

**BEFORE THE DIRECTOR OF THE WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES**

In Re:

TESTCOMM, LLC

ARBITRATION DECISION

Prevailing Wage

Judy Schurke, Director of the Washington State Department of Labor and Industries (Department), has considered the record in this matter, and now makes the following Arbitration Decision.

PROCEDURAL HISTORY

Testcomm LLC (Testcomm) requested a determination from the Department's industrial statistician about the wage for its testing, adjusting, and balancing (TAB) work under the Prevailing Wage Act. Prevailing wage program manager and industrial statistician David T. Soma responded by letter dated May 9, 2006, that the applicable scope of work for testing, adjusting and balancing of air-handling equipment and duct work (TAB) in connection with a public works project falls within the Sheet Metal Scope of Work under WAC 296-127-01372. On May 24, 2006, Testcomm requested reconsideration of the May 9 determination. On July 17, 2006, assistant director Patrick Woods affirmed the May 9, 2006 determination that the work in question falls within the Sheet Metal Scope of Work. Testcomm filed a Petition for Arbitration, received by the Department on September 21, 2006. On October 30, 2006, the matter was referred to the Office of Administrative Hearings (OAH) for hearing. The parties agreed to create a record regarding the issues through OAH. The Department requested a Proposed Decision from Senior Administrative Law Judge (ALJ) David Hansen. The parties agreed either party would be entitled to appeal from an adverse decision. On March 20, 2007, Sheet Metal Workers Local No.66 (Intervenors) moved to intervene as an interested party. On March 27, 2007 Administrative Law Judge David G. Hansen granted the motion. Hearings were held on March 22, and 23rd, and June 14, 2007. A Proposed Finding of Fact, Conclusions of Law and Decision (Proposed Decision) affirming the industrial statistician's May 9, 2006 determination was issued on December 3, 2007. Testcomm appealed to the Director on January 2nd, 2008. On January 16, 2008, the

Department and Intervenors filed with the Director's office objections to additional witnesses and requested an opportunity to respond. By January 24, 2008 letter to the parties, the Director established a briefing schedule. Two Requests for extensions of time for briefing were granted due to the Department counsel's illness. On February 22, 2008 Testcomm filed its brief. On May 21, 2008 the Department's Response was filed.

ISSUE

Should the Director affirm the December 3, 2007 Proposed Decision of ALJ David G. Hansen that affirmed the May 9, 2006 determination of the industrial statistician, that the TAB work of air-handling equipment and duct work on public works projects comes within the Sheet Metal Scope of Work description, WAC 296-127-01372?

FINDINGS OF FACT

1. Testcomm appeals the Department's industrial statistician's May 9, 2006 determination, affirmed by the December 3, 2007 Proposed Decision of Administrative David G. Hansen, that the correct scope of work for TAB work is the Sheet Metal Scope of Work, WAC 296-127-01372. Testcomm's appeal does not cite specific parts of the record to support its contentions, or the specific Findings of Fact or Conclusions of Law it appeals. It appeals on the grounds that the TAB work at issue is outside the work identified in WAC 296-127-01372, or not subject to prevailing wages because: 1) the TAB contractor's primary duty is to evaluate and make reports on the systems; 2) tools and instruments such as ladders, wrenches and drills are not routinely used in the testing, adjusting and balancing of HVAC systems, which is computer analysis; 3) TAB work is professional in nature and TAB workers perform only "cursory function adjustment"; 4) TAB contractors do not install or construct anything. Testcomm's main function is that of a TAB contractor, testing, adjusting and balancing numerous systems; 5) TAB work is much more involved than that a sheet metal worker would perform, thus, it is outside the requirements of the Sheet Metal Scope of Work; 6) the certificate of occupancy is usually issued before the testing is done, making Testcomm's TAB work part of the acceptance of the project, not the installation; 7) the federal prevailing wage law, other state's laws, a 1986 statement from George May, and a 2003 statement from James Christensen should exempt TAB work from coverage.

