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6 **DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES**  
7 **STATE OF WASHINGTON**

8 In re: WESTWATER CONSTRUCTION  
9 COMPANY,

No. 2023-005-PW

10 Appellant/Employer.

DIRECTOR'S ORDER

11 Agency No. NOV190702

12 OAH Docket No. 10-2019-LI-01202

13 Joel Sacks, Director of the Washington State Department of Labor & Industries, having  
14 considered the Initial Order, the petitions for review filed by Westwater Construction Company  
15 (Westwater) and Intervenor Washington & Northern Idaho District Council of Laborers  
16 (Intervenor) with the Director's Office, the briefing submitted to the Director's Office by the  
17 parties, including intervenors, and the record developed at the Office of Administrative Hearings,  
18 issues this Director's Order.

19 The parties are the Department, Westwater, and the Intervenor.

20 The Director makes these Findings of Fact, Conclusions of Law, and Final Decision and  
21 Order.

22 **I. FINDINGS OF FACT**

- 23 1. The Office of Administrative Hearings issued and served the Initial Order on March 11,  
24 2022. The initial order affirmed the Department's Notice of Violation No. NOV190702.  
25 It found Westwater violated RCW 39.12.010, RCW 39.12.020, RCW 39.12.030, RCW  
26 39.12.065, WAC 296-127-011, and WAC 296-127-013 by paying 22 workers at the  
27 incorrect prevailing wage, scope of work classification for the work performed, in the  
amount of \$29,588.26. It also found Westwater violated RCW 49.28.010, RCW  
49.28.065, RCW 49.46.130, WAC 296-127-022, and WAC 296-128-015(1) by failing to

1 pay workers time and a half for hours worked in excess of eight hours per calendar day,  
2 when there were no four-ten agreements between it and the workers, failing to pay  
3 workers double-time for hours worked on Sundays, and failing to pay workers double-  
4 time for shifts in excess of 12 hours. The Initial Order found Westwater liable for a  
5 penalty of 20 percent for the total prevailing wage violation under RCW 39.12.065(3).  
6 Finally, it found that the alleged violations counted as one strike toward debarment under  
7 RCW 39.12.065.

- 8 2. On April 8, 2022, Westwater and the Intervenor timely filed petitions for administrative  
9 review with the Director.
- 10 3. The Director adopts and incorporates the Initial Order's "Hearing" summary.
- 11 4. The Director adopts and incorporates the Initial Order's findings of fact 4.1 through 4.11.
- 12 5. A pipelayer works as part of a pipelaying crew. A typical pipelaying crew includes two  
13 operators, one with an excavator for digging, one with an excavator for compacting the  
14 trench. A top man (another laborer classification) rigs and handles the pipe to get it  
15 prepared. A pipelayer is in the trench, confirming that the grade is good so that the pipe  
16 can be laid to grade, checking the bell of the pipe to ensure it is clean, making sure the  
17 gasket is in the correct place, and then setting the new pipe into the bell and completing  
18 the joint. The actual joining of the pipe is a relatively quick process that involves aligning  
19 the pipe, moving the spigot end into the bell end, and ensuring that the pipe has been  
20 pushed all the way in to ensure a proper seal. There are no unique plumbers' tools that are  
21 used to connect the pipe.
- 22 6. Laborers install ductile-iron-pipe water mains on civil road and utility projects. Ductile  
23 iron is the most predominant material used for water mains.
- 24 7. Utility contractors consistently use laborers to install ductile iron pipes when the pipes  
25 are not under pressure. The industry practice of pipelayers installing ductile-iron-pipe  
26 water mains dates back at least 25-30 years.
- 27 8. When the pipes will be joined while under pressure, the industry practice is to use  
plumbers and to pay the plumber/pipefitter rate of pay. A hot tap involves joining pipe to  
a live system, and is performed when the pipe is being joined to a system that cannot be  
turned off for some reason. Hot tapping entails fitting a T-strap around the pipe, placing a  
new valve on the tee, opening the valve, and using a specialized drill unit that can operate  
under pressure to drill through the valve. Hot tapping is significantly more complex than  
installing ductile-iron-pipe water mains. When there is a need to do a hot tap, many  
companies bring in specialty subcontractors like Speer Taps or Master Tap, which  
employ plumbers/pipefitters.
9. WAC 296-127-013 provides in part that industry practice is a factor when creating scope  
of work descriptions. The Department uses industry practice both to create and interpret  
the scopes.

