STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
Prevailing Wage
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Sent via Email

February 13, 2024

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Ms. Smith and Mr. Berger,

Thank you for your letters, both received on November 22, 2023, requesting a modification of my resinous floors determination issued October 26, 2023. While the determination in question here was issued pursuant to a complaint filed by Mario Silva with the Cement Masons and Plasterers LU 528, it was not intended to be project-specific. Rather, I address the work-process specific to the installation of cement or cement-like materials to build up a thin set, seamless composition floor with aggregate materials added after surface preparation and, I will add in response, *that require troweling methods and associated tools (metal and non-metallic) to apply the product* (RCW 39.12.015[1]).

The original determination on this subject was clear, the scope of work description for Cement Masons is broadly worded using the phrase "... work includes, but is not limited to ...". The October 26, 2023 determination is work-process specific: where thin set, cement or cement like products are being installed using troweling methods and associated tools, with aggregate material added during the installation process to build up a commercial or industrial floor system, the trade scope best defining the work process involved is the Cement Mason (WAC 296-127-01315). The original determination was clear on this point:

> The scope of work for Cement Masons describes a variety of tasks including "all work where finishing tools are used." The scope of work also specifies "the installation of seamless composition floors and the installation and finishing of epoxy based coatings … when applied by spraying or troweling." The scope of work does not limit itself to work in which the use of a traditional cement finishing tool is the last step in the process.

And, as noted above, troweling tools are not limited to those made of metal.

If the products being applied do not require troweling methods to install but rather are "applied with brushes, spray guns or rollers" for the purposes of "waterproofing or protective coatings" even if aggregate material is added for beatification or non-skid purposes, then as Leewens notes, the painter trade would be appropriate (WAC 296-127-01356).

L&I has not enforced its interpretation consistently since the initial determination in 2014. I believe this inconsistency has encouraged contractors to misclassify this work. I am providing this determination to make the department's position clear. I am affirming that the Laborer scope does not apply to built up, thin set floor installations involving the use of troweling as a work process. Where it is noted, installation of such thin set, built up floor systems requires significant knowledge and training. The laborers scope and apprenticeship training standards do not support the application of their wage rate to the installation process for a thin set, built up floor systems requiring troweling in the installation process.

I am affirming the original November 10, 2014 Armorclad determination. The department will be enforcing the payment of Cement Mason wage rates to public works projects involving the installation of built up, seamless composition flooring with aggregate materials added after surface preparation and utilizing troweling methods and associated tools to apply the product. You may ask for a reconsideration of this determination by the Assistant Director and those procedures are attached.

Sincerely,

Jody Robbins, Industrial Statistician
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Attachment: Appeal Procedures

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November 22, 2023

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RE: Determination – Resinous Flooring (10/26/2023)
Our File No. 3293-127

Dear Mr. Robbins:

I represent the Washington and Northern Idaho District Council of Laborers and Laborers Local 242 (together, Laborers) in the above-referenced matter. Pursuant to WAC 296-127-060(3), I write to request a modification of your October 26, 2023, determination regarding the applicable scope of work's prevailing wage for "the installation of thin set, epoxy seamless composition flooring systems that incorporate aggregate following the initial surface preparation" on public works projects.[1] To the extent this determination is meant to address the work that was subject to the since-withdrawn notice of violation against Leewens Corporation in Docket No. 08-2020-LI-01503/Agency No. NOV2000501, the determination should be modified to reflect that this work falls under the Laborers' or Painters' scopes of work, not the Cement Masons'.[2]

As explained further below, the October 26 determination was both procedurally defective and incorrectly decided on the merits. The determination was procedurally defective because it rendered judgment on a hypothetical, prospective fact pattern instead of the work performed on a particular public work project. The Department of Labor and Industries (LNI) has the authority to issue determinations

[1] By seeking modification of the determination, the Laborers do not concede the industrial statistician's statutory authority to adjudicate disputes over scopes of work, do not waive any claims or arguments concerning the existence or non-existence of such authority, and expressly reserve the right to raise claims or arguments concerning this issue in any appropriate forum.
[2] To the extent this determination addresses a different work process, the determination should still be withdrawn for improperly commenting on an abstract, hypothetical scenario rather than a specific project. In the alternative, the Laborers request you clarify that "the installation of thin set, epoxy seamless composition flooring systems that incorporate aggregate following the initial surface preparation" is materially different from the work at issue in Case No. NOV2000501, and that you identify which public works project(s) is covered by the instant determination.

only as to specific cases. Moreover, the Laborers were denied due process because they were not afforded an opportunity to submit evidence or argument about these hypothetical facts. Finally, the determination is inconsistent with LNI's conclusions in the materially identical DPK and Leewens cases, thereby violating the principle that administrative agencies should apply *stare decisis* to like cases. The determination is wrong on the merits because it misconstrues the contested wage scopes, misunderstands how crews installed the resinous floor coating at the University of Washington Life Sciences Building, Animal Research and Care Building, and at similar public works projects, and ignores overwhelming reliable evidence of industry practice in favor of the least probative and most-easily manipulated evidence.

ARGUMENT

I. The October 26, 2023, determination was procedurally defective.

A. The determination improperly ruled on the applicable wage scope for abstract, hypothetical facts disconnected from an actually-existing public works project.

LNI has published express standards governing the circumstances under which it which issue prevailing wage determinations and the information private parties must supply in order to obtain them. *See* Determination Request Requirements, *available at* https://lni.wa.gov/licensing-permits/_docs/DeterminationRequirementsWithChecklist.pdf. Crucially, "[d]etermination letters are provided to address specific factual situations and the applicable prevailing wage rates which must be paid" in those specific cases. *Id*. at 1. *See also* Determination – Cedar Hills Landfill, Determination 01292019 (2019) at 2 ("Prevailing wage determinations answer specific questions about whether prevailing wages are required to be paid on a specific project and/or which prevailing wage rate is required for a specific body of work on that project.") (attached hereto as Exhibit 1).

To ensure the industrial statistician rules on specific factual situations, LNI requires parties seeking determinations to submit, among other things, "the project name, a description of the project, the prime contractor and awarding agency, copies of project plans, specifications and contracts, relevant financing information, the prime contractor's Statement of Intent to Pay Prevailing Wages, and any other relevant information related to the project or proposed project." Determination Request Requirements at 1. Parties must submit a checklist documenting the inclusion of this requirement information. *Id*. at 2.

When parties fail to present evidence regarding the facts of the particular project, the industrial statistician must decline to issue a determination. As the former industrial statistician wrote in 2021 in a response to an evidentiarily deficient request:

> The Department Provides Determinations Based on Fact-specific Circumstances.
>
> The director of L&I, and his or her designee (or the law's designee as in the case of RCW 39.12.015) has a quasi-judicial role. With that role comes a responsibility to decline to decide matters which are hypothetical or abstract, and in which there is no specific fact set or dispute. PLAN arbitrators also have a quasi-judicial role, and can sometimes decline to reverse a jurisdictional assignment. L&I has this option as well.

