STATE OF ILLINOIS – DEPARTMENT OF LABOR
160 N. LASALLE ST., STE. C-1300
CHICAGO, ILLINOIS 60601

IN THE MATTER OF:	)	
	)	
CATHY AND SCOTT JONES,	)	
	)	
PETITIONER(S),	)	
	)	
v.	)	STATE FILE NO. 2018-H-PK07-1914
	)	
JOSEPH BEYER, DIRECTOR OF THE ILLINOIS DEPARTMENT OF LABOR and the ILLINOIS DEPARTMENT OF LABOR,	)	
	)	
RESPONDENT.	)	
	)	

ORDER

THIS MATTER COMING on to be heard under the Prevailing Wage Act ("PWA" or "Act"), 820 ILCS 130/0.01-12 and Notice of Hearing issued thereunder; and, Petition to Intervene filed by Associated General Contractors of Illinois, the Southern Illinois Builders Association, E.T. Simonds Co., and United Contractors Midwest ("AGCI")and an oral Petition to Intervene made by Midwest Region of the Laborers' International Union of North America ("Midwest Laborers" or "Laborers") pursuant to 56 Illinois Administrative Code 120.400 (a) (1-6) all parties having been duly advised on the premises issues this order;

FINDINGS

Procedural History

Two causes of action have been filed involving same or similar issues contained in the case at bar. *Parilli et. al v. Illinois Department of Labor and the Director of Labor*, 16 CH 12963, 16 CH 12966 16 CH 13033 and 16 L 50642 has been filed in Cook County. *Oller v. Illinois Department of Labor et. al*, 17- MR-134 has been filed in St. Clair County. Both lawsuits were filed prior to commencement of this administrative proceeding.

The *Parilli* matter involves multiple lawsuits filed by four individual plaintiffs who are members of various unions seeking Administrative Review and a Writ of Mandamus against the Illinois Department of Labor ("IDOL" or Department"). The Cook County Circuit Court issued a mandamus compelling IDOL to post the 2016 prevailing wage rates on May 26, 2017. In response to the mandamus order the prevailing wage rates were posted on May 26,2017. However, the posting provided the prevailing wage rates were effective June 5, 2017 rather than July 15, 2016, as required by statute (or so the plaintiffs in the *Parilli* matter maintain). The Court entertained a Rule to Show Cause against the Department regarding the caveat providing a June 5 effective date as to the court ordered posted rates. The Court found that the Rule was filed late and declined jurisdiction to issue the requested relief. Thus, the legal issue involved before the Cook County Circuit Court regarding the prospective posting of the rates was not addressed on the merits but remains before the Court. This lawsuit involves precisely the same issue presented to this Tribunal under a Section 9 PWA Objection and the issue of the posting also remains a live issue before the Cook County Circuit Court. The instant matter was filed by Petitioners' within 30 days of the May 26, 2017 posting. 820 ILCS 130/9. In addition, the *Parilli* matter also requests administrative review which currently remains pending and one issue involve is the Department's alleged refusal to grant affected union members an administrative hearing before IDOL regarding 2016 prevailing wage rates and other issues as well.

The *Oller* matter seeks declaratory and injunctive relief as well as damages and alleges among other items dereliction of duty by the Department, Director of Labor, and Assistant Director of Labor in both official and

individual capacities for alleged refusal to properly investigate and ascertain the 2016 prevailing wage rates and to publish the 2016 said prevailing wage rates in July 2016. In addition, it is specifically noted that Cathy Jones and Scott Jones are Plaintiffs in the *Oller* action.

As of the writing of this Order, these two matters remain pending with the Circuit Courts in Cook and St. Clair Counties.

Petitions to Intervene

Midwest Laborers' Petition to Intervene

On September 11, 2017, the Midwest Laborers emailed to the parties in this matter a Petition to Intervene captioned an intervention in a related case, *Dan O'Connell v. Joseph Beyer, Director of the Illinois Department of Labor and the Illinois Department of Labor*, 2018-H-PK-07-1915. Dan O'Connell is a member of the carpenter's union and filed a section 9 PWA objection which was subsequently posted on IDOL's website. An order also posted on IDOL's website indicated at the time that the O'Connell and Jones cases were to be consolidated if the Jones case was not withdrawn by August 30, 2017. This order was entered on August 23, 2017. The O'Connell matter was subsequently withdrawn on August 24, 2017 and the Motion to Withdraw the Request for Hearing was granted on the same date. However, for unknown reason, this order was not posted on IDOL's website. As far as the Laborers stood, the next date on the newly consolidated matter was scheduled September 12, 2017.

On September 11, 2017, the Midwest Laborers attorney wrote:

> Attached please find my Motion for intervention in above referenced case, I understand that there is a telephone conference on this matter tomorrow and with your permission I would like to participate. I also understand that it has been consolidated with the case of Jones v. Beyer, if need be I will enter my appearance and intervention in that matter as well but would suggest it is unnecessary if these cases have been consolidated.

The Midwest Laborers argue it relied on IDOL's website when filing its intervention and thought it was intervening in both cases.

On Tuesday September 12, I wrote an email regarding 2018-H-PK-7-1915 O'Connell v. Beyer which stated:

> Dear Ms. Schanzle-Haskins:
>
> Thank you for your September 11, 2017 email. Please be advised that this matter has been resolved. Complainant withdrew its request for hearing. Attached please find the relevant order issued August 24, 2017.
>
> Thank you for bringing to my attention that this order has not been posted on IDOL's website. I am correcting that error.
>
> DOL.hearings@illinois.gov
> Illinois Department of Labor
> 160 N. LaSalle St., Ste. C-1300
> Chicago, IL 60601
> 312-793-1805

On September 12, 2017, in response, the Midwest Laborers emailed stating:

> As I mentioned in my email of yesterday, it was my understanding that the second case, Jones v. Beyer #1914 was combined with this case and is still outstanding. During the telephone conference that was scheduled today at 11:30 I was planning to ask you whether you wanted me to file the same intervention under the Jones case number or whether my filing in the Carpenters' case would suffice. Given this new information that I did not have, I would like to

request to participate in the Jones matter which I believe is still scheduled for telephone conference today at 11:30 and I would ask that my pleading be simultaneously filed in that matter without further expenditure of time and further pleading.

