

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES  
STATE OF WASHINGTON

*In re:*

GLACIER NORTHWEST, INC., et al,

Appellant,

OAH Docket No. 04-2019-LI-01039

2023-002-PW

DIRECTOR'S ORDER

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Initial Order served on June 14, 2022, having considered the appeal filed by the Department of Labor and Industries Prevailing Wage Program with the Director's Office and briefing submitted to the Director's Office, and having reviewed the record, issues this Director's Order.

The parties are Glacier Northwest, Inc.; the Department of Labor & Industries Prevailing Wage Program; and Intervenor, International Union of Operating Engineers, Local 302.

The Director makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order.

**I. FINDINGS OF FACT**

1. In 1995, Glacier acquired the Mats Mats quarry in located near Port Ludlow, Washington. It is a private quarry reclamation project. Since acquiring the quarry,

- Glacier has accepted qualifying dirt, or spoils, from various projects, both public and private, to fill holes at the quarry. This quarry was the location where the challenged work took place. The land is not public land.
2. In 2010, the Washington State Department of Transportation (WSDOT) and Seattle Tunnel Partners (STP) contracted to build the SR 99 Bored Tunnel Project. STP is a joint venture that contracted with WSDOT to organize and oversee the demolition of the SR 99 viaduct in Seattle, Washington, and its replacement with an underground tunnel highway.
  3. This was a large public works project involving boring a miles-long hole under downtown Seattle in order to build a tunnel to reroute SR 99 along the Seattle waterfront. The boring machine (Big Bertha) created millions of tons of dirt—called “spoils” or “tunnel muck”—that STP had to remove and transport off-site for disposal. Nielson Decl. ¶ 4. STP committed to the muck disposal in its contract with WSDOT, and WSDOT’s payment to STP for this project included costs of tunnel dirt disposal. Disposal of the spoils from the deep bore tunnel was necessary for the completion of the project.
  4. STP proposed barging the tunnel muck to Mats Mats for disposal. And it identified barging the materials to Mats Mats as a method to improve safety and reduce impacts to the local roads over other disposal methods, such as trucking the dirt out of downtown Seattle. WSDOT incorporated STP’s proposal about the tunnel spoils at Mats Mats in the final design-build contract for the project. STP was required to maintain insurance for environmental issues at “non-owned disposal sites.” Design-Build Contract, at 106.

5. Glacier entered into a Tunnel Spoils Service Agreement with STP to “receive, manage, store and/or dispose of” tunnel spoils, aka dirt or “clean soil” from the tunnel project. Tunnel Spoils Service Agreement, at 1. Glacier needed to obtain and provide to STP “all necessary submittals, permits, documents as may be necessary for STP’s approval for use of the Mats Mats Quarry Disposal site with regards to the SR 99 Environmental permits.” Tunnel Spoils Service Agreement at 11.
6. The STP-Glacier contract refers to the work throughout as “disposal,” referring to Mats Mats as the “Disposal Facility” and specifying, “[Glacier] shall dispose of the Tunnel Spoils . . . at the Disposal Facility.” Tunnel Spoils Service Agreement, at 2. Glacier warrants in the contract that it is “engaged in the business of storage and disposal of clean soils . . . including [the] Tunnel Spoils” *Id.* at 4.
7. Glacier prepared for the disposal by building conveyors, which required building concrete foundations, grading, and proper drainage. Glacier built haul roads for the trucks to dump the material.
8. STP engaged an independent contractor to transport the spoils to Port Ludlow. The spoils would be loaded into hoppers to conveyers, and the conveyers moved the materials to huge dump trucks or to a surge pile. Glacier’s trucks then distributed the spoils around the quarry, filling holes.
9. To perform the disposal, Glacier hired a group of operators dispatched from International Operating Engineers Local No. 302 to Mats Mats. The workers were not regular quarry workers. All of the operators who performed work at Mats Mats for the disposal work were members of the Local 302, who were brought over to Mats Mats for the tunnel spoils work. This disposal was full-time work, requiring day and

night shifts every day for several years. The employees who worked at Mats Mats disposing of the tunnel projects spoils performed no other work for Glacier during that time. When Glacier completed its aspect of the tunnel project, Glacier shut down the quarry.

