



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

Prevailing Wage
PO Box 44540 • Olympia, Washington 98504-4540
360/902-5335 Fax 360/902-5300

September 19, 2014

Lindsay K. Taft
Ahlers & Cressman PLLC
999 Third Ave., Suite 3800
Seattle, WA. 98104

Dear Ms. Taft,

This letter is in response to your September 27, 2013, request for a modification of the Industrial Statistician's determination related to state overtime requirements on the project known as MARYHILL ROAD VIC TO WOOD CR BR –BST for the Washington State Department of Transportation. See the enclosed document, "*Prevailing Wage Determination Request and Review Process.*"

As you know, the industrial statistician who issued the determination, Ann Selover, retired in 2013. I was appointed industrial statistician in January, 2014, and your request therefore comes before me. I apologize for the delay in issuing a response. I have reviewed the relevant laws, regulations, and policies.

Your question regards the applicability of Washington's prevailing wage requirements, including overtime requirements, where both state and federal prevailing wage laws apply. This situation arises regularly where state and federal funding applies to a given project.

In your letter, you contend that Construction Ahead has complied with prevailing wage requirements based on your interpretation of WAC 296-127-025. Your position appears to center on the view that, pursuant to this regulation, complying with prevailing wage requirements on joint state-federal projects begins with an assessment, at the outset of a project, of which prevailing wage rate is higher (or which wage rates collectively are higher). In doing so, you appear to compare the published straight time rates, without regard to all statutory overtime requirements. As a result of this comparison, you appear to draw a conclusion as to whether Washington's prevailing wage or certain other legal requirements must be met on the project. In this case, the comparison appears to have led the firm to conclude that compliance with federal law is sufficient.

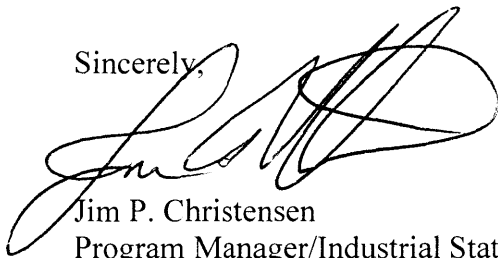
Lindsay K. Taft
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Such interpretation of WAC 296-127-025 is incorrect. WAC 296-127-025 does not, and cannot, have the effect of reducing the wage amounts owed to a worker under Washington labor law. Chapter 39.12 RCW entitles workers to specific wages, depending on the duties they perform on an hourly basis. Chapter 39.12 RCW also requires certain premium rates required for work performed on specific days such as Saturdays, Sundays and Holidays. Chapter 49.28 RCW provides for overtime rates to be paid for hours in excess of eight per day on public works (or over ten hours under certain circumstances). Chapter 49.46 RCW requires that workers receive time-and-one-half overtime rates for hours worked in excess of forty hours per week. WAC 296-127-025 affirms the applicability of each of these laws where they result in required rates that exceed federal requirements for a given project.

I have considered your question in detail, and it is my assessment that the initial determination provided by Industrial Statistician Ann Selover is correct. Washington's wage requirements for individuals employed by contractors on public works are primarily found under Chapter 39.12 RCW, and are supplemented by overtime provisions which are found in Chapter 49.28 RCW and Chapter 49.46 RCW. WAC 296-127-025 does not create an exception to the applicability of Washington's prevailing wage requirements or other overtime requirements. Likewise, it does not provide that compliance with federal law guarantees compliance with Washington state law. To the contrary, it clarifies that Washington's prevailing wage requirements apply notwithstanding the applicability of federal wage requirements, and vice versa.

Thank you for this opportunity to review Ms. Selover's determination and underscore the independence between state and federal labor law. I am forwarding this letter to Mr. Bob Koshman, the industrial relations agent who has been responsible for the prevailing wage investigation on the above named project. Accordingly, he will continue with the investigatory process. If you have any questions about the above, please let me know.