Best regards,

Ellen Schanzle-Haskins

Given this new information the Midwest Laborers requested an opportunity to participate/listen in the Jones matter on September 12, 2017. Absent any objection to this request, it was allowed.

On September 12, 2017, a pre-hearing conference was held in this matter. Participating in the conference were the undersigned, the Jones' through their attorney, the Department of Labor/Director of Labor through its counsel, AGCI, potential intervenor through its counsel and the Midwest Laborers, potential intervenor, through its counsel. Discussion ensued at this conference regarding potential intervenors "petitions" and the possibility of a stay to this proceeding due to pending matters in St. Clair and Cook Counties as the lawsuits which are pending cover similar if not identical issues contained in this objection. Furthermore, the Midwest Laborers maintains that an administrative law judge is without jurisdiction to decide the retroactive/prospective effect of the prevailing wage rate postings.

In addressing the intervention situation that arose regarding the Midwest Laborers, at the September 12, 2017 pre-hearing conference, the participants and tribunal stated, in pertinent part, as follows:

THE TRIBUNAL:

> "We do not as yet have a Petition to Intervene [in reference to the Midwest Laborers] there has not been any date set as far as I can recall on this case as to cut off dates for Petitions to Intervene. So she [in reference to Ellen Schanzle-Haskins] has a right to file and try and attempt to intervene in this case, and, I am assuming that the, I don't know the reason but I am assuming it is fairly close to the reason that was given by the parties in joint agreement last time as to why they did not want this to matter to proceed in terms of there being an underlying civil case in Cook County and, now it would appear there is an underlying civil case in St. Clair County. Is that correct Ms. Haskins"

MS. HASKINS:

> "Yes, it is."

September 12, 2017 Pre-Hearing Conference Digital Recording at 2:32 -3:21.

During the same September 12, 2017 pre-hearing conference the Tribunal concluded as follows, in pertinent part:

THE TRIBUNAL:

> "...to allow Ms. Haskins to file her petition to intervene and then we can do a similar, well I don't know if it was this case, no it wasn't, it was a different case where there would be some pleading back and forth on the petition to intervene because one of the parties indicated they were going to object to it, and we can move it forward in that manner, see what the circuit courts say and if at that point there is no judgment I guess, you know, I will make a ruling as to what is before me whether it is going to be stayed or not or whether we're going to just move forward and set it out for a hearing. So I mean I think Mr. Jones makes a very good point his clients are simply just laborers and they are just trying to obtain justice of some sort in some forum without you know getting sucked down into all of the attorney's fees and so forth and so on and that's why this Section 9 hearing is supposed to move forward rapidly so that we can resolve issues not only for the employees but also for the contractors and the employers out there so that they know what the proper prevailing rate is to be paid to the individuals. So, it's really an issue on all sides. So, I think

that's where we're going to move from here, I will issue an order setting a deadline on petitions to intervene and responses. If you do not object, and I don't know, Ms. Buerkett, the Department I think in the other matter did not object, are you planning on objecting to their intervention?"

MS. BUERKETT (Counsel for Illinois Department of Labor):

I have not been able to speak to my contact there and so I really don't want to say right now.

THE TRIBUNAL:

I understand. So, if the opposing parties do not object to it, feel no need to file a response to her petition but, I'd like to have it plead out for any reviewing court.

September 12, 2017 Pre-Hearing Conference Digital Recording at 19:37-21:34.

Following the pre-hearing conference, the undersigned issued an order on or about September 18, 2017 providing:

1. Any and all Petition(s) to Intervene shall be filed by all interested persons/entities as defined by 56 Ill. Adm. Code 120. 320 on or before **September 29, 2017.**

2. All Petitions to Intervene shall comply with 56 Ill. Adm. Code 120.320. Any brief accompanying the response shall comply with 56 Ill. Adm. Code 120.301.

3. Failure to file the Petition in accordance with 56 Ill. Adm. Code 120.320 will result in the Petition not being in compliance with this order and subsequent denial.

4. Any Petition filed **after September 29, 2017** will be deemed untimely and will unduly delay or prejudice the adjudication of rights of the original parties 56 Ill. Adm. Code 120.320 (2).

5. Any and all written responses opposing timely Petition(s) to Intervene including but not limited to potential intervenor identified as Laborers' International Union of North America, Southern and Central Illinois Laborers' shall be filed on or before **October 13, 2017.** Any brief accompanying the response shall comply with 56 Ill. Adm. Code 120.301.

6. The parties are under a continuing duty to notify the undersigned should this matter be stayed by an Illinois Court. Any such notification shall include a copy of the order issued by the Court.

7. All parties and the undersigned have agreed to accept service via email.

8. Respondent's Motion to Extend Answer Date is entered and continued.

9. A pre-hearing conference is scheduled for **October 26, 2017** at **11:30 a.m.** to address:

    a. Petitions to Intervene;
    b. Oral Motion(s) to Stay; and,
    c. The scope or which counties are at issue in this hearing.

    The undersigned will initiate the conference call. The same phone numbers previously provided will be utilized.

    ALJ Manley Order, September 18, 2017.

In response to various email inquiries, on October 13, 2017 the undersigned communicated to all as follows: (properly copied to all potential parties and parties in the O'Connell matter)

Dear Ms. Haskins, Mr. Weisberg, Ms. Buerkett, Mr. Kasmer and Mr. Jones:

The Department's hearings unit has received multiple Objections and Requests for Section 9 Prevailing Wage Hearings and the demand is overwhelming given the complexity, number of these many matters and strict statutory time frames involved. Due to the apparent lack of clarity regarding the situation outlined in the communications recently received from Ms. Buerkett and Ms. Haskins, in an effort to keep the best record possible for all involved, all interested parties should place their Motions and arguments in writing in regard to the matter or matters involved in this situation, so that all involved can understand and have the opportunity to present their side of the matter on the record in writing and/or verbally should the need arise. The *O'Connell/Carpenters v. IDOL*, 2018-H-PK07-1915 matter will remain closed.

Jones v. IDOL, 2018-H-PK07-1914 matter is scheduled for a pre-hearing conference on October 26, 2017 at 11:30 a.m. Please file all motions, objections, arguments in writing before that date. Those who are not parties on the Jones matter shall advise with name of contact and phone number to DOL.hearings@illinois.gov by October 23, 2017 whether they wish to join on that that date. It is assumed given this disagreement that Ms. Haskins wishes to participate to present her argument regarding this matter.