> Your letter asks a hypothetical question. There is no fact set to compare against law and rule. As mentioned above, location can be relevant. The purpose of the work can also be relevant, along with the specific tools, materials, equipment and methods involved. Here, we have no purpose, tools, materials, equipment or methods to consider…
>
> In order for me to make a determination of prevailing wage I need specific facts. I have given examples of this, with trowels and brooms and with inspections of concrete surfaces. Your request for a determination omits the needed facts. There is no genuine dispute here, no one whose wages can be decided by looking at his or her methods, materials, tools, etc. For this reason, I decline to issue a formal prevailing wage determination under RCW 39.12.015 of what wage applies to that hypothetical work. Your letter appears to ask L&I to make a broad pronouncement of policy regarding concrete finishing in tunnels. There is additional reason that I decline to issue a formal determination asking for a general pronouncement.

February 19, 2021, Jim Christensen Letter at 3–4 (attached hereto as Exhibit 2).

The determination process would be utterly meaningless if parties could invite determinations, devoid of evidentiary support, based on their preferred articulation of work processes at generic work sites. And the industrial statistician would have no means to verify the information presented by the requesting party, such as by conducting site visits and employee interviews or requesting the submission of additional documentation.

Here, the Cement Masons' request for a determination appears to have involved an entirely hypothetical scenario divorced from any particular public works project. Neither the October 26 determination nor any of the materials attached thereto disclose a project name, description, prime contractor, awarding agency, project plans, specifications, or contracts, financing documents, statements of intents, or other project-specific records. Nor is there an indication that LNI independently verified the work performed at any unnamed project the Cement Masons may have been alluding to. The Cement Masons' request is framed in purely abstract terms based on hypothetical facts of its choosing: "Preparation and installation of MasterTop 1853 SRS CQ – a methyl-methacrylate-based (MMA) flooring system with a decorative quartz broadcast to resurface the pool deck." Determination at 1.[3] Without project-specific information, there is no basis to believe this work is being or has been performed on any public works projects in Washington. The determination refers in passing to the Cement Masons' claim that employees of Leewens Corporation were not paid the proper prevailing wage "to resurface the pool deck." *Id*. But if this refers to a particular Leewens "pool deck" project, it is never identified. Moreover, the Cement Masons' request for determination apparently "note[d]" past determinations on pool deck projects, but since determinations for those projects have already issued, they cannot be the subject of requests here.

Finally, the determination states that the request implicates "similar work" to that at issue in the since-withdrawn NOV against Leewens in Case No. NOV2000501 (UW Life Science Building), and thus conceivably extends its ruling to the facts of that case. However, there are material differences between

[3] Unlike with other determinations, the Cement Masons' request for determination is not enclosed with the materials published on LNI's website. So the scope of their request must be inferred from the determination itself.

the resinous floor coating project at the UW Life Science Building and the Cement Masons' hypothetical, on the one hand, and the work performed in the Armorclad/Tukwila Pool determination, on the other. For instance, the former involve MMA, an acrylic resin; the latter, an epoxy resin. The former involve broadcasting decorative quartz or plexiglass flakes; the latter, interspersing sand. The former—at least the UW Life Science Building—involve a floor coating around 140 mils thick; the latter, a coating about 78 mils thick.

The October 26, 2023, determination appears to address the Armorclad/Tukwila Pool fact pattern, not the UW Life Science Building work or the Cement Masons' hypothetical. It pertains to "the installation of thin set, epoxy seamless composition flooring systems that incorporate aggregate following the initial surface preparation." This framing replaces terms used in the recitation of the Cement Masons' request with materially different terms. For instance, the request sought a determination on the "preparation and installation of MasterTop 1853 SRS CQ," which the Cement Masons acknowledge is a methyl-methacrylate. As noted above, MMA is an acrylic resin. The final determination, on the other hand, pertains to "thin set, epoxy," which is a different kind of resin altogether. Similarly, the request's hypothetical involved broadcasting "decorative quartz," whereas the determination referred to the incorporation of "aggregate." While "aggregate" may encompass some kinds of crushed stones, it does not necessarily include decorative quartz flakes. It is unclear whether the determination's word replacements reflect an intentional conflation of the materials under consideration, unintentional imprecision, or a deliberate effort to reorient the question posed.[4] In any case, the discrepancy among terms highlights the dangers of issuing determinations on hypothetical facts: without reference to a particular project where one can consider the actual tools, materials, and methods used, the industrial statistician is at risk of making overbroad pronouncements.

The determination also states that it is issuing its ruling to provide "clarity." But there is no statutory authority for the industrial statistician to issue mere advisory opinions. In any case, ruling on a broad speculative fact pattern reduces clarity by leaving parties guessing about whether and how the determination applies to actual resinous floor coating projects that involve different tools, materials, and methods. That is especially so when there is an unexplained discrepancy between the work described in a party's request and in the determination issued.

"Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *accord Nat'l Conservative Political Action Comm. v. Fed. Election Comm'n*, 626 F.2d 953, 959 (D.C. Cir. 1980) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures."). In this case, the October 26 determination's adjudication of the Cement Masons' hypothetical facts contradicts LNI's own procedures—embodied in the "Determination Request Requirements"—and precedents—embodied in prior responses to deficient determination requests, as exemplified by Mr. Christensen's February 19, 2021, letter. Principles of fairness and due process require LNI to apply its evidentiary standards equally to all requests for determinations. The October 26 determination undermines these principles by indulging the Cement Masons' request for a ruling on the wage scope that applies to an abstract work process untethered to any specific project, equipment, materials, or methods that can be investigated.

[4] As indicated above, to the extent this determination was not intended to encompass MMA flooring systems, the Laborers request the determination be modified to so state and further, to reaffirm that the installation of this material belongs in the Laborers' or Painters' scopes of work.

B. LNI denied the Laborers due process by failing to give them an opportunity to submit evidence or argument in response to the Cement Masons' request for determination.

Administrative proceedings must provide procedural due process. *Morgan v. United States*, 304 U.S. 1, 15 (1938). Part of due process means giving "interested parties" notice that is "'reasonably calculated to apprise [them] of the pendency of the action and afford them an opportunity to present their objections." *Guardianship Estate of Keffeler ex rel. Pierce v. State*, 151 Wn.2d 331, 342, 88 P.3d 949 (2004) (cleaned up; citation omitted). LNI normally abides by this requirement in evaluating requests for determinations. LNI's "Prevailing Wage Determination Process Flow" provides that when the assigned specialist begins researching and writing a draft determination, they should "notify impacted stakeholders." Process Flow (attached hereto as Exhibit 3). Then, when the industrial statistician reviews the draft determination, he may consult with stakeholders. *Id*. The Process Flow also advises generally that LNI staff consider whether they've been transparent with stakeholders. *Id*.

