COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Department of Labor and Workforce Development, Division of Occupational Safety

In Re:	Wage Determination Appeal
Palmer Paving of Palmer, MA; Aggregate Industries Inc., of Saugus, MA; 56 Contractor Employers Belonging to the Labor Relations Division of Construction Industry of Massachusetts; 32 Contractor Employers Belonging to the Massachusetts Aggregate & Asphalt Pavement Association; and Construction Industries of Massachusetts	

DECISION OF THE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, DIVISION OF OCCUPATIONAL SAFETY

Appearance for Appellants:

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JURISDICTION

Pursuant to Massachusetts General Laws c. 149, § 27A, the undersigned, as designee of the Director of the Department of Labor and Workforce Development, Division of Occupational Safety ("DOS") (formerly known as Commissioner of the Department of Labor and Industries), conducted a hearing on August 16, 2001 at One Ashburton Place, Boston, MA. The subject of the hearing concerned an appeal brought by Palmer Paving of Palmer, MA; Aggregate Industries Inc., of Saugus, MA; 56 Contractor Employers Belonging to the Labor Relations Division of Construction Industry of Massachusetts; 32 Contractor Employers Belonging to the Massachusetts Aggregate & Asphalt Pavement Association; and Construction Industries of Massachusetts (collectively the "Appellants") contesting the applicability of prevailing wage rates to truck drivers who will haul bituminous concrete (asphalt) to Massachusetts Highway Department ("MHD") Project No. 603407-01, District 2 - Resurfacing and Related Work at Various Locations (the "project").

The issue presented is whether truck drivers who haul bituminous concrete should be paid prevailing wage rates for the over-the-road time spent hauling in connection with the public works project.

STATEMENT OF FACTS

On July 7, 2001, the Massachusetts Highway Department advertised Project No. 603407-01, District 2 - Resurfacing and Related Work at Various Locations. Bid specifications were made available on August 3, 2001 which incorporated a prevailing wage schedule issued by DOS. Proposals for the project are scheduled to be opened on August 28, 2001.

In 1989, the Supreme Judicial Court issued a ruling in Construction Industries of Massachusetts v. Commissioner of Labor and Industries, 406 Mass. 162, 546 N.E. 2d 367 (1989) (the "CIM" case) in which it held that teamsters hauling bituminous concrete to public construction sites were not merely "materialmen" because their work was an "integral part" of public works road construction projects. CIM, 406 Mass. at 168. The CIM Court stated: "the commissioner is empowered to set wages for teamsters when there is a *significant nexus* between the work those teamsters perform and the site of the construction project." CIM 406 Mass. at 167. (Emphasis added).

Following the CIM decision, in 1993, just prior to the split by the Legislature of the Department of Labor and Industries' authority with the Attorney General's Office, a policy was issued by then commissioner Thomas Dengenis (the "Dengenis Policy") stating that not only were bituminous drivers covered over-the-road as well as on-site under the Prevailing Wage Law but also drivers who haul ready-mix concrete (cement) as well. The connection between the type of work performed by ready-mix drivers and bituminous drivers was reaffirmed in a 1995 27A decision issued following an appeal filed by Lakeville Redi-Mix, Inc., and A. Graziano, Inc (the "Lakeville Decision"). Thus, the work performed by ready-mix drivers and bituminous drivers has been considered by DOS to be substantially the same and a single policy should be applicable to both on the issues raised in this appeal.

The Appellants, by their appeal, seek a review and reconsideration of the Dengenis Policy, particularly as it pertains to the time bituminous drivers spend over-the-road. In its notice to interested parties, DOS solicited testimony on the applicability of prevailing wage rates to the time that ready-mix concrete drivers spend hauling over-the-road in connection with the project

as well as bituminous concrete drivers. Testimony was received in opposition to the inclusion of ready-mix drivers as part of the hearing and decision. However, the opponents to the scope of the hearing failed to present any reasoning as to why the work of ready-mix drivers is dissimilar to the work of bituminous drivers and should be treated singularly. Moreover, Mr. O'Reilly, representing the Appellants, stated at the hearing that he did not object to the inclusion of ready-mix drivers in the review of the Dengenis Policy in this proceeding. Though the Dengenis Policy also addressed the issue of the applicability of the prevailing wage law to drivers who haul jersey barriers, the work of those drivers is substantially dissimilar to the work of bituminous and ready-mix drivers and is properly considered separately, with the input of interested parties involved in that type of work. Accordingly, notice of the appeal and hearing was sent to interested parties involved with the delivery of ready-mix concrete as well as bituminous concrete.

