



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

Prevailing Wage
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July 11, 2012

Doug Tweedy, Executive Secretary – Treasurer/CEO
Pacific Northwest Regional Council of Carpenters
25120 Pacific Hwy. S., Suite 200
Kent, WA 98032

Re: Request for Review of the April 17, 2012 Scaffold Erectors Determination

Dear Mr. Tweedy:

Thank you for your May 14, 2012, letter to José Rodriguez, Assistant Director for Specialty Compliance Services. You requested a modification to my April 17, 2012, prevailing wage determination regarding scaffold erector apprentices. Since such reconsideration would start with me as the industrial statistician, Mr. Rodriguez asked me to respond to your letter.

In this response, references to the Revised Code of Washington (RCW) and Washington Administrative Code (WAC) are included and those specifically cited are attached as a separate document.

I appreciate your concerns and will address each of the issues you identified. The information provided here may be helpful in relating how various laws, standards and rules do and do not interact. That can be important for the methodology issues you mention. Those topics can be generally categorized in two groups:

1. Procedures for determinations and reconsiderations (administrative remedies).
2. How wage determinations are accomplished and the relationship of such wage rates to decisions by the industrial statistician on the correct scope of work (trade and occupation classification) for particular facts.

Determinations and Reconsiderations

The process for administrative remedies of prevailing wage issues is defined by statute and rule. The statute tells us who determines the prevailing rate of wage:

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

RCW 39.12.015.

This law directs to the industrial statistician all inquiries seeking direction on the correct prevailing rate of wage.

Administrative rules outline the process for seeking modifications to a prevailing wage determination or a redetermination:

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.

WAC 296-127-060(3).

The details about how to petition for arbitration are set forth in rule requiring notice to the director, the public agencies involved, the industrial statistician and other persons known to be interested in the subject matter. See WAC 296-127-061. The rule prescribes proper form for a request for arbitration (see attached).

To summarize this process in sequential order:

1. The industrial statistician makes a determination (such as the April 17, 2012, determination regarding which prevailing rate of wage applies to erection of scaffolding on a public work).
2. You may direct a request to reconsider to the industrial statistician.
3. After the industrial statistician has reconsidered (and if the request to reconsider is denied in whole or part) you may ask the assistant director for Specialty Compliance Services to reconsider the determination.
4. Following reconsideration by the assistant director, you may choose to ask for arbitration in the manner detailed in WAC 296-127-061.

Wage Determinations

You expressed a concern that my April 17, 2012 determination letter does not conform to the methodology prescribed in chapter 39.12 RCW. I do not agree and think there may be a misunderstanding of what methodology is actually required. The wage rate determination is handled in its own process as described here:

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The definition of the "prevailing rate of wage" and other definitions are actually found in RCW 39.12.010 (see attached).

In addition to the definition of locality in RCW 39.12.010(2), there is the limit in RCW 39.12.026 that you noted. That restriction prohibits the use of data from a different county to establish a wage rate. The prevailing rates of pay are established in full accordance with RCW 39.12.026. Each individual prevailing wage trade and occupation classification as described in the scopes of work (WAC 296-127-01301 to 01396) has data gathered by county and largest city in that county to determine the prevailing rate of wage. A question about a scope of work does not require a new, additional wage survey to answer such questions.

You also note the authority of the industrial statistician to establish the prevailing rate of pay:

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.

RCW 39.12.015.

The "same trade or occupation" language in statute is addressed by the scope of work descriptions adopted as Washington Administrative Code (WAC) (see WAC 296-127-013 attached).

Please note that the language regarding approved apprenticeship standards is one part of what is used for developing a scope of work description but does not, by itself, define or result in a scope of work description. In considering whether a prevailing wage trade and occupation needs to be added we would first look at whether existing scope of work descriptions already contain the work in question. If so, there is likely no need for an additional scope of work description.

For each trade and occupation recognized as being involved in public work, the prevailing wage program conducts wage surveys to obtain the data used to establish the prevailing rate of wage. The data is segregated by that trade and occupation, the county, and the largest city in the county. Data on the hourly rate of wage paid, the hourly rate of usual benefits paid, and overtime paid in that locality for the particular trade or occupation are used to determine the prevailing rate of wage.