2. This matter concerns TAB work involving air-handling equipment associated with heating, ventilating, and air conditioning systems (HVAC) systems. It does not involve

sound and vibration testing. The work is performed on new construction or remodel public works projects. Specific contracts are not at issue.

3. Testcomm, LLC is a Spokane contractor that performs the testing, adjusting, and balancing (TAB) of the air-handling equipment in heating, ventilating, and air conditioning systems (HVAC). At or near the completion of a project and once the mechanical contractor has completed the initial installation of the HVAC system, Testcomm, an independent entity from the mechanical contractor, comes onto the project to insure that the system was installed as designed. Testcomm employees test, gather data, adjust, and balance the HVAC system in order to ensure that it is working to specification.

4. In performing this work, Testcomm employees operate the system, and make adjustments to such things as the dampers and fan speed. The employees use instruments and hand tools in the process. These adjustments are made either electronically or mechanically depending on the system. Fan speed is sometimes adjusted by manually changing a sheave. The tools and instruments used include wrenches and drills, as well as devices that measure air velocity, amp meters, flow hoods, and laptop computers. TAB work may call for working on dampers in a ceiling which requires the employee to climb a ladder, take out ceiling tile, adjust a damper using an allen wrench, and climb down the ladder. Although computers are used in part of the testing, the evidence shows that TAB work includes manual work that cannot be done with a computer alone.

5. If a Testcomm employee finds a deficiency in an HVAC system during the TAB process, that deficiency is reported to the proper authority. The deficiency is not repaired by the Testcomm employees. Once the deficiencies are corrected, Testcomm performs more TAB work on the HVAC system to verify that the mechanical contractor has corrected the deficiencies. Testcomm employees then finalize the system by setting and locking the controls.

6. The TAB work is performed as part of the original contract and is an integral part of the project. Generally, a tenant of a project does not take possession of the space until after Testcomm's work has been completed. It is not unusual however for a tenant of a public works project to occupy the building prior to the issuance of a Certificate of Occupancy by the responsible governmental agency and before all the TAB work has been completed. In that situation, Testcomm employees are performing some TAB work after the space has been occupied by the tenants.

7. Testcomm employees do not install equipment or build anything on projects. Testcomm is professionally certified by a national association which certifies TAB contractors. The final product they produce is a report to others on how the HVAC system is performing.

CONCLUSIONS OF LAW

1. There is jurisdiction to decide this matter under RCW 39.12.060 and WAC 296-127-062.

2. In Washington State it is required that all "laborers, workers, or mechanics, upon all public works..." be paid the prevailing rate of wage for an hour's work in the same trade or occupation. . . . RCW 39.12.020.

3. Pursuant to the Department's rule making authority, the Department is required to "issue scope of work descriptions for each trade and occupation recognized as being involved in public work." WAC 296-127-013(1). Sources for determining the scope of work descriptions are state apprenticeship and training council standards for apprenticeship; collective bargaining agreements; dictionaries of occupational titles; experts from organized labor, licenced contractors, and contractor's associations; and recognized labor and management industry practices. WAC 296-127-013(2). The prevailing wage rates are to be "determined by the scopes of work performed by those workers, and not by their specific job titles:" WAC 296-127-013(3). To that end, the Department has issued a scope of work description for sheet metal workers.

4. Sheet Metal Scope of Work, WAC 296-127-01372 provides:

For the purpose of the Washington state public works law, chapter 39.12 RCW, sheet metal workers perform the following work:

. . .

(3) The testing and balancing of air-handling equipment and duct work.

WAC 296-127-01372(3)

5. The evidence shows that the initial TAB work is an essential part of a public works contract. As such, the work is covered under RCW 39.04.010 and RCW 39.12.020, and subject to payment of prevailing wages. Consistent with industrial statistician and prevailing wage program manager David Soma's testimony, this initial testing is the testing of the installer, and should be paid at the rate of the installer, the Sheet Metal rate under WAC 296-127-01372.