In his testimony, Mr. O'Reilly argued that the Dengenis Policy should be changed for the following reasons: 1) DOS, and its predecessor agency, DLI, improperly applied prevailing wage rates to the time that bituminous drivers spend over-the-road, and that applicability should be limited to the time spent on-site only, consistent with the holding in CIM; 2) DOS should interpret the prevailing wage statute, Mass. G. L. c. 149, §§ 26 - 27D (the "statute"), to apply only to the time workers spend on-site, with the sole exception of those workers who haul gravel or fill in connection with a public construction project in accordance with the limited exception added by amendment to Section 27 in 1973; 3) because bituminous drivers typically travel to public and non-public construction sites during a work day, the current policy of covering bituminous drivers' over-the-road time creates logistical difficulties, including bookkeeping

difficulties that arise when tracking prevailing and non-prevailing wage hours, the potential for strife the current policy creates between workers who are assigned to public construction projects and those who are not, the potential increased costs of truck rental rates, the confusion over when the over-the-road hours begin and end, and the stated assumption that drivers would receive different rates when they travel between areas having different prevailing wage rates; 4) and DOS should adopt the U.S. Department of Labor's 20% Rule which, under the Davis-Bacon Law, would not require payment of prevailing wage rates to drivers who spend less than 20% of their day on-site, citing similar statutory language and the economies associated with the adoption of identical state and federal rules.

Opponents of any change in the Dengenis Policy made one or more of the following arguments: 1) the current policy is consistent with the CIM case and that DOS has authority to set prevailing wage rates for drivers both on-site and over-the-road; 2) the current policy is more friendly to working people than the federal 20% Rule, and DOS should disregard the federal Rule; 3) drivers should be considered construction site workers; 4) any change would create bookkeeping difficulties when tracking on-site and over-the-road hours; and 5) bituminous and ready-mix concrete are actually mixtures of "gravel and fill," and the drivers hauling those mixtures should be afforded the same coverage for over-the-road work time as provided to drivers of "gravel and fill" under the 1973 amendment to the statute.

ANALYSIS

1. The prevailing wage statute, Mass. G. L. c. 149, §§ 26 - 27D, includes "teamsters" (as that term is used generically to refer to truck drivers) within the universe of workers entitled to

receive prevailing wages when employed on public construction projects. The question raised by the CIM case was whether the work the bituminous drivers perform at the construction site are part of the public construction project, or whether these drivers were just the supplier of materials, referred to in the decision as "materialmen," and not entitled to receive prevailing wage rates. The decision affirmed that the DLI commissioner (now the DLWD director) is empowered to set prevailing wage rates for drivers "employed to haul bituminous concrete to public works project sites," because there is a "significant nexus between the work those [drivers] perform and the site of the construction project." CIM, 406 Mass. at 167.[1] Since the ruling in that case, bituminous drivers have been undisputedly covered by the prevailing wage law while at the work site.

While reasoning that bituminous drivers are more than just materialmen and therefore must receive prevailing wage rates while on-site, the Court's decision did not address the question of whether those drivers are entitled to receive prevailing wage rates for the over-the-

[1]The CIM Court stated: "Quite clearly, the commissioner has not been given authority to set wages for all teamsters who have any connection with a public works project. The language of the statute limits his authority. The focus of that limitation is twofold. First, the statutory language makes repeated reference to the work site itself. This is the plain meaning of the language 'on' and 'upon' which appears in the statute. Second, the nature of the work performed on the site is an important aspect of the statute. This is evident from the use of phrases such as 'in the construction' and 'engaged in.' Thus, the limits of the commissioner's authority to set wages under §§G.L. c. 149, 26 and 27, are governed by the physical locus of the work site itself and the work which is performed there. The commissioner is empowered to set wages for teamsters when there is a significant nexus between the work those teamsters perform and the site of the construction project. In simple terms, the commissioner must ask, 'What do they do at the site?' When the performance of a statutorily specified job has a significant connection with the construction project, then that job falls within the domain of the posted wage law statute." 406 Mass. at 167.

road portion of their work. It left that question unanswered, and within the authority of the commissioner to decide.

Because the CIM Court left unanswered the question of whether bituminous drivers should be covered by the prevailing wage law while off-site, we must look to the prevailing wage law itself for guidance. Quite clearly, the statute limits the commissioner's authority to set rates for workers who are employed on-site, except where it requires drivers that haul gravel or fill to receive prevailing wage rates while traveling over-the-road. The statute makes repeated references to the employment of workers "on said works," "upon [the public works project]," and "on various types of public works" while making a single exception for "persons engaged in the transporting of gravel or fill to the site of said public works or removing gravel or fill from such site," Mass. G. L. c. 149, §§ 26 and 27.

By requiring prevailing wage rates to be paid to bituminous and ready-mix drivers while traveling over-the-road in the Dengenis Policy, the commissioner expanded his authority under the statute beyond its plain meaning. Though the CIM Court was mainly concerned with determining whether bituminous drivers are materialmen or not, it did explore the limits of the commissioner's authority, ruling that "... the limits of the commissioner's authority to set wages under G. L. c. 149, §§ 26 and 27, are governed by the physical locus of the work site itself and the work which is performed there." See CIM, 406 Mass. 162, 546 N.E. 2d 367 (1989). Any regulation of the wages of off-site workers, except drivers who haul gravel or fill, is an expansion of the statute's applicability beyond its clearly stated scope.