Thank you for your communications.

Claudia D. Manley
Chief Administrative Law Judge
Illinois Department of Labor
160 N. LaSalle St., Ste. C-1300
Chicago, IL 60601
312-793-1805

Email, Administrative Law Judge Manley, October 13, 2017

On October 26, 2017 another pre-hearing conference was convened during which the following participated through counsel: AGCI, Midwest Laborers, Jones and IDOL/Director of Labor. At this conference the "Petitions to Intervene" filed by both the Midwest Laborers and AGCI were addressed as were other matters.

The Midwest Laborers presented its "petition to intervene" arguing that paragraph number 5 of the September 18, 2017 order gave the Midwest Laborers the understanding that the Department was to file a response or object to the Midwest Laborers intervention and had until October 13 to do so. The Midwest Laborers believed it need not need file anything.

The Midwest Laborers argue that in good faith it was under a mistaken belief that the O'Connell and Jones matters were combined that the two cases had been consolidated and did not learn until having received Judge Manley's September 12 email that the O'Connell case had been withdrawn.

As to the substance of the Petition to Intervene, the Midwest Laborers believe it should be granted as its members will be adversely affected. The issue in this matter involves whether or not the Department maintains the authority to establish a prospective effective date for prevailing wages when a Cook County Judge issues a mandamus against IDOL and its Director for not posting the 2016 rates by July 15, 2016 and were only posted because of a court order. The result of the delay in posting resulted in non-union members being paid less in a locality from July 15, 2016 through the effective date of June 5, 2017 that the rate that prevailed. Due to the delay in posting, the Director and Department affected union members who are normally paid pursuant to collective bargaining agreements as well as the contractors/employers.

In addition, the Midwest Laborers argue the prospective effective date also impacts those employers whose employees work under participation agreements and are not paid pursuant to a collective bargaining agreement. Participation agreements are generally tied to the established prevailing wage rates as posted by IDOL. Thus, during this 11 month period these workers and contractors have the same issue as the non-unionized

Jones' which is that they worked on public works construction projects from July 2016 through posting of rates date, May 26, 2017, and were not paid the rate that prevails in the locality worked. As such, those impacted under participation agreements should be able to maintain a cause of action for back pay against non-union contractors. The Midwest Laborers have members who work under said participation agreements and have been underpaid. These employees work on a call out basis and/or are permanent part-time employees employed by state agencies and operate under a participation agreement which ties wages paid to the prevailing wage rates posted at the time. The Midwest Laborers argue that the governing participation rate under which its members worked was tied to the prevailing wage rate which suffered an eleven-month posting delay resulting in its members not being paid the rate that prevails in the locality during the time period worked. This occurred, the Midwest Laborers maintain, because IDOL did not perform the statutorily mandated action, timely posting the prevailing wage rates, causing financial injury to the workers.

The Midwest Laborers also assert that the Department's failure to post the prevailing wage rate timely has also resulted in union contractors being underbid and undercut by non-union contractors. Due to the eleven-month posting delay, non-union contractors were only mandated to pay the lower 2015 rate during this time frame. The Midwest Laborers represent that undercutting of bidding by non-union contractors has occurred during this time frame resulting in loss of employment for its members.

The purpose of the PWA, the Midwest Laborers argue is to assure workers are paid evenly and equally across the State of Illinois and non-union and/or out of state contractors cannot bid by undercutting the union rate. The alleged inaction by IDOL has resulted in this having occurred.

The Midwest Laborers believe it has a vested interest in the case and agrees with AGCI that this matter and should be stayed pending the actions in the two circuit courts, primarily the St. Clair County Court in the *Oller* matter which has been handling this matter since April 2017.

The Department stated at the pre-hearing conference that it did not recall if at the September 12 conference the Midwest Laborers were allowed to have a Petition to Intervene in a separate unrelated case stand in this matter. The Department believes it simple to file the intervention in the Jones matter and the actions of the Midwest Laborers is causing all to attempt to decipher whether the Petition has been properly filed or not. The Department believes these actions should not simply be accepted, that a filing in one case cannot stand in another case without express allowance by the Tribunal, which IDOL believes did not occur. The Department believes that the Midwest Laborers' Oral Petition to Intervene should be stricken.

The Department argues if it is accepted that a petition has been filed, it should not be granted due to the lack of timeliness. "Granting untimely bids for intervention on claims far too stale to be brought in their own right would sanction an end run around the limitations period and other procedural barriers." *Daniels v. United States*, 32 U.S. 374, 383 (2001). There is a limitations period, an express one, in Section 9 of the Act and it is 30 days. The Midwest Laborers knew of the prevailing wage rate posting. The effective date of posting was May 26, 2017 and the Midwest Laborers had until June 26, 2017 to object to the "effective date" issue under Section 9 and never did so. Instead, they are attempting to intervene in this matter. It should also be noted in the Cook County matter which is also hearing the same matter as this Tribunal, the Rule to Show Cause against the Department for placing an effective date on the rates that posted on May 26 was filed late which demonstrates a routine pattern by the Midwest Laborers of ignoring procedural requirements. The Court in that matter found the Rule was untimely by one day and now after the fact the Midwest Laborers are attempting to intervene here. The fact that the Midwest Laborers chose not to file an actual Petition in this matter should work to their own detriment and the Tribunal should not allow a cure for failing to comply with administrative orders, instructions and administrative regulations. It could have easily solved this situation by filing a timely objection after "effective date" rates were published.

The Department argues that allowing the Midwest Laborers to intervene would change the entire complexion of the case. Currently, there are two non-union workers (Petitioners) who have performed work in seven Illinois counties. The *case as it stands* is small and an intervention would necessarily change the complexity of this matter. In addition, the seeming purpose of the Midwest Laborers' petition to intervene is an attempt to control

this matter from going in a direction it does not want. This is not a basis for intervention. *Chicago, Milwaukee, St. Paul & Pac. R. Co v. Harris*, 63 Ill. App. 3d 1012, (1st Dist 1978) provides there must be reasons for intervention and it is improper to allow intervention where one is attempting to steer a matter because it would be better for the Midwest Laborers in the *Oller* matter. The Midwest Laborers have no right to intervention, they have a remedy in statute, did not pursue it, and have a remedy in court as they are named parties in the *Oller* matter. It is an improper use of intervention to sanction an end run around a statute of limitations which is clearly set forth in PWA. This is an improper use of a Petition to Intervene and should be denied.

