STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

American Incorporated

Case No. 08-0134-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

ORDER DENYING RECONSIDERATION

On August 25, 2010, American, Incorporated, the affected contractor in the above matter ("American"), requested reconsideration of the Decision served on August 11, 2010 ("Decision"). Pursuant to Labor Code section 1742, subdivision (b) and California Code of Regulations, title 8, section 17261, subdivision (b), the Director hereby denies the motion in its entirety. (See, Cal. Code Regs., tit. 8, § 17261, subd. (d).)

Several issues raised by American deserve more than summary denial and are discussed below. As to any issue not discussed below, American's arguments were considered and rejected for the reasons set forth in the Decision.

Miller's Testimony On Travel And Subsistence Provisions.

Over the Division's objection, Miller was permitted to offer expert testimony on the meaning of the collective bargaining agreement language from which the travel and subsistence provisions were drawn. The thrust of Miller's testimony was to show that the language in the applicable prevailing wage determination concerning travel and subsistence pay had a generally accepted meaning different from the words themselves. As such, the testimony was not relevant for interpreting the requirements of the prevailing wage determination because it sought to change the plain meaning of the determination. Moreover, Miller acknowledged that the intent of the negotiating parties changes from time to time, that he was more familiar with the language of the plumbers agreement (Tr. page 98:lines 17-21), and that he was not involved in 2006 con-

tract negotiations and therefore "did not know what the intent was." (Tr. 102:18-20.)[1] This substantially undercut the authoritativeness of the testimony, in particular about whether the 2006 language expressed the intended meaning of the relevant, pre-2006 language.

As to whether Miller acknowledged that the IBEW would not agree with American's interpretation, the testimony does not support American's motion for reconsideration:

> MR. FRIED: Q. What you're testifying to is what occurred with signatory contractors; is that correct?
>
> [MR. MILLER]: A. Well, not necessarily signatory contractors, but others that wished to do prevailing wage construction.
>
> Q. But was it correct as to the signatories?
>
> A. That's correct. Some unions would argue.
>
> Q. Tell me about the IBEW. How -- would the IBEW argue if a signatory contractor did this?
>
> MR. YUEN-GARCIA: I think we're going off the field about what they would do.
>
> MR. FRIED: It is just the nature of foundation, indicating that (inaudible) of expert's testimony. And with that, I'm --
>
> HEARING OFFICER CUMMING: I actually did not hear the answer to the last question.
>
> MR. FRIED: Q. Well, the question is, did the signatory contractors, in fact --
>
> HEARING OFFICER CUMMING: I think you said would IBEW argue. And I --
>
> MR. FRIED: Yes, that's correct.
>
> Q. Was there -- when signatory contracts did what you described, were they -- were the IBEW (inaudible) signatory contractors to do this?
>
> MR. YUEN-GARCIA: I object. This is speculating.
>
> MR. FRIED: No, no, I'm asking as to his own experience.
>
> MR. YUEN-GARCIA: No.
>
> MR. FRIED: Then my mistake in asking the question.

[1] Miller also acknowledged that he had not participated in negotiating the contract from which the travel and subsistence provisions in FRE-2005-2 were drawn, but had participated in drafting the language in question at some earlier time. (Tr. 102:23 - 103:16.)

HEARING OFFICER CUMMING: Your understanding is that some do?

THE WITNESS: That's correct.

HEARING OFFICER CUMMING: Okay, thank you. I just wanted to hear the answer. I will hear argument about it later.

(Tr. 106:22 – 107:18.)

Miller acknowledged that the 2006 agreement *added* the new free zone corridor between Fresno and Visalia (Tr. 105:1-2). Thus, the Decision is a fair and reasonable distillation of Miller's volunteered acknowledgments that signatory contractors did not necessarily follow the practice of setting up shops to expand the free zone, and that "some unions would argue" with the validity of this practice for signatory contractors. Since IBEW is the only union signatory to the agreement forming the basis for the applicable determination, Miller's acknowledgment of dissent reasonably can be seen as applying to IBEW.

The broader undeniable conclusion to be drawn from Miller's testimony is that there was no clear or universal understanding that the travel and subsistence language meant what American contends that it meant. Thus, ultimately, Miller's testimony could not be the basis of American proving the Assessment was incorrect.

Overtime Claim In Assessment:

As stated in the Decision, the burden of proof on all issues to prove the Assessment incorrect was on American. (Lab. Code, § 1742, subdivision (b); Decision, p. 8.) American does not argue that it was unaware of the assessment of overtime wages (and mandatory penalties), nor does it argue it was precluded by the Hearing Officer from contesting this aspect of the Assessment. American never made the overtime aspect of the Assessment an issue and plainly failed to carry its burden.

