



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

Prevailing Wage
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December 21, 2016

Judd H. Lees
Sebris Busto James
14205 SE 36th Street, Suite 325
Bellevue, Washington 98006

Dear Mr. Lees:

Thank you for your December 10, 2014 letter requesting modification of the determination dated November 10, 2014 regarding the proper classifications of labor under the prevailing wage law, chapter 39.12 RCW, for work performed on the Tukwila Pool Project.

The Industrial Statistician determines the prevailing rate of wage. RCW 39.12.015.

In this case I have been asked to review whether the determination dated November 10, 2014 “finding the work preparatory to the floor painting was within the Laborer’s scope of work and whether the floor painting work was within the Cement Mason’s scope of work” is correct.

I affirm the prior decision on both issues. A further analysis of why the “floor painting work” is within the Cement Mason’s scope of work follows.

Copies of the applicable scopes of work, administrative code sections, and statutes, as well as an explanation of appeal rights, are enclosed with this decision.

Work Performed at the Tukwila Pool

1. Pool Deck Seamless Composition Floor

I rely on the description of the work in your June 17, 2014 letter. A concrete floor with exposed aggregate was present before the seamless composition floor was installed. I also obtained a copy of a photograph from the pool deck from 2010 and believe the deck was in substantially similar condition when Armorclad began to work under the contract in 2013.

Before installing the pool deck seamless composition flooring system, the workers taped and masked the areas around the pool, shot blasted the existing floor, and smoothed the exposed aggregate with sandpaper, steel wool, wire brushes, and 4" standard wheel grinders attached to a drill. Nail holes, cracks, and joints were filled with putty, plaster, or other fillers. Thereafter, Tnemec¹ was applied to the floor using long handled squeegees² and traditional paint rollers.

The installation process for the seamless composition floor surrounding the pool deck was as follows. A resin/converter mixture was first spread onto the floor using squeegees, backrolled with paint rollers and additionally smoothed using paint brushes. Next, sand was broadcast into the resin/converter mixture before the mix set. Broadcast was done to refusal, and then the excess was vacuumed. The resin/converter/broadcast process was then repeated and sand was again broadcast to refusal. Thereafter, excess sand was vacuumed and a finish was applied to the broadcast layer. The finish was applied with squeegees, rollers and brushes. According to manufacturer specifications, the finished thickness of this flooring system is not less than 1/8" (125 mils).

You explained in response to our follow up questions in an e-mail dated May 31, 2016 that for the pool deck, Armorclad used Tnemec series 280, the same product it used for the locker room walls. Also, inexpensive sand was used rather than colored decorative bagged aggregate, for the broadcast layer around the pool deck.

2. Locker Room and Bathroom Floors

I understand the work in the locker rooms and bathrooms was different than the process outlined above because the existing floors in the locker rooms and bathrooms were ceramic, not concrete. The existing ceramic tile floors were prepared to receive coatings in a similar fashion, but the coatings were of different types and were applied differently.

I rely on the explanations in Mr. Lees' June 17, 2014 letter and Mr. Lees' e-mail of May 31, 2016 in response to our follow up questions.

¹ Tnemec makes a series of products to install seamless composition floors. Such floors, in general, are installed by combining different materials in several layered and repeated steps. As each material is added, materials combine to create a floor from the bottom up.

² We consistently use the term "squeegee" in this document without argument about whether or not they can be used as a finishing tool. We agree that squeegees were used to apply and spread epoxy on this project. In this use, the squeegee serves the spreading function of a trowel. "Squeegee trowel" is a term used by manufacturers and retailers.

Smoothing the floor tiles in the locker room and bathrooms was done with both grinders and wire brushes. You point out in your letter of June 17, 2014 that only the glossy surface of the tile was removed. Epoxy putty and mortar using broad knives, putty knives, and trowels were used to correctly place patches in line with existing tile. Once dry the patched areas were ground and sanded.

