



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
PO Box 44000 Olympia Washington 98504-4000

August 13, 2015

Judd Lees, Attorney at Law
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Re: Request for redetermination with regard to Beynon Sports Surfaces, Inc. – Installation of Plexipave Tennis Court Surfaces

Dear Mr. Lees,

Thank you for your July 19, 2013 request for reconsideration of the determination for the correct prevailing rate of wage for the installation of Plexipave tennis court surfaces. The original determination was issued by Industrial Statistician, Ann Selover on June 19, 2013, and found that portions of the installation must be paid at the rate for Cement Masons, WAC 296-127-01315. The details of your position in regard to the applicable scope of work are found in correspondence that you attached between you and the Department which preceded Ms. Selover's letter of determination.

Issue

In its initial determination, the department found the Cement Mason scope of work to be the most appropriate scope. Beynon requested reconsideration on the finding that the Painter classification under WAC 296-127-01356 does not apply to employee use of a squeegee to spread the Plexipave product on tennis court surfaces.

The department interviewed the Cement Masons on February 20, 2015 and Beynon on October 23, 2014 to gain a better understanding of the tools and materials used, as well as the specific type of skills and methods necessary to complete the activities of the application.

Background

Beynon submitted a request to Karol Bakamus on August 14, 2012 requesting approval of their Intents and Affidavits of Wages Paid. The documents requested application of the Laborer scope for the Plexipave work. Beynon's reasoning for this classification is that the Laborer scope specifically states, "the application of *penetrating sealer* and *primer protective coatings* to concrete floors and steps when safe to walk on." This classification also covers employees that "mix, pour, and spread asphalt, gravel and other materials using hand tools, and mix, pour, spread and rod concrete."

On November 19, 2012, Marcus Ehrlander, Industrial Relations Specialist, responded to Beynon's letter from August 14, 2012. In the letter, Ehrlander reiterates Beynon's wishes to obtain a more comprehensive resolution to questions regarding the applicable scopes of work. He first reviewed an overview of the work performed on tennis courts and on running tracks as well as specification sheets of products used and additional documentation received via email and telephone. Through his review of the documents, he found that beyond the distinction of tennis courts and running tracks, different products and processes may be used. Beynon contends that the appropriate scope of work for all surfaces is the Laborer classification under WAC 296-127-01344. Beynon quoted the portion of that scope which refers to "the application of penetrating and primer protective coatings to concrete floors and steps when safe to walk on," and workers who "mix, pour, and spread asphalt, gravel, and other materials using hand tools and mix, pour, spread, and rod concrete.

Ehrlander first addresses track surfaces. He felt laborer would be the proper scope of work for this work with only two reservations. 1) If the "paver" referenced is in fact a motor-propelled vehicle, the use of such equipment could not be done under the Laborer scope. Rather, it would fall under the Operating Engineer's scope, WAC 296-127-1354. 2) Painting of lines or markings on the surface work would require the rate of wage for Traffic Control Strippers, WAC 296-127-01386.

Ehrlander next addressed tennis courts. Through review of this information, Ehrlander found Cement Mason, WAC 296-127-01315 to be the appropriate scope and rate of wage to use for the tennis court surfaces. "This is because the nature of the work appears most closely related to the finishing of a concrete or "seamless composition floor." This work is distinguished from the work of Laborers primarily due to the use of a finishing tool.

On January 2, 2013, Beynon wrote a letter addressing its concerns and provided supporting documentation. Beynon agreed that the Cement Mason classification was correct for patching and sealing cracks. Beynon believes that this is true due to the materials and tools used in the

process and I agree.¹ Beynon also believes that Traffic Control Striper is the appropriate classification for striping a tennis court, but argues the department's determination that the application of either Acrylic Resurfacer or Fortified Plexipave, not involving the patching of tennis courts, may constitute as Cement Mason work. The argument seems to be over the tool that is used to spread the Plexipave. Beynon calls the tool a squeegee and the department calls the tool a long-handled trowel. Trowel is specific to the Cement Mason scope to the process of applying Plexipave to the tennis court with this tool.