The Decision's References to *Rex Moore* :

To the extent that American argues that the prior decision in *Rex Moore Electrical Contractors and Engineers Inc. v. Division of Labor Standards Enforcement*, Nos. 04-0076-PWH and 04-0101 (2004) ("*Rex Moore*") cannot be relied on precedent because it has not been so designated under Government Code section 11425.60, the Director concurs. (See, Govt. Code, §

11425.10, subdivision (a)(7).) However, *Rex Moore* is mentioned in two places only in the Decision: Footnote 1, which notes that American focused its own arguments on why *Rex Moore* was wrongly decided, and in the Liquidated Damages section, which discusses American's awareness of that decision in relation to its own determination to pursue its appeal and the arguments made in this case. Other than these references, the Director did not rely on any prior decision; it was American that sought to distinguish *Rex Moore* as if it were precedent.

The Imposition of Liquidated damages:

American asserts a need for the Director to rule on the lawfulness of the prior statutory scheme but provided no analysis or record for making such a ruling. A review of the record finds a total of only four sentences devoted to this issue: one on page 2 of the Request for Review ("The assessment of liquidated damages for non-payment of putatively due wages during the review process affects fundamental due process and is inherently void"); and one each in American's Post-Trial Reply Brief at page 4 ("As to liquidated damages, the structural due process defects in the relevant provisions of the Labor Code are compelling"), its Supplementalal Briefing at page 3 ("The pre section 1421.4 [sic] statutory scheme placed the employer at risk of forfeiture of funds if paid to workers during the 60-day appeal process based on a subsequent determination as to whether a good-faith dispute existed"), and its Reply Brief at page 2 ("The ultimate question presented is one of the employer's good faith efforts in the context of the plain due process inadequacies of the then existing 1742.1 process"). Nevertheless, even if issue had been raised properly and more fully addressed, Article 3, Section 3.5 of the California Constitution precludes the Director from declaring a statute unconstitutional or unenforceable on constitutional grounds unless an appellate court has determined that the statute is unconstitutional Furthermore, similar provisions have been upheld as constitutional. (*Overnight Motor Transport, Co., Inc. v. Missel* (1942) 316 U.S. 572, 583-584 [62 S.Ct. 1216].)[2]

[2] Even prior to the addition of the new escrow deposit safe harbor provision in 2009, Labor Code section 1742.1, subdivision (a) afforded some safe harbor protection to contractors who lacked a "substantial basis for believing the assessment to be in error," by allowing them to avoid the imposition of liquidated damages if they paid the wages due within 60 days after service of the assessment. Section 16(b) of the Fair Labor Standards Act [29 U.S.C. §216(b)], which was upheld as constitutional in *Overnight Motor Transport*, and Labor Code section 1194.2 [suits to recover minimum wages], its California counterpart, have no similar provision and instead impose liability for liquidated damages immediately upon the filing of a civil action for unpaid wages.

American also seeks a ruling on the effect of its "good-faith retention of funds" as well as an order somehow delimiting the withholding authority of the awarding body. American has never provided legal analysis or authority to support its contention that its voluntary segregation of funds in an account under its exclusive control should have the effect of forestalling the imposition of liquidated damages; this is despite previously having been specifically invited to do so. (Minutes of Further Posthearing Conference; Notice of Supplemental Hearing on Merits; and Orders issued on October 15, 2009, at pages 2-3.) With regard to funds retained by the Fresno Unified School District, American again provides no basis in the record or legal support for the requested order and appears to confuse the Labor Commissioner's authority under Labor Code section 1727 with the Director's authority under Labor Code section 1742, which is limited to affirming, modifying, or dismissing an Assessment.

All other issues raised by American that are not specifically addressed above are rejected without further discussion. This is an Order Denying Reconsideration and not a modified or reconsidered Decision under California Code of Regulations, title 8, § 17261, subdivision (d).

Dated: 8/26/10

John C. Duncan
Director of Industrial Relations

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

American Incorporated

Case No. 08-0134-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected Contractor American, Incorporated ("American") requested review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("Division") with respect to the Fresno Unified School District's Nutrition Center Project in the City of Fresno ("Project"). The principal hearing on the merits was held on January 12, 2009, in Fresno, California, and a supplemental hearing was held on November 2, 2009, in San Francisco, California, before hearing officer John Cumming. American appeared through Robert Fried, and the Division appeared through Ramon Yuen-Garcia. Following the submission of an amended audit and closing post-hearing briefs, this matter was submitted for decision on December 31, 2009.