In this case, LNI did not provide any notice to, or consult with, the Laborers about the Cement Masons' request for a determination, even though they are obvious stakeholders, given the longstanding dispute between the trades about the scope of work applicable to various types of resinous floor coating work. The Laborers were put at a structural disadvantage in this proceeding by virtue of the Cement Masons initiating the request for determination and offering descriptions of work and possibly other evidence of their choosing. Had it received notice of the request, the Laborers would have submitted evidence and argument contesting the Cement Masons' characterization of the work that may have influenced the outcome of the industrial statistician's determination. Instead, the Laborers were merely informed of the industrial statistician's forthcoming decision on June 28, 2023, at a meeting between the industrial statistician and trade representatives during the WSBCTC Conference.

LNI's failure to give the Laborers an opportunity to provide evidence and argument despite their stakeholder status does not accord with due process. The determination should therefore be vacated.

C. The determination is inconsistent with LNI's prior decisions.

Although agencies are not strictly bound by the principle of *stare decisis*, they "should strive for equality of treatment." *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn. 2d 144, 174, 256 P.3d 1193, 1207 (2011) (citation omitted). LNI has already decided that the installation of MMA floor coating falls within the Laborers' or Painters' scope and not the Cement Masons'. In the DPK Inc. case, the Prevailing Wage enforcement division fielded a complaint from the Cement Masons concerning work at the UW Animal Research and Care Facility which was materially identical to their instant request for determination. That investigation involved a lengthy colloquy with DPK's principals and correspondence with the MMA manufacturer's representatives. *See* DPK investigation summary (attached hereto as Exhibit 4). As a result of those discussions, LNI declined to issue a notice of violation. Bolden email to DPK principals (attached hereto as Exhibit 5).

Likewise, as a result of a similar complaint by the Cement Masons in connection with Leewens' MMA floor coating work on the UW Life Sciences Building, LNI issued a notice of violation against Leewens for which a hearing was scheduled. The hearing was eventually stayed so the industrial statistician could collect evidence and argument from interested stakeholders on the application of the

prevailing wage work scopes to Leewens' MMA work at the Life Sciences Building. As a result of that investigation, LNI withdrew its NOV against Leewens, found no prevailing wage violation concerning Leewens' rate of pay for the work at issue, and concluded that the Painters' or Laborers' scopes likely applied. *See* October 6, 2021, Withdrawal of Notice of Violation (attached hereto as Exhibit 6); Leewens Case File Excerpts (attached hereto as Exhibit 7).

To the extent the October 26, 2023, determination finds the Cement Masons' wage scope applicable to the same MMA floor coating work at issue in the UW projects, it clearly contradicts the Prevailing Wage enforcement division's prior findings. It would prejudice all relevant stakeholders, raise doubt over the finality of LNI's interpretation, and confusion over the wage scopes' prospective application to treat this case differently from materially similar prior cases.

II. The October 26, 2023, determination was, on the merits, incorrectly decided.

A. The determination erred in its description of the MMA floor coating process.

To the extent the determination purports to encompass the work of applying MMA to floor surfaces, its description of the work process errs in several critical respects. These errors have important bearing on the identification of the correct scope of work.

First, the determination incorrectly suggests that MMA is a type of epoxy, juxtaposing the term MMA parenthetically next to epoxy in the work description. But the two materials cannot be conflated. MMA is a base material necessary for the production of acrylic resins or plastics. *See* RS Means Illustrated Dictionary, Student Ed. (2012) (attached hereto as Exhibit 8 at 197) ("methyl methacrylate (MMA)" is "[a] rigid, transparent material widely used in the manufacture of acrylic resins and plastics, as well as in surface-coating resins, emulsion polymers, and impact modifiers."). Although MMA and epoxy are both resinous adhesives used to coat floor surfaces, in the construction industry, the two are treated as competing coating options with different properties, benefits, and drawbacks. *See*, e.g., Forgeway, "Epoxy adhesives vs methyl methacrylate adhesives; Which is right for you?" (attached hereto as Exhibit 9). For instance, epoxy resins are stronger but require more extensive preparation and take longer to cure. *Id*.

This is significant because while the Cement Masons' scope references "finishing of epoxy based coatings," WAC 296-127-01315, it does not mention MMA, acrylics, or resins more generally. This demonstrates that the only kind of resinous material within the Cement Masons' scope of work is epoxy-based. Meanwhile, the Painters' scope refers broadly to the "application of…resin," WAC 296-127-01356(4), and therefore captures acrylic resins such as MMA.[5] Indeed, in the course of the Animal Research Building investigation, BASF—the manufacturer of the MMA product at issue—informed the prevailing wage investigator that MMA was most properly classified as a "resin" and opined that the Painters' scope best fit the nature of the material and the purpose to which it was being put. Exhibit 4 at 2–3.

Second, the October 26 determination incorrectly described quartz as a kind of aggregate material. The hallmark of an "aggregate" is the "granular" composition of the material. Exhibit 8 at 20 (defining

[5] Notably, the Painters' scope also references the application of "epoxy," WAC 296-127-01356(4), confirming that LNI treats "resin" and "epoxy" as distinct concepts. The fact that the Painters' scope listed both resin and epoxy, while the Cement Masons' scope lists only epoxy, must be accorded significance.

aggregate as a "[g]ranular material such as sand, gravel, crushed gravel, crushed stone, slag, and cinders"). Stone qualifies as aggregate only when it is crushed into grains, *id*., and thus loses any aesthetic character. Conversely, decorative quartz is broadcast by hand in flake form and retains a distinct appearance to give the floor visual appeal. *See* Leewens Life Sciences Building Work Processes (attached hereto as Exhibit 10).