In rebuttal, the Midwest Laborers argue it filed the court case in April 2016 in St. Clair County and at the time the "effective date" posting was made by IDOL this case had already been filed in St. Clair County and filed within the limitations period and should preempt the IDOL administrative process here in this matter. Midwest Laborers considered that the issue was already under review by a circuit court and the Midwest Laborers as such did not file a Section 9 Objection for themselves but when discovered that *O'Connell* and *Jones* matters raised these same issues the Midwest Laborers attempted to intervene because it too has the same issue. Midwest Laborers maintain that a pending circuit court matter does not preclude them from intervening in this matter. No case law was cited for this argument.

The Midwest Laborers maintain it should be allowed to intervene as it is so situated that it will suffer adverse impact by a final IDOL Order. The interests are same or similar to the *O'Connell* matter. The Midwest Laborers maintain it will suffer adverse impact, that the Petition to Intervene was timely and any attempt to keep the Midwest Laborers from intervening is form over substance.

AGCI's Petition to Intervene

It is clear that AGCI's Petition to Intervene was received by the Illinois Department of Labor ("Department" or "IDOL") on September 29, 2017. Anything beyond this fact is unclear. While the Petition is dated as having been received by IDOL September 29, 2017, it was not received by IDOL's Chicago Office. The date stamp reflects a date stamp utilized by IDOL's Springfield office. One copy of the Petition to Intervene appeared in the Department's hearings unit in Chicago, Illinois on a date uncertain, but well after the September 29, 2017 deadline imposed in the September 18, 2017 order. The filing did not contain a certificate of service, a mailing envelope, and was not received in duplicate. This caused confusion as to who, if anyone, had been served and whether it was filed inadvertently or properly.

At the time of the October 26, 2017 pre-hearing conference, AGCI indicated that the Petition to Intervene was filed by an associate attorney. AGCI advised at the October 26, 2017 pre-hearing conference that it had been addressed to IDOL's Chicago office but was mistakenly directed to and filed in the Department's Springfield office where the firm had previously filed notices of objections. The associate attorney did not send a copy of the Petition to all parties, apparently only the Department received the Petition on September 29. The error was later discovered and AGCI's attorneys corrected the error by sending an October 13, 2017 letter to all parties. The undersigned did not receive copies of the correspondence serving the parties.

The Department as well as Cathy and Scott Jones agree they were later served with the Petition to Intervene and received same along with October 13, 2017 correspondence from AGCI's counsel. Notably, receipt of the correspondence Petition occurred after the deadline set in the September 28, 2017 order for the filing of a response.

AGCI does wish to intervene and admits procedural error as far as filing and service goes. AGCI maintains that this matter raises an important legal issue: a declaration as to proper effective date of prevailing wage rate postings which will, AGCI argues, apply in all future proceedings statewide. Currently, AGCI states that the Cook and St. Clair County Circuit Court cases are ongoing and contain the same issue. AGCI argues preventing its participation will prejudice all interested parties. Excluding the employers altogether would deprive the fact finder of the employer's perspective especially as to effect of possible back pay. AGCI indicates this is purely a legal issue, which will cause no delay and it is proper to allow intervention especially where the employers would be adversely impacted by any ruling that the rates are or should be retroactive. Specifically, AGCI argues that it negotiates statewide agreements that cover all counties and construction work performed work in all counties for public bodies. AGCI represents that in general the contracts entered

into by and between public bodies and contractors provide that the contractor, not the public body, assumes liability for payment of any increase in prevailing wages during the pendency of the contract.

In this instance, the procedural error should be excused due to fact that the hearing has not occurred within the statutory 45 days and now pending is a motion to stay these administrative hearing proceedings. Given that these delays have occurred there is no prejudice to allow the Petition to Intervene. If not allowed to intervene and an adverse final order issues AGCI argues it would have to insert itself and challenge any denial of its petition to intervene. AGCI pleads that equity rule regarding this petition.

Petitioner raises no objection to AGCI's Petition to Intervene. Petition argues that the prospective effective date as to the rates made by IDOL is wrong and applies to everyone in the State, employers and employees alike will be impacted by a ruling. Petitioner argues IDOL is without authority to make such a decision.

The Department represents that rules EXIST for a purpose and everyone would benefit from having those followed. The Department indicates that the petition's purpose as outlined in writing is vague but that AGCI articulated that AGCI does maintain an interest in this matter, specifically that AGCI would not want retroactive application of the rates versus the Jones who want to see a retroactive ruling because they want to receive back pay. Any intervention changes the complexion of the case. In this matter, the Department argues it would expanding the issues from seven counties to all 101 Illinois counties and would increase from one contractor (Brandt Construction) to dozens if not hundreds of contractors. This, the Department argues changes the nature of the case and proof required to demonstrate that these are "persons affected" as defined by Section 9 of the Act, which would necessarily result in the Department having to examine all of those contracts. In addition, it also goes to permissive intervention rather than intervention as of right.

In addition, the Department argues that the petition was not appropriately filed procedurally. The Department states that the regulations governing this matter provide that petitions to intervene are to be filed in the Chicago office, it was not, it was submitted to Springfield and it is unknown whether it was by hand or mailed In addition, the filing contained no certificate of service. In addition, the Department does not know how many copies arrived in Springfield office (nor does the undersigned) as it is supposed to be filed in duplicate. The Petition was received three days past the Petition to Intervene response date provided by administrative order. However, the undersigned allowed the Department to file a response. The Department maintains the Petition was not filed properly and because it was not filed properly, it should be denied.

As to the merits of the Petition, the Department sees this situation as different than the Midwest Laborer's situation. AGCI did not have an objection to the prospective "effective date" regarding the 2016 rates and has no legal mechanism to voice support for the "effective date" posting only a mechanism to object to a posting. In truth and fact, the AGCI does not have another remedy this is where they should be allowed to intervene.

SCOPE OF SECTION 9 HEARING

The Objection filed by Cathy Jones and Scott Jones states in pertinent part as follows:

> Petitioners, Cathy Jones and Scott Jones, are construction workers on Illinois public works projects and have worked on public works projects for Brandt Construction, Inc, a non-union contractor, between July 1, 2016 and June 5, 2017.