The Assessment determined that American failed to pay its workers for travel and subsistence in accordance with the requirements of General Prevailing Wage Determination No. FRE-2005-2 for the classification of Electrician: Inside Wireman ("FRE-2005-2"). These provisions required a mileage payment for travel beyond a prescribed "free zone," a subsistence payment for longer range travel beyond the free zone, and a separate mileage payment for required use of a personal vehicle. The principal issue raised in this appeal is whether a contractor is exempt from making these payments so long as the project site is within *any* free zone prescribed in the travel and subsistence provisions, or whether instead there is only one free zone for a worker or work force based on the point of dispatch. Because recognition of a single free zone is more consistent with the language and intent of these provisions, and American has failed to show that

its alternative construction should apply, the Assessment is being affirmed but modified to subtract amounts assessed for vehicle use that were actually paid by American.[1]

FACTS

The core facts are not in dispute. The Fresno Unified School District advertised the Project for bid on February 10, 2006, which meant that contractors were required to meet the prevailing wage requirements set forth in FRE-2005-2, including related travel and subsistence provisions.[2] (*See* Labor Code section 1773.2.)[3] American contracted to perform electrical work on the Project, and employed workers on the Project from July 10, 2006, through May 2, 2007. American's shop was located at 7533 Avenue 304 in Visalia, California, and the Project was located at 4600 North Brawley Avenue in Fresno. The distance in road miles between these two locations was approximately 49 miles. The distance in *air* miles from the Project site to the Visalia City Hall was in excess of 40 miles, *i.e.* it was beyond a 40 mile radius from Visalia City Hall (*see* Section 3.23 of Travel and Subsistence provisions below). However, the Project site was less than ten miles from the Fresno City Hall.[4]

The travel and subsistence provisions for Inside Wiremen under FRE-2005-2 were derived from a collective bargaining agreement between the East Central California Chapter of the National Electrical Contractors Association and Local Union #100 of the International Brotherhood Workers ("IBEW") for inside wiremen in Fresno, Kings, Madera, and Tulare Counties,

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[1] The specific travel and subsistence requirements at issue in this case have been addressed by Directors in two prior cases: *Rex Moore Electrical Contractors and Engineers, Inc. v. Division of Labor Standards Enforcement*, Nos. 04-0076-PWH and 04-0101-PWH (2004), *aff'd.* Fresno Superior Court Nos. 05-CECG-00418 and 05-CECG-00420 (2005), and *Telstar Instruments, Inc. v. Division of Labor Standards Enforcement*, No. 07-0233-PWH (May 13, 2008) [unrelated subsequent history omitted]. Although the decisions are not precedential, American's arguments focused on why it believed those cases were wrongly decided.

[2] American's controller Frank Saucedo testified that he calculated American's bid based on the wage rates in FRE-2005-2 but that employees were voluntarily paid the higher wage rates specified in FRE-2006-2 (issued August 22, 2006) and later determinations. However, American did not believe that its workers were entitled to travel and subsistence pay under either the old provisions associated with FRE-2005-2 or the new ones associated with FRE-2006-2 and later determinations.

[3] All further statutory references are to the Labor Code unless otherwise indicated.

[4] While not relevant to the determination of entitlements under FRE-2005-2, American presented evidence showing that the four dozen workers employed on the Project resided all over the area, with a few in close proximity to the Project site, but most in communities in Tulare or Kings Counties and one in Bakersfield.

from June 1, 2003 to May 31, 2006. The relevant parts of these provisions stated as follows:[5]

Section 3.19 The employer shall pay for travel time and furnish transportation from shop to job, and job to job, and job to shop. . . .

* * *

Section 3.22 There shall be established a free zone within a ten (10) mile radius of the Fresno and Visalia City Halls, whereby the employees working under the terms of this Agreement for Employers with a recognized shop located within the jurisdiction of Local Union #100, IBEW, may be required to report on the job without travel time or expense at the regular starting time. When the Employer's permanent shop is located in other towns in the jurisdiction of Local Union #100, IBEW, the same free zone radius from the center of the town will prevail for those permanent local shops only.

For the purpose of traveling expense, any traveling Employer shall be privileged to order and obtain workmen from the dispatch point in Fresno or Visalia, but employers shall not transfer or order their workmen to any other free zone other than from where they were originally dispatched unless travel time or subsistence is paid.

A recognized permanent shop shall be an established place of business with a business telephone and mailing address located within the geographical jurisdiction of Local Union #100, IBEW, actively engaged in bidding and performing electrical work within said jurisdiction, and must be engaged in the above activity for a period of one year prior to being recognized as permanent.

Travel time and mileage shall begin at the perimeter of each established ten-mile free zone. On all jobs beyond the perimeter of these free zones there shall be paid to each employee $1.50 per day plus **thirty-five ($0.36)** cents per mile each way for each mile beyond the perimeter of the zone, maximum travel time is **$23.10**. This sum shall be full payment for all transportation and travel.