The surveys are periodically performed in cycles (or groups). For example, the Carpenters trade was surveyed in group five. When the survey identifies a majority wage in the locality, that wage is used to set the prevailing rate of wage for that trade or occupation in that specific locality. When that majority wage is derived from a collective

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bargaining agreement (CBA), WAC 296-127-019(1)(b) enables the adoption of wage adjustments in the CBA between the survey periods. WAC 296-127-011 prescribes the biannual publication and effective dates used for such wage updates.

As you can see, there is a large body of work that goes into gathering data and establishing the prevailing rate of wage. I do not agree with your conclusion that the draft determination did not rely on any survey data.

The prevailing rates of wage are not revisited or revised with each and every inquiry the department receives about a scope of work (trade and occupation classification), or the correct use of apprentice wages for prevailing wage situations, or similar issues. Instead, the work already in place to survey and set the wage rates by locality (county and the largest city in the county) and the applicable prevailing wage trade and occupation classification (scope of work description) is used to answer the question. It would not be feasible to run a new wage survey for every question and, fortunately, the law does not require that methodology.

The methodology used for the April 17, 2012, determination letter regarding scaffold erector apprentices is not a factor that would affect the validity of the determination.

Prospective Application

Your letter discusses how contractors used the apprenticeship standards in good faith. Although standards for apprenticeship programs do not establish a trade and occupation classification for the prevailing wage law, chapter 39.12 RCW, I agree that reasonable notice of the determination could be a vital issue here. In consideration of your concern, we will apply the April 17, 2012, determination prospectively and will not apply that determination to past circumstances prior to July 10, 2012, the date of this letter.

Thank you for sharing your thoughts and concerns.

Sincerely,



L. Ann Selover
Industrial Statistician
Program Manager

cc: Judy Schurke, Director
Ernie LaPalm, Deputy Director for Field Operations
José Rodriguez, Assistant Director for Specialty Compliance

WAC 296-127-061(3)

- (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.

RCW 39.12.010

Definitions

- (1) The "prevailing rate of wage", for the intents and purposes of this chapter, shall be the rate of hourly wage, usual benefits, and overtime paid in the locality, as hereinafter defined, to the majority of workers, laborers, or mechanics, in the same trade or occupation. In the event that there is not a majority in the same trade or occupation paid at the same rate, then the average rate of hourly wage and overtime paid to such laborers, workers, or mechanics in the same trade or occupation shall be the prevailing rate. If the wage paid by any contractor or subcontractor to laborers, workers, or mechanics on any public work is based on some period of time other than an hour, the hourly wage for the purposes of this chapter shall be mathematically determined by the number of hours worked in such period of time.
- (2) The "locality" for the purposes of this chapter shall be the largest city in the county wherein the physical work is being performed.
- (3) The "usual benefits" for the purposes of this chapter shall include the amount of:

- (a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and
- (b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers, laborers, and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the workers, laborers, and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of such benefits.
- (4) An "interested party" for the purposes of this chapter shall include a contractor, subcontractor, an employee of a contractor or subcontractor, an organization whose members' wages, benefits, and conditions of employment are affected by this chapter, and the director of labor and industries or the director's designee.

WAC 296-127-013.

Scope of work descriptions.

- (1) In order to determine applicable prevailing wage rates, the director or his/her designee will issue scope of work descriptions for each trade and occupation recognized as being involved in public work.
- (2) The scope of work descriptions shall be created using authoritative sources available to the department, such as:
 - (a) Washington state apprenticeship and training council approved apprenticeship standards;
 - (b) Collective bargaining agreements;
 - (c) Dictionaries of occupational titles;

(d) Experts from organized labor, licensed contractors, and contractors' associations;

(e) Recognized labor and management industry practice.

(3) The applicable prevailing wage rates for workers employed on public works projects shall be determined by the scopes of work performed by those workers, and not by their specific job titles.