Sincerely,



Jim P. Christensen
Program Manager/Industrial Statistician – Prevailing Wage Program
Department of Labor and Industries

Cc: Robert Koshman (via email: KOSH235@LNI.wa.gov)

Prevailing Wage Determination Request and Review Process

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

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

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

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

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

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

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

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

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

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

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

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

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

Prevailing Wage Determination Request and Review Process

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

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

Direct petitions for arbitration to:
Joel Sacks, Director
Department of Labor & Industries
P O Box 44001
Olympia, WA 98504-4001

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

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

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

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

September 27, 2013

VIA EMAIL AND US MAIL

Ms. L. Ann Selover
Department of Labor & Industries
PO Box 44810
Olympia, WA 98504-4810
Email: Ann.Selover@Lni.wa.gov

Re: **Request For Modification Or Other Change
Determination Letter Re Maryhill Road Vic To Wood Cr BR-BST Project**

Dear Ms. Selover:

As you are aware, this firm represents Construction Ahead, Inc. ("Construction Ahead"). On September 16, 2013, we received your letter asserting the Department of Labor & Industries' (the "Department") position as it relates to the calculation of Prevailing Wage Overtime requirements. With this letter, however, Construction Ahead requests you reconsider and revise your decision.

1. Overtime Is A Component Of The Prevailing Rate Of Wage; Thus, A "For The Project" Analysis Remains Appropriate.

First, your letter asserts that it is Construction Ahead's position that it is not required to comply with Washington's overtime requirements. This misstates Construction Ahead's position. As previously noted by Construction Ahead, WAC 296-127-025 provides that "if [the state prevailing wage rates] are higher than the federal prevailing wage rates **for the project**," then every subcontractor must pay at least the Washington state prevailing wage rates. (emphasis added). In contrast, if the "federal prevailing wage rate **for the project**" is higher, than the contractor shall pay the federal rate as required by law. *Id.* (emphasis added).

In turn, as you also acknowledge in your letter, the "Prevailing Rate of Wage" includes three components: (1) the rate of hourly wage, (2) usual benefits, *and* (3) overtime. Therefore, pursuant to WAC 239-127-025, when determining the proper prevailing wage "for the project," the contractor *must* consider the rate of hourly wage, the usual benefits, *and* overtime. This is precisely what Construction Ahead did; for the project, when considered in sum, the federal prevailing wage rate (hourly wage, usual benefits, *and* overtime) remained higher than the state prevailing wage rate (hourly wage, usual benefits, *and* overtime). Thus, Construction Ahead is in compliance with both RCW 49.28 *and* WAC 296-127-025.

2. Each Word Of WAC 269-127-025 Must Be Interpreted In Accordance With Its Ordinary And Plain Meaning—It Cannot Be Disregarded.

Second, your reasoning casually dismisses the explicit “for the project” language of the regulation, asserting that this language is somehow trumped by other regulations and statutes for overtime requirements or should be afforded no weight. Contrary to your reasoning, however, it is a well-established rule in Washington that “each word of a statute is to be accorded meaning.” *State ex rel. Schillberg v. Barnett*, 79 Wash.2d 578, 584, 488 P.2d 255 (1971). Whenever possible, statutes and regulations are to be construed so “no clause, sentence or word shall be superfluous, void, or insignificant.” *Kasper v. City of Edmonds*, 69 Wash.2d 799, 804, 420 P.2d 346 (1966) (emphasis added and quoting *Groves v. Meyers*, 35 Wash.2d 403, 407, 213 P.2d 483 (1950)). A court “is required to assume the Legislature meant exactly what it said and **apply the statute as written.**” *Duke v. Boyd*, 133 Wash.2d 80, 87, 942 P.2d 351 (1997) (emphasis added). Further, “absent ambiguity or a statutory definition, [courts] give the words in a statute their common and ordinary meaning.” *Garrison v. Wash. State Nursing Bd.*, 87 Wash.2d 195, 196, 550 P.2d 7 (1976). “Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, **regardless of contrary interpretation by an administrative agency.**” *Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wash.2d 392, 396, 103 P.3d 1226 (2005) (emphasis added).

Although your letter references general statutes regarding overtime (RCWs and WACs), as described above, the regulations are consistent as overtime is a component of the overall “Prevailing Rate of Wage.” There is, however, no authority to disregard explicit language (“for the project”) from the regulation or attribute to that phrase any other meaning than its common and ordinary meaning. Here, the plain language of the regulation is clear—whether a contractor should pay the federal or state prevailing wage rate depends on which rate (the federal or the state) is higher “**for the project**”—not whether that rate is higher on a particular day as contended by the Department.