Section 3.23 All jobs or projects outside of a forty (40) mile radius from the center of the free zones shall be considered as subsistence jobs and shall be paid at the rate of **thirty-five dollars ($35.00)** per day worked.

Section 3.24 No agreement which would make it necessary for a workman to possess an automobile, motorcycle, or truck, to reach his work is to

[5] The bold type is shown here as in the original and appears to represent amendments to text carried over from predecessor agreements.

> be recognized in any way. When any workmen does possess an automobile, motorcycle, or truck, and is requested to use same by the Employer for transportation of his personal tools or himself, he shall be compensated at the rate of **thirty-six (36) cents** per mile from and to the Employer's shop. . . .

These travel and subsistence requirements were substantially revised in General Prevailing Wage Determination No. FRE-2006-2 based on changes in the successor collective bargaining agreement for inside wiremen in the four county area. The successor provision to Section 3.22 above [which became Section 3.24],

> . . . established a **permanent** free zone within **ten (10) air miles perpendicular to and from the center of State Highway 99 in either direction extending northward from Avenue 144 in Tulare County to Avenue 17 in Madera County; Ten (10) air miles perpendicular to and from the center of State Highway 168 in either direction extending from State Highway 99 eastward to Shepard Avenue in Fresno County; and Ten (10) air miles perpendicular to and from the center of State Highway 198 in either direction extending from State Highway 99 eastward to State Highway 65 in Tulare County,** whereby the employees working under the terms of this Agreement for Employers **traveling from outside the jurisdiction and Employers** with a recognized shop located within the jurisdiction of Local Union #100, IBEW, may be required to report on the job without travel time or expense at the regular starting time.

The successor to Section 3.23 above [which became Section 3.25] was revised to identify four different zones and subsistence payment rates based on distances in either direction from Highway 99. American does not dispute that the earlier determination FRE-2005-2 established the prevailing wage rates and requirements for the entirety of the Project. However, American contends that language of the collective bargaining agreement was amended in 2006 to clarify how the parties had always intended the free zone rules to operate and thus supplies the correct interpretation for the prior language.

Labor Relations Consultant David Miller testified as an expert in support of American's position that it was not liable for travel and subsistence because the Project was within one of the Free Zones prescribed by the underlying collective bargaining agreement. Miller stated that he had participated in drafting predecessor language as early as 1974-75. He expressed the opinion

that American's interpretation of the language was reasonable and correct and that prior cases reaching the opposite conclusion (*see* note 2 above) had been wrongly decided. However, Miller acknowledged that the IBEW would dispute American's interpretation. He also acknowledged that the 2006 agreement added a free zone corridor along Highway 99 that had not existed previously and that he had not participated in negotiating the 2006 language.

Following receipt of a complaint, the Division investigated and determined that American had underpaid its employees for work performed on the Project due to the failure to pay travel and subsistence. In calculating the back wages, the Division found that all of the affected workers were entitled to the maximum rate of $23.10 per day for travel time under Section 3.22 above and $35.00 per day for subsistence under Section 3.23, since the Project was outside a 40 mile radius from the Visalia City Hall. The Division also assessed an additional $29.50 per day in travel expenses for employees who drove their vehicles to the Project site.[6]

There is no dispute over the Division's calculation of unpaid amounts except that American claims a credit for money it paid workers to reimburse them for expenses. American provided vehicles and gas cards to some employees and reimbursed others for the use of their own vehicles to drive to the Project site and to other work locations on unrelated projects. American calculates its reimbursement for expenses paid for the Project as $57,854.61, based on the total amount of reimbursement, pro-rated for the number of hours worked on this Project. To the extent that American paid more than the amount required in 3.24 for travel expenses, it seeks a credit against other potential unpaid prevailing wage benefits. The Division questions American's calculations and entitlement to any credit for these payments, but as a fallback asserts that the credit can be no greater than the sum assessed for vehicle expenses under Section 3.24 of the Travel and Subsistence provisions, or a total of $32,937.78.[7]

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[6] It is unclear how the Division determined this rate since it appears to be based on less than the actual distance from American's shop to the Project site. However, since American is being credited for these payments except in one instance in which it claims to have paid less than the worker's entitlement, it is not necessary to inquire further into how the Division arrived at its figure.

[7] As shown in an attachment to the Division's Post Hearing Opening Brief (filed May 28, 2009), the Division assessed a total of $33,541.50 for 13 workers, and American claimed reimbursement credits for those 13 workers as well as 5 others. However, for one employee Rodolfo Contreras, American claimed a credit that is $603.72 *less* than the travel expense amount assessed by the Division. Thus, the proposed maximum allowable credit represents the difference between the total amounts assessed and the $603.72 that would remain due to Contreras even after allowing the other credits.