Objections and Request for Section 9 Hearing, Page 1.

> Cathy Jones and Scott Jones, object to the prevailing wage determination posted on the Department's website on May 26, 2017 and respectfully request a hearing on these objections pursuant to 820 ILCS 130/9.

Objections and Request for Section 9 Hearing, Page 4.

Due to the lack of specificity contained within the Objections and Request for Section 9 Hearing, the undersigned raised the issue of the scope and issues in this hearing. Upon additional inquiry, it is undisputed that

Cathy Jones and Scott Jones are non-union workers who have been employed as laborers during the relevant time frame on public works construction projects. It is further undisputed that the Jones' have performed work as laborers from July 1, 2016 through June 5, 2017 on public works projects in the counties of Carroll, Bureau, Henry, Knox, Warren, Mercer and Rock Island only.

Petitioner believes that any ruling in this matter as to whether the prospective application by IDOL regarding the posting of the 2016 rates has a statewide impact on all individuals employed on a public works project. Any ruling Petitioner argues made on this issue will naturally be applied by the Department to all other counties and individuals who fall into the aggrieved worker category. As such, the scope of the hearing was meant to encompass all 101 Illinois counties and not be limited to simply the counties in which the Jones' performed work.

IDOL argues that the Jones' only maintain standing to assert claims in the counties in which work was performed during the relevant period and maintains that the scope of the hearing should be limited to the seven counties enumerated above. The Department reasoned that one of the requirements for an objector is that they be "persons affected" 820 ILCS 130/9. IDOL argues that the only "persons affected" are the Petitioners as they are the only two people that have objected and properly filed a timely Section 9 Objection.

There has been no certification of this matter as a class action, nor for that matter, has said Motion been made. Any such motion is, also at this point, untimely.

STAY

Petitioners and Respondents agree that this matter should be stayed pending resolution of the Cook County Circuit Court matter entitled *Parilli et al v. Illinois Department of Labor and the Director of Labor*, 16 CH 12963, 16 CH 12966 16 CH 13033 and 16 L 50642. The *Parilli* matter involves multiple lawsuits filed by four individual plaintiffs who are members of various unions seeking Administrative Review and a Writ of Mandamus against Defendant. The Cook County Circuit Court issued a mandamus to compel IDOL to post the 2016 prevailing wage rates on May 26, 2017. In response to the mandamus order, the Department posted the rates but provided that the prevailing wage rates were effective June 5, 2017 rather than July 15, 2016. The Court entertained a Rule to Show Cause against the Department regarding the caveat providing an effective date for the posted rates. The Court found that the Rule was filed late and the Court declined jurisdiction to issue requested relief. Thus, the legal issue involved before the Cook County Circuit Court regarding the prospective posting of the rates was not addressed on the merits. This involves precisely the issue before this Tribunal as this action, Petitioner's reason, was filed within 30 days of the May 26, 2017 posting. In addition, the *Parilli* matter also requests administrative review which currently remains pending and involves the Department's alleged refusal to grant impacted union members an administrative hearing before IDOL regarding 2016 prevailing wage rates.

However, Petitioners and Respondents do not agree that this matter should be stayed pending resolution of the St. Clair County matter *Oller v. IDOL*, 17- MR-134. The *Oller* matter seeks declaratory and injunctive relief as well as damages and alleges among other items dereliction of duty by the Department, Director of Labor, and Assistant Director of Labor in both official and individual capacities for alleged refusal to properly investigate and ascertain the 2016 prevailing wage rates and to publish the 2016 prevailing wage rate in July 2016. In addition, it is specifically noted that Cathy Jones and Scott Jones are Plaintiffs in the *Oller* action.

The Department argues that the Jones' are named parties in that matter, thus they have an alternative remedy at law available to them other than going through this administrative proceeding. The Jones' are plaintiffs in the St. Clair County case and they have a cause of action and ability to seek relief through this case. The Jones' have the ability through the St. Clair County court to seek a court order from the Circuit Court staying this matter which has not occurred. *Hammond v. Cape Indus.*, 97 Ill. App. 3d 877, (4th Dist 1981), *overruled on other grounds by People ex rel. Collings v. Burton*, 276 Ill. App.3d 95 (4th Dist. 1995). While, the Department does not object to a stay while Cook County matter proceeds through the court system, it does object to a stay on the basis of the St. Clair County case.

APPLICABLE LAW

820 ILCS 130/9 provides, in pertinent part, as follows:

At any time within 30 days after the Department of Labor has published on its official web site a prevailing wage schedule, any person affected thereby may object in writing to the determination or such part thereof as they may deem objectionable by filing a written notice with the public body or Department of Labor, whichever has made such determination, stating the specified grounds of the objection. It shall thereafter be the duty of the public body or Department of Labor to set a date for a hearing on the objection after giving written notice to the objectors at least 10 days before the date of the hearing and said notice shall state the time and place of such hearing. Such hearing by a public body shall be held within 45 days after the objection is filed, and shall not be postponed or reset for a later date except upon the consent, in writing, of all the objectors and the public body. If such hearing is not held by the public body within the time herein specified, the Department of Labor may, upon request of the objectors, conduct the hearing on behalf of the public body.

The public body or Department of Labor, whichever has made such determination, is authorized in its discretion to hear each written objection filed separately or consolidate for hearing any one or more written objections filed with them. At such hearing the public body or Department of Labor shall introduce in evidence the investigation it instituted which formed the basis of its determination, and the public body or Department of Labor, or any interested objectors may thereafter introduce such evidence as is material to the issue. Thereafter, the public body or Department of Labor, must rule upon the written objection and make such final determination as it believes the evidence warrants, and promptly file a certified copy of its final determination with such public body, and serve a copy by personal service or registered mail on all parties to the proceedings. The final determination by the Department of Labor or a public body shall be rendered within 30 days after the conclusion of the hearing.

If proceedings to review judicially the final determination of the public body or Department of Labor are not instituted as hereafter provided, such determination shall be final and binding.

The provisions of the Administrative Review Law, and all amendments and modifications thereof, and the rules adopted pursuant thereto, shall apply to and govern all proceedings for the judicial review of final administrative decisions of any public body or the Department of Labor hereunder. The term "administrative decision" is defined as in Section 3-101 of the Code of Civil Procedure.

