

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

In re:

Penhall Company,

Appellant,

Notice of Violation No. NOV210201

OAH Docket No. 06-2021-LI-01655

No. 2023-013-PW

DIRECTOR'S ORDER

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Initial Order served on April 13, 2023; having considered the petition for administrative review filed by the Prevailing Wage Section of the Department of Labor and Industries (Department) and the briefing submitted to the Director's Office; and having reviewed the record and files created at hearing, issues this Director's Order.

Under WAC 296-127-01396's plain language, ground penetrating radar (GPR) concrete scanning and x-ray imaging work falls within the construction site surveyor scope of work because this result tracks the terms of the regulation. And WAC 296-127-01344, the laborer scope of work, has terms that preclude application of the laborer scope. So the construction site surveyor scope is the best fit, and the February 11, 2021 Notice of Violation (NOV) is

AFFIRMED AS MODIFIED.

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

DIRECTOR'S ORDER

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

I. FINDINGS OF FACT¹

The Director finds:

E-130 Public Work

1. Penhall is a concrete drilling and saw cutting company.
2. Penhall began its operations in 1957. It has 40 offices throughout the United States and Canada. Penhall has performed GPR concrete scanning services in Seattle for approximately 13 years. In addition to GPR scanning, Penhall uses x-ray concrete imaging to detect concrete embedments. (An embedment is a buried object—the terms are used interchangeably.)
3. The work at issue was performed on-site as part of the Sound Transit East Link Extension Project (E-130 Project). The parties stipulated that the E-130 Project is a public works contract and that Sound Transit is a public agency.
4. The prime contractor for the E-130 Project was Kiewit-Hoffman. On or about July 14, 2017, Penhall entered into a subcontract with Kiewit-Hoffman to perform bridge demolition, GPR scanning, barrier cutting, and core drilling in support of the E-130 Project.

GPR Scanning and X-Ray Concrete Imaging

5. GPR concrete scanning and digital x-ray imaging tools identify and locate subsurface embedments in concrete. GPR and digital x-ray tools can locate objects with greater precision than methods of ferro scanning and looking at the as-builts plans. Wiltshire, Tr. 21-23 (Dec. 12, 2022). A ferro scan is similar to a stud finder in that it signals with a green or red light if iron is detected below. *Id.* at 21-22. But it is inferior to GPR scanning because ferro scanning doesn't indicate the depth and precise location of buried objects with their varied compositions like the post-tension cables. *Id.*² And digital x-rays are safer than non-digital methods. *Id.* at 20-21. Defensive drilling techniques are used to not hit embedments when drilling. *Id.* at 23-24.
6. GPR analysts and x-ray technicians worked on the project on the I-90 Bridge. For most of the project, they were either scanning the pontoons to use for core drill holes or scanning the bridge columns, bridge piers, and caps. Wiltshire, Tr. 16 (Dec. 12, 2022). Penhall's GPR analysts used the Mini XT, a self-contained electronic unit with radar emitting antenna, to scan areas of concrete pre-marked for drilling. The GPR units measure the time-delay between the emission and return of the radar and then display the data on a digital screen. GPR analysts interpret the data to determine the location, elevation, distance, and depth of buried objects from the scanned surface

¹ Differences in the Initial Order's Findings of Fact are discussed in the Conclusions of Law Appendix.

² It is beyond the scope of this decision to determine whether ferro scanning and non-digital x-ray devices were construction site surveyor methods. Contrary to Penhall's suggestion, this issue has not been decided. Christensen, Tr. 54 (Dec. 8, 2022).

7. Digital x-ray imaging involves technicians, in teams of two, placing an x-ray tube on one side of a concrete slab and aligning it with a digital detector plate on the other. The x-ray tube emits radiation to produce a digital image of the concrete interior to identify and locate embedments, such as post-tension cable, rebar, and conduit. The technicians have to control the device in terms of voltage and amperage to shape the results of the x-rays. Garcia, Tr. 101 (Dec. 5, 2022). The x-ray technicians took pictures of deck (where vehicles drove) to determine the location of objects. Wiltshire, Tr. 19 (Dec. 12, 2022). They used x-ray imaging for locating post-tension cables to avoid hitting them and damaging the bridge. Galloway, Tr. 122 (Dec. 13, 2022).
8. The Director finds that Mini XT handheld radar unit, x-ray emitter, and x-ray detectors used by the GPR analysts and x-ray technicians are “electronic measuring devices” because they are used to establish location, elevation, distance, and other measurements like depth of subsurface objects.
9. As part of the GPR scanner and x-ray imaging work, Penhall employees also used lasers. Garcia, Tr. 87, 90, 97 (Dec. 5, 2022). Penhall’s employees used lasers alongside the digital x-ray imaging system to help properly align it. *Id.* at 90, 102. The GPR unit has “two lasers that come out of the side of the device,” which help “line up” the device while scanning. *Id.* at 97. The lasers are not used as a level but are used to target. *Id.* at 151-52. The lasers are used when establishing the locations of the embedments. *Id.* at 90, 97, 101, 151-52.
10. After scanning or imaging an area, GPR analysts and x-ray technicians create a diagram of their findings on the surface of the concrete, marking the location, distance, elevation, and depth of embedments within the target area. Penhall’s standard marking protocols include the use of different colors to distinguish types of identified embedments. Peter Brands, Penhall’s expert, testified that in his construction site survey work, they use markings like color-coded ribbons to note their findings. Brands, Tr. 100, 103 (Dec. 12, 2022).
11. Conditions of the site, such as moisture, harder aggregate, and environmental or weather conditions can affect GPR measurements. Marking protocols include an extra 2” barrier or rebar, and a 3” barrier for post-tension cables. This buffer is known as an exclusion zone, which drillers should avoid.
12. Crews performing concrete cutting and core drilling on the E-130 project utilized GPR and digital x-ray markings to help avoid striking embedments within the target area.
13. The main purpose of GPR scanning and x-ray concrete imaging, in connection with core drilling, is to prevent “drill strikes” on subsurface embedments, such as rebar or post-tension cables, while boring holes in concrete. The GPR analyst and X-ray technician activities aid with the accuracy of drilling and cutting concrete. “Almost always, [GPR scanning occurs] because [the customer] is going to be drilling a hole in concrete.” Plemel Tr. 138 (Dec. 8, 2022). “GPR is applying the tenets of radar or radio detection and ranging in order to determine the depths and . . . properties of objects within a substrate or a . . . solid medium.” *Id.* at 125; Ex. 13 at 11-14; Ex. 15 at 1. The GPR sends out a

wave that goes through the concrete and bounces back with data. Wiltshire, Tr. 18 (Dec. 12, 2022); Garcia Tr. 97 (Dec. 5, 2022). It involves the refraction of signals. Plemel, Tr. 125 (Dec. 8, 2022). The GPR measures “depth, depth of items, and keeps track of the distance so that you can compare them.” Garcia, Tr. 97 (Dec. 5, 2022). The GPR measures as “you move back over that significant shape which is called a hyperbola, the lasers should line up with it. In actuality, what it means is that the antenna of the device is directly over top of something if you're at the peak of the parabola.” Garcia, Tr. 97 (Dec. 5, 2022); Wiltshire, Tr. 18 (Dec. 12, 2022).