Third, the October 26 determination asserts that trowels "are the typical tool used to meter the spread of epoxy flooring solution" and "are utilized during the installation of built-up, thin set, resinous floor." But trowels were not used in either of the MMA projects LNI has investigated. In both the UW Animal Research and the Life Sciences Building projects, workers spread the primer, base coat, intermediate coats, and topcoats of MMA using long-handled squeegees, gauge rakes, back rollers, spike or "porcupine" rollers, and brushes. Exhibit 4 at 1; Exhibit 10 at 1.[6] Metal trowels were not used for this work for two reasons: (a) the metal interacts with the MMA to create greyish streaks which upset the MMA's uninform appearance, Exhibit 10 at 1; and (b) MMA flooring systems—at least those of the "flow applied flooring" thickness—are "self-leveling," William R. Ashcroft, *Industrial Polymer Applications*, Royal Society of Chemistry, at 29 (2019) (excerpts attached hereto as Exhibit 11), which obviates the need for finishing tools like trowels, which by definition, are used to level and smooth surfaces. Exhibit 8 at 121 ("finishing" means "[l]eveling, smoothing, compacting, and otherwise treating surfaces of fresh or recently placed concrete or mortar to produce the desired appearance and service"). The absence of trowels in the application of MMA has been confused by parties' occasional reference to a "squeegee trowel." But this is a misnomer. As Leewens' work process document explains, the term "squeegee trowel" is used interchangeably with long-handled squeegees with flat rubber blades. Exhibit 10 at 1. These squeegees are not used to level the MMA on the floor surface but to spread the material out. *Id*. A "trowel," meanwhile, refers in the flooring context exclusively to "[a] flat, broad-blade *steel* hand tool used in the *final stages of finishing operations* to *impart a relatively smooth surface* to concrete floors and other uniformed concrete surfaces." Exhibit 8 at 325 (emphasis added). The so-called "squeegee trowel" is used for a completely different purpose.[7] In any case, a basic Google search reveals that commercially available squeegee trowels are short-handled devices, not the long-handled ones used on the UW projects, so true "squeegee trowels" were not used by Leewens or DPK employees to spread MMA.

Fourth, the determination claims that "seamless composition flooring system" is the most appropriate term to describe "the work of building up and creating a flooring system by applying successive layers of epoxy and solids to achieve a new floor that is of a prescribed thickness." This finding misconstrues the term "seamless composition flooring," which is a term of art related to a particular kind of cementitious flooring. The term first appeared in the early 20th century, when trade journals in the U.S. and Britain described "seamless composition floors" as a "durable, inorganic, non-absorbent" covering that could be placed over traditional wooden floor boards when they began to wear out, rather than replacing them. Charles James Fox, "Seamless Composition Floors," *The Metal Worker, Plumber and Steam Fitter*, Vol. LXIX, No. 4, at 36 (Jan. 25, 1908) (attached hereto as Exhibit 12); *see also* Unknown, *The Journal of the Society of Estate Clerks of Works*, Vol. XXI, No. 243 at 186 (Sept. 1, 1908) (quoting Fox) (attached hereto as Exhibit 13). These journals specifically noted that "the basis of all these floors is Sorel's cement," an admixture of magnesium chloride and magnesia, to which could be added "[s]awdust,

[6] At most, metal trowels were used to spread a pre-installation level of epoxy. Exhibit 4 at 1. But that pre-installation work is not the subject of the Cement Masons' request for determination.

[7] Indeed, even the Armorclad determination withheld judgment on whether squeegee trowels constitute finishing tools. *See* Determination – Preparation to Swimming Pool and Pool Deck Prior to Painting, 12212016 (Dec. 21, 2016), at 2, n.2.

asbestos, sand and other materials, including coloring matter," in various proportions. *Id*. The admixture of various disparate materials is consistent with RS Means' Construction Dictionary's definition of "composite construction," Exhibit 8 at 71, but inconsistent with the uniform nature of MMA. Although the term has eluded definition in modern times, other state regulatory regimes that designate "seamless composition floors" as part of the Cement Masons' scope of work explain the term by way of example, citing quartzite (a rock compound) and Dex-O-Tex (a company that produces various cementitious, urethane, terrazzo, and epoxy compounds) as types of "seamless composition floors." *See* MN ADC 5200.1102, subp. 6, Code No. 706(B)(6) (Minnesota); 8 CRS 30-3.060(7)(E)(1)(E) (Missouri).[8]

Conversely, for the reasons explained in greater detail in the Laborers' August 13 and September 10, 2021, position statements concerning the UW Life Sciences Building investigation, attached hereto as Exhibit 15 and 16, respectively, the terms "penetrating sealer," "primer protective coating,"—which appear in the Laborers' scope of work, WAC 296-127-01344—or "protective coatings," which appears in the Painters', WAC 296-127-01356(4)—more accurately describe the purpose served by the MMA floor coatings.

B. The determination misinterpreted the plain language of the scopes of work.

When deciding which prevailing wage rate applies to a project, the industrial statistician looks first to the plain language of each scope of work as set out in WAC 296-127. The October 26, 2023, determination's analysis of this language was flawed. For the reasons described below, the facial language supports the applying the Laborers' or Painters' scopes of work to MMA floor installation. At the very least, it is ambiguous as to which scope of work applies to the disputed work.

1. The Laborers' scope of work applies to MMA floor coating installation.

The October 26, 2023, determination found that the disputed work is not covered by the Laborers' scope of work, WAC 296-127-01344, because (a) the Laborers' scope of work is limited to preparatory work, foreclosing the ability for the Laborers to install built up resinous floors outside of a support capacity; and (b) the language in the Laborers' scope does not provide for "the application/installation of built-up resinous floor systems with aggregate materials added."

The plain language does not support a reading confining the Laborers' work to preparatory activities. The Laborers' scope is in fact much broader than the Cement Masons' or the Painters'. It provides that Laborers "perform a variety of tasks," WAC 296-127-01344, but unlike the Cement Masons' scope of work, that language is not prefaced by any qualifying clause specifying which kinds of tools Laborers use or otherwise constraining the Laborers' scope of work to preparatory and support activities. While the Laborers' scope of work captures some support and preparatory work, the ensuing bullet points cover an array of tasks from beginning to end of work processes. Examples of such beginning to end tasks incorporated in the Laborers' scope includes work such as "[e]rect[ing] and repair[ing] guard rails," "mix[ing], pour[ing] and spread[ing] asphalt, gravel and other materials," "position[ing], join[ing], align[ing], wrap[ping], and seal[ing] pipe sections," and "spray[ing] material… through hoses to clean,

[8] Strictly speaking, Dex-O-Tex is a company, not a material. Although the company currently sells a wide array of floor covering and waterproofing products, its original product was a mix of rubber and cement. *See* Exhibit 14 (company history). When referred to generically, Dex-O-Tex can reasonably be identified as this cementitious compound. At any rate, there is no evidence that Dex-O-Tex produces an MMA product.

coat or seal surfaces." The most natural reading of the Laborers' scope is that Laborers conduct a variety of work, including, *but not limited to*, preparatory work, in both a support capacity and as the main trade on the job.

The determination fails to address the most on-point Laborers' task listed in their scope: "[t]he application of penetrating sealer and primer protective coatings to concrete floors and steps when safe to walk on." Without explanation, the determination lumps this task in with other allegedly preparatory activities. But "penetrating sealer" is an apt umbrella term for the MMA floor coating at issue, and "primer protective coating" covers a subset of MMA layers used for primer purposes. Exhibit 15 at 2–3.

Finally, the fact that the Laborers' scope does not provide for "the application/installation of built-up resinous floor systems *with aggregate materials added*" is beside the point. (emphasis added). The installation of resinous floors at the UW projects did not involve aggregate materials, but decorative flakes made of plexiglass. Exhibit 4 at 1.