You said the Tnemec Series 222 system consists of a layer of clear epoxy that is poured onto the floor from a bucket and spread out with a squeegee and paint brushes, then backrolled with a paint roller and allowed to level. After the layer had leveled, colored sand was broadcast to provide a decorative color and texture. Once dry, the excess sand was swept up and the surface vacuumed. The process was repeated again to provide additional color coverage, texture consistency, and build as required. Thereupon, a final coat of epoxy was applied. According to the manufacturer, the finished thickness of this flooring system is not less than 1/8" (125 mils).

I visited the Tukwila Pool to examine the floors and to take pictures.

General Principles of Interpretation for Scopes of Work

Scopes of work are interpreted to promote the remedial purposes of the Act and to benefit workers. Thus, when two scopes of work could be interpreted to overlap, the department interprets those scopes such that work is placed within the scope that most closely describes the work. When a scope has both a general term and a specific term, the specific term trumps the general term. Scopes of work are also read as a whole to ascertain their meaning. Related terms in a scope are given related meaning.

Where more than one wage rate could be construed (according to the scope of work descriptions) to apply to a work activity, the local wage standard to be preserved may not be clearly obvious. In these instances, and to avoid the inadvertent erosion of a wage standard, I hesitate in applying the analysis favoring the lower paid classification.

Armorclad asserts, and we agree, the purpose and nature of the work outstrips incidental facts such as the specific tools used. *Lockheed Shipbuilding Co. v. Dep't of Labor & Industries*, 56 Wn. App. 421 (1989). We review here both the tools used, which are relevant, and the nature of the work, which is paramount.

1. When a scope of work contains the phrase "includes, but is not limited to", the scope is broadly interpreted.

The scope of work for cement masons states as follows:

"For the purpose of the Washington state public works law, chapter 39.12 RCW, cement masons perform all work where finishing tools are used.

The work includes, but is not limited to:

- The installation of seamless composition floors and the installation and finishing of epoxy based coatings or polyester based linings to all surfaces, when the coatings or linings are applied by spraying or troweling.”

When a scope of work uses the phrase “includes, but is not limited to”, an expansive reading of the rule is appropriate.

2. When a scope of work contains the phrase “is as follows”, the scope is narrowly interpreted.

The scope of work for painters states “the job description for painters is as follows”, and goes on to state that work is classified under “Painter” when the work is:

- washing, cleaning, and smoothing of surfaces, using sandpaper, brushes or steel wool.
- removal of old paint or other coatings from surfaces, using paint remover, scraper, wire brush, or by sandblasting.
- application of polyurethane elastomers, vinyl plastics, neoprene, resin, polyester and epoxy as waterproofing or protective coatings to any kind of surfaces (except roofs) when applied with brushes, spray guns, or rollers.

Application of the Scopes of Work & Analysis:

Your various letters to my office on this topic, and their substantive contents, were considered before issuing my November 10, 2014 determination letter and they continue to be respected and considered here.

I continue to regard the thickness of the flooring system on this project as relevant, though not dispositive. The Painter scope discusses waterproofing and protective coatings. Paint coatings rarely exceed a few mils in thickness. In sharp contrast, the Tukwila pool and locker room floors are roughly 125 mils thick (1/8”).

Considerably more dispositive is the language of the scopes themselves, and the nature of the work performed. As discussed above, the Painter scope is written to be interpreted more narrowly than the Cement Mason scope.

Further, the Cement Mason scope appears to describe the work more specifically with the phrase:

“The installation of seamless composition floors and the installation and finishing of epoxy based coatings or polyester based linings to all surfaces, when the coatings are linings are applied by spraying or troweling.”

By contrast, the Painter scope includes:

“Application of ... epoxy as waterproofing or protective coatings to any kind of surfaces (except roofs) when applied with brushes, spray guns or rollers.”