Demonstrating the phrase’s common and ordinary meaning is the Department’s own Prevailing Wage Law Guide, which only requires the determination on a “classification by classification basis” (*See L&J Prevailing Wage Law Guide at p. 14*) and, more importantly, the impact of interpreting the regulation to require a daily or hourly (not by project) assessment of a laborer’s “Prevailing Rate of Wage.” Prevailing wage projects are almost always awarded after a sealed, competitive bidding process. Thus, prior to being awarded a job, the contractor must submit a bid based on a total amount for which it can complete the work, including labor costs. To accurately provide a bid, the contractor must have some basis to estimate the wage rate it will be paying. Using the reasonable interpretation of a “project” based prevailing wage analysis, a contractor is able to forecast this amount with relative certainty. Conversely, however, to accept the Department’s position requires that the contractor must provide an estimate in its bid, but that this estimate must factor in a retroactive hourly or daily analysis that cannot possibly be known at the time of bid and, instead, only be calculated after the project is at least partially complete. Not only is this position overly burdensome (requiring each hour and day of projects to be scrutinized in detail), but such costs could potentially provide a windfall to either the prime

Ms. L. Ann Selover
September 27, 2013
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contractor or the public agency, forcing the contractor to finance that portion of the work. This is clearly not the intent of Prevailing Wage legislation.

In sum, Construction Ahead understands the Department's purported position to be that the contractor must assess whether federal or state prevailing wage rates apply depending on an *hourly* or *daily* basis for each component as opposed to a *project* basis. Such a position (1) requires the disregard of explicit language in WAC 239-127-025, and (2) finds no support in the Revised Code of Washington or the Washington Administrative Code. Accordingly, Construction Ahead requests that you modify or change your determination to find in favor of Construction Ahead.

Thank you in advance for your review of this matter. Construction Ahead looks forward to its resolution.

Very truly yours,

AHLERS & CRESSMAN PLLC



Lindsay K. Taft

LKT: grl

cc: Construction Ahead, Inc.



Lindsay K Taft
Direct: (206) 520-2014
Main: (206) 267-3000
Fax: (206) 277-0960
ltaft@ac-lawyers.com

June 18, 2013

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED, EMAIL, AND FAX

Mr. Joel Sacks, Director
Department of Labor & Industries
PO Box 44810
Olympia, WA 98504-4810
Email: pwl@lni.wa.gov
Fax: 360-902-5300

**Re: Petition for Review Pursuant to WAC 296-127-470
Determination Letter Re Maryhill Road Vic To Wood Cr BR-BST Project**

Dear Director Sacks:

This firm represents Construction Ahead, Inc. ("Construction Ahead"). On June 11, 2013, after the completion of an audit by Labor and Industries, Construction Ahead received the enclosed determination and demand letter from Labor and Industries Industrial Relations Agent, Robert G. Koshman (Attachment A). This letter concludes that Construction Ahead purportedly owes \$3,581.52 dollars in unpaid prevailing wages and demands payment by June 28, 2013. Construction Ahead, however, disputes Mr. Koshman's calculation of the amounts owed as well as his interpretation of the relevant prevailing wage statutes and regulations. Accordingly, Construction Ahead submits this petition for review pursuant to WAC 296-127-470.

Construction Ahead understands it is Mr. Koshman's position that, on Washington public projects that are subject to both federal and state prevailing wage laws, the contractor must assess whether federal or state prevailing wage rates apply on an *hourly* or *daily* basis as opposed to a *project* basis. Specifically, rather than complying with the higher of the federal prevailing wage rate or state prevailing wage rate for the project as allowed by Washington regulation, the contractor must perform a daily if not hourly assessment of its worker's wages throughout the course of the project and, in turn, determine whether the federal or the state rate is more beneficial for that hour or day. Based on this interpretation of the regulations, Mr. Koshman has asserted that Construction Ahead owes \$3,581.52 in prevailing wages.¹

Contrary to Mr. Koshman's determination (and, therefore, his assessment), this

¹ Construction Ahead concedes that, regrettably, inadvertent calculation errors were made with respect to two workers. As a result, Construction Ahead agrees that \$102.93 is due and owing. A list of the relevant amounts and the related worker is enclosed as Attachment B. Construction Ahead takes no issue with these payments and will issue and deliver Cashier's Checks or Money Orders made payable to the workers to the Kennewick L&I office by June 28, 2013 as required. Nevertheless, with this Petition, Construction Ahead is only contesting the remaining \$3,478.58 Mr. Koshman asserts is owed.

Mr. Joel Sacks, Director
June 18, 2013
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interpretation of prevailing wage regulations is not supported by Washington law. The pertinent Washington Administrative Code (WAC) regulation is WAC 296-127-025. This regulation provides as follows:

- (1) When a public works project is subject to the provisions of the Washington state public works law, chapter 39.12 RCW, and the Federal Davis-Bacon and related acts, the contractor and every subcontractor on that project must pay at least the Washington state prevailing wage rates, if they are higher than the federal prevailing wage rates *for the project* unless specifically preempted by federal law.
- (2) When the federal prevailing wage rates are higher than the Washington state prevailing wage rates, the contractor shall pay the federal rate as required by federal law.