2. The Painters' scope of work applies to MMA floor coating installation.

The October 26, 2023, determination stated that the Painters' scope of work does not apply because (a) that scope of work covers work applied with brushes, spray guns, or rollers, but not trowels; and (b) the scope does not anticipate the Painters applying epoxy for purposes other than waterproofing or protective coating.

That the Painters' scope does not incorporate the use of trowels is immaterial because trowels are not used for MMA floor coating installation, other than for discrete preparatory and coving work. *Supra*, 7. In fact, the Painters' scope specifically lists two of the main tools used for the job—rollers and brushes. WAC 296-127-01356. Furthermore, the Painters' scope, unlike the Cement Masons', specifically mentions the application of "resin," of which MMA and other synthetic acrylics are subsets. *Supra*, 6.

3. The Cement Mason's scope of work does not apply to MMA floor coating installation.

WAC 296-127-01315 sets out the scope of work for the Cement Masons. The October 26, 2023, determination notes that the Cement Masons' scope of work includes "all work where finishing tools are used." The determination focused in particular on the Cement Masons' task of performing "[t]he installation of seamless composition floors and the installation and finishing of epoxy based coatings…, when… applied by spraying or troweling." WAC 296-127-01315. This language, combined with the fact that the Cement Masons' scope was the only one that "includes the use of finishing tools and specifically lists trowels in its description," resulted in the conclusion that the Cement Masons' scope of work was the most applicable to the disputed work. This analysis is flawed in two respects.

First, the language cited in the scope of work for the Cement Masons is prefaced by the declaration that the Cement Masons "perform all work where finishing tools are used," which "includes, but is not limited to" that work. WAC 296-127-01315. As noted above, "finishing" in this context means leveling and smoothing recently placed concrete or mortar. *Supra*, 7. Those tools were not used in the UW projects because MMA is self-leveling. *Id*. Further, MMA is an acrylic resin, not a concrete or mortar, material. *Supra*, 6.

Second, the supposedly decisive bullet point in the Cement Masons' scope of work is not applicable to MMA floor coating work. The foregoing bullet point can be disaggregated into two separate clauses: one providing for "the installation of seamless composition floors," and the other providing for "the installation and finishing of epoxy based coatings…, when… applied by spraying or troweling."

As to the first clause, the term "seamless composition floors" has historically referred to a covering involving an admixture of cement, aggregate, and other non-resinous materials. *Supra*, 7–8. MMA, on the other hand, is a uniform, acrylic material, and does not contain such aggregate materials. *Supra*, 6–7.

Meanwhile, the language in the second clause is limited to the installation and finishing of *epoxy-based* coatings. MMA is not an epoxy-based material, but an acrylic resin. *Supra*, 6. Even if MMA was epoxy-based, the Cement Masons scope would only cover the disputed work if the MMA was applied by spraying or troweling. However, the MMA installation work at the UW projects was conducted with long-handled squeegees, gauge rakes, back rollers, spike rollers, and brushes, not trowels. *Supra*, 7.

C. The determination misapplied the industry practice inquiry.

As the October 26, 2023, determination correctly noted, it is proper for the industrial statistician to consult the authoritative sources enumerated in WAC 296-127-013 to aid the identification of the correct scope of work applied to a particular job when the plain language of the scopes are ambiguous. *See* OAH No. 11-2020-LI-01557, April 11, 2023, Order, ¶ 11 (attached hereto as Exhibit 17). This exercise is based on the presumption that the scope of work drafters consulted these very sources when devising the work processes associated with each trade. *Id*. The available authoritative sources include apprenticeship standards, collective bargaining agreements, dictionaries of occupational titles, experts, and, critically, "[r]ecognized labor and management industry practice." WAC 296-127-013(2).

Considering industry practice is especially important to ensure the scopes of work follow, rather than create, established industry practice. *See* November 12, 2020, Letter of Jim Christensen at 2 (attached hereto as Exhibit 18). Prevailing wage laws exist to make sure that employees are not paid substandard wages on public works projects. *Everett Concrete Products, Inc. v. Department of Labor & Industries*, 109 Wn.2d 819, 823–24, 748 P.2d 1112 (1988); *D.W. Close, Inc. v. Dep't of Labor & Indus.,* 143 Wn. App. 118, 129 (2008) (*citing Heller v. McClure & Sons, Inc.,* 92 Wn. App. 333 (1998)). Looking to current industry practice to confirm whether LNI's interpretation of the scopes of work is correct ensures that the scopes are enforced consistently with that objective. If LNI's interpretation is inconsistent with the thousands of intents and affidavits being filed with the department, that should cause LNI to pause and take a closer look at the scope to assess whether another reasonable interpretation that harmonizes with industry practice is possible. *See* OAH No. 10-2019-LI-01202, Hearing Transcript from September 21, 2021, at Tr. 805:11-16 (excerpt attached hereto as Exhibit 19) (recognizing that if the scopes of work are "out of step" with industry practice, that "would suggest that L&I either needs to interpret the existing scopes differently or change the language of the scopes."). Indeed, the Director recently recognized the importance of industry practice in interpreting the scopes in reversing an Initial Order after finding that the scopes in question were "subject to more than one reasonable interpretation and [] thus ambiguous." *See* Exhibit 17, ¶ 8. In that case, the Director relied upon the fact that "the recognized industry practice has been to use [L]aborers, not plumbers" to conclude that the Laborers' scope of work applied to a particular body of work. *Id.* at ¶¶ 7-9.

For the reasons discussed above, the plain language of the Laborers' and Painters' scopes of work encompasses the disputed MMA floor coating installation work. However, to the extent the industrial statistician believes there is some language favoring the Cement Masons, consulting industry practice definitively rules this out.

Yet the October 26 determination seriously misconstrued industry practice when it found this source "not helpful" because, supposedly, "this installation work is being assigned to multiple crafts." The only evidence the determination cited in support of this proposition was the National Labor Relations Board's (NLRB or Board) Decision in Case 19-CD-211263, *Skanska USA Building, Inc.*, 366 NLRB No. 161 (2018) (attached hereto as Exhibit 20), which concerned the very MMA floor coating work performed by Leewens at issue in the since-withdrawn NOV. But that decision shows instead that the overwhelming industry practice in the Seattle metropolitan area has been to assign MMA floor coating work to Laborers, not Cement Masons. For instance, the Board credited testimony from both Leewens' and Local 242 representatives that "Seattle-area floor coating companies [did not] us[e] any craft but Laborers" for resinous flooring work. *Id*. at 4. Further, the Board found that "between 2010 and 2017, 42 out of 47 resinous flooring projects [conducted by Skanska] were awarded… to Laborers-affiliated subcontractors." *Id.* at 4; *see also* (Skanska's 2010-2017 job list, attached hereto as Exhibit 21). This trend has only strengthened over time, with 30 out of 31 latest resinous flooring jobs by Leewens being awarded to Laborers at the time of the Board decision in 2018. In fact, the Board found that "Leewens almost exclusively uses Laborers-represented employees for epoxy floor coating work." Exhibit 19 at 4. Thus, concluded the Board, "employer preference, *current assignment… past practice… and industry and area practice*" all favored assigning the work to the Laborers. *Id*. (emphasis added). Likewise, the Board found that the Laborers, have actual training in both "the general aspects of floor coating and in installing methyl methacrylate (MMA) in particular." *Id*. Meanwhile, there was no evidence introduced suggesting the Cement Masons possessed the necessary certifications or training. *Id*. In sum, the Board's 10(k) decision refutes the notion that industry practice is in any way disputed.