The net wages found due and owing in the Division's revised audit was $161,351.73, subject to a potential reduction or credit of $32,937.78, if American is found to have paid the amounts assessed for travel expense. The Division also assessed penalties under section 1775 at the rate of $20 per worker per day, for a total of $58,220.00 in section 1775 penalties under the last revised audit. This penalty rate was set in consideration of the fact that American had no prior history of violations but was an established business that should have been able to ascertain and pay the correct rates. In addition, the Division assessed $4,775.00 in penalties under section 1813 (at the rate of $25 per violation) for underpayments in connection with overtime hours. No information was provided concerning how American accrued liability for unpaid overtime and associated penalties under section 1813, but this aspect of the Assessment was not separately challenged or disputed by American.

As noted above, American disputes its liability for back wages and any resulting penalties based on the principal contention that the Project site was located within the 10 mile Free Zone surrounding the Fresno City Hall. American contends that the travel and subsistence provisions in FRE-2005-2 entitled employers to an exemption in both free zones, regardless of where the employer or its employees were based. American further contends that even if the Division correctly interpreted FRE-2005-2, the company is still entitled to credits for providing company vehicles to some employees and monthly allowances to others who used their own vehicles; and American offered evidence to support taking an aggregate credit of $57,854.61 based on the prorated value of these benefits relative to hours worked on the Project. With regard to penalties, American contends that the Division could and should have set the section 1775 penalty amount at $0 per violation based on American's good faith and substantial and compelling arguments for interpreting the travel and subsistence requirements differently.

With respect to its potential liability for liquidated damages, American presented evidence that it set aside $162,245.30 in a separate interest bearing account in Commerce Bank on or about August 28, 2008. This amount was equal to the total wages and penalties found due in the original Assessment issued on June 30, 2008. American's Controller and Chief Financial Officer Frank Saucedo testified that this money is being held for the purpose of paying the wages and penalties due if the Assessment is upheld. American contends that this set-aside of funds

absolves American of any potential liability for liquidated damages under the current language of section 1742.1.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects.

> 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).) The Division 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(a), and *see Lusardi, supra.*)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate, and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1(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 the service of a civil wage and penalty assessment. However, liquidated damages are subject to waiver by the Director upon a showing of "substantial grounds for believing the assessment . . . to be in error" under the statutory language in effect prior to January 1, 2009, or "substantial grounds for appealing the assessment" under the current language. Under another amendment that became effective on January 1, 2009, section 1742.1(b) further provides that a contractor may avoid liability for liquidated damages by depositing the full amount of assessed wages and penalties with the Department of Industrial Relations, within 60 days following service of the Assessment, to be held in escrow pending administrative and judicial review.

When the Division 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 that assessment by filing a Request for Review under section 1742. In that appeal the contractor or subcontractor "shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§1742(b).)

1. American's Employees Were Entitled to Travel Time and Subsistence Pay.

The principal dispute is whether the travel and subsistence provisions in FRE-2005-2 established two or more free zones for all workers and jobs in the four county area, or whether they instead provided for a single free zone tied to the locus of employment (hiring hall or employer's place of business). The subject travel and subsistence requirements, which in this case are drawn from a collective bargaining agreement, must be construed in accordance with the general principles governing the construction of a contract, that is, by construing the provisions as a whole, giving effect to all terms in a manner consistent with the overall purpose, and not in an unduly literal fashion which ignores that purpose. (*See* Civ. Code, §§1636, et seq. and *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-65.)

The fundamental principle underlying these provisions, as expressed in Section 3.19, is that the employer must "pay for travel time and furnish transportation from shop to job, job to job, and job to shop." The "free zone" prescribed by Section 3.22 represents the normal obligation of an employee to get a job site within a ten mile radius of the employer's shop. Beyond that free commute zone, however, the employee is entitled to travel time pay up to the prescribed maximum of $23.10 per day, and for jobs located more than 40 air miles from the center of the free zone, an additional subsistence payment of $35.00 per day.

Understood in this same context there is only one "free zone" for any electrician working under this collective bargaining agreement or otherwise entitled to prevailing wages in accordance with its provisions. That zone is based either on the location of the employer's business or the location of the hiring hall from which the employee is dispatched. It covers a 10 mile radius (for which no travel pay is due) in recognition that construction contract work by nature requires reporting to different locations to do the work. Beyond that distance, however, a worker is entitled to "pay for travel time from shop to job" as expressed in Section 3.19.