6. The Sheet Metal Scope of Work is plain on its face. "If an administrative rule or regulation is clear on its face, its meaning is to be derived from the plain language of the provision alone." *Cannon v. Dep't of Licensing*, 21 147 Wn.2d 41, 56, 50P.3d 627 (2002)

7. Substantive agency regulations have the force and effect of law. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002).

8. RCW 39.12, the prevailing wage law, is remedial. The employees, not the contractor, are the beneficiaries of the law. *Everett Concrete Prods., Inc. v. Dept. of Labor and Indus.*, 109 Wn.2d 819, 823-24, 748 P.2d 1112 (1988).

9. Testcomm failed to show, by a preponderance of evidence, that the Sheet Metal Workers' Scope of Work, WAC 296-127-01372, is not the correct scope of work for the TAB work at issue.

10. Applying the above to the case at hand and having carefully considered the matter, the undersigned agrees that the work performed by Testcomm in the testing, adjusting, and balancing of air-handling equipment and ductwork is within the Sheet Metal workers' scope of work. Testcomm may do other work as well, however, the focus of this inquiry concerns the TAB of air-handling equipment and duct work. Insofar as the TAB of water handling equipment is intertwined with the TAB of air-handling, it is likely that water handling equipment would also be covered under WAC 296-127-01372(3), consistent with David Soma's testimony. The regulation explicitly states that the testing and balancing of HVAC systems is within the scope of work for sheet metal workers. It makes no distinctions or exceptions. The regulation superseded any earlier agency statements. Laws and policies from other jurisdictions may not control in Washington state. The fact that Testcomm's employees use computers and perform complex calculations in the performance of their work does not remove it from the sheet metal scope of work. In their work, the employees make adjustments, either mechanically with tools or electronically, to the HVAC systems they are balancing. The fact that the work performed by Testcomm employees is not what one would "traditionally" consider that of "laborers, workers, or mechanics" is not determinative. Testcomm employees perform labor on public works projects. The regulation is clear and unequivocal. The TAB work is not purely technical or professional. Additionally, in new construction, or remodel, it is not material that some of the initial TAB work is performed after a tenant takes occupancy of the space. Testcomm's work is part of the entire public works project irrespective of whether a tenant is in the space or not. The

product produced by Testcomm, a report to others, does not remove the work from the scope in question. The TAB work is an integral and necessary component of the construction and completion of a public works project. Therefore, ALJ Hansen and the Department's industrial statistician correctly determined the testing, adjusting, and balancing of HVAC systems to be within the scope of work for sheet metal workers.

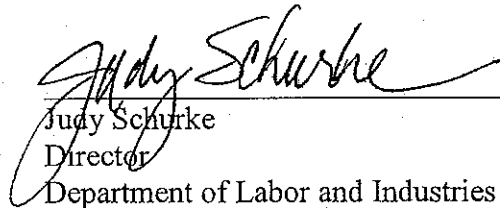
DECISION

1) The correct scope of work for the TAB work on air-handling equipment is WAC 296-127-01372.

2) I affirm the December 3, 2007 Proposed Decision of ALJ Hansen that affirmed the May 9, 2006 determination of David Somà that the TAB of air-handling equipment in connection with public works projects comes within the Sheet Metal Scope of Work, WAC 296-127-01372.

Review: The decision of the Director of the Department of Labor and Industries shall be final and conclusive and binding on all the parties involved in the dispute. RCW 39.12.060; *Lockheed Shipbuilding v. Dep't. of Labor and Indus.*, 56 Wn. App. 421, 783 P.2d 1119 (1989).

DATED at Tumwater, Washington, this 27 day of June, 2008.



Judy Schurke
Director
Department of Labor and Industries

DECLARATION OF MAILING

I, Liza Rodriguez, hereby declare under penalty of perjury under the laws of the State of Washington, that the Arbitration Decision was mailed on the 27 day of June, 2008 to the following parties:

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