Other indicia of industry practice in the Seattle metropolitan area confirm that Laborers have historically performed the disputed work. For instance, public works job bids and their associated affidavits of paid wages show that contractors performing MMA and other resinous floor coating work have regularly paid workers at Laborers and Painters prevailed rates. Exhibit 16 at 1–2 (citing Exhibits P–Y). Indeed, a search on LNI's affidavit database for hours spent on public works projects by Epoxy Technicians—the Laborers classification that generally performs resinous floor coating work—yields 29,362.67 hours since 2003. *See* Spreadsheet of Hours (attached hereto as Exhibit 22). Similarly illustrative of the industry recognition accorded Laborers is the 2003 Award pursuant to NABTU's Plan for the Settlement of Jurisdictional Disputes (Plan Award) (attached hereto as Exhibit 23). That decision awarded resinous floor coating work to the Laborers over the Painters based on Leewens' established practice of hiring the former for said work. *Id*. at 5.

Rather than examining highly probative evidence of which trade actually performs the relevant work in the field, the determination instead examined a far less probative source: the formal descriptions of apprenticeship training standards utilized by the Cement Masons', Laborers', and Painters' affiliated apprenticeship programs. Even assuming the Cement Masons' standards correspond to MMA floor coating installation, the fact that the Masons' managed to include this work in their apprenticeship program says very little about how the scopes of work were meant to be understood when drafted. The Washington State Apprenticeship and Training Council, which is responsible for approving new and amended

standards, does not police jurisdictional disputes between trades and so does reject proposed standards because another trade has historically performed the tasks in which programs seek to train apprentices. WSATC's laissez faire approach makes it easy for apprenticeship standards to be strategically amended by trades hoping to expand their jurisdictions. These amended standards can then later be invoked in prevailing wage disputes as "evidence" of the trade's supposed expertise in a given area of work—exactly what the Cement Masons have done here. It is inappropriate to weigh easily-manipulated apprenticeship training standards as an authoritative source in the face of objective evidence that the Laborers—not the Masons—have performed resinous floor coating work in the Seattle metro area.

CONCLUSION

For the foregoing reasons, the Laborers respectfully request the October 26, 2023, determination be withdrawn or amended as described above. Please contact me with any questions or concerns at (206) 257-6006.

Sincerely,

Ben Berger
Counsel for WNIDCL and Laborers Local 242

cc: Stacy Martin
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November 22, 2023

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RE: Leewens Corporation's Request for Redetermination of the Department's October 26, 2023 Prevailing Wage Determination.

Dear Ms. Monahan:

I am writing on behalf of Leewens Corporation ("Leewens") with respect to the October 26, 2023 prevailing wage determination (the "Determination") issued by L&I's Industrial Statistician Jody Robbins. Leewens hereby requests that the Department reconsider this October 26, 2023 Determination and issue a redetermination that properly finds the scope of work at issue fully falls within the Laborers' scope.

The Determination issued on October 26, 2023 is premised upon a misapplication of appropriate standards, ignores industry practices, and arbitrarily reverses course. Let me explain:

I. The Preparation and Installation of MMA Flooring Has Properly Been Encompassed Within the Laborers' Scope of Work for Years. That Remains the Case Today.

The scope of work at issue here for the Seattle Aquarium Project was previously the subject of litigation on the UW Life Science Building Project, initiated by L&I's Notice of Violation No. NOV200501. However, in that prior proceeding, L&I ultimately concluded that this work is properly within the Laborers' scope. In its October 1, 2021 correspondence rescinding its Notice of Violation No. NOV200501, L&I expressly stated that:

> **The above-referenced Notice of Violation is rescinded. After review of the materials received, L&I finds no violation of prevailing wage law for this project.**
>
> **We appreciated the documents and materials provided by Leewens, which included a sufficiently detailed description of the work performed including tools and methods used and materials applied. L&I also requested and received substantial materials from four labor organizations, which were also appreciated and reviewed.**

L&I's October 1, 2021 Rescission of Notice of Violation NOV200501.

The scope of work pertaining to the Seattle Aquarium Ocean Pavilion Project ("Seattle Aquarium Project"), and referenced in the Department's October 26, 2023 Determination, involves the same preparation and installation of resinous flooring, the same tools, and the same application process as the scope of work performed on the Life Science Building Project.

Leewens has utilized Laborers to perform this scope of work for decades. Leewens has properly paid the Laborers' prevailing wage rate for this work. That was the case on the Life Science Building Project, which L&I ultimately approved. The same determination that the work at issue properly falls within the Laborers' scope is equally warranted here.

The work at issue involves the preparation and installation of resinous flooring. In particular, Methyl Methacrylate (MMA) resins are applied to the floor and base of the wall with a squeegee to spread it out, and brushes and rollers to even out each coat to the proper thickness/texture. Vinyl flake is broadcast into the basecoat to provide a decorative and textured property to the system. This work is properly classified under Laborers (or Laborers, Epoxy

Technician). (Leewens recognizes that this work could also be classified under the Painters' scope of work.)

As was the case two years ago when L&I previously determined this issue, again, nothing here falls within the Cement Masons' scope of work. The closest the Cement Masons' scope comes to this particular work is: "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." WAC 296-127-01315 (Cement Masons). Here, however, no spraying or troweling was utilized to apply the floor coating. Instead, squeegees, brushes, and rollers were used.

Applying MMA is not specifically covered by the Cement Masons' scope, nor does it fall within its intended reach. The Cement Masons' scope primarily focuses on work with concrete and cement-based product. Instead, the MMA material and application process is more consistent with the Laborers' or Painters' scopes of work: "Application of polyurethane elastomers, vinyl plastics, neoprene, resin, polyester and epoxy was waterproofing or protective coatings to any kind of surfaces (except roofs) when applied with brushes, spray guns or rollers." WAC 296-127-01356(4) (Painters). Or: "The application of penetrating sealer and primer protective coatings to concrete floors...." WAC 296-127-01344 (Laborers).