While I notice that epoxy was spread and backrolled using squeegees and rollers respectively, the tools used are less important than the purpose and nature of the work. The purpose of the work was to create a seamless composition floor. Successive pouring and spreading in order to build up an epoxy and sand floor that is a minimum of 1/8” finished thickness is not, in my view, the application of epoxy as waterproofing or protective coating. The thickness, in and of itself, similar to the tool that is used (trowel or paint roller), is not dispositive. Thickness is relevant, however. These floors were not protected or waterproofed so much as they were rebuilt or resurfaced.

The sand used in this flooring system is not merely a texturing strategy. The sand, as in other combinations of cement and aggregate, adds both volume and strength. The sand is distributed throughout the epoxy mixture such that only a minor portion of the sand is near enough to the surface to add texture to that surface.

Concrete, perhaps the most common of all nonresidential building materials, is made from Portland Cement and water which is combined with sand and/or other aggregate materials. The materials and processes used to make the floor on the Tukwila pool project are similar. On that project, as with projects using standard concrete, cement (epoxy is a type of cement) is mixed with aggregate (sand) and the resulting material is spread or formed or used to fill. I determine the work on the floors at the Tukwila Pool extended beyond “floor painting” or “Application of ... coatings” but was instead the installation of a seamless composition flooring system, made of a combination of cement (epoxy) and aggregate (sand). The proper prevailing wage for this work is therefore that of Cement Mason.

It has been suggested that this work may fall within the Terrazzo (artificial marble) Workers scope (WAC 296-127-01379). I disagree. As you know, in determining which prevailing wage applies to a body of work, we place that body of work into the scope description that best describes that work. Scope descriptions (generally) do not overlap, as outlined earlier in this letter. The Terrazzo scope describes the creation of a terrazzo floor. There are some differences between the Tukwila Pool floor and a terrazzo floor. Terrazzo floors are thicker. Terrazzo floors contain much larger aggregate compared to the sand used at the Tukwila Pool. Last but not least, terrazzo floor materials are mixed first, then put into place. The aggregate chips or granules are mixed into the cement (often epoxy) first, then put into place using a float and/or trowel. Finally, terrazzo floors are then ground and polished to create a unique, attractive and durable artificial marble floor surface. WAC 296-127-01379 describes this process in some detail. The methods used to create the Tukwila Pool floors are different, and are not described in WAC 296-127-01379.

I decline to apply the narrowly tailored scope of work for painters to a single part of the installation of a seamless composition floor simply because some component of the floor is installed using brushes and rollers. We agree it may not be entirely unreasonable to apply the scope of work for painters to certain parts of the installation of the seamless composition floor, because parts of the installation are done with brushes and rollers, which are used by painters. However, keeping in mind the realities of the worksite, our preference to avoid placing work in two scopes, and the need to avoid strained and absurd results, we decline to do so here.

Instead, we construe the more broadly written scope of work for cement masons to determine that the installation and finishing of the seamless composition flooring system adjacent to the swimming pool done with grinders, trowels, squeegees, brushes, or rollers is within the scope of work for cement masons.

Conclusion

I affirm the determination dated November 10, 2014. Installation of the seamless composition flooring systems at the Tukwila Pool is properly within the scope of work for cement masons and is paid at the prevailing wage for cement masons, WAC 296-127-01315.

I appreciate your interest in prevailing wage compliance and the opportunity to address your concerns. If you have further questions, please let me know.

Sincerely,



Jim P. Christensen
Industrial Statistician/Program Manager
Prevailing Wage

cc: Elizabeth Smith, Assistant Director, Labor and Industries
Eric Coffelt, Business Manager, OPCMIA Local 528
Miriam Moses, Executive Director, REBOUND

Enclosures

RCW 39.12.015

Industrial statistician to make determinations of prevailing rate.

All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

[1965 ex.s. c 133 § 2.]

Cement masons.

For the purpose of the Washington state public works law, chapter 39.12 RCW, cement masons perform all work where finishing tools are used.