WAC 296-127-025 (emphasis added). Thus, based on the explicit language of the WAC, the relevant analysis is whether the federal prevailing wage rates are higher than the state prevailing wage rates "*for the project*"—not whether the federal prevailing wage rate is higher than the state overtime rate for a particular day during the construction of the project.

This position is further corroborated by Labor and Industries own Prevailing Wage Law Guide, which, with regard to Joint State-Federal Projects, it states:

Joint State-Federal Projects: For projects where both the state prevailing wage law and the federal Davis-Bacon and related Acts apply, **contractors and subcontractors must pay the higher of the state or the federal wage rates, on a classification-by-classification basis. This requirement should also be stated in the bid specifications and the contracts.** WAC 296-127-025

See L&I Prevailing Wage Law Guide at p. 14. Again, Labor & Industries, by its own interpretation does not require a daily assessment but rather an assessment on a classification-by-classification basis, consistent with a project analysis versus a daily analysis. Further, this also requires that any such requirement should be included in the bid specifications and contracts. No such provision mandating a day by day assessment of the federal versus daily rate is set forth in Construction Ahead's current contracts or bid specifications, including the project at issue, upon which Construction Ahead based its bids. Rather, Construction Ahead relied upon the plain language of WAC 296-127-025 and paid the higher prevailing wage rate *for the project*, which was, in this case, the federal prevailing wage rate.

Finally, not only is Mr. Koshman's position overly burdensome (requiring each hour and day of projects to be scrutinized in detail), but such costs are not accounted for in Construction Ahead's bid, providing a windfall to either the prime contractor or the public agency. Thus, Mr. Koshman's misinterpretation of the regulation not only expounds the WAC beyond its clear import, but such a construction would make any forecasting of labor an estimating nightmare. Accordingly, Construction Ahead (1) disagrees with Mr. Koshman's position on this matter which improperly reads language into the WAC regulation, and (2) because Construction Ahead

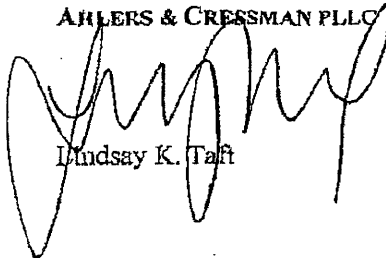
Mr. Joel Sacks, Director
June 18, 2013
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is aggrieved by such a determination, petitions for review of the determination pursuant to WAC 296-127-470 as well as an opportunity to be heard on the matter. Construction Ahead further requests that any deadline relating to payment of amounts owed (beyond the \$102.93 undisputed amount for which payment will be sent shortly) be stayed until Construction Ahead's petition for review is fully resolved.

Thank you in advance for your review of this matter. Construction Ahead looks forward to its resolution.

Very truly yours,

AHLERS & CRESSMAN PLLC



Lindsay K. Taft

LKT: grl

cc: Construction Ahead, Inc.
Robert Koshman (via email: KOSH235@LNLWA.GOV)

06/18/2013 TUE 13:24 FAX

005/009

ATTACHMENT A

PREVAILING WAGE PROGRAM / REGION 5 ~ (509) 735-0116
4310 West 24th Avenue, Kennewick, WA 99338 -1992

SENT BY AND CERTIFIED MAIL

June 10, 2013

Construction Ahead Inc
P O Box 7204
Kennewick, WA 99336

Dear Employer:

On behalf of The Department of Labor and Industries (L&I) I have completed my review of the documents pertaining to an investigation of your firm on the **MARYHILL ROAD VIC TO WOOD CR BR -BST** for WSDOT. Please note that this audit encompassed work performed on the above-stated public works project only and did not include any review of possible unpaid prevailing wage hours of work for your other Washington State jobs. Based upon this examination of the claim, which included payroll records, daily time sheets, along with the applicable regulations, I calculate that your workers are owed a total of **\$3581.52** dollars in unpaid prevailing wages for work performed on this project.

Listed below are names of **NUMBER** workers I have identified as having been employed on this project who are owed additional prevailing wages. Along with the names there is a listing of the gross amounts due.