- 1 10. The Director adopts and incorporates the Initial Order’s findings of fact 4.17 and 4.18.
- 2
- 3 11. Many labor union organizations, utility owners, and contractors testified that industry  
4 practice reflects that laborers scope of work applies to joining of ductile iron pipe that is  
5 not under pressure, even if the pipe will be under pressure in the future.
- 6 12. This industry practice has existed since at least 1989.
- 7 13. Plumbers and pipefitters have joined ductile iron pipe, but this is typically in special  
8 circumstances, such as when there is a hot tap, when there is scope gap, or when ductile-  
9 iron-pipe water mains are being installed in a structure like a tunnel.
- 10 14. The Director adopts and incorporates the Initial Order’s findings of fact 4.22 through  
11 4.37.
- 12 15. The Director adopts and incorporates the Initial Order’s findings of fact 4.60 through  
13 4.75.

## 14 II. CONCLUSIONS OF LAW

- 15 1. The Director adopts and incorporates the Initial Order’s conclusions of law 5.1 through  
16 5.22.
- 17 2. The ALJ erred when he concluded that he lacked authority to address the Department’s  
18 interpretation of the subject regulations.
- 19 3. Statutory construction rules apply to administrative rules just as they do to statutes. *Dep’t*  
20 *of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002) (quoting *City of Kent v.*  
21 *Beigh*, 145 Wn.2d 33, 45, 32 P.3d 258 (2001)). Under plain language analysis, the court  
22 determines a rule’s meaning from its terms “to give effect to its underlying policy and  
23 intent.” *Id.* at 56. The fundamental objective in interpreting a statute is to give effect to  
24 the drafter’s intent. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). If the  
25 statute’s meaning is plain on its face, then the court gives effect to that plain meaning as  
26 an expression of legislative intent. *Associated Press v. Wash. State Legislature*, 194  
27 Wn.2d 915, 920, 454 P.3d 93 (2019). If there is more than one reasonable interpretation  
of the statute, the statute is ambiguous and the court uses canons of construction. *See*  
*Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).
4. Whether the laborer/pipelayer or plumber/pipefitter wage rate applies turns on whether  
the ductile iron pipe “will be under pressure” or “will not be under pressure.” The  
laborer/pipelayer wage rate applies to “[j]oining ductile iron pipe by using screws, bolts,  
fittings, caulking or any other method for making joints in the industry, *when the pipe*  
*will not be under pressure.*” WAC 296-127-01340 (emphasis added). The  
plumber/pipefitter wage rate, by contrast, applies to “[j]oining [ductile iron] pipes by

1 using any method for making joints in the industry, *when the pipe will be under*  
2 *pressure.*" WAC 296-127-01364 (emphasis added).

- 3 5. In the Department's view, the phrases "will be under pressure" and "will not be under  
4 pressure" refer to the time when the system is operating. It contends that if the system  
5 will be pressurized once in operation, the plumber/pipefitter wage rate applies, and that  
6 the laborer/pipelayer wage rate applies only to work on systems that are unpressurized  
7 during operation. The Department asserts that the regulations are unambiguous, so no  
8 evidence about industry practice should be considered.
- 9 6. Westwater and the Intervenor say that the phrase "will be under pressure" refers to the  
10 time when the work is performed. So if the ductile iron pipe will be under pressure during  
11 the joining of the pipe, the plumber/pipefitter wage rate applies. But if pipe is not under  
12 pressure during the joining, even if it will ultimately be under pressure during operation,  
13 the work should be paid at the laborer/pipelayer rate.
- 14 7. The scope of work regulations for pipefitter and laborer are subject to more than one  
15 reasonable interpretation and are thus ambiguous. While the use of the future tense in the  
16 phrases "will be under pressure" and "will not be under pressure" denotes some point in  
17 the future, this language does not indicate what point in the future is being referenced. On  
18 the one hand, it could refer to the point in time when the system is in operation, as the  
19 Department argues. Or it could mean that the pipe will be under pressure during  
20 performance of the work, as argued by Westwater and the Intervenor. This means the  
21 regulation is ambiguous.
- 22 8. Because the regulations are ambiguous, it is appropriate to look beyond their plain  
23 language to assess their meaning. The purpose of the prevailing wage laws is to protect  
24 employees from substandard wages and "preserve local wage standards." *Everett*  
25 *Concrete Products, Inc. v. Dep't of Lab. & Indus.*, 109 Wn.2d 819, 823-24, 748 P.2d  
26 1112 (1988). At the time the Department adopted the scope of work regulations, it was  
27 required to look to approved apprenticeship standards, collective bargaining agreements,  
dictionaries of occupational titles, construction industry experts, and recognized industry  
practice. WAC 296-127-013. The Department agrees that, for ambiguous scope of work  
descriptions, it is proper to look to industry practice when determining the meaning of  
those scopes.
9. Here, the recognized industry practice has been to use laborers, not plumbers, to install  
ductile-iron-pipe water mains when the pipe is not under pressure at the time the work is  
being done. This practice has existed for decades, since at least 1989. It was the  
recognized practice at the time the scope of work regulations were codified.
10. WAC 296-127-01364 does not apply to the installation of ductile-iron-pipe water mains  
when the pipe is not "under pressure" when the pipe is being installed. WAC 296-127-  
01340 governs that work.