Appeals from all final orders and judgments entered by the court in review of the final administrative decision of the public body or Department of Labor, may be taken by any party to the action."

820 ILCS 130/6 provides: "The Department of Labor shall inquire diligently as to any violation of this Act, shall institute actions for penalties herein prescribed, and shall enforce generally the provisions of this Act. The Attorney General shall prosecute such cases upon complaint by the Department or any interested person."

56 Ill. Adm. Code 120.130 (a) provides:

Documents and requests permitted or required to be filed with the Director or the Department in connection with a hearing shall be addressed and mailed or delivered to the Department's Chicago office, 160 N. LaSalle, C-1300, Chicago IL 60601. The Department's Chicago office is open from 8:30 a.m. to 5:00 p.m. Monday through Friday, except for national and State legal holidays. When the Act or this Part requires the filing of a motion, brief, exception or other paper in any proceeding, the document must be received by the Department or the officer or agent designated to receive that matter before the official closing time of the receiving office on the last day of the time limit, if any, for the filing or extension of time that may have been granted. Filings received after 5:00 p.m. will be considered filed on the following business day.

56 Ill. Adm. Code 120.130 (c) provides Documents may be filed with the Department by certified or First Class mail, by messenger service, private delivery service, or personally at the Department's Chicago office. Filing by electronic transmission, such as telefax machine or electronic mail (e-mail), will not be accepted, except when specifically requested or ordered by the ALJ.

56 Ill. Adm. Code 120.130 (g) provides:

The person or party serving the papers or process on other parties shall submit to the Department a written statement of service stating the names of the persons served and the date and manner of service. Proof of service shall be required by the Department only if, subsequent to the receipt of the statement of service, a question is raised with respect to proper service.

56 Ill. Adm. Code120.320 (Intervention) provides:

a) Permission to Intervene

1) Upon timely written application, the ALJ may, in his or her discretion, permit any party to intervene in a hearing proceeding, subject to the necessity for conducting an orderly and expeditious hearing, when:

A) The party is so situated that he or she may be adversely affected by a final order arising from the hearing;

B) The party requesting intervention is a necessary party to the hearing proceeding; or

C) A party's claim or defense and the main action have a question of law or fact in common.

2) In exercising discretion under this subsection (a), the ALJ shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

b) Two copies of a petition for intervention shall be filed with the ALJ, and one copy shall be served on each party.

c) An intervenor shall have all the rights of an original party subject to the order of the ALJ, except that the ALJ may, in his or her order allowing intervention, provide that the party shall not raise issues that might more properly have been raised at an earlier stage of the proceeding, that the party shall not raise new issues or add new parties, or that in other respects the party shall not interfere with the conduct of the hearing, as justice and the avoidance of undue delay may require.

CONCLUSIONS

Midwest Laborers' Petition to Intervene

On September 12, 2017, the Midwest Laborers participated as observers in the pre-hearing conference. After review of the digital recording, I believe it was made abundantly clear to the Midwest Laborers that it was expected to reduce its petition to intervene to writing and be filed in accordance with the governing administrative regulations. I stated "we do not as yet have a petition" from the Midwest Laborers, even though at that particular time, a Petition to Intervene had been filed in the *O'Connell* matter, a dismissed and closed matter. A *written* Petition by the Midwest Laborers was *never* filed in this matter. Furthermore, it was the undersigned's intention to keep and maintain a clear record of the proceedings which necessitated that written pleadings be filed. *See September 12, 2017 Digital Recording at 19:37-21:34, Order, September 18, 2017 email of October 13, 2017.* Subsequent to this pre-hearing conference, the undersigned gave any and all potential intervenors the opportunity to file a written petition to intervene by setting a deadline by which all potential intervenors were to have filed a Petition to Intervene. This order was posted on IDOL's website. The deadline was set in an effort to promptly move the matter forward toward hearing and to maintain the intention of the statute requiring prompt hearing and rapid results. Instead, this process has been bogged down by two petitions to intervene involving complicated procedural scenarios as to whether or not the Petitions have properly been filed.

Review of the official administrative record, relevant digital recordings and written pleadings reflect that the Midwest Laborers did not properly file a *written* petition to intervene in this matter. The only written request came to the undersigned (copied to all relevant parties) via email dated September 11, 2017 that if the O'Connell and Jones matters had been consolidated that the Midwest Laborers' believed it would therefore be unnecessary to file a second petition to intervene. In response to this communication, the undersigned signaled quite clearly at the time of the September 12 pre-hearing conference to all involved that the issues should be reduced to writing and filed in the form of a motion with copies to those involved. This was followed by a written order providing anyone interested with the opportunity to file a Petition to Intervene in accordance with IDOL's rules until September 29, 2017. The Midwest Laborers did not follow these instructions. Last, in response to email inquiries amongst and between the parties and potential intervenors, the undersigned instructed all to place the issues in writing. IDOL did place its issues in the form of a motion, the Midwest Laborers remained steadfastly persistent in its position that it need not file anything additional and did not.

On October 26, 2017, the Midwest Laborers were allowed to make a record regarding the merits of allowing it to intervene. The matter was taken under advisement as to whether a verbal Motion would be allowed to stand.

The Midwest Laborers were given three opportunities to reduce its Petition to Intervene into writing and failed to do so. By failing to do so, it is concluded that it failed to comply with the requirements as provided by 56 Ill. Adm. Code 120.320 and 120.130(a) which requires that the petition/motions be 'written', multiple copies filed and the filing is to have occurred in IDOL's Chicago office, none of which occurred in this fact scenario.

Furthermore, the Department's argument is persuasive that even were I to entertain this as a verbal motion in contravention of administrative regulation, the purpose for which the Petition is filed is for an improper purpose. The Midwest Laborers had the opportunity within 30 days of the Department's posting on June 5, 2017 to file its own Objection and Request for Section 9 hearing regarding the proper or improper prospective application of the 2016 wage rates and failed to do so within the statutory time frame. In this case, the Midwest Laborers are seeking to contravene the time constraints that require a filing within 30 days of the posting. Granting this Verbal Petition to Intervene, would "permit challenge far too stale to be brought in their own right, and sanction an end run around statutes of limitations and other procedural barriers that would preclude the movant from attachment the prior [judgment] directly." *Daniels v. United States*, 532 U.S. 374, 383 (2001).