10. Ultimately, STP excavated about 2.4 million tons of material. Glacier then disposed of these spoils. STP's contract with Glacier provided \$28.35 million to Glacier. Glacier invoiced STP directly after the delivery of the spoils at unit price of \$12.89 per ton. The funds were sourced from the contract between STP and WSDOT.
11. The Department has found bulldozing and leveling at a waste disposal site to be covered by the prevailing wage laws in the *Grady Excavating* case. There is no record of the Department issuing a policy memorandum or rule on the disposal issue here.
12. On June 13, 2016, the Department received a prevailing wage complaint on behalf of the International Union of Operating Engineers, Local 302.
13. The Department issued a Notice of Violation to Glacier on December 17, 2018. The Notice of Violation alleged that Glacier failed to pay prevailing wage to 46 of its employees, failed to file a Statement of Intent to Pay Prevailing Wages, an Affidavit of Wages Paid, and certified payroll records. Based on these allegations, the Department assessed wages and civil penalties due in the amount of \$446,299.34.
14. On January 11, 2019, Glacier appealed this Notice of Violation, and Office of Administrative Hearings conducted a summary judgment hearing.
15. Office of Administrative Hearings issued an initial order on June 14, 2022, granting Glacier's summary judgment motion to vacate the Notice of Violation and to deny the Department's partial motion for summary judgment.

16. The Department timely petitioned for administrative review on July 12, 2022.

## II. CONCLUSIONS OF LAW

1. The Director has jurisdiction to hear this matter under RCW 39.12.065 and RCW 34.05.
2. On summary judgment, a court views the evidence in the light most favorable to the nonmoving party. *See Sehmel v. Shah*, 23 Wn. App. 2d 182, 188, 514 P.3d 1238 (2022). The court grants summary judgment only if there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. CR 56(c). When the facts are not in dispute, courts may grant summary judgment for the nonmoving party if that party is entitled to judgment as a matter of law. *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992).
3. This case turns on statutory construction, as the salient facts are not in dispute. Courts examine the plain language of a statute to determine legislative intent. *State v. M.Y.G.*, 199 Wn.2d 528, 531, 509 P.3d 818 (2022). In discerning legislative intent, courts look to the text of that statutory provision, the context of the statute, related provisions, and the statutory scheme as a whole. *Id.*
4. RCW 39.12.020 provides “[t]he hourly wages to be paid to laborers, workers, or mechanics, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, shall be not less than the prevailing rate of wage for an hour’s work in the same trade or occupation in the locality within the state where such labor is performed.” RCW 39.04.010 in turn defines “public work” as “all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the

cost of the state or of any municipality, or which is by law a lien or charge on any property therein. All public works, including maintenance when performed by contract shall comply with chapter 39.12 RCW.”

5. It is an axiom of statutory interpretation that when the Legislature defines a term, the court will use that definition. *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005). If the statute at issue does not define a term, a court may rely on the Legislature’s definition of that term in a closely related statute. *M.Y.G.*, 199 Wn.2d at 532. So when the Legislature uses a word in a statute with one meaning and subsequently uses the same word in legislating on the same subject, the word will be given the same meaning. *Id.* If there were any question about whether “public work” used in RCW 39.12.020 was defined in RCW 39.04.010, the cross reference to “chapter 39.12 RCW” in RCW 39.04.010 ends the inquiry. Likewise, the courts have applied the definition of public work in RCW 39.04 to questions under RCW 39.12. *See Supporters of the Ctr., Inc. v. Moore*, 119 Wn. App. 352, 358, 80 P.3d 618 (2003).
6. The determinative language here is the language is that public work is defined as “executed at the cost of the state.” RCW 39.12.010(4). There is no dispute that the money allocated by WSDOT and provided to Glacier from STP was public funds, so the disposal was “executed at the cost of the state.” This language cannot be read out of the statute as Glacier suggests. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (court doesn’t delete words from statute). Although RCW 39.12.020 states that prevailing wages must be paid “upon all public works,” this doesn’t mean that prevailing wages are limited to the site of the project. *See Everett Concrete Products*,