The interpretation of this provision to allow a single free zone is further supported by

Section 3.22, which states that "employers shall not transfer or order their workmen to any other free zone other than from where they were originally dispatched unless travel time or subsistence is paid." This prohibition would be unnecessary if employers had multiple free zones from which to choose, unrelated to their permanent shops or places of dispatch.

The alternative construction pressed by American derives from the word "and" in the first sentence of Section 3.22, which could be read as meaning that all free zones apply for any job rather than simply that there is more than one defined free zone in these provisions. However, this construction is inconsistent with the intent of these provisions, including the prohibition against transferring employees back and forth, and leads to anomalous results. American's interpretation leads to a duty, for example, to pay for travel to Kingsburg or Hansford, which are much closer to American's shop, but not to Fresno or Clovis, which are more distant. By contrast, the Division's construction harmonizes the language in a manner that is consistent with the principle expressed in Section 3.19 and does not lead to anomalous results.

The expert testimony and revised contract language that American offered in support of its construction are not a basis for another interpretation. Though prevailing wage standards may be derived from a collective bargaining agreement (*see* section 1773), the Director cannot interpret those standards in light of private understandings, hidden meanings, or negotiating history that is not apparent from the language itself. To do so would unfairly disadvantage contractors who are not privy to such information. Furthermore, the evidence offered by American fails to support American's own argument concerning the proper interpretation of the agreement. In particular, by acknowledging that IBEW did not agree with American's interpretation, expert witness Miller effectively admitted that this interpretation is *not* based on any shared or mutual understanding of the meaning of these provisions by the parties to the underlying collective bargaining agreement. Miller also acknowledged that the 2006 agreement introduced the new concept of free zone corridors along Highway 99, thereby undercutting American's claim that the new language simply clarified the meaning or intent of the preexisting language on free zones in FRE-2005-2. Consequently, American has failed to carry its burden to show that its workers were not entitled to travel and subsistence pay as determined by the Division.

With respect to the travel expense payments due under Section 3.24 of the Travel and

Subsistence provisions, American met its obligations by providing vehicle and gas cards or by reimbursing workers for the use of their own vehicles, except insofar as it paid less to Rodolfo Contreras than he was entitled to under Section 3.24. American has not established that these reimbursements were for anything more than reimbursement of work-related vehicle use. In non-prevailing wage situations, reimbursement for work-related expenses would be a payment separate from wages or other benefits. (*See* §2802.) This means that the entire $57,854.61 represents payments dedicated to reimbursing actual expenses. American has not shown that these reimbursements were intended or are creditable toward other distinct prevailing wage obligation. Accordingly, the maximum allowable credit for the assessed unpaid travel expenses under Section 3.24 is $32,937.78,[8] American's net liability for unpaid prevailing wages is $128,413.95.

2. American is Liable for the Penalties Assessed Under Section 1775(a).

Section 1775(a) provides in relevant part as follows:

> "(1) 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 fifty dollars ($50) 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 . . ..
>
> "(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 . . . 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 . . ..
>
> "(ii) Whether the contractor . . . has a prior record of failing to meet its prevailing wage obligations.
>
> * * *
>
> "(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion."

Abuse of discretion is established if the Labor Commissioner "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are

[8] As indicated in footnote 7 above, the figure represents the difference between the total of $33,541.50 assessed by the Division for Section 3.24 expenses, and American's admitted underpayment of $603.72 to employee Rodolfo

not supported by the evidence." Code of Civil Procedure section 1094.5(b). In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment "because in [his] own evaluation of the circumstances the punishment appears to be too harsh." *Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95 at 107.

The revised section 1775 penalty assessment amount of $58,220.00 is based on a total of 2,911 violations assessed at the rate of $20.00 per violation. The credit allowed for expense reimbursements does not change the number of violations because in every instance in which there was entitlement to an expense reimbursement, there was also an additional entitlement to travel time and subsistence pay which American did not pay.

American's defense to section 1775(a) penalties is tied to its position on the merits. American argues that based on its good faith mistake and lack of prior violations, the Division could have assessed a penalty of $0. However, American does not argue that the Division was *required* to set a penalty of $0. That the Division might have set a lower or higher penalty does not compel the conclusion that the Division abused its discretion in assessing these penalties at the rate of $20 per violation. In light of the finding that American underpaid its workers, these penalties must be affirmed.

3. American is Liable for the Penalties Assessed Under Section 1813.

Section 1813 provides for the assessment of a penalty in the amount of twenty-five dollars ($25) for each worker employed in excess of eight hours in a single calendar day or forty hours in a calendar week without being paid the required prevailing overtime rate. Failure to pay the required overtime rate constitutes a distinct prevailing wage violation, and unlike the penalties assessed under section 1775, the Division has no discretion to vary the amount of section 1813 penalties assessed for each overtime violation.