Other types of workers who perform part of their work off-site in connection with public construction projects are not required to receive the prevailing wage rate under the statute, for

example, the work performed by the makers of custom cabinet fixtures and decorative iron fixtures made off site. While it is undisputed that those workers must be paid prevailing wage rates while installing fixtures on-site because they participate in the installation of the materials being delivered, they would also be required to receive prevailing wage rates for the time spent delivering the fixtures and manufacturing them in a workshop if the statute were interpreted to cover the off-site time of workers who participate in the installation of the materials they deliver. The statute should be narrowly construed. CIM, 406 Mass. at 169, n. 5. Clearly, the workers who produce, deliver, and install fixtures have a significant nexus to the construction project while at the work site. However, it would be an erroneous expansion of the statute if the Dengenis Policy were applied to all workers engaged in any way to a public works project by requiring those workers to receive prevailing wage rates while off-site as well as on-site.

2. The question before DOS in this appeal is not only whether the Dengenis Policy conflicts with the holding in CIM, but whether, taking the statute as a whole, the Dengenis Policy, and its predecessor policies that included over-the-road time, is the correct interpretation of the intent of the statute. In examining this latter question, the statute specifically grants coverage of over-the-road time to haulers of gravel and fill only. Applying the usual rules of statutory construction, one should assume that where, as here, "a statutory expression of one thing is an implied exclusion of other things omitted from the statute." Harborview Residents' Comm., Inc. v. Quincy Housing Authority, 368 Mass. 425, 432 (1975). Expressio unius est exclusio alterius. See 2A C. Sands, Sutherland Statutory Construction § 47.23, at 194 (4th ed. 1984). Thus, we should assume, absent any evidence to the contrary, that the legislature intended that only haulers of gravel and fill would be covered under the statute for both their on-site time and their over-

the-road time, and that the same should not apply to the time other workers spend off-site.

A change in DOS's policy to exclude over-the-road time for all drivers except those who haul gravel or fill is not only more consistent with the "nexus" test applied in CIM but also is a better interpretation of the statute as a whole. This unambiguous interpretation also aligns the state and federal prevailing wage rules by requiring workers to be covered on-site only, except for gravel and fill haulers under the state statute. Cf. Building and Construction Trades Department v. U.S. Department of Labor, 932 F.2d 985 (D.C. Cir. 1991).

3. Employers' recordkeeping challenges have been raised as a problematic issue by the Appellant and by several other interested parties. While it is commonly held that recording the time that drivers dedicate solely to public construction projects during the course of a workday can be a difficult task, the converse, which is the present situation, is also difficult to record (i.e., keeping separate the over-the-road time that the driver is doing other work not connected with the public works project). However, the difficulty attached to proper adherence to a statutory requirement has no bearing on the proper application of the prevailing wage statute. Employers are required to pay employees prevailing wage rates for all applicable hours based on the statute and any guidance received from the courts or DOS. The degree of difficulty in keeping records is immaterial as long as the statute continues to require that records be kept for every employee for all applicable hours. Regardless of whether the current scenario under the Dengenis Policy were to remain in place, or an alternative, recordkeeping will remain a cumbersome task.

4. The Appellant's suggestion that DOS adopt the U.S. Department of Labor's 20% Rule as the desired outcome of this determination is not among the realm of possibilities. Although similar language may exist in both the Massachusetts and federal statutes, the adoption of the

U.S. Department of Labor's 20% Rule would be inconsistent with the ruling in the CIM case if it were applied to bituminous drivers who spend less than 20% of their day on-site. The CIM case requires those drivers to receive prevailing wage rates for the on-site portion of their work, regardless of duration.

5. The argument that bituminous concrete and ready-mix concrete are mixtures of gravel and fill, and the drivers who haul them should thus be paid in the same manner, is not valid because, although bituminous and ready-mix may contain gravel, each is a separate product and generally recognized in the construction industry as wholly distinct from what the industries recognizes as "gravel and fill" and the terms are never used synonymously in the construction industry.

CONCLUSION

The Dengenis Policy of June 26, 1993 ignored the Prevailing Wage Statute's limited scope of authority by its applicability of the statute to the over-the-road, or off-site, portion of the work performed by drivers who haul bituminous concrete, ready-mix concrete, and jersey barriers. The Dengenis Policy is hereby rescinded.

Drivers who deliver bituminous concrete or ready mix concrete to public construction projects for which a prevailing wage schedule dated on or after August 22, 2001 has been issued, and who work on MHD Project No. 603407-01, are covered by the prevailing wage law while they are on-site at the public construction project. Those drivers are not covered by the prevailing wage law while off-site, including over-the-road driving and picking-up materials. All

drivers who operate trucks on public construction sites as part of the construction work are covered by the prevailing wage law while they are on-site.

DOS will consider the applicability of prevailing wage rates to drivers who deliver jersey barriers to public construction sites at a later date.

August 21, 2001

Department of Labor and Workforce Development

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