14. The GPR analyst calibrates the image and dimensions as part of locating the buried objects. Garcia, Tr. 111 (Dec. 5, 2022). They analyze and interpret the data. *Id.* at 82. “It’s an interpretive analysis. That’s why the title is GPR analyst, and we’re making our . . . best assumptions about what is underneath.” Doser, Tr. 43 (Dec. 9, 2022). Their work involves examining an area on the site of a public works project; performing mathematical and geometric calculations using the hyperbola and parabola; using results in geometrical renderings; taking linear measurements; delineating the location, elevation, distance, and depth of existing features; calibrating the dimensioning of objects buried in concrete, as well as using computerized three-dimensional readings; and interpreting the measurements and data. Garcia, Tr. 97-98, 106, 110-11 (Dec. 5, 2022). GPR analysts and x-ray technicians work with others to determine where to scan and do not exercise independent judgment to determine where to scan. Instead, an engineer places a blue dot or an “X” to mark target areas for scanning.
15. The record contains no evidence that GPR concrete scanning is part of an established apprenticeship program. GPR analysts learn to use and interpret the Mini XT through on-the-job training. Penhall Vice President Elisabeth Doser testified that Penhall provides training that teaches use of the equipment, the basic science of GPR, what it can and can’t do, standard marking protocol, and Penhall’s standards and processes. Doser, Tr. 40 (Dec. 9, 2022).
16. X-ray technicians receive approximately 40 hours of classroom radiography and radiation safety instruction prior to on-the-job training. The record contains no evidence of an apprenticeship program for x-ray technicians.
17. GPR analysts and x-ray technicians disclaim any responsibility for striking objects; instead, their scans and images provide a best estimate of what lies beneath the surface of concrete.
18. GPR analysts and x-ray technicians did not use transits, tripod mounted levels, electrotape, and theodolites. They use what the Director finds to be electronic measurement tools—Mini XT handheld radar units, x-ray emitters, and x-ray detectors, as well as lasers. Garcia, Tr. 87, 90, 97 (Dec. 5, 2022).
19. GPR scanning and x-ray concrete imaging work is both physical and mental in nature and performed exclusively on the construction site.

20. Mr. Garcia, the complainant in this case, had no prior technical knowledge or experience with GPR scanning or x-ray imaging equipment or processes before joining Penhall as an analyst and technician.

Construction Site Surveyors

21. Some construction site surveyors' work aims to generate control points and mark positions based on mathematical coordinates derived from building plans, so other construction trades can build improvements in the correct site locations. This type of construction site surveyor is responsible for laying positions on the construction site based on the general contractor's building plans. The Director finds that other construction site surveyors perform GPR concrete scanning and digital x-ray imaging to determine the location, elevation, distance, and depth of embedments. Although there are some differences in the type of construction site survey work that Penhall witness, Peter Brands performs and that performed by GPR analysts and x-ray imaging technicians, the two work activities have similar features, including the use of lasers and electronic measuring devices for measuring location, elevation, and distance.
- 21.1 Survey work includes the understanding of geometry, mathematics and applying it to the earth. Mr. Brands' work involves using machines that rely on principles of geometry and mathematics, and so does the work of GPR analysts and technicians. Garcia, Tr. 97-98, 106, 110-11 (Dec. 5, 2022); Wiltshire, Tr. 18 (Dec. 12, 2022); Director Order Finding of Fact No. 18. Both types work with the earth.
- 21.2 Survey work includes analysis and mental work. Mr. Brands' work involves analysis. *See* Brands, Tr. 92, 99 (Dec. 12, 2022). The GPR analyst's work involves analysis of data. Garcia, Tr. 82, 97-98, 106, 110-11 (Dec. 5, 2022); Wiltshire, Tr. 18 (Dec. 12, 2022).
- 21.3 Mr. Brands stated that he looked for control points at a distance and with vertical changes. Brands, Tr. 104 (Dec. 12, 2022). GPR analysis and x-ray imaging technicians electronically look for location, distance, and vertical changes. Director Order Finding of Fact No. 11.
- 21.4 Mr. Brands reported that he used markings like color-coded ribbons to note findings. Brands, Tr. 100, 103 (Dec. 12, 2022). GPR analysts and x-ray technicians used markings to describe their findings. Director Order Finding of Fact No. 15.
- 21.5 One of the tools Mr. Brands uses is a metal detector. Brands, Tr. 118 (Dec. 12, 2022). He finds things like rebar under the surface. *Id.* at 119. Likewise, GPR analysis and x-ray imaging technicians look for subsurface objects. Director Order Finding of Fact No. 11-12.
- 21.6 Mr. Brands uses a "total station," which is theodolite or transit that uses a laser. Brands, Tr. 121-22 (Dec. 12, 2022). A total station uses a laser to measure distances. *Id.* at 122. This equipment works with a data collector to do the

calculations, and it measures the distances. *Id.* at 129-31. Brands also uses parabolic mirrors to bounce light from one position to the other to gauge distance. *Id.* at 122. GPR analysis and x-ray imaging technicians use lasers and other electronic measuring equipment to gage and calculate distances and bounce signals. Director Order Finding of Fact No. 14, 18.

- 21.7 Mr. Brands provides directions to either cut or fill, to add material, or to take away material from a particular location. Brands, Tr. 146 (Dec. 12, 2022). GPR analysis and x-ray imaging technicians provide information as to where it safe to drill to avoid “drill strikes.” Director Order Finding of Fact No. 18.
22. Construction site surveyors use survey tools, including transits, tripod mounted levels, electrotape, theodolites, lasers, or electronic measuring devices.

Union and Contractors

23. In May 2016, Penhall participated in a pre-job meeting related to the E-130 project. A pre-job meeting includes union representatives and the contractor, who assigns work to a particular trade/craft. During the May 2016 pre-job meeting, laborers claimed Penhall’s concrete core drilling and sawing work. However, no unions claimed GPR concrete scanning and x-ray concrete imaging.
24. On May 31, 2016, the Seattle Building Trades Council communicated its agreement, in an email to Penhall, that GPR scanning and x-ray analysis is non-craft work, outside of the PLA’s scope.