In fact, installing an MMA flooring system is entirely different from the work traditionally performed by the Cement Masons. MMA and cement-based products have radically different cure times. Hydrogen peroxide is added to MMA to initiate the curing process. Once mixed, MMA is rolled and squeegeed into place. The curing begins just 10 to 20 minutes after the hydrogen peroxide is added, and it is fully cured within one hour. By contrast, concrete and cementitious mortars can take up to 28 days to fully cure.

Because of how quickly MMA cures, applying it requires a unique, continuous application technique in order to create a seamless coating. If the applicator fails to maintain a wet edge or proper technique, unwanted transition lines will be created instead of a seamless floor. In this sense, the application of MMA is more similar to applying paint, rather than finishing concrete.

The technique involved in applying MMA is different from Cement Masons' work. MMA manufacturer BASF recognizes the distinction of applying MMA compared to other material. BASF requires extensive training and five years of experience before BASF will certify an applicator to use MMA. MMA applicators are trained on, among other things, how to mix the

product, how to properly roll it while maintaining a wet edge, how to properly cove the product, and even how to pour the product from the bucket onto the work floor in a manner consistent with the quick curing time and unique properties of MMA.

The material, MMA, is not traditionally used by the Cement Masons, nor is it a cement-based product. In fact, Leewens is aware of no instance of the Cement Masons installing an MMA flooring system. Nor does the application of MMA involve the typical trowels and tools of the Cement Masons' trade.

Simply put, this work has traditionally been performed by Laborers (and sometimes by Painters). The Cement Masons' claim that such work falls within their scope is frankly part of a larger jurisdictional campaign by the Cement Masons. Dissatisfied with their results before the National Labor Relations Board and the Plan for Jurisdictional Disputes, the Cement Masons are using L&I for leverage in their jurisdictional disputes.

Here, no materials containing cement and no cement or concrete finishers' tools were used. Rather, the nature of the work and material, as well as the tools used, do not support a classification in the Cement Masons' favor. Instead, Leewens' classification of its employees under the Laborers' scope of work was entirely reasonable. L&I's recent Wage Determination concluding otherwise must be reversed.

II. Relevant Jurisdictional Proceedings Before the National Labor Relations Board Further Support the Conclusion that the Laborers' Scope of Work Applies.

Although not necessarily binding on L&I, the decision by the National Labor Relations Board ("the Board" or "NLRB") in *Washington and Northern Idaho District Council of Laborers and Skanska USA Building, Inc., et al.*, 366 NLRB No. 161 (2018), is highly relevant to L&I's determination here. The referenced Board decision reviewed a jurisdictional dispute between the Cement Masons and the Laborers under Section 10(k) of the National Labor Relations Act. In that decision, the Board ruled that the work performed on the same Project at issue in this L&I matter was properly within the Laborers' jurisdiction – not the Cement Masons.

In reaching its conclusion that the disputed work properly belonged to the Laborers, the Board relied on the parties' past practice, the industry and area practice, relative skills, economy and efficiency of operations, and employer preference. Notably, the Board found that, not only has Leewens almost exclusively relied upon Laborers to perform the disputed work, but that the

prevailing industry practice among other subcontractors also favored the Laborers. In fact, the Cement Masons failed to identify a single project on which they performed the work at issue. A copy of the Board's decision is enclosed.

The Board properly concluded that the Laborers – not the Cement Masons – were entitled to the disputed work at issue here. The same conclusion is warranted with respect to prevailing wage rates and L&I's scopes of work. Just as the Board found, the Cement Masons have not worked with MMA or performed the resinous floor coating at issue here. The Cement Masons do not have the required training or years of experience necessary to perform the work in question. If the Cement Masons are unqualified to perform this work, how can L&I reasonably assign this to the Cement Masons' scope? It cannot.

Furthermore, it makes no logical sense to conclude the MMA floor coating work is Cement Masons' work when the Cement Masons have not identified a single instance of working with this product. As the Board found, it is the Laborers who have historically performed this work, both for Leewens and within the industry. To declare that this scope of work belongs to the Cement Masons with respect to prevailing wages runs completely counter to the realities of the industry, and places L&I squarely within the Cement Masons' unfounded jurisdictional grab for this work.

III. A Prior Jurisdictional Award for the Laborers Additionally Supports Leewens' Position.

A prior jurisdictional dispute arose in 2003 involving Leewens' installation of epoxy resin floors at the Seattle Public Library. The dispute was submitted to the Plan for Settlement of Jurisdictional Disputes in the Construction Industry ("the Plan"). Both the Laborers and the Painters claimed the work. The Cement Masons also had the opportunity to make a claim for this work at the time, but they did not do so.

Following an arbitration reviewing industry and company practices, the arbitrator awarded the work to the Laborers. The arbitrator found that Leewens had relied on Laborers extensively in the performance of this work – not other crafts. Industry practices further supported the arbitrator's conclusion. Following this 2003 award, Leewens has consistently performed its floor coating work with the Laborers. It has not been until the last couple of years that the Cement Masons have suddenly sought to expand their jurisdiction to encompass resinous floor coating work. It is the Laborers (or, in some cases, the Painters) who have performed this work for decades. The Cement Masons' sudden interest in this work does not

justify a prevailing wage determination in their favor. L&I should refrain from being used as a pawn by the Cement Masons in the Masons' jurisdictional overreach.

IV. The Prevailing Industry Practice Does Not Favor the Cement Masons.

As mentioned above, Leewens has historically relied on the Laborers to perform the resinous floor coating work at issue here. Leewens is not alone in this. In fact, the vast majority of Leewens' competitors in the industry also heavily rely on the Laborers to perform resinous floor coating work. (See the enclosed NLRB Decision and the Plan Arbitration Award discussions on this point.) Some companies instead utilize Painters. However, Leewens is unaware of a single company that has utilized the Cement Masons to work with MMA, in particular, or resinous floor coatings more broadly. Prior to around 2016, the Cement Masons had not even attempted to claim this work.

Leewens is not alone in its practices of utilizing Laborers for this work. In fact, Leewens is aware of a dispute over the similar application of MMA by another subcontractor, DPK Inc., on the University of Washington Animal Research and Care Facility in or around 2017. The Cement Masons sought the resinous floor coating work, including the application of MMA. Although L&I concluded that a small portion of the work fell under the Cement Masons' scope (the leveling prior to the application of the floor coating system), L&I concluded that the Cement Masons' scope of work did not apply to the floor coating system at the Animal Research and Care Facility. The Cement Masons' scope similarly does not apply to Leewens' MMA floor coating work.

L&I's conclusion that the disputed work at issue here falls within the Cement Masons' scope runs completely counter to the prevailing practices within the industry. Leewens is prepared to present additional testimony and evidence of prevailing practices within the industry, as well as its own past practice, in support of its position.