In addition, review of the record reveals that at no time was there a verbal request or properly filed written motion made by anyone *at the September 12, 2017 pre-hearing conference* (emphasis added) that the Petition to Intervene filed in the matter of O'Connell v. Joseph Beyer, Director of the Illinois Department of Labor and the Illinois Department of Labor, 2018-H-PK07-1915 should stand in this matter. Rather, it was made clear that the Midwest Laborers should file a petition in this matter.

It is concluded, that the Midwest Laborers were advised on three separate occasions to file a Petition to Intervene in writing and to date it has not done so. *See September 12, 2017 Digital Recording at 19:37-21:34, Order, September 18, 2017 and ALJ Manley email, October 13, 2017.* For these reasons, the Midwest Laborers verbal Petition to Intervene is denied.

AGCI's Petition to Intervene

Review of the administrative hearing record reveals that the Illinois Department of Labor's Springfield, Illinois office received one Petition for Intervention regarding this matter on September 29, 2017 from AGCI. The Petition was signed by Attorney Andrew Martone, HesseMartone on behalf of AGCI. The Petition was forwarded to IDOL's Chicago Office and arrived in the Hearings Unit *on or about* October 10, 2017. At the time of arrival, it did not contain a certificate of service thus not allowing one to understand who received the Petition or in fact if this was an authentic filing. After the October 26, 2017 pre-hearing conference, and at the urging of the undersigned, AGCI has since submitted a Certificate of Service in an attempt to cure the "defect".

The administrative hearing rules governing this situation provide: 1) any documents that are being served in connection to a hearing are to be filed at IDOL's Chicago Office, and 2) a filing is to include a certificate of

service providing the names of persons served and the date and manner of service, and 3)filings are to have been filed in duplicate. 56 Ill. Adm. Code 120.320, 120.130.

The argument provided by AGCI as to its failure to comply with IDOL's written rules was not reasonable. The Petition was filed by an unidentified associate attorney employed by HesseMartone, presumably licensed to practice law in the State of Illinois who was said of have made an error. AGCI accepted responsibility for the failure to properly file the Petition but at the time of the pre-hearing conference addressing this issue had made no attempt to comply with IDOL's filing requirements. Other parties to the matter were sent a letter indicating that an error had been made. However, the undersigned received no such communication.

The undersigned is without authority to excuse the filing requirements contained in the administrative code. In addition, errors such as these are not a reasonable excuse for the improper filing of a motion. It is a common practice in Illinois that pleadings filed with tribunals and courts require certificates of service, multiple copies and generally contain filing location restrictions. The regulations provided by IDOL provided no higher barrier to properly filing a Petition to Intervene than other tribunals or the courts themselves. The requirements are not unique or exceptional and should have been easily complied with by a licensed attorney. As such, it is found that AGCI's Petition to Intervene was improperly filed in that it failed to comply with 56 Ill. Adm. Code 12.130 (a) (c) and (g), *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209 (2009). It is found that the errors made are not mere harmless error where a slight defect in the form of notice exists.

Scope of Hearing

Quite a different factual scenario exists in this matter as opposed to a customary Section 9 hearing. Customarily a Section 9 "affected person" is seeking a change in the rate of pay or seeking to establish a new classification retroactively *and* prospectively upon the posting of rates by IDOL. During the pendency of a customary proceeding, work as yet to be performed in as yet to be identified counties could occur by either a union or in this case non-union workers. The possibility of work being performed in another county exists in a factual situation described above.

Rather, in this unusual scenario, the applicable time frame as plead in Petitioners' Objection is July 1, 2016 through June 5, 2017, a time frame that has already passed. The Petitioners have already performed work in specified counties and worked in specified classifications. There is no possibility that they will perform work in as yet to be unidentified counties and/or in unidentified classifications during the time period at issue. The factual scenario is concrete because this matter deals with a time in the past, not the future.

Any future decision rendered by the undersigned will not have the effect of setting a 'statewide precedent' as the Petitioners argue. The result of the fact finding and gathering at the Section 9 hearing will result in a recommended decision and order to the Director of Labor who maintains the ultimate authority to decide this matter and may possibly set a 'statewide precedent' or limit the findings to this matter. 56 Ill. Adm. Code 120.650.

Thus, it is concluded that the Jones' qualify as "affected person(s)" and have been affected by the Department's prospective application of the 2016 prevailing wage rates, but only as to work performed as laborers in the seven counties identified above. **The scope of this hearing is limited to the laborer classification in the counties of Carroll, Bureau, Henry, Knox, Warren, Mercer and Rock Island from July 1, 2016 through June 5, 2017.**

Stay

The Illinois Constitution provides Circuit Courts with "original jurisdiction over all justiciable matters. Ill. Const. 1970, art VI, Sec 9. However, the legislature has the ability to "vest original jurisdiction in an administrative agency when it enacts a comprehensive statutory scheme that creates rights and duties that have no counterpart in common law or equity." *J & J Ventures Gaming v. Wild, Inc.*, 409 Ill. Dec 31, 39, 67 N.E.3d 243 (Il Sup Ct 2016). However, if the legislative enactment does divest the circuit courts of their original jurisdiction through a comprehensive statutory administrative scheme, it must do so explicitly. *Employers Mutual Companies v. Skilling*, 163 Ill. 2d 284, 288, 644 N.E.2d1163 (Il. Sup Ct. 1994). Determining whether the legislature

intended to divest the circuit court of jurisdiction requires a thorough review of the statutory administrative scheme. *City of Chicago v. City of Kankakee,* 2017 IL. App (1st) 153531, 2017 WL4358182, *J & J Ventures Gaming v. Wild, Inc.*, 409 Ill. Dec 31, 67 N.E.3d 243 (Il Sup Ct 2016), *Employers Mutual Companies v. Skilling*, 163 Ill. 2d 284, 644 N.E.2d1163 (Il. Sup Ct. 1994). "On questions relating to whether an administrative agency has exclusive subject-matter jurisdiction, we are to look to the statutory framework as a whole in order to give effect to the intent of the legislature." *J & J Ventures* at 251. Another consideration is "the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *J & J Ventures, Id.*

The Illinois Prevailing Wage Act provides a statutory scheme for statewide administration and local public body administration of wages paid to workers employed on public works construction contracts. The Department maintains authority to investigate violations of PWA. If IDOL finds a violation has occurred, the Office of the Illinois Attorney General is charged with prosecuting said complaints. 820 ILCS 130/6.