The work includes, but is not limited to:

- The setting of screeds, the rodding (buildings), shaping, smoothing and finishing of the surfaces of freshly poured concrete floors, walls, sidewalks, curbs, steps and stairways, the finishing of extruded barrier rails, or any other concrete surface requiring finishing, using hand tools or power tools, including floats, trowels, screeds and straightedge.
- The removing of rough or defective spots from concrete surfaces, using grinder or chisel and hammer and patching holes with fresh concrete or epoxy compound preparatory to sacking. (The finishing of a large surface of patched holes.)
- The moulding of expansion joints and edges, using edging tools, jointers and straightedge.
- The application of penetrating sealer and primer protective coatings to concrete floors and steps for the first twenty-four hours after pouring, when part of the finishing process.
- The installation of seamless composition floors and the installation and finishing of epoxy based coatings or polyester based linings to all surfaces, when the coatings or linings are applied by spraying or troweling.
 - Sandblasting or waterblasting for architectural finish or preparatory to patching.
 - The setting of all forms one board high.
 - The cutting of joints with concrete saw for the control of cracks in buildings and contiguous to buildings.
- The setting of concrete curb, gutter and sidewalk forms as a composite crew with laborers.
- All cleanup work required in connection with the above work.

[Statutory Authority: Chapter 39.12 RCW, RCW 43.22.270 and 43.22.051. WSR 00-15-077, § 296-127-01315, filed 7/19/00, effective 7/19/00.]

Painters.

For the intents and purposes of the Washington state public works law, chapter 39.12 RCW, the job description for painters is as follows:

- (1) Preparation of surfaces.
 - (a) Washing, cleaning and smoothing of surfaces, using sandpaper, brushes or steel wool.
 - (b) Removal of old paint or other coatings from surfaces, using paint remover, scraper, wire brush or by sandblasting.
 - (c) Filling of nail holes, cracks and joints with putty, plaster or other fillers.
- (2) Color matching and mixing.
- (3) Application of paint, varnish, stain, enamel, lacquer, vinyl, wallpaper and other materials of whatever kind or quality applied to walls or ceilings with paste or adhesive using brushes, spray gun or paint rollers.
- (4) Application of polyurethane elastomers, vinyl plastics, neoprene, resin, polyester and epoxy as waterproofing or protective coatings to any kind of surfaces (except roofs) when applied with brushes, spray guns or rollers.
- (5) Application of sprayed on fire retardant foam.
- (6) Texturing and decorating.
- (7) Erecting of scaffolding or setting up of ladders to perform the work above ground level.
- (8) Responsible for all the cleanup required in connection with painters work.

[Statutory Authority: Chapter 39.12 RCW, RCW 43.22.270 and 43.22.051. WSR 00-15-077, § 296-127-01356, filed 7/19/00, effective 7/19/00.]

WAC 296-127-01379**Terrazzo (artificial marble) workers.**

For the purpose of the Washington state public works law, chapter 39.12 RCW, terrazzo workers create durable and decorative surfaces on floors, walls and ceilings.

The work includes, but is not limited to:

- (1) Spreading a one-half inch mixture of sand, cement, and water with trowel to form a base over walls, ceilings, and concrete floors where terrazzo is to be applied.
- (2) The cutting and setting of metal or wooden strips into the terrazzo base so that the top edges form a design or pattern and define the level of the finished floor surface.
- (3) Spreading a mixture of cement terrazzo, magnasite terrazzo, polyacrylate terrazzo, epoxy matrix terrazzo, exposed aggregate, rustic or rough washed for the interior or exterior of buildings, over a terrazzo base with float and trowel to form the finished surface.
- (4) Spreading of any other kind of mixture of plastics composed of chips or granules of marble, granite, blue stone, enamel, mother-of-pearl, quartz, ceramic colored quartz and all other kinds of chips or granules when mixed with cement, rubber, neoprene, vinyl, magnesium, chloride or any other resinous or chemical substances used for seamless flooring systems, and all other binding materials when used on any part of the interior and exterior of buildings and on fountains, swimming pools, etc.