The Division initially assessed $4,775.00 in penalties under section 1813. In its last revised audit, the Division recalculated this liability upward to a total of $21,000.00. However, the Division did not move to amend its Assessment, and accordingly no revision in section 1813 penalties is allowed. (Cal. Code Regs., tit. 8, § 17226.)

Contreras for these expenses.

The Division has no discretion to modify the statutory penalty rate of $25 per violation, and American offers no defense to this penalty assessment separate from its position on the merits. Accordingly, these penalties also must be affirmed.

4. American is Liable for Liquidated Damages.

At the time the Assessment in this case was issued and served, section 1742.1(a) provided in pertinent part as follows:

> After 60 days following the service of a civil wage and penalty assessment under Section 1741 ..., the affected contractor, subcontractor, and surety ... shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages.

With the adoption of Stats. 2008, ch 402 §3 [SB 1352], which became effective on January 1, 2009, a new subdivision (b) was added to section 1742.1, to provide a "safe harbor" alternative for avoiding liability for liquidated damages, as follows:

> (b) Notwithstanding subdivision (a), there shall be no liability for liquidated damages if the full amount of the assessment or notice, including penalties, has been deposited with the Department of Industrial Relations, within 60 days following service of the assessment or notice, for the department to hold in escrow pending administrative and judicial review. . . .

American contends that it brought itself within this new "safe harbor" rule by placing the original Assessment amount of $162,245.30 in a separate private interest-bearing account within sixty days after that Assessment was issued on June 30, 2008, and thereafter retaining the funds in that account. American argues paradoxically that is entitled to retroactive application of subdivision (b) but should be excused from complying with the statutory requirement to deposit the money with the Department on the ground that the new subdivision did not exist when American appealed the Assessment and set aside the funds. The Division contends that the new subdivision is not retroactive, that American failed in any event to bring itself within the terms of the subdivision, and that American is liable for liquidated damages.

"New statutes are presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) "[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209.) This presumption, however "does not preclude the application of new procedural or evidentiary statutes to trials occurring after enactment, even though such trials may involve the evaluation of civil or criminal conduct occurring before enactment." (*Elsner v. Uveges, supra*, 34 Cal.4th at p. 936.) "A statute affecting procedure or providing a new remedy for the enforcement of existing rights is properly applicable to actions pending when the statute becomes effective, provided that vested rights are not thereby impaired." (*Department of Alcoholic Beverage Control v. Superior Court* (1968) 268 Cal.App.2d 67, 76.)

Measured in light of these standards, the new subdivision (b) of section 1742.1 does apply to Assessments that had been served and for which wages thereafter remained unpaid more than 60 days prior to January 1, 2009. American has not identified any expression of legislative intent that the amendment should apply retroactively. Second, the amendment was not merely procedural in nature, but rather created a new means for affected contractors to avoid the imposition of liquidated damages while in turn curtailing the ability of affected workers to receive those damages in cases where required wage payments are delayed during the pendency of non-meritorious appeals. However, even if perceived as a "statute affecting procedure or providing a new remedy for the enforcement of an existing rights" the amendment could not be applied retroactively here to impair vested rights that were already in existence when the amendment became effective. (*Department of Alcoholic Beverage Control, supra,* 268 Cal.App. 2d at p. 76.)

Under section 1742.1(a), then and now, liability for liquidated damages is imposed by operation of law on wages that remain unpaid "60 days following the service of a civil wage and penalty assessment". Once imposed, this liability can be removed only by establishing that the underlying wages are not due or by making the showing required for the Director to waive payment of these damages.

In this case, the wages found due in this decision remained unpaid to the workers as of

September 3, 2008, which was 60 days following service of the Assessment, and thus liquidated damages were imposed by operation of law on September 3, 2008.[9] Thus the damages were vested on that date, subject to the Director's authority to waive those damages upon a proper showing, and the later amendment of section 1742.1(b) could not impair those vested rights in the absence of an expressed intent that the statute apply retroactively.

Furthermore, even if the new safe harbor rule could be applied retroactively to cover this Assessment, American failed to bring itself within the terms of the statute by depositing the funds "with the Department of Industrial Relations" (§1742.1(b)). There is no evidence of any attempt by American to deposit the funds with the Department at any time either before *or after* January 1, 2009. Depositing and holding the funds in a separate interest bearing account that remains under American's exclusive control satisfies neither the express language of the statute nor the underlying intent of guaranteeing that the funds are beyond the reach of the contractor and will be available unconditionally to satisfy an Assessment that is upheld on review.