V. L&I's Own Industrial Statistician/Prevailing Wage Program Manager Acknowledged and Agreed that This Work is Properly Within the Laborers' Scope.

Just over two years ago, L&I explicitly acknowledged that Leewens is not running afoul of the prevailing wage rules by paying the Laborers' rate for this exact work. L&I's Industrial Statistician/Prevailing Wage Program Manager Jim Christensen acknowledged that the information provided by Leewens in response to Notice of Violation No. NOV200501 "included a sufficiently detailed description of the work performed including tools and methods used and

materials applied," sufficient to find "no violation of prevailing wage law" concerning this scope of work. L&I's October 1, 2021 Letter Rescinding Notice of Violation.

To stand here today and disregard this explicit determination two years ago, and to arbitrarily flip flop on the appropriate scope of work, completely undermines the legitimacy of this current Determination. It is contrary to industry practice, contrary to L&I's own conclusions concerning the application of MMA to flooring systems with respect to both Leewens and DPK in the past. If L&I believes there is a need for "clarity" as asserted in its October 26, 2023 Determination, which departs from its well-established position previously on this very topic, then it needs to instead engage in appropriate rulemaking rather than arbitrarily hiding behind wage determinations to change its mind on the interpretations of scopes of work.

VI. L&I's Prior Armorclad Wage Determination Has No Bearing on Leewens' Work.

L&I's October 26, 2023 Determination claims it is reaffirming a prior determination concerning work performed by Armorclad on the Tukwila Pool project. In that determination, L&I concluded that certain epoxy floor coating work fell within the Cement Masons' classification. L&I concluded that certain preparatory work fell within the Laborers' scope, that the Painters' scope applied to the work on walls, and the floor coating system fell within the Cement Masons' scope on that particular project.

Leewens does not dispute that the Painters' scope could apply to certain work it has assigned to Laborers. However, Leewens disagrees with L&I's conclusion that the floor coating system installed by Armorclad belonged to the Cement Masons. That being said, the work performed by Armorclad on the Tukwila Pool project is distinguishable from the disputed work performed by Leewens.

Regarding the Tukwila Pool project, L&I emphasized the nature of the material used, including the mixture of a cement-based epoxy and sand. L&I heavily relied on its interpretation that such material is more traditionally affiliated with the Cement Masons' work. Although Leewens disagrees with L&I's conclusion concerning Armorclad, Leewens points out that the product at issue here is different. Leewens' Laborers are not working with a cement-based product. Instead, Leewens' work involves applying an entirely different material, MMA. Leewens' work at the Seattle Aquarium Project has not involved product containing sand or aggregate. As described in more detail above, MMA requires a significantly different application process than the type of work traditionally performed by the Cement Masons. The technique,

skill set, experience, and certifications required to apply MMA are notably distinguishable from the application or installation of cement-based products.

VII. Reversing Course on the Scope of Work At Issue Here is Arbitrary and Capricious and an Inappropriate Attempt to Avoid Agency Rulemaking.

An agency must act fairly and impartially in the performance of its duties. *Nationscapital Mortg. Corp. v. Dept. of Fin. Inst.*, 133 Wn. App. 723, 758, 137 P.3d 78 (2006). The agency must consider the record as a whole, and interpret it in a fair-minded rational manner. *Teamsters Local Union No. 117 v. Dep't of Corr.*, 179 Wn. App. 110, 121 (2014). An agency acts in an arbitrary and capricious manner when its action is willful and unreasoning and does not consider surrounding facts or circumstances. *Tucker v. Columbia River Gorge Comm'n*, 73 Wn. App. 74, 78, 867 P.2d 686 (1994).

Agencies are not categorically precluded from changing prior determinations. However, an agency must provide a reasoned explanation for changing course, particularly when such change occurs within a short time frame upon the same facts.

> ....[A]n agency also "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010) (emphases and internal quotation marks omitted). Under certain circumstances, an agency's prior factual findings or conclusions may be "relevant data" such that an agency must "articulate a satisfactory explanation" when it changes its mind.

Defenders of Wildlife v. Zinke, 856 F.3d 1248, 1262 (9th Cir. 2017).

Here, the resinous flooring installation process has not changed, the tools and nature of the work and the material have not changed, and the scope of work definitions have not changed since L&I's 2021 conclusion that this was properly within the Laborers' scope. Changing course now, on a whim, particularly without reasoned justification, is exactly the type of arbitrary and capricious action that runs afoul of the APA.

It does not provide "clarity" to announce a new Determination which contradicts the Department's prior conclusions, only two years after abandoning the same Cement Masons'

claim against Leewens. This purported attempt at "clarity" only creates a disruptive seesaw effect in the public works community. It prejudices not only Leewens, but the industry as a whole, when L&I changes the rules at the whim of union pressure and enforces a prevailing wage determination that ignores industry practices.

In fact, the Determination's selective citation to apprenticeship standards, while ignoring all available contrary industry evidence that recognizes the Laborers' longstanding performance of this work, completely disregards the very industry practice L&I claims it should be taking into consideration. An agency cannot ignore relevant evidence by arbitrarily designating it as "unhelpful." This is particularly true when 100% of the evidence and precedent determinations and NLRB rulings which are summarily ignored are those that favor Leewens and the Laborers over the Cement Masons' baseless claims to this work.

VIII. The Laborers' Scope of Work is the Appropriate Conclusion Here.

In sum, L&I's assertion that the disputed work falls within the Cement Masons' scope is completely unsupported. The Cement Masons do not have the appropriate training or experience necessary to work with MMA, in particular. They have not historically performed this work with Leewens or otherwise within the industry. Both the NLRB and the Plan for Jurisdictional Disputes have found the work at issue properly belongs to the Laborers. Furthermore, the Cement Masons' scope of work is distinguishable from the actual work performed at the Seattle Aquarium Project.

Simply put, the disputed floor coating work is not Cement Masons' work. L&I's contrary conclusion is incorrect and warrants reversal. This letter shall not be construed in any way as a limitation on or a waiver of Leewens' right to present additional evidence, facts, or arguments in support of its position that it properly classified its employees in the performance of the disputed work.

The Cement Masons have no basis for claiming this work belongs to them, nor that the Cement Masons' prevailing wage rate applies. They have lost this battle in multiple forums, and on numerous projects. The same conclusion is warranted here: The Cement Masons have no claim to this work, and this work properly falls within the Laborers' (or Painters') scope of work and prevailing wage rate(s).

As such, Leewens respectfully requests that the Department withdraw the October 26, 2023 Determination and find instead that such work continues to be properly designated as within the Laborers' scope of work. In the event L&I decides to engage in agency rulemaking, Leewens and other industry groups must be provided an opportunity to provide relevant factual information through the mandatory notice-and-comment process.

Sincerely,

Selena C. Smith
Attorney for Leewens Corporation

Encl.