(4) The applicable scope of work description for a public works contract is the scope of work description that is in effect on the date that the bids are due to be submitted to the contract awarding agency. If the contract is not awarded within six months of the bid due date, then the applicable scope of work description shall be that which is in effect on the date that the contract is awarded. The same scope of work description shall remain in effect for the duration of the contract.

(5) In the event a dispute arises regarding a scope of work description following the award of a public works contract, the aggrieved party may request an arbitration hearing pursuant to the provisions of RCW 39.12.060, WAC 296-127-060, 296-127-061, and 296-127-062.

Pacific Northwest Regional Council of Carpenters

Affiliated with

United Brotherhood of Carpenters and Joiners of America

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May 15, 2012

Ann Selover, Industrial Statistician
Jose Rodriguez, Assistant Director
Department of Labor and Industries
PO Box 44540
Olympia, WA 98504

RE: Request for Review of Prevailed Wage Determination issued on April 17, 2012

Dear Mr. Rodriguez,

This letter respectfully requests that you, as the Supervisor of the Industrial Statistician or the Director of Labor & Industries, review the Prevailed Wage Determination issued on April 17, 2012. The Determination involved a December request from the Laborers to determine in the abstract which wage would prevail in the erection of scaffold on a construction site, and hypothetically, which wage would prevail if a Scaffold Erector Apprentice performed such erection work.

Upon review, I expect that you will find that the Determination suffers from the following defects: (1) it does not conform with the methodology prescribed in RCW 39.12 and (2) it arbitrarily and capriciously threatens contractors who relied previously upon Apprenticeship Standards approved by the Washington Apprenticeship Council, acted in good faith to support apprenticeship utilization, and performed due diligence by submitting affidavits of wages paid to the Industrial Statistician's staff who approved such wages and authorized the release of retainage by awarding agencies.

The legislature not only grants the Industrial Statistician authority to make rate of prevailed wage determinations, but also provides a specific methodology for such determinations. RCW 39.12.015 bestows authority upon the Statistician. Several surrounding statutory sections fetter the authority. RCW 39.12.010 defines "rate of prevailed wage" as "the rate of hourly wage, usual benefits, and overtime **paid in the locality, to the majority of workers, laborers, or mechanics, in the same trade or occupation.**" [Emphasis added] This section requires the statistician acquire data on what is paid in the locality. In the Determination Letter dated April 17th, 2012 pertaining to an inquiry from the laborers union, the Statistician did not obtain any intrinsic data about wages paid in any locality. RCW 39.12.026 requires each determination be limited to the specific county from which survey data was obtained. The determination did not rely upon any survey data.

A determination of prevailed wage made in the absence of data cannot stand. The Industrial Statistician acknowledges the absence of data in the letter itself. Moreover, the letter repeatedly states that its conclusion depends upon facts of each case.



The letter threatens to investigate and cite contractors who paid carpenter apprentice wages to a scaffold erector apprentice.

If we find an employer falsely designated a Scaffold Erector Apprentice as a Carpenter Apprentice on an Affidavit of Wages Paid form, we may find that this constitutes a "false Statement" and a violation of the provisions of RCW 39.12.050. A civil penalty and a strike toward debarment may be imposed for this violation. If the employer receives a second strike for false filing within a five year period, the employer may be prohibited from bidding on public work contracts for one year. See RCW 39.12.050.

Accordingly, a contractor who acted in accord with Apprenticeship Standards approved by the Washington Apprenticeship Council could be cited for any and all **past** erroneous filing. Such action would serve as a penalty to any contractor on a State Government Project who acted in good faith to support apprenticeship utilization. Finally, such action would disregard a contractor's due diligence of submitting affidavits of wages paid to the Industrial Statistician's staff that not only approved such wages, but also authorized the release of retainage by awarding agencies.

For the aforementioned reasons, I ask that you reconsider and rescind the April 17th determination.

Sincerely,



Doug Tweedy
Executive Secretary-Treasurer/CEO

DT/aw, opeiu #23

cc: Judy Schurke, Director, WA Dept. of L&I