Since American is not covered by the safe harbor provision, the only other way it may escape liability for liquidated damages is by establishing grounds for the Director to waive those damages under section 1742.1(a), specifically by establishing that American had "substantial grounds for believing the assessment . . . to be in error."[10] This standard has been further defined by regulation at Cal.Code Reg., title 8, §17251(b) [Rule 51(b)] as follows:[11]

> To demonstrate "substantial grounds for believing the Assessment or Notice to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment or Notice was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment or Notice.

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[9] Section 1741 requires an Assessment to be served "pursuant to Section 1013 of the Code of Civil Procedure," and thus service deadlines and extensions of time are computed in the same manner as provided for mail service under Code Civ. Proc. Section 1013. (Cal.Code Reg., title 8, §17203(d) [Rule 3(d)].)

[10] The statute which added the "safe harbor" rule to section 1742.1 also revised this waiver standard to "substantial grounds for appealing the assessment." For the reasons discussed above, the amendment does not apply to this case. However, even if it did apply, the new language does not appear to materially alter the standard for waiving liquidated damages.

[11] This definition tracks the standards applied by courts in construing similar language found in the Fair Labor Standards Act (29 U.S.C. §§216 and 260, *supra. See Local 246 Utility Workers Union of America v. Southern California Edison Co.* (9th Cir. 1996), 83 F.2d 292, 297-98.

American became aware of the Director's construction of the travel and subsistence provisions in the *Rex Moore* decision (footnote 1 *supra*) within a day after being told by the Division investigator that it was liable for travel despite the Project's proximity to Fresno City Hall. (Testimony of Controller Frank Saucedo at pages 72-73 of the January 12, 2009 Hearing Transcript.) American proceeded with its appeal in the belief that *Rex Moore* was wrongly decided. There is no dispute that American had a reasonable subjective belief that the Assessment was in error, and that the claimed error would have eliminated American's liability for back wages, thus satisfying the first and third tests of Rule 51(b). The remaining question is whether American had an objective basis in law and fact for pursuing its appeal.

In *Rex Moore*, the former Acting Director regarded the waiver of liquidated damages as a close question that ultimately favored the contractor in light of the less than clear language of the travel and subsistence provisions, the fact that the contractor was a stranger to the underlying collective bargaining agreement and any hidden meaning of the language at issue, and the Division's own difficulty in articulating a clear and consistent position on the meaning of the language. Four years later, American had the benefit of a much clearer statement on the language's meaning and intent within the context of prevailing wage law, from the decisions of the former Acting Director and court in *Rex Moore* and the current Director in *Telstar* (footnote 1 *supra*).

American pursued its appeal on the strength of two interpretative aids – the expert testimony of David Miller and the revised language of the 2006 travel and subsistence provisions – that it believed would prove *Rex Moore* was wrongly decided. However, these interpretative aids did not support American's position or the arguments that had been advanced by the contractors in *Rex Moore* and *Telstar*. Instead they had the opposite effect of showing American's position on how the contract language had been historically understood and interpreted to be untenable. Consequently, American did not have a substantial basis in law or fact for appealing the assessment as to the $128,413.95 unpaid wages that remain due, and it remains liable for liquidated damages in an equivalent amount.

FINDINGS

1. Affected contractor American, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the Fresno Unified School District's Nutrition Center Project.

2. American's employees were entitled to travel and subsistence pay and travel expense reimbursements under the terms of Prevailing Wage Determination No. FRE-2005-2 at the aggregate rate of $87.60 per day. The total wages due under the revised Assessment was $161,351.73.

3. American is entitled to credit for travel and expense reimbursements in the aggregate amount of $32,937.78. The net wages remaining due after application of this credit is $128,413.95, plus interest as required under section 1741(b).

4. The Division did not abuse its discretion in setting penalties at the rate of $20 per violation for 2,911 violations, for a total of $58,220.00 in penalties under section 1775.

5. American is liable for $4,775.00 in penalties under section 1813 based on 191 overtime violations assessed at the statutory rate of $25 per violation.

6. In light of Finding No. 3 above, the potential liquidated damages due under the Assessment is reduced to $128,413.95. No part of the back wages found due in the Assessment, as modified by Finding No. 3, has been paid; and American has not demonstrated substantial grounds for believing the Assessment to be in error or any other basis for avoiding liability for liquidated damages. Accordingly, American is liable for liquidated damages in the amount of $128,413.95 under section 1742.1(a).

7. The amount found due in the Assessment as modified and affirmed by this Decision is as follows:

Wages Due:	$128,413.95*
Penalties under section 1775(a)	$ 58,220.00
Penalties under section 1813	$ 4,775.00
Liquidated Damages under section 1742.1	$128,413.95
TOTAL	**$319,822.90**

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

ORDER

The Civil Wage and Penalty Assessment is modified and affirmed 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: 8/11/10

John C. Duncan
Director of Industrial Relations