Notably, the statute provides authority for public bodies to set actual prevailing rates. In absence of a public body setting a rate, the rates set per county by the Department prevail and apply to construction contracts let by public bodies in the State of Illinois. 820 ILCS 130/9. This statutory scheme anticipates a "crazy patchwork" of prevailing wage rates that each individual public body may promulgate in a county. However, in practice and reality, few if any public bodies ascertain and post prevailing wage rates. Most public bodies default to those set by IDOL through adoption of IDOL's rates by the governing public bodies' official approval of a Prevailing Wage Act Resolution pursuant to 820 ILCS 130/4 reflecting same. There are some noted exceptions within the statutory framework as it applies to the Illinois Department of Transportation. 820 ILCS 130/9.

The Department through the Office of the Illinois Attorney General's representation maintains authority to sue for injunctive relief if a contract is awarded wherein the prevailing wage rates are not met. The statute provides an individual right of action for pursuit of non-payment of prevailing rate wages while also providing the Department the ability to maintain a cause of action on behalf of any individual who has a private right of action under the statute. Last, it provides for penalties and punitive damages payable to the workers and Department should certain thresholds be met. 820 ILCS 130/11.

Section 11a provides the Department the exclusive authority to debar contractors who have not complied with the obligation of paying the prevailing wage rate a certain number of times to workers on public works construction contracts within a certain number of years. It is also the exclusive province of the Department to provide whistleblower protection under the PWA. Both are subject to the Illinois Administrative Procedure Act. 820 ILCS 130/11a.

Given the array of language, assignments of duty and rights contained throughout the statutory scheme, it cannot be said that the circuit courts are *conclusively or explicitly* divested of jurisdiction in this statutory scheme. Rather the Act provides the Department **or** a public body the power to set and post prevailing wage rates for a given county. It provides the ability to hold hearings under Section 9 to the Department **or** a public body. In addition, the statute provides that the Office of the Attorney General will seek certain relief on behalf of the Department in court **and** workers can maintain a private right of action under the statute to seek justice from a circuit court.

Furthermore, the statute provides for some enforcement to occur through representation of the Illinois Attorney General in court and not through formal administrative hearing procedures at the agency level. **Therefore, it is concluded that the Department does not maintain primary jurisdiction as defined and applied by the Illinois Supreme Court under the Illinois Prevailing Wage Act and that Illinois Circuit Courts maintain jurisdiction under this statutory scheme.**

In *Oller* and *Parilli* , the parties seek: 1)a declaration regarding a question of law, and 2) equitable relief, and 3) recovery of attorney's fees and damages. Furthermore, it would be improper for an administrative law judge to entertain allegations of dereliction of duty and qualified immunity issues of the Director of Labor and the Assistant Director of Labor. The PWA does not provide the undersigned with an ability to fashion equitable relief, determine dereliction of duty or qualified immunity issues as those are not subjects within the contemplation of the scheme developed by the Illinois Legislature.

Thus, after thorough review of the statute, it is found that the undersigned does not maintain exclusive or primary jurisdiction over this matter, that the circuit courts can properly maintain jurisdiction over both the *Oller* and *Parilli* cases and that the parties have elected a forum through filing first with the Circuit Courts in both St. Clair and Cook Counties and have filed secondarily with the Department out of an abundance of caution to preserve a defense against any possible exhaustion of administrative remedy argument.

This matter is stayed pending resolution of the Cook County matter *Parilli et al v. Illinois Department of Labor and the Director of Labor*, 16 CH 12963, 16 CH 12966 16 CH 13033 and 16 L 50642 and the St. Clair County matter *Parilli et al v. Illinois Department of Labor and the Director of Labor*, 16 CH 12963, 16 CH 12966 16 CH 13033 and 16 L 50642. This stay extends to any appellate court action taken in these matters.

ORDER

1. The verbal **"Petition to Intervene"** was **not filed properly** by the **Midwest Laborers**. It has been filed an improper purpose and is **denied**. The **Midwest Laborers** are **denied intervenor status.**

2. The written **Petition to Intervene** by **AGCI** was **not properly filed procedurally**, and is **denied. AGCI** is **denied intervenor status.**

3. The **scope and issues** in this hearing are **limited** to **work performed** from **July 1, 2016 through June 5, 2017** on **public works construction projects** in the **laborer classification** in the Counties of **Carroll, Bureau, Henry, Knox, Warren, Mercer and Rock Island only.**

4. This matter is **stayed** pending resolution of the Cook County matter ***Parilli et. al v. Illinois Department of Labor and the Director of Labor*, 16 CH 12963, 16 CH 12966 16 CH 13033 and 16 L 50642** and the St. Clair County matter ***Oller v. Illinois Department of Labor*, 17- MR-134.** This stay extends to any appellate court action taken in these matters.

5. The Illinois Department is under a continuing duty to provide status to the individual assigned to preside over this matter as to final disposition in both the *Parilli* and *Oller* matters within 15 days of the ruling. This may be done via U.S. Mail at the address listed above or email at DOL.hearings@illinois.gov. The notification shall include a copy of the relevant decision and/or court orders.

DATE: 11/22/17

/s/ Claudia D. Manley
Claudia D. Manley
Chief Administrative Law Judge

Claudia D. Manley
Chief Administrative Law Judge
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Note: A party has the right to appeal any order issued by an ALJ during the pendency of a proceeding. 56 Ill. Adm. Code 120.301 (j).

STATE OF ILLINOIS)
)
)
COUNTY OF COOK)

CERTIFICATE OF SERVICE

Under penalties as provided by law, including pursuant to Section 1-109 of the Code of Civil Procedure, I Ann Harrison a non-attorney, affirm, certify or on oath state, that I served notice of the attached Order upon all parties to this case, or their agents appointed to receive service of process, by enclosing a copy of the Order in Case No. 2018-H-PK-07-1914 and a copy of the Certificate of Service in an envelope addressed to each party or party's agent at the respective address shown on the Order or on the Certificate of Service, having caused each envelope to be served by U.S. mail with postage prepaid at 100 W. Randolph Street, Chicago, Illinois on the 22nd day of November, 2017 prior to 4:30 p.m. and placed on the Illinois Department of Labor's official website at and placed on the Illinois Department of Labor's official website at www.state.il.us/agency/idol/

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