*Inc. v. Dep't of Lab. & Indus.*, 109 Wn.2d 819, 822, 748 P.2d 1112 (1988). RCW 39.04.010 has no such limitation, and it provides the controlling definition. Work off-site may be upon a public work, and the site the work is performed doesn't need to be publicly owned. *Everett Concrete*, 109 Wn.2d at 821-22, 828. In *Everett Concrete*, the Court rejected a request "to limit RCW 39.12 by restricting its application to on-site employers and those off-site employers having a sufficient nexus with the site of the public works project." *Id.* at 828. The Court stated that a broader interpretation was necessary and upheld the off-site tunnel liner construction as covered by the prevailing wage laws. *Id.* Contrary to the suggestion in the Initial Order, there is no indication that the tunnel liner workers inserted the tunnel liners at the project or that the Court's holding was based on such a fact. Instead, the issue in the case was whether to compensate the manufacture work performed off-site under the prevailing wage laws. *See Everett Concrete*, 109 Wn.2d at 820 ("This case presents the issue of whether the prevailing wage law applies to the off-site manufacture of prefabricated items for use on a particular public works project."). Just as there needed to be the off-site construction of the tunnel liners, so did there need to be off-site disposal (along with the labor to accomplish it) for on-site generated "spoils" in the tunnel bore project. Disposal work is subject to the broad interpretation in *Everett Concrete*.

7. That other cases have found prevailing wages owed in the scenario where materials were incorporated into the project under the specific language of a regulation (*e.g.*, *Superior Asphalt & Concrete Co. v. Washington State Dep't of Lab. & Indus.*, 112 Wn. App. 291, 49 P.3d 135 (2002)), doesn't mean work on the tunnel site is required for disposal of the material. Those cases didn't consider the disposal fact pattern, are

under different regulations, and are of little use here. Yet Glacier argues that “the Department must prove that a Glacier disposal pit worker *removed* the excavated tunnel dirt from a public works construction site.” Glacier’s Resp. to Dep’t’s Opening Br. and Intervenor’s Appeal Br., at 2 (cleaned up). No such limitation is found in RCW 39.04.010(4). This statute doesn’t link the payment of prevailing wages for on-site work, instead it looks to the nature of the funding and character of the work, not where the work is performed.

8. Glacier argues that not all work associated with a public work is subject to prevailing wage requirements. This statement obscures the test the courts use. “Washington’s statutory definition of ‘public work’ does not require the governmental agency’s direct involvement in the work performed; rather, it requires only that the work be ‘executed at the cost of’ the governmental entity.” *Supporters of the Ctr.*, 119 Wn. App. at 359-60 (quoting *City of Spokane v. Dep’t of Lab. & Indus.*, 100 Wn. App. 805, 814-15, 998 P.2d 913 (2000)). “There is no bright-line definition of when a project is executed at the cost of the State . . . we look to both the source of the funding and the character of the project in deciding whether it is executed at the cost of the State. *Id.* at 358-59. Here there is “work” that is executed at the cost of the state and the character of the project is labor that inexorably benefits the public works project. “[W]orkers on public works projects who are classified as ‘laborer, workers, or mechanics’ are entitled to prevailing wage when their work directly relates to the prosecution of the work that is contracted to be performed and necessary for the completion of that work.” *Heller v. McClure & Sons*, 92 Wn. App. 333, 340, 963 P.2d 923 (1988).