[Statutory Authority: Chapter 39.12 RCW, RCW 43.22.270 and 43.22.051. WSR 00-15-077, § 296-127-01379, filed 7/19/00, effective 7/19/00.]

Prevailing Wage Determination Request and Review Process

RCW 39.12.015 is the basis for requesting a determination, since it provides:

All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

If you disagree with a determination the industrial statistician provides, WAC 296-127-060(3) provides for a review process:

(3) Any party in interest who is seeking a modification or other change in a wage determination under RCW 39.12.015, and who has requested the industrial statistician to make such modification or other change and the request has been denied, after appropriate reconsideration by the assistant director shall have a right to petition for arbitration of the determination.

(a) For purpose of this section, the term "party in interest" is considered to include, without limitation:

(i) Any contractor, or an association representing a contractor, who is likely to seek or to work under a contract containing a particular wage determination, or any worker, laborer or mechanic, or any council of unions or any labor organization which represents a laborer or mechanic who is likely to be employed or to seek employment under a contract containing a particular wage determination, and

(ii) Any public agency concerned with the administration of a proposed contract or a contract containing a particular wage determination issued pursuant to chapter 39.12 RCW.

(b) For good cause shown, the director may permit any party in interest to intervene or otherwise participate in any proceeding held by the director. A petition to intervene or otherwise participate shall be in writing, and shall state with precision and particularity:

(i) The petitioner's relationship to the matters involved in the proceedings, and

(ii) The nature of the presentation which he would make. Copies of the petition shall be served on all parties or interested persons known to be participating in the proceeding, who may respond to the petition. Appropriate service shall be made of any response.

If you choose to utilize this review process, you must submit your request within 30 days of the date of the applicable industrial statistician's determination or response to your request for modification or other change. Include with your request any additional information you consider relevant to the review.

Direct requests for determinations, and for modification of determinations via email or letter to the prevailing wage industrial statistician:

Jim P. Christensen
Industrial Statistician/Program Manger
Department of Labor & Industries
Prevailing Wage
P O Box 44540
Olympia, WA 98504-4540
Jim.Christensen@Lni.wa.gov

Prevailing Wage Determination Request and Review Process

Direct requests via email or letter seeking reconsideration (redetermination) by the assistant director to:

Elizabeth Smith, Assistant Director
Department of Labor & Industries
Fraud Prevention and Labor Standards
P O Box 44278
Olympia, WA 98504-4278
Elizabeth.Smith@Lni.wa.gov

Direct petitions for arbitration to:

Joel Sacks, Director
Department of Labor & Industries
P O Box 44001
Olympia, WA 98504-4001

If you choose to utilize this arbitration process, you must submit your request within 30 days of the date of the applicable assistant director's decision on reconsideration (redetermination). Submit an original and two copies of your request for arbitration to the Director personally, or by mail. The physical address for the Director is 7273 Linderson Way, SW, Tumwater, WA 98501.

WAC 296-127-061 also contains the following provisions regarding petitions for arbitration:

In addition, copies of the petition shall be served personally or by mail upon each of the following:

- (a) The public agency or agencies involved,
 - (b) The industrial statistician, and
 - (c) Any other person (or the authorized representatives of such person) known to be interested in the subject matter of the petition.
- (2) The director shall under no circumstances request any administering agency to postpone any contract performance because of the filing of a petition. This is a matter which must be resolved directly with the administering agency by the petitioner or other party in interest.
- (3) A petition for arbitration of a wage determination shall:
- (a) Be in writing and signed by the petitioner or his counsel (or other authorized representative), and
 - (b) Identify clearly the wage determination, location of project or projects in question, and the agency concerned, and
 - (c) State that the petitioner has requested reconsideration of the wage determination in question and describe briefly the action taken in response to the request, and
 - (d) Contain a short and plain statement of the grounds for review, and
 - (e) Be accompanied by supporting data, views, or arguments, and
 - (f) Be accompanied by a filing fee of \$75.00. Fees shall be made payable to the department of labor and industries.