Information about Scope

25. Beginning in November 2016, Penhall sought a determination from the Department regarding concrete scanning and its classification. On December 20, 2016, Laura Herman, Industrial Relations Specialist, advised Penhall that GPR scanning and x-ray imaging fell within the construction site surveyor scope of work.
26. On February 13, 2017, in response to Ms. Herman’s technical guidance, Penhall requested a formal determination from the Department’s Industrial Statistician, Jim Christenson. Receiving no response, Penhall renewed its request on March 14, 2017.
27. Mr. Christenson had no memory of ever responding to Penhall’s request for a determination. The record contains no evidence of any response from the Department’s Industrial Statistician.

Statement of Intent to Pay Prevailing Wage and Certified Payroll Records

28. On July 17, 2017, Penhall filed a “Statement of Intent to Pay Prevailing Wages.” Therein, Penhall identified laborers, in the occupations of “concrete saw operator/core driller” and “general laborer” as its employees entitled to prevailing wage. Penhall’s Statement of Intent did not include its GPR analysts or x-ray technicians.

Change in Union Position

29. During or about the first quarter of 2019, laborers union contacted Penhall to claim GPR scanning and x-ray concrete imaging work. During or about July 2019, Penhall's GPR analysts and x-ray technicians joined the laborers union.
30. The Operating Engineers union claimed construction site surveyor work for individuals who generate control points and mark positions based on mathematical coordinates derived from building plans. It does not claim the contested work for GPR analysts and x-ray imaging technicians. It did not dispute the laborer's 2019 claim for Penhall's GPR concrete scanning work.
31. Operating Engineers claim construction site surveyor work for individuals who generate control points and mark positions based on mathematical coordinates derived from building plans. Such work is included in the Operating Engineers' 6,000-hour apprenticeship program.

Laborers

32. The laborer scope of work is a non-exhaustive list of tasks performed by laborers. WAC 296-127-01344. The list of work processes contained in the laborers' scope of work is preceded with, "[f]or the intents and purposes of the Washington state public works law, chapter 39.12 RCW, laborers perform a variety of tasks such as: ..." WAC 296-127-01344.
33. Laborers claim several occupations that are not specifically enumerated in the laborers' scope of work. These occupations include concrete core driller, concrete saw operator, air tac drill operator, brush cutters, hydraulic diamond cutters, and electric air & gas.
34. The Department's prevailing wage rates for the laborer trade include several job classifications not enumerated in WAC 296-127-01344.

Prevailing Wage Complaint

35. On February 7, 2019, Thomas Garcia filed a Prevailing Wage Worker Complaint ("complaint") against Penhall. Therein, Mr. Garcia asserted that he was entitled to prevailing wage, as a construction site surveyor, for work performed as a Penhall GPR analyst and x-ray technician from April 2, 2018 until December 26, 2018.
36. Penhall paid Mr. Garcia \$38.57 per hour, fringe benefits in the amount of \$2.43 per hour, and overtime for hours in excess of 40 per week. *Id.* In his complaint, Mr. Garcia contended that he was owed \$60.49 per hour and overtime for hours in excess of 8 per day. *Id.*
37. Mr. Garcia's rate of pay, including fringe benefits, was less than the prevailing wage for laborers or construction site surveyors.

38. On February 18, 2019, the Department assigned Mr. Garcia's complaint to Industrial Relations Agent, Barbie Lima Gierbolini.
39. On February 19, 2019, Ms. Lima Gierbolini printed off the construction site surveyor scope of work, WAC 296-127-01396. Ms. Lima Gierbolini did not print, review, or consider any other scopes of work after commencing her investigation.
40. On May 21, 2019, Ms. Lima Gierbolini received instructions from "headquarters," stating that GPR or x-ray work in support of a construction contract is classified under the construction site surveyor scope of work, WAC 296-127-01396.
41. Industrial Relations Agent Ramona Christensen-Russell directed Ms. Lima Gierbolini to apply the construction site surveyor scope of work in her investigation. In doing so, Ms. Christensen-Russell forwarded a 2017 email communication from Industrial Relations Agent Laura Herman, which also asserted that the surveyor classification applied to the work at issue.
42. Ms. Lima Gierbolini did not independently analyze the classification of GPR scanning and x-ray imaging as construction site surveyor work. Ms. Lima Gierbolini specializes in math, not scope of work classifications. She does not purport to have an opinion regarding the appropriate classification for the work at issue.
43. The Department did not call Laura Herman or Ramona Christensen-Russell to present first-hand testimony regarding their scope of work analysis or the basis for the Department's classification decision in this case.
44. The Department stipulated that it did not consider industry practice in its classification decision in this case. This stipulation reflects that the Department's consistent practice has been to "faithfully apply the plain language of scope of work descriptions," with the understanding that "[i]ndustry practice does not trump the plain language of a scope of work description." Ex. B at 1, 4.
45. A site visit helps identify the purpose of the work being performed, an important factor in its classification. The Department did not conduct a site visit as part of its investigation in this case. Site visits don't occur for every investigation. Christensen, Tr. 64 (Dec. 8, 2022).
46. During her investigation, Ms. Lima Gierbolini requested records from Sound Transit, Kiewit-Hoffman, and Penhall. Responsive certified payroll records did not include Penhall's employees who performed GPR scanning and/or x-ray imaging work in support of the E-130 Project.
47. Penhall subsequently provided the Department with daily timecards and weekly pay statements for its GPR analysts and x-ray technicians. Using these records, Ms. Lima Gierbolini conducted an audit to calculate wages owing Penhall's 37 GPR analysts and x-ray technicians, at the prevailing wage rate for construction site surveyors.

48. Through its investigation and audit, the Department determined that Penhall failed to pay 37 GPR analysts and x-ray technicians prevailing wages for construction site surveyors, and that a violation occurred. On February 11, 2021, the Department issued the NOV here on appeal.

Notice of Violation/Office of Administrative Hearings

49. On February 11, 2021, the Department issued NOV No. NOV210201, in which the Department alleged that Penhall failed to pay prevailing wages and overtime to 37 employees who performed GPR scanning and/or x-ray imaging work, failed to pay daily overtime as required, and filed 108 false certified payroll records, which omitted these 37 workers. This work was on the I-90 bridge project.
50. The NOV alleged that the affected workers performed work under the construction site surveyor scope of work classification, WAC 296-127-01396, and were entitled to overtime pay for hours worked in excess of 8 per calendar day.
51. The NOV assessed \$501,758.70 in unpaid prevailing wages; \$146,850.98 in interest for unpaid prevailing wages; a \$100,351.74 civil monetary penalty for failure to pay prevailing wages; and a \$54,000.00 civil monetary penalty for an alleged certified payroll records violation. The NOV assessed a total of \$804,961.42 in wages, interest, and penalties.
52. On March 10, 2021, Penhall timely appealed the NOV. The Department referred this matter to the Office of Administrative Hearings.