On January 31, 2013, Marcus Ehrlander responded twice in an email string to Beynon's correspondence dated January 1, 2013. Additional documentation was provided and further review found no change to the original assessment because the product is not a sealer. Plexipave is a "system of durable asbestos free colorful playing surface comprised of a combination of texture coats and finish coats that provide a long-wearing color surface of uniform texture. The surface is intentionally permeable." "There is no indication that the product provides a 'primer protective coating.'"

The Cement Mason scope refers to the "installation of seamless composition floors and finishing of epoxy-based coatings or polyester-based linings to all surfaces, when the coatings or linings are applied by spraying or trowelling." Furthermore, the first line of the Cement Mason scope of work mentions the performance of all work where finishing tools are used. Beynon's use of the long-handled squeegee in the application of the Plexipave coating appears to be similar in structure to the long-handled trowel commonly used by the Cement Masons. Similarly, the term "squeegee trowel" is frequently used among distributors. Irrespective of the terminology used, in Plexipave installations it is used not just for spreading, but also as a finishing tool. Ehrlander continues to uphold his finding that the appropriate scope of work is that of Cement Mason. The department received a letter from Beynon on March 8, 2013 reiterating their concern for the Cement Mason classification on the tennis courts. Beynon also provided pictures illustrating the process as "painting." In addition, Beynon also argued that the application uses a squeegee and latex paint. Based on the application process in addition to the materials applied, Beynon believes either Laborer or Painter is the most appropriate scope of work.

On June 19, 2013, a determination was issued citing the following supporting evidence:

- Email correspondence dating 11/19/2012 to Industrial Relations Specialist, Marcus Ehrlander
- 8/14/2012 Beynon letter to Industrial Relations Agent, Karol Bakamus

¹ Cement Masons are also referred to as "Cement Finishers." Traditionally, this craft focuses on finishing various surfaces, usually concrete surfaces. Concrete is typically placed by Laborers, and then its surface is finished by Cement Masons. Where an existing concrete surface is to receive a new finish, the patching of cracks, holes and other defects prior to finishing is also part of the finishing process.

- 1/2/2013 Beynon letter to Industrial Relations Specialist, Marcus Ehrlander 3/8/2013
Beynon letter to Industrial Relations Specialist, Marcus Ehrlander
- Plexipave website: www.plexipave.com

New Evidence and Arguments Presented

On October 23, 2014, we spoke with Judd Lees (Counsel for Beynon) and Rob Glockner of Beynon-West Coast Operations. During this phone call, the department discussed methods, nature of materials used, and industry practice. Within this conversation, Rob stated that a squeegee is used the entire time on 98-99% of tennis courts they perform work on. Further research demonstrated that trowel and squeegee can be used interchangeable and are in essence the same tool, often referred together as a "squeegee trowel." Trowel and troweling are both mentioned in the Cement Mason scope but not in the Laborer or Painter scopes.

On February 20, 2015, I spoke with representatives of the Cement Masons, John Kearns and Kristina Detwiler (Counsel for Cement Masons). During this phone call, the department asked the Cement Masons to provide any information or perspective that they feel would pertain to the decision. We also asked questions related to industry practice, factors they use to determine scope, and an explanation of the application of the Plexipave coating. They explained that, from their perspective, the methods used for the application of a Plexipave-style surface are very similar to other flooring system applications that are poured over and then spread evenly using finishing tools, on a concrete surface. In those types of applications, Cement Masons frequently use long-handled squeegee trowels or similarly built "magic trowels", in addition to other tools, to attain the desired surface.

Finding

Based on my review of the scopes of work, review materials submitted in the original determination, and my consideration of the work performed, I am upholding the Industrial Statistician's original determination that under chapter 39.12 RCW the correct wage rate for this work is Cement Mason.

