondence and to ask her to promptly provide the information requested by Caltrans. Vogels further testified:

> We did not get involved with the paperwork as far as Crush's responses to Caltrans demands for information because that's all Crush's operations and we have nothing to do with that so we were just hoping that that she was responsive that Christina was responsive to the Caltrans demands and providing all the information that they asked for and that's there's nothing else Peterson-Chase could do except hope that she could comply.

Peterson-Chase's reply brief provides no response to the Caltrans argument on this issue. Peterson-Chase failed to show by a preponderance of evidence that it lacked knowledge of Crush's failure to pay the specified prevailing rate of wages to Marquez and Escalante on February 23, 2018. Thus, it failed to satisfy the first prong of the statutory test. Moreover, there is no evidence that Peterson-Chase monitored Crush's "payment of the specified general prevailing rate of per diem wages . . . by periodic review of the certified payroll records . . .." (§ 1775, subd. (b)(2).) Similarly, there is no evidence that upon becoming aware of Crush's failure to pay Marquez and Escalante the specified rate, Peterson-Chase took corrective action to rectify the failure within the meaning of section 1775, subdivision (b)(3). Thus, Peterson-Chase does not meet the four-part second prong of the statutory test.

Because Peterson-Chase has not established that it complied with section 1775, subdivision (b)'s safe harbor requirements, it is not entitled to relief from the obligation to pay the penalties imposed under section 1775, subdivision (a). Consequently, Peterson-Chase is jointly and severally liable with Crush for the penalties assessed.

Penalty Assessment Under Section 1813.

Section 1813 provides in pertinent part:

> The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article.

Thus, the contractor is liable for section 1813 penalties whenever it fails to pay the overtime rate as required in the applicable PWD. The phrase "violation of this article" is a reference to Labor Code Division 2, Part 7, Chapter 1, Article 3, titled "Working Hours," which is limited in its scope to employment on public works. Thus, section 1811 provides: "The time of service of any worker employed upon public work is limited and restricted to eight hours during any one calendar day, and 40 hours during any one calendar week, except as hereinafter provided for under Section 1815." Section 1815 in turn provides:

> Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1 1/2 times the basic rate of pay.

Thus, section 1813 penalties apply only to the required wage for overtime pay for the hours worked by workers "employed upon public work."

The Notice indicated that Crush was liable for $525.00 in section 1813 penalties for 21 violations. However, as discussed above, Crush is liable in this proceeding only for the underpayment of wages to Marquez and Escalante. Marquez was underpaid for overtime on all three days he worked, and Escalante was underpaid for overtime on the one day he worked. Thus, Crush is liable for a total of four section 1813 violations, and the Notice must be modified accordingly to reduce the total number of violations from 21 to four.

Section 1813 provides no discretion as to the penalty rate. Accordingly, Crush is liable for a total of $100.00 in section 1813 penalties at the rate of $25.00 per violation. The Notice must be modified accordingly to reduce the total amount of section 1813 penalties from $525.00 to $100.00.[15]

[15] Peterson-Chase is not liable for penalties assessed against Crush for overtime violations. (§ 1813.)

Based on the foregoing, the Director makes the following findings:

FINDINGS AND ORDER

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. The Notice of Withholding of Contract Payments was timely served by Caltrans in accordance with section 1741.
3. Affected contractor Peterson-Chase General Engineering filed a timely Request for Review of the Notice of Withholding of Contract Payments issued by Caltrans with respect to the Project.
4. While Crush Materials Corp. supplied materials for the Project, two of its employees performed construction work on the site of the Project. Crush Materials Corp.'s status as a material supplier does not relieve it of the obligation to pay prevailing wages for actual construction work.
5. Most hours worked on the Project by Crush Materials employees were not covered by the Prevailing Wage Law.
6. Crush Materials Corp. underpaid the two workers performing the work of Operating Engineer Group 6 by paying them less than the rates specified in the applicable PWD for that classification. Eric Marquez was underpaid in the amount of $9.85, while Brian Escalante was underpaid in the amount of $9.66.
7. The remainder of the workers did not perform work requiring the payment of prevailing wages.
8. Crush Materials Corp. did not underpay any worker due do misclassification.
9. Crush Materials failed to pay the required overtime rates to two employees on the Project.
10. In light of findings 4 through 9 above, Crush Materials underpaid its employees on the Project in the aggregate amount of $19.51.
11. Crush Materials Corp. did not underpay required training fund contributions.

12. Neither Caltrans nor the Labor Commissioner abused their discretion in assessing penalties under Labor Code section 1775 at the rate of $120.00 per violation. The Notice's finding of 21 violations is modified downward to two, resulting in the aggregate sum of $240.00.

13. Peterson-Chase General Engineering is not protected by the safe harbor provision of section 1775, subdivision (b), and is jointly and severally liable with Crush Materials Corp. for the section 1775 penalties.

14. Caltrans's finding of 21 overtime violations is modified downward to four. Accordingly, the aggregate amount of section 1813 penalties is modified downward from $525.00 to $100.00.

15. The amount found due in the Notice is affirmed as modified by this Decision as follows:

Basis of the Assessment	**Amount**
Wages Due:	$ 19.51
Training Fund Contributions:	$ 0.00
Penalties under section 1775	$ 240.00
Penalties under section 1813	$ 100.00
TOTAL:	**$ 359.51**

In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

The Notice of Withholding of Contract Payments is affirmed as modified herein, 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: 5/8/24

Katrina S. Hagen

Katrina S. Hagen, Director
California Department of Industrial Relations