9. STP contracted for muck disposal with WSDOT, with disposal specifically directed in the contract. Under the contract, STP was responsible for disposing of excess excavation, and this cost was built into the contract and disposal of the spoils was necessary for the completion of the project. The final design-build contract between WSDOT and STP specifically contemplated disposal of the tunnel muck at Mats Mats. In turn, Glacier entered into a Tunnel Spoils Service Agreement with STP to “receive, manage, store and/or dispose of” tunnel spoils, aka dirt or “clean soil” from the tunnel project. Tunnel Spoils Service Agreement, at 1. These contracts show—and the need for the contracts to complete the tunnel bore project show—that disposal was directly related to prosecution of public work.
10. The disposal work at Mats Mats was essential to the tunnel bore project, and it was integral to the multi-billion dollar contract between WSDOT and STP and the subcontract between STP and Glacier. It is impossible to bore the tunnel without also disposing of the excavated materials. So the disposal work is directly related to and necessary for the completion of the tunnel project and is work covered by prevailing wage laws.
11. That the prime contractor had responsibility to dispose of the materials shows that it is contemplated to be part of the public works contract. When STP delegated this work to Glacier, this work was part of the public works contract. RCW 39.12.030 provides that subcontractors are bound to not pay less than the prevailing wage.
12. Glacier believes that the Department must have a rule to cite it for failing to pay prevailing wages. This is incorrect. RCW 39.12.065 specifically gives the Department authority to determine “compliance with this chapter [RCW 39.12].” An agency does

not need a rule when following an explicit statute. *Loyal Pig, LLC v. Washington State Dep't of Ecology*, 13 Wn. App. 2d 127, 145, 463 P.3d 106 (2020) (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002)); *Providence Physician Servs. Co. v. Washington State Dep't of Health*, 196 Wn. App. 709, 726-28, 384 P.3d 658 (2016).

13. Glacier points to five types of work in the regulations under RCW 39.12, but they don't provide a limit on work covered—only the statute can do that. *See Lenander v. Washington State Dep't of Ret. Sys.*, 186 Wn.2d 393, 409, 377 P.3d 199 (2016) (agency's rules or regulations cannot amend or alter legislative enactments); *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 715, 153 P.3d 846 (2007) (same).
14. Glacier contends that looking to the language “executed at the cost of the state” “impermissibly adds coverage for disposal pit work that was omitted from the Department’s existing WAC 296-127-018(2)(c).” Glacier’s Resp. to Dep’t’s Opening Br. and Intervenor’s Appeal Br., at 37. Its position is that because WAC 296-127-018(2)(c) addresses removal, disposal can’t also be covered under RCW 39.04.010. This rule provides that workers are covered if “[t]hey remove any materials from a public works construction site pursuant to contract requirements or specifications (e.g., excavated materials, materials from demolished structures, clean-up materials, etc.)” WAC 296-127-018(2)(c) isn’t determinative as the Department need not have exhaustive rules on every possible topic as L&I can enforce both rules and statutes. RCW 39.12.065(1). What is required is compliance with the applicable statutes and to follow legislative intent. *See In re Impoundment of Chevrolet Truck, WA License No.A00125A ex rel. Registered/Legal Owner*, 148 Wn.2d 145, 156, 60 P.3d 53

(2002). Workers are entitled to the protection of RCW 39.04.010, RCW 39.12.020, and RCW 39.12.030. See *Everett Concrete*, 109 Wn.2d at 823. An agency has no authority to restrict the scope of a statute. See *Bostain*, 159 Wn.2d at 715 (regulation could not read in a requirement that Washington only work covered under overtime laws when statute didn't have such requirement).

15. RCW 39.04.010(4) and RCW 39.12.020's plain language resolves the questions here. But if there is another reasonable reading of these statutes' language (there isn't), the statute must be judged under the principles governing ambiguity. See *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002). In construing an ambiguous statute, "the interpretation adopted should always be one which best advances the legislative purpose." *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). RCW 39.12 is remedial and should be construed liberally. *Everett Concrete*, 109 Wn.2d at 823. A liberal construction "should carry into effect the purpose of the statute." *Port of Tacoma v. Sacks*, 19 Wn. App. 2d 295, 303, 495 P.3d 866 (2021) (quoting *Everett Concrete*, 109 Wn.2d at 823). The purpose of the Prevailing Wage on Public Works Act is twofold: (1) to protect employees working upon public works from substandard wages and (2) to preserve local wages. *Superior Asphalt & Concrete Co. v. Dep't of Lab. & Indus.*, 84 Wn. App. 401, 406, 929 P.2d 1120 (1996). Limiting prevailing wages to exclude off-site work is not only against the case law but it would not protect against substandard wages or preserve local wages.
16. Courts "accord an agency's interpretation of the law great weight where the statute is ambiguous and is within the agency's special expertise." *Snohomish County v.*

*Pollution Control Hearings Bd.*, 187 Wn.2d 346, 357, 370, 386 P.3d 1064 (2016).