Akins, Julie Ann	\$112.39
Cordova, Elias	133.38
Eacret, Kevin	166.37
Faria-Stroud Christina	267.73
Garcia, Sergio	112.39
Gaston, Amy Jo	333.51
Hanks, Susan	109.84
Horn, Ian B	112.39
Iniguez, Isette	148.31
Jaime, Tina	129.25
Kingman, Tyler Henry	122.03
Kunkel, Adam	164.47
Meyer, Nathan Ivan	86.58
Murillo, Andrianna	55.85
Murillo, Victor	69.20
Owens, Mathews	112.39
Phipps, Kristin	19.64
Rash, Robert	62.87
Sizemore, Grayson	85.95
Stiwater, Luke	205.53
Stock, Dirk Edwin	41.91
Tinkcom, Wesley	855.25
Williams, Kody	74.30
Grand Total	\$3581.52

BUSINESS NAME

DATE

Page 2

Enclosed are Wage Transcription Sheets for workers identified above, which show a breakdown of the various hourly rates, craft types identified, hours worked in each craft, and wages paid for during the time frame of this project. The hours of work were taken from the daily time records you provided, and the job duty codes shown on the records for such hours were matched up with your job codes/list of work to be performed, then were crosschecked against the certified payroll records you filed, to arrive at the actual hours worked per day on this project and the required prevailing wage rate.

Based on this investigation, on behalf of the Department of Labor and Industries I am requesting payment for the 23 listed workers by June 28, 2013. The wages must be paid by Cashier's Checks or Money Orders, and are to be **made payable to the workers** in the stated amounts, less authorized deductions (i.e., state and federal taxes), and are to be sent to this office at the address listed on the letterhead. Upon receipt of the 23 worker's Cashier's Checks/Money Orders from your firm, a letter will be sent to those employees stating we have payment for prevailing wages due them. The workers will be required to sign release forms we will enclose in their letters indicating acceptance of their Cashier's Check/Money Order as payment in full prior to delivery. When all payments have been accepted by the workers, the signed releases will be then be forwarded to you.

Failure to comply with this request for payment of the correct prevailing rate of wage to all workers may result in the issuance of a formal Notice of Violation, which may include assessment of penalties as provided in RCW 39.12.050 and RCW 39.12.065. Possible penalty amounts include, but may not be limited to, a 20% penalty on the wages found to be owed and \$500.00 for each week's false filing of certified payroll records.

As a closing reminder, RCW 39.12.110 provides as follows:

Any employer, contractor, or subcontractor who fails to provide requested records, or fails to allow adequate inspection of records in an investigation by the department of labor and industries under this chapter within sixty calendar days of service of the department's request may not use the records in any proceeding under this chapter to challenge the correctness of any determination by the department that wages are owed, that a record or statement is false, or that the employer, contractor, or subcontractor has failed to file a record or statement.

If you have any questions, you may contact me at 509 735 0116, or you may send an e-mail to Kosh235@LNI.WA.GOV.

Sincerely,

ROBERT G. KOSHMAN
Industrial Relations Agent

Enclosures

cc: WSDOT
Columbia Asphalt and Gravel

CONSTRUCTION AHEAD INC DBA PAVEMENT SURFACE CONTROL

JUNE 17, 2013

**PAYROLL CALCULATION ERRORS
JOB # 22062 - MARYHILL RD VICINITY TO WOOD CREEK BRIDGE - BST**

<u>EMPLOYEE NAME</u>	<u>DATE</u>	<u>CRAFT</u>	<u>PAY RATE</u>	<u>PAID RATE</u>	<u>DIFFERENCE</u>	<u>HOURS WKD</u>	<u>OWING</u>
EVANS, CASEY	8/7/12	LABORER	\$41.87	\$27.91	\$13.96	0.50	\$6.98
EVANS, CASEY	8/8/12	LABORER	\$41.87	\$27.91	\$13.96	0.50	\$6.98
GOTTSCHALK, ANTHONY	9/17/12	FLAGGER	\$38.12	\$25.41	\$12.71	7.00	\$88.97
TOTAL						8.00	\$102.93

This spreadsheet represents calculation errors made on payroll during the timespan that employees worked on the Maryhill Project. Correction checks will issued 6/18/13. Copies will be sent to you. Casey should have been paid a half an hour of overtime on 8/7/12 and 8/8/12 due to a half an hour of shop in the morning. Anthony worked on another job in the morning of 9/17/12 causing the Maryhill time to be overtime that evening.

Jennifer Carney
P: (509) 586-1969
F: (509) 585-8297

06/18/2013 TUE 13:24 FAX

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