Methodology for Decision

The Cement Mason scope is decidedly the most appropriate scope for this type of work for two reasons: 1) the type of tools listed in their scope, 2) installation methods and techniques. First, the Cement Mason scope is the only classification that includes the use of finishing tools and specifically lists trowels in its description. The presence of finishing tools, such as a long-handled squeegee trowel, on a flooring application are key indicators that point to the appropriate scope in this case. The Cement Mason scope also mentions specific methods used in this circumstance, such as, the "the installation of seamless composition floors... and

troweling." The Painter and Laborer scopes do not mention these tools and products so specifically. Rather, they refer to a penetrating surface, which is unrelated to the nature of the tennis court coating.

Despite the use of similar materials, the Painter classification under WAC 296-127-01356 does not best fit this circumstance. The specific language of the Painter scope contains the phrase "the job description for painters is as follows:" This language is narrow and specifically focused on the items contained in the scope. In contrast, the Cement Masons scope says "The work includes, but is not limited to:" The net effect of the language of the Painter scope is that if the material is not applied with brushes, spray guns or rollers, then the work falls outside the Painter scope. The tools described in the scope, when executing "application of polyurethane elastomers, vinyl plastics, neoprene, resin, polyester and epoxy as waterproofing or protective coatings to any kind of surfaces" are limited to the use of "brushes, spray guns, or rollers." In this case, the Plexipave material being applied to the tennis courts in this case called for the use of a long-handled squeegee trowel. The purpose of the tool in this circumstance is both as an applicator and as a finishing tool, spreading the material efficiently and evenly to ensure a uniform finish. This tool, the long-handled squeegee trowel, is mentioned in the Cement Mason scope, but is neither listed nor described in the Painter scope. Because of these factors, the Cement Mason scope is most appropriate to apply, and the Painter scope is not appropriate.

The Laborer classification does not most appropriately apply here, because the scope description also fails to mention the use of finishing tools or a squeegee, though it is specifically stated in the Cement Mason scope. A long-handled squeegee trowel was used to spread the Plexipave surfacing on the courts, and in this instance, was used as a finishing tool. While the Laborer scope mentions the application of a "penetrating sealer and primer protective coatings to concrete floors and steps when safe to walk on," this is not applicable to the tennis courts because the surface of the courts is considered a complete flooring system, closer in nature to a seamless composition floor, than to a penetrating sealer or primer protective coating.

Here, at least three scopes of work descriptions could loosely be thought to potentially apply. However, the focus of the wage determination is to decide the scope that is the *most* appropriate for the methods, tools, materials and purpose involved in the work being performed.

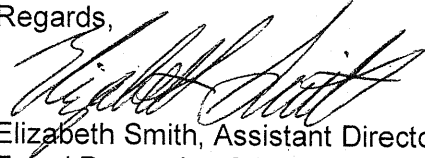
Although I have carefully considered your viewpoint and concerns, it is my decision to uphold the determination letter issued on June 19, 2013 by Ann Selover in regards to the installation of Plexipave tennis court surfaces under Chapter 39.12 RCW, the prevailing wage law. The correct prevailing wage rate under chapter 39.12 RCW for the application of Plexipave playing surfaces on tennis courts is that of Cement Mason.

This is a redetermination of the Assistant Director for Fraud Prevention and Labor Standards regarding the application of Washington's prevailing wage requirements on this specific

question and is made pursuant to RCW 39.12.015. See the attached document, "Prevailing Wage Determination Request and Review Process." If any party in interest disputes this redetermination, you must file a petition for arbitration of the redetermination pursuant to WAC 296-127-060 and -061 within 30 days to the director of labor and industries at the above address.

If you have further questions or concerns, please do not hesitate to let me know.

Regards,



Elizabeth Smith, Assistant Director
Fraud Prevention & Labor Standards

cc: Jim Christensen, Prevailing Wage Program Manager

Prevailing Wage Determination Request and Review Process

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

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

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

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

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

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

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

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

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

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

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

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

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