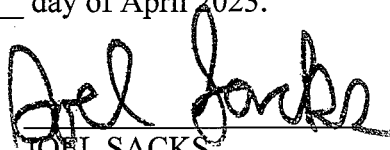
- 1 11. WAC 296-127-01364 does apply to “hot taps” or “live taps” of ductile-iron-pipe water  
2 mains when the pipe is “under pressure” when the work is being done.
- 3 12. The ALJ erred by affirming the Department’s application of plumber/pipefitter wage  
4 rates to the installation of the ductile-iron-pipe water mains at issue, since those water  
5 mains were not under pressure at the time of construction.
- 6 13. The proper wage rate for the ductile-iron-pipe water main work at issue was the  
7 laborer/pipelayer rate.
- 8 14. The Director adopts and incorporates the Initial Order’s conclusions of law 5.30 through  
9 5.31.
- 10 15. In this case, the prevailing wage rates for ironworker, cement mason, as well as flagger,  
11 overtime, and double time hours and rates applied to the City of Bothell, at the time of  
12 the Mainstreet Enhancement Project. The ironworker prevailing wage rate was \$65.53  
13 per hour. The cement mason prevailing wage rate was \$55.56. In addition, Westwater did  
14 not have any four-ten agreements in place with its workers. Westwater argues that the  
15 Department’s hours were not accurate and relies on its testimony and the certified payroll  
16 records, paystubs, foreman reports, and timesheets.
- 17 16. The Director adopts and incorporates the Initial Order’s conclusions of law 5.33 through  
18 5.34.
- 19 17. Westwater argues that equitable estoppel bars the Department from pursuing the alleged  
20 violation regarding application of the plumber/pipefitter rate because the Department  
21 approved Westwater’s Statements of Intent to Pay Prevailing Wage. Because the Director  
22 reverses the Department’s Notice of Violation with respect to application of the  
23 plumber/pipefitter rate, the Director need not reach this issue. The Director notes,  
24 however, that Westwater has failed to prove the elements of estoppel by clear, cogent and  
25 convincing evidence. It was not reasonable for Westwater to have relied upon the  
26 Department’s approval of statements of intent to pay prevailing wage and affidavits of  
27 wages paid when all contractors that submit intents and affidavits must acknowledge the  
disclaimer that approvals do not signify approvals of classifications. In addition,  
application of estoppel on this basis would severely impair the exercise of governmental  
functions by undermining L&I’s ability to enforce prevailing wage laws.
18. The Director adopts and incorporates the Initial Order’s conclusions of law 5.36 through  
5.37, and conclusion of law 5.41.
19. This matter is remanded to the Office of Administrative Hearings for the purpose of  
determining the amount of wages owed to Westwater employees in light of the Director’s  
determination that the Department erred in finding that the plumber/pipefitter rate of pay  
applied to the joining of ductile-iron-water mains when the pipes are not under pressure  
at the time of joining.

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**III. ORDER**

1. Consistent with the above Findings of Fact and Conclusions of Law, the Director reverses the March 11, 2022 Initial Order to the extent that it concludes that the plumber/pipefitter rate of pay applied to the installation of ductile-iron-pipe water mains.
2. This matter is remanded to the Office of Administrative Hearings for further proceedings consistent with this order pursuant to WAC 296-127-170(7). The Administrative Law Judge shall recalculate the amount of wages owed to Westwater employees and issue an Amended Initial Order in light of the Director's conclusion that the laborer/pipelayer rate of pay applies to the joining of ductile-iron-pipe water mains that are not under pressure at the time of joining.

DATED at Tumwater, Washington this 11 day of April 2023.

  
JOEL SACKS  
Director



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2 **DECLARATION OF SERVICE**

3 I, Lisa Deck, declare under penalty of perjury under the laws of the State of Washington,  
4 that the DIRECTOR'S ORDER was mailed on the 11 day of April 2023, to the following via  
5 regular mail, postage prepaid and email.

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24 DATED at Tumwater, Washington this 11 day of April 2023.

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26   
27 LISA DECK