The courts look to L&I's wage-related interpretations for guidance in reading the statutes and rules that L&I enforces. *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 581, 397 P.3d 120 (2017). The agency's long standing position is that prevailing wages need to be paid for off-site work. *See Everett Concrete*, 109 Wn.2d at 821. The court defers to the Department's interpretations when the agency has an established practice of enforcement that doesn't conflict with the statute. *See Port of Tacoma*, 19 Wn. App. 2d at 304-05. The doctrine of liberal construction and longstanding agency interpretation all demonstrate that prevailing wage projects are determined if they are executed at the cost of the state.

17. Sometimes it may be appropriate to look to industry practice in the prevailing wage context. Industry practice is considered for questions about the scope of work once it is established that there is a public work and that the regulation is ambiguous. WAC 296-127-013(2)(e). But industry practice is generally not appropriate to determine whether work was executed at the cost of the state. The absence of prior enforcement activity doesn't mean RCW 39.04.010(4)'s definition doesn't apply. The use of industry practice to determine whether there is a public work project in this context would put violators in the driver's seat to determine whether there is a violation. Such a result departs from the prevailing wages' remedial scheme.
18. In any event, a governmental agency may take enforcement action against one of many parties violating a statute, "absent the use of an arbitrary or prohibited ground to determine specific instances of enforcement." *Northlake Marine Works, Inc. v. Dep't of Nat. Res.*, 134 Wn. App. 272, 293, 138 P.3d 626 (2006). Relying on


complaints is not an arbitrary way to act. This is not a case in which the Department is acting contrary to a previous policy memorandum. *E.g., Silverstreak, Inc. v. Washington State Dep't of Lab. & Indus.*, 159 Wn.2d 868, 887, 154 P.3d 891 (2007). The Department's previous adjudication in *Grady* shows the opposite. Industry practice is not determinative to deciding whether there is public work because a company could perform public work without the Department's knowledge unless a complaint was filed. The Department has limited resources and may choose to limit investigation to claims where the workers took the time to complain to the Department.

19. The tunnel disposal work performed by Glacier's workers was work upon a public work, and prevailing wages are owed to such workers in the amount determined by further proceedings. RCW 39.12.020.

### III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, summary judgment is granted in favor of the Department and the Intervenor and denied as to Glacier, and this case is remanded to Office of Administrative Hearings to determine the amount of wages owed and determine the issues about certified payroll records, intents to pay prevailing wages, and affidavits of wages paid.

DATED at Tumwater this 21 day of February, 2023.



JOEL SACKS  
Director

2023-002-PW

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DIRECTOR'S ORDER

OFFICE OF THE DIRECTOR  
DEPARTMENT OF LABOR & INDUSTRIES  
P.O. BOX 44001  
OLYMPIA, WA 98504-4001

## SERVICE

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

## APPEAL RIGHTS

**Reconsideration.** Any party may petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order or (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support, should be filed by emailing it to [directorappeal@lni.wa.gov](mailto:directorappeal@lni.wa.gov) or by mailing or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

**NOTE: A petition for reconsideration is not required before seeking judicial review.** If a petition for reconsideration is filed, however, the 30-day period will begin to run upon resolving that petition. A timely filed petition for reconsideration is deemed to be denied if, within 20 days from the date the petition is filed, the Director does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. RCW 34.05.470(3).

**Judicial Review.** Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. RCW 49.48.084(5) provides, "Orders that are not appealed within the time period specified in this section and Chapter 34.05 RCW are final and binding, and not subject to further appeal." Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.



## DECLARATION OF MAILING

I, Lisa Deck, declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 21 day of February 2023, to the following via regular mail, postage prepaid and email.

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DATED this 21 day of February 2023, at Tumwater, Washington.

  
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LISA DECK