Director Appeal

53. The Initial Order was served on the parties on April 13, 2023. It ruled that Penhall failed to pay prevailing wages, and owed payments under the laborer scope of work. It ruled that Penhall's failure to pay prevailing wages and file certified payroll records was due to inadvertence. It remanded to the Department to recalculate the wages under the laborers scope.
54. On May 15, 2023, the Department petitioned for administrative review with the Director. Penhall Company did not petition for administrative review.

II. CONCLUSIONS OF LAW

The Director concludes:

1. Based on the Department's timely filed petition for review, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.

Failure to Petition for Administrative Review

2. Any petition for administrative review of the Initial Order was due 30 days after service of the order. WAC 296-127-170(5).

DIRECTOR'S ORDER

3. Because Penhall did not appeal from the Initial Order, any adverse ruling cannot now be contested by Penhall. WAC 296-127-170(5); see *Devore v. Dep't of Soc. & Health Servs.*, 80 Wn. App. 177, 181, 906 P.2d 1016 (1995).
4. The Initial Order concluded that “[b]ased on the foregoing and the findings of fact herein, the Department has met its burden to establish that the work at issue is covered under RCW 39.12, and that prevailing wages are owing.” Initial Order Conclusion of Law No. 5.13. This conclusion, as well as other adverse conclusions to Penhall cannot be disputed now by Penhall and is adopted. This means, among other things, that Penhall cannot contest that there is covered work under RCW 39.12; the import of the PLA; the wage calculations, including overtime and benefits; and the determination that there was a failure to pay prevailing wages and file certified payroll records. Accordingly, the Director adopts Initial Order Findings of Fact No. 4.10 to 4.14, and the Director adopts Initial Order Conclusions of Law No. 5.6, 5.13, 5.25 to 5.37 together with the Director’s enumerated conclusions.

Burden of Proof and Standard of Review

5. In an appeal of a NOV, the Department has the burden of proving by a preponderance of the evidence that the violations occurred and that any wages were unpaid as stated in the notice. WAC 296-127-170(1).
6. The Director reviews de novo the Department’s NOV, giving due regard for the presiding officer’s ability to observe the witnesses. RCW 34.05.464(4).

Scopes of Work

7. Washington’s Prevailing Wages on Public Works Act requires payment of not less than the prevailing rate of wage for an hour’s work “in the same trade or occupation” to laborers, workers, or mechanics upon all public works. RCW 39.12.020. The Director appoints an industrial statistician who makes the agency determinations of the prevailing rate of wage. RCW 43.22.260-.270; RCW 39.12.015.
8. The Department’s prevailing wage rules (WAC 296-127) provide for the issuance of “scope of work descriptions for each trade and occupation recognized as being involved in public work.” WAC 296-127-013(1).
9. This case primarily concerns interpreting scopes of work WAC 296-127-01396 and WAC 296-127-01344. Statutory construction rules apply to administrative rules just as they do to statutes. *Dep’t of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). Under the plain language analysis, the court determines a rule’s meaning from its terms “to give effect to its underlying policy and intent.” *Id.* at 56. The court reads no term in a rule in isolation, but within the context of the regulatory scheme. See *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993). The court gives effect to all the language in a rule, harmonizing all provisions. *Cannon*, 147 Wn.2d at 57. “The court should not construe a regulation in a manner that is strained or leads to absurd results.” *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002).

10. Determining the drafter's intent and purpose is the first step in analyzing a regulation. *See Cannon*, 147 Wn.2d at 56. The purpose of the Prevailing Wages on Public Works Act is to protect employees on public works projects from substandard wages and preserve local wages. *Associated Gen. Contractors of Wash. v. State*, 200 Wn.2d 396, 400, 518 P.3d 639 (2022). The worker is the intended beneficiary of the act, not the contractor. *Id.*
11. The Department looks for the best fit, the "best estimation" for a scope of work. *Cf. D.W. Close Co. v. Dep't of Lab. & Indus.*, 143 Wn. App. 118, 132, 177 P.3d 143 (2008)"

Scope of Work—Construction Site Surveyor

12. WAC 296-127-01396 provides the description of the scope of work for construction site surveyors:

For the purpose of the Washington state public works law, chapter 39.12 RCW, construction site surveyors perform survey work which requires the use or utilization of transits, tripod mounted levels, lasers, electrotape and other electronic measuring devices or theodolites to establish a location, an elevation or grade, distances, and other measurements.

The work of the construction site surveyor includes, but is not limited to:

(1) Survey work performed after the contract is awarded and during the actual construction in direct support of construction crews when the worker is in the employ of and working under the direction of a construction contractor to survey checkpoints of location and grade on a construction site using a variety of measurement tools, instruments, and procedures.

(2) The construction site surveyor scope of work does not include surveying services not within the description in subsection (1) of this section that are required by specification or contract or state law to be performed under the direct supervision of individuals registered under chapter 18.43 RCW.

13. It must be determined whether WAC 296-127-01396 is the best fit for the GPR analyst and x-ray imaging work.
 - 13.1 Construction site surveyors "perform survey work . . . to establish a location, an elevation or grade, distances, and other measurements." WAC 296-127-01396. Broadly speaking under the language of the regulation, survey work is the establishing of a location, elevation, grade, distance, or other measurements. *Id.*; Christensen, Tr. 91 (Dec. 8, 2022).
 - 13.2 "Location" is "a position . . . marked by some distinguishing feature."³ "Elevation" is "locating something in three dimensional space." Christensen, Tr. 80 (Dec. 7, 2022). It is "a geometrical drawing that depicts one vertical plane of

³ <https://www.merriam-webster.com/dictionary/location>.

an object or structure.”⁴ “Distance” is “the degree or amount of separation between two points, lines, surfaces, or objects.”⁵ “Measurement” is “a figure, extent, or amount obtained by measuring : Dimension.”⁶ The purpose of the GPR scanning and x-ray imaging performed is to establish and mark positions of buried objects within existing concrete structures. The GPR analysts and x-ray technicians look for locations as a point that has distinguishing features, elevations in the vertical plane in a three-dimensional space, distances between points, and other measurements such as depth. The work here involved examining an area on the site of a public works project; performing mathematical and geometric calculations using the hyperbola and parabola; using results in geometrical renderings; taking linear measurements; delineating the location, elevation, distance, and depth of existing features; and calibrating the dimensioning of objects buried in concrete, as well as using computerized three-dimensional readings. This is survey work that satisfies the construction site surveyor scope of work. *See* Director’s Order Finding of Fact Nos. 5, 13-14, 21, 21.1 to 21.6.

- 13.3 And GPR analysts and x-ray technicians used survey tools as required: lasers, measurement tools, and electronic measuring devices. These were used to establish locations, elevations, depths, and distances. Director’s Order Finding of Fact Nos. 8-9.
- 13.4 The work described by Mr. Brands is also construction site surveyor work, but it is not an exclusive description of such work. The reason the work described by Mr. Brands and Mr. Garcia are both considered construction site surveyor work is that each of their work stems from the meaning of survey work. Mr. Brands and Mr. Garcia described work that had overlapping attributes as described in Director Order Finding of Fact No. 21.1 to 21.6. In addition, the GPR analysts and x-ray technicians use tools “required” in the regulation: lasers and electronic measuring devices. Director’s Order Finding of Fact Nos. 8-9.
- 13.5 Penhall argues that “survey work” is limited to “laying out (i.e., staking out) of the construction site.” Penhall Company’s Response Br. (Penhall Br.) 38. It argues, “[a] construction site surveyor is responsible for laying positions on the construction site based upon the general contractor’s building plans.” Penhall Br. 7 (quoting Initial Order Finding of Fact No. 4.31). But there is no such limitation in WAC 296-127-01396. The scope of work says nothing about requiring staking out or building plans. In essence, Penhall impermissibly asks the tribunal to add words to the regulation. *See Fuller*, 177 Wn.2d at 269.
- 13.6 Penhall’s arguments about boundaries are based on the laws governing the inapposite land surveyor profession. Penhall Br. 38-39. Penhall quotes RCW 18.43.020(11) for the duties of a land surveyor in relation to drawing corners,

⁴ <https://www.merriam-webster.com/dictionary/elevation>.

⁵ <https://www.merriam-webster.com/dictionary/distance>.

⁶ <https://www.merriam-webster.com/dictionary/measurement>.

lines, and boundaries. Penhall Br. 38. But WAC 296-127-01396(2) specifies that this law does not apply: “[t]he construction site surveyor scope of work does not include surveying services . . . that are required by specification or contract or state law to be performed under the direct supervision of individuals registered under chapter 18.43 RCW.”

- 13.7 Penhall says that the GPR concrete scanning and digital x-ray imaging work isn’t survey work because it “is attempting to detect subsurface objects to avoid while concrete drilling.” Penhall Br. 39. But such work is plainly within the scope of the regulation. Its purpose is to establish the locations, elevations, distances, and other measurements such as depths of the buried objects, including their distances from the surface, their size and shape, and their positions relative to one another. *See* Director’s Order Finding of Fact Nos. 5, 13-14.
14. The introductory sentence of WAC 296-127-01396 provides that for the purposes of prevailing wage laws, construction site surveyors perform survey work that “requires the use or utilization of transits, tripod mounted levels, lasers, electrotape and other electronic measuring devices or theodolites to establish a location, an elevation or grade, distances, and other measurements.”
- 14.1 The Initial Order divided WAC 296-127-01396 into two categories of tools: “[Part 1] transits, tripod mounted levels, lasers, electrotape” and “[Part 2] other electronic measuring devices or theodolites.” Initial Order Conclusion of Law 5.19. And the decision concluded that a selection from both categories of tools was required for the construction site surveyor scope to apply. *Id.* Likewise, Penhall argues that “[t]he plain language of the construction site surveyor scope of work requires that work performed must use at least [Part 1] one specifically enumerated survey tool in conjunction with [Part 2] an ‘other electronic measuring device’ in order for the ‘other electronic measuring’ device to bring the work under WAC-01396.” Penhall Br. 36. This interpretation of the regulation is not supported by its words.
- 14.2 Regulations are to be given “a rational, sensible interpretation.” *Cannon*, 147 Wn.2d at 57. WAC 296-127-01396 lists all the various tools that may be used for survey work. The regulation is properly read as allowing “[1] transits, [2] tripod mounted levels, [3] lasers, [4] electrotape and [5] other electronic measuring devices [,] or [6] theodolites to establish a location, an elevation or grade, distances, and other measurements.” The plain language of the introductory sentence reflects an intent to list a *series* of tools. To that end, there is an omitted comma before “theodolites,” but this omission is not dispositive when reading the provision as a whole. *See United States v. Bass*, 404 U.S. 336, 340 n.6, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971); *Airborne San Diego, LLC v. Travelers Prop. Cas. Co. of Am.*, 538 F. Supp. 3d 1032, 1042 (S.D. Cal. 2021). The listing of the tools is a series, and the fact that there is no comma before “theodolites” doesn’t change that the introductory sentence in the regulation contains a series under a sensible and natural reading of the sentence. Otherwise, under the last antecedent

rule “to establish a location, an elevation or grade, distances, and other measurements” would only modify theodolites, which makes no sense. *See State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010) (last antecedent rule not applied if applying rule would result in an absurd or nonsensical interpretation).

- 14.3 The alleged Part 1 and Part 2 construct would cause absurd results by unnaturally cutting the sentence into two parts. The plain language accounts for the central definition of the scope: “to establish a location, an elevation or grade, distances, and other measurements.” This motivating purpose clause applies to all the tools in the regulation. But under the Initial Order and Penhall’s theory, this clause would not apply to all the instruments. Such an outcome would undercut the whole purpose of the regulation.
- 14.4 The phrase “electrotape and other electronic measuring devices” reads together as defining an electrotape as one type of electronic measuring device. But the regulation doesn’t require the use of both an electrotape *and* other electronic measuring devices to constitute construction site surveyor work. It grammatically makes sense to group the two items, but it would make no sense for the scope of work regulation to require the use of both an electrotape and also multiple electronic measuring devices (potentially for the same purpose). Given the context, the “and” between an electrotape and other electronic devices can be read as an “or.” The use of “and” instead of “or” is not determinative under ordinary statutory interpretation principles. “In certain circumstances, the conjunctive ‘and’ and the disjunctive ‘or’ may be substituted for each other if it is clear from the plain language of the statute that it is appropriate to do so.” *Bullseye Distrib., LLC v. State Gambling Comm’n*, 127 Wn. App. 231, 239, 110 P.3d 4 1162 (2005); *see Mt. Spokane Skiing Corp. v. Spokane County*, 86 Wn. App. 165, 174, 936 P.2d 1148 (1997).
- 14.5 Under Subsection (1) of the rule, surveyors “survey check points of location and grade on a construction site using a variety of measurement tools, instruments, and procedures.” GPR analysts and x-ray technicians don’t locate grade. But the reference to grade is not determinative because the section begins: “(1) The work of the construction site surveyor *includes, but is not limited to.*” WAC 296-127-01396 (emphasis added). The “includes, but is not limited to” terms includes looking to “depth” or “elevation” instead of grade.
15. Even under the Initial Order’s reasoning, the regulation is satisfied because of the use of lasers.
- 15.1 As noted, the Initial Order and Penhall postulate that construction site surveyor work required use of a selection from “[Part 1] transits, tripod mounted levels, lasers, electrotape” and a selection from “[Part 2] other electronic measuring devices or theodolites.” Initial Order Conclusion of Law 5.19; Penhall Br. 36. As explained, the language of the regulation doesn’t support this interpretation. But even if this theory were correct, it is satisfied. While it is true that Penhall’s GPR

analysts and x-ray technicians did not use transits, tripod mounted levels, or an electrotape, Penhall's workers used lasers in their work, and "lasers" are among the tools enumerated in the alleged Part 1. And the "other electronic measuring devices" would be the Mini XT handheld radar unit, x-ray emitter, and x-ray detectors used on the project in alleged Part 2. *See* Director Order Finding of Fact No. 8-9.

- 15.2 Penhall appears to not dispute that the workers used lasers, but points out many trades use them. But there is no requirement of exclusivity of tools under the plain language of the regulation, which contemplates the use of lasers if the purpose is, as here, "to establish a location, an elevation or grade, distances, and other measurements." WAC 296-127-01396. The words of the regulation must be followed. *Cannon*, 147 Wn.2d at 56.
- 15.3 The lasers were used as part of establishing the locations of the buried objects. Penhall argues that the "[l]asers are only used to align/calibrate the x-ray machine, and are not used to measure the distance of any objects." Penhall Br. 25 (citing Garcia, Tr. 152 (Dec. 5, 2022)). Contrary to Penhall's suggestion, Mr. Garcia did not testify that lasers were not used to measure the distance of the objects. *Id.* And he testified that lasers were used as part of the measuring process to target the embedments. *Id.* at 90, 97, 101, 151-52. In any event, the lasers were used as part of the process to establish locations, elevations, distances, and other measurements, such as depths. *See* WAC 296-127-01396. But for the survey work of searching for buried objects, lasers are used. Thus, there is use of tools from alleged Part 1 and 2. *See* Director Order Finding of Fact No. 8-9.

Scope of Work—Laborers

16. As observed, determining what scope applies turns on what scope is the best fit. So it must be considered whether the laborer scope of work is the best fit.

- 16.1 The laborer scope of work provides:

For the intents and purposes of the Washington state public works law, chapter 39.12 RCW, laborers perform a variety of tasks such as:

- Erect and repair guard rails, median rails, guide and reference posts, sign posts and right of way markers along highways.
- Mix, pour and spread asphalt, gravel and other materials, using hand tools, and mix, pour, spread and rod concrete.
- Lift, carry and hold building materials, tools and supplies.
- Measure distances from grade stakes, drive stakes and stretch tight line.
- Bolt, nail, align and block up under forms.
- Signal operators of construction equipment to facilitate alignment, movement and adjustment of machinery to conform to grade specifications.
- Level earth to fine grade specifications, using pick and shovel.
- Mix concrete, using portable mixer.
- Position, join, align, wrap and seal pipe sections.
- The placement and testing of plastic conduit for electrical cable, when the conduit is buried underground.

- Erect scaffolding, shoring and braces.
- Mop, or spread bituminous compounds over surfaces for protection (outside buildings).
- Spray material such as water, sand, steam, vinyl, or stucco through hoses to clean, coat or seal surfaces.
- Apply caulking compounds by hand or with caulking gun to seal crevices.
- The application of penetrating sealer and primer protective coatings to concrete floors and steps when safe to walk on.
- Installation of plastic panels on the inside of existing window frames for insulation (instead of storm windows). The panels are held in place magnetically (with metal brackets) and with self-taping screws.

The cleaning and grinding of concrete floors and walls by high pressure waterblasting or sandblasting preparatory to the application of waterproofing.

- The removing of rough or defective spots from concrete surfaces, using grinder or chisel and hammer and patching holes with fresh concrete or epoxy compound when not preparatory to sacking (finishing a large surface of patched holes).

- The setting of concrete curb, gutter and sidewalk forms as a composite crew with cement masons.

- The laying of concrete, granite and brick pavers in beds of sand.
- General cleanup required after damage caused by water or fire.

All clean-up work required in connection with the above work. Clean tools, equipment, materials and work areas:

(1) When the cleanup is performed for more than one trade (usually employed by general contractor).

(2) When assisting those trades for which laborers have been specifically designated as tenders, e.g., carpenter tender, cement finisher tender, etc.

16.2 The laborers scope of work is not a default scope of work. “There is no scope of work description that we throw work into when we can’t seem to make a decision. As I say, we find the reference in a . . . scope that seems to describe the work better than all the other passages in all the other scopes, and that’s where we place the work.” Christensen, Tr. 78 (Dec. 7, 2022).

16.3 The laborer scope of work starts with “[f]or the intents and purposes of the Washington state public works law, chapter 39.12 RCW, laborers perform a variety of tasks such as:”

16.4 Because of use of the phrase “such as,” the laborer scope can only cover work that is similar to those items already listed. Specific terms restrict the application of general terms. *Davis v. Dep’t of Licensing*, 137 Wn. 2d 957, 970, 977 P.2d 554 (1999). Although the language “variety of tasks” is broad, it would be limited to the general caliber of tasks listed in the regulation as directed by the “such as” language. “Such as” means “equally, similarly, to the same degree.”⁷ GPR analyst

⁷ <https://www.thesaurus.com/browse/such as>.

and x-ray technician work is not similar to the tasks listed in the laborer scope of work.

- 16.5 The GPR analysts interpret the measurements and data from the scanning they perform. Garcia, Tr. 97-98, 106, 110-11 (Dec. 5, 2022); Wiltshire Tr. 18 (Dec. 12, 2022). X-ray technicians decide and calibrate what voltage and amperage to use to shape the results of the x-rays. Garcia, Tr. 101 (Dec. 5, 2022). Penhall distinguishes GPR analysts and x-ray technicians as having a “mental nature” that “made [the work] technical.” Penhall Br. 66; *see* Wiltshire Tr. 129, 131 (Dec. 13, 2022).⁸ Indeed Penhall provides scientific training in the use of GPR. Doser, Tr. 40 (Dec. 9, 2022). In the laborers scope, there is no mention of “technical” work in using an instrument that requires the GPR analyst to analyze the data, that require radiation training, and that requires the technical skills to do calibrations to scan and image subsurface objects to prevent dangerous and costly “strikes.” *See* Director Order Finding of Fact No. 13-14, 16.
- 16.6 “Survey work” requires mathematical and geometric calculations, both of which are done for the GPR scanning and the traditional construction site surveyor work. The construction site surveyor scope requires analyzing data like the GPR analysts do. As Mr. Garcia put it, they learned how to “manipulate [the] unit, how to interpret the data, [and] how to apply that data to the situations we’re confronting on the bridge.” Garcia, Tr. 82 (Dec. 5, 2022). This analysis is nothing like what is provided for in the list of laborer tasks. *See* Director Order Finding of Fact No. 14, 21, 21.1 to 21.6.
- 16.7 Both the laborer and construction site surveyor scope of work refer to measuring. WAC 296-127-01344; WAC 296-127-01396. But the laborer is “measure[ing] distances *from* grade stakes”—locations that have already been determined. WAC 296-127-01344 (fourth bullet) (emphasis added). In contrast, the construction site surveyor (here GPR analysts and x-ray technicians) using electronic measuring tools “to *establish* a location.” WAC 296-127-01396 (emphasis added). This work to locate an object is different from measuring from an object already located. By expressing that “measuring” uses an already known location in the laborers scope, means the converse of finding a location is not covered. “[T]o express one thing in a statute implies the exclusion of the other.” *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

Best Fit

17. The construction site surveyor scope of work applies because it is the best fit or best estimation under the terms of the regulation. It best describes the technical work of using

⁸ The Director agrees with Initial Order Conclusion of Law No. 5.12 that GPR analysts and x-ray technicians aren’t the type of individual exempt from classification as “laborers, workers, or mechanics.” RCW 39.12.020, .030. These categories can include work that is technical in nature or a mixture of technical and physical. The Director disagrees with 5.12 that the GPR analysts and x-ray technicians’ work was solely physical in nature as such a conclusion is belied by the facts of calibrating equipment and analyzing and interpreting data.

electronic measuring devices as required to establish locations, distances, elevations, and other measurements. Because it is the best fit, the laborers scope does not apply. A regulation covering an area of law controls—here construction site surveyors. *Wingert*, 146 Wn.2d at 848 (regulations have the force and effect of law). It does not matter that laborers claim the adjacent concrete drilling work; work on a construction site involves the interlocking work of many trades. And the laborer scope of work doesn't contemplate the "mental" and "technical" aspects of analyzing the data obtained from scanning. The laborers scope's use of "measuring" to use with preexisting locations contrasts sharply with the construction site surveyor scope's use of sophisticated tools to measure in order to establish a location.

Ambiguity

18. WAC 296-127-01396 and WAC 296-127-01344's plain language resolves the questions here. But if there is another reasonable reading of these regulations, the regulations must be judged under the principles governing ambiguity. *See Cannon*, 147 Wn.2d at 56. The courts construe an ambiguous regulation to carry out the intent of the agency adopting the regulation. *Id.* at 57. "In construing an ambiguous provision, courts may not read into it matters that are not in it and may not create legislation or promulgate rules under the guise of interpreting a provision." *Id.* at 57-58.
19. In construing an ambiguous prevailing wage statute or regulation, RCW 39.12 and the regulations under it are remedial and construed liberally to benefit the workers. *See Everett Concrete Products, Inc. v. Dep't of Lab. & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988). A liberal construction "should carry into effect the purpose of the statute," here to benefit the workers not Penhall. *Id.*; *Associated Gen. Contractors*, 200 Wn.2d at 400. Under liberal construction, any unresolved question under the statutory construction principles discussed above in Director Order Conclusions of Law 13 to 17 must be construed to benefit the workers. Penhall's reading of WAC 296-127-01396 and WAC 296-127-01344 does not serve the purpose to benefit workers as it deprives workers of their proper wages.
20. Courts also "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, 386 P.3d 1064 (2016). "An agency acting within the ambit of its administrative functions normally is best qualified to interpret its own rules, and its interpretation is entitled to considerable deference by the courts." *D.W. Close*, 143 Wn. App. at 129 (quoting *Pac. Wire Works v. Dep't of Labor & Indus.*, 49 Wn. App. 229, 236, 742 P.2d 168 (1987)) (approving of use of prevailing wage scope of work that Department believed was the best estimation). The courts look to the Department's wage-related interpretations for guidance in reading the statutes and rules that the Department enforces. *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 581, 397 P.3d 120 (2017). The Legislature has designated the industrial statistician as the expert in prevailing wages. RCW 43.22.260-.270; RCW 39.12.015. The Industrial Statistician gave a carefully reasoned explanation about why the construction site surveyor scope of work applied, and why the laborer scope did not apply. Christensen, Tr. 108-109 (Dec 7,

2022); Christensen, Tr. 87-95 (Dec. 8, 2022). The Industrial Statistician believed the construction site surveyor scope was the best fit because this surveyor scope “points to using tools and electronic measuring devices to establish locations and elevation.” Christensen Tr. 108-09 (Dec 7, 2022). The Industrial Statistician “couldn’t find [a] reference in the laborer’s scope that even remotely seemed . . . to describe [the GPR and x-ray] work.” Christensen, Tr. 109 (Dec. 7, 2022). This opinion deserves deference under RCW 34.05.452(5). See *D.W. Close*, 143 Wn. App. at 129.

21. Penhall argues that the Department’s view shouldn’t be considered because it allegedly is a “litigation” position. Penhall Br. 48. But Ms. Herman emailed Penhall technical guidance of the Department’s position that GPR scanning applied based on technical guidance about another public works project. Ex. 105 at 1. And she emailed this to Penhall before any litigation; indeed, it was before Penhall’s work started. This is not a litigation position because it mirrored the previous opinion and because the opinion about the scope Penhall was not given for the purpose of litigation but to aid in properly determining what prevailing wage to pay. The Department has been consistent with its viewpoint, with no new interpretation for the hearing. RCW 34.05.452(5) allows for recognizing technical or scientific facts within the agency’s specialized knowledge, and that is what was testified about.
22. WAC 296-127-013(2) directs how to establish a new scope of work, and this includes looking at collective bargaining agreements and industry practice. *D.W. Close*, 143 Wn.2d at 132 (looking at industry practice at the time of adoption of rule). But the relevancy changes about CBAs and industry practice after adopting a scope of work into rule.
 - 22.1 “The applicable prevailing wage rates for workers employed on public works projects shall be determined by the scopes of work performed by those workers, and not by their specific job titles.” WAC 296-127-013(3). So job titles in the industry are not determinative to deciding prevailing wage classifications. Christensen, Tr. 110 (Dec. 7, 2022); WAC 296-127-013(3). What is important is the “facts of the work itself and the scope of work descriptions.” Christensen, Tr. 110 (Dec. 7, 2022).
 - 22.2 It may be appropriate to look to industry practice in the prevailing wage context if a regulation is ambiguous. But once a scope is adopted by rule, even if the scope is ambiguous, considerations about union jurisdiction and industry practice become less useful. Later developments don’t change what the rule meant when it was adopted. What industry practice treats a given set of work post-rule adoption cannot trump the words of the regulation.
 - 22.3 Penhall points to the jurisdictional position of the laborers union as relevant to show industry practice. Penhall’s GPR and x-ray work wasn’t claimed by the laborers union until July 2019, approximately two years after affected Penhall employees began working on the E-130 Project. This is not the relevant time to determine industry practice. And of course, union jurisdictions may differ from

the scopes of work. Christensen, Tr. 110 (Dec. 7, 2022). That union characterizations of work may differ from the scopes makes sense because CBAs are privately negotiated contracts that don't need to adopt the prevailing wage scopes of work, and CBAs don't negate the terms of a regulation. See *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002).

- 22.4 Penhall points out previous methods (e.g., looking at as-builts, ferroscons, and nondigital x-rays) to find buried objects that were used by core drillers. Wiltshire Tr. 21-23 (Dec. 12, 2022). The Director makes no ruling as to whether those methods are part of the laborers or construction site surveyors' scopes of work. But these methods involved distinguishable technology and work processes. For example, ferroscons use a green light/red light function that could only detect iron and not the depth or elevation. *Id.* at 21-22. In contrast, the GPR scanning tool can find depth and non-iron objects and, through interpretation, "pinpoint . . . within a couple inches of accuracy, where an embedment would be." *Id.* at 22. The GPR scanning tool, unlike the methods Penhall points to, uses the analysis of electronic data to determine precise locations, elevations, distances, depths, and measurements related to the buried objects and so fit within the scope of work in WAC 296-127-01396. And the method of defensive drilling is irrelevant because it is basically a useful way to operate the drill as part of the core drillers' job. Wiltshire Tr. 23-24 (Dec. 12, 2022); see Director Order Finding of Fact No. 5, 8.
23. Even if the regulations are ambiguous, the wording of the regulations remains the touchstone and the laborer scope shows no intent to cover technical work requiring calibrating electronic devices and analyzing electronic data. But the construction site surveyor scope includes those tasks in its ambit.

Factors

24. Penhall argues that Mr. Christensen discussed factors that he did not apply. It points to industry practice, tools used, material supplied, methods or processes followed, purpose of the work, industry knowledge, union jurisdiction, CBA coverage, submission of a dispute, availability of apprenticeship training, location of the work, and presence of a site visit. But a plain language analysis only requires looking at "the facts of the work itself and the scope of work descriptions. They control how prevailing wage work is classified for prevailing wage purposes—not their job title, not their union membership." Christensen, Tr. 110 (Dec. 7, 2022); see WAC 296-127-013. And the teased-out 12 factors range in helpfulness if the regulation is ambiguous. The Director considers the factors nonexclusive, nonexhaustive, and nonmandatory, with a range of appropriateness for a given fact pattern if the regulation is ambiguous. What is mandatory is following the language of the regulation.

Investigation and Witness Choice

25. Penhall raises several critiques of the Department's processes, including what information the industrial relations agent relied on, the lack of a site visit, whether there should have been a peer review of the audit, and decisions about calling witnesses who

provided information to the industrial relations agent during the investigation. It is unclear what the purpose is for these critiques. Penhall did not appeal from the Initial Order, and it is conclusive that Penhall violated the Prevailing Wages of Public Works Act. Penhall's arguments are immaterial to the statutory construction questions at issue.

26. Although not necessary because the application of the Prevailing Wages on Public Works Act is not at issue given Penhall's failure to appeal, the Director will briefly address the arguments.

26.1 Penhall names no process or investigatory procedure that is required by any statute or regulation. WAC 296-127-170(1) provides that "[t]he department shall have the burden of proving, by a preponderance of the evidence, that the violations occurred and that any wages were unpaid as stated in the notice." This regulation places the sufficiency of the NOV at issue, not the process to obtain the NOV.

26.2 In any event, Penhall would have to show some sort of prejudice for the omission of one of Penhall's claimed procedures. "Error without prejudice isn't grounds for reversal, and error isn't prejudicial unless it affects the case outcome." *Qwest Corp. v. Wash. Util. & Transp. Comm'n*, 140 Wn. App. 255, 260, 166 P.3d 732 (2007). The salient testimony was that the workers used radar GPR concrete scanning services and x-ray concrete imaging to detect concrete embedments. And the salient legal question is whether this is construction site surveyor or laborer work. Nothing in any of Penhall's critiques contradicts this fact and this legal approach. There is no showing of prejudice.

27. Penhall argues that the individuals that made the classification decision in this case should have testified. But no regulation requires such testimony. WAC 296-127-170(1) places the sufficiency of the NOV at issue, not the process to obtain the NOV. This doctrine doesn't apply to the legal issues in this case. And the missing witness doctrine does not apply because the Industrial Statistician is the Department's top manager and expert on prevailing wage matter, and he provides the agency's opinion. RCW 39.12.015 (industrial statistician makes determinations of prevailing wage rates); RCW 43.22.260-.270. Given an industrial statistician's authority and expertise, *id.*, it was appropriate to call Mr. Christensen to testify. Christensen, Tr. 40 (Dec. 7, 2022) (industrial statistician signs NOV). The missing witness inference arises "only where, under all the circumstances of the case, such unexplained failure to call the witnesses creates a suspicion that there has been a willful attempt to withhold competent testimony." *State v. Blair*, 117 Wn.2d 479, 488, 816 P.2d 718 (1991) (quoting *State v. Baker*, 56 Wn.2d 846, 859-60, 355 P.2d 806 (1960)). Ms. Herman and Ms. Christensen-Russell both had the opinion that the classification was construction site surveyor, and Mr. Christensen had similar testimony. Given this consistency and the fact that Mr. Christensen speaks for the agency, there is no suggestion of a willful attempt to withhold testimony or that Ms. Herman and Ms. Christensen-Russell would contradict Mr. Christensen, Ms. Lima Gierbolini's, or that any contradiction would be relevant.

Wages Owed

27. Based on the foregoing and the findings of fact, the Department has met its burden to establish that the work at issue is covered under RCW 39.12.065, and that prevailing wages are owed under the construction site surveyor scope of work.
28. Penhall owes the wages and interest listed in the NOV.
29. Further interest is owed as of the date of the NOV to April 12, 2023. There is no interest owed as of the date of the Initial Order, April 13, 2023, until the date of service of this order. Interest is owed the day after service of this Director's Order until the wages are paid.

Debarment

30. Having violated former RCW 39.12.065, Penhall has a strike toward debarment.

III. FINAL DECISION AND ORDER

1. The Department's NOV is **AFFIRMED AS MODIFIED**.
2. Initial Order Findings of Fact Nos. 4.10 to 4.14 and Initial Order Conclusions of Law Nos. 5.6, 5.13, 5.25 to 5.37 are incorporated by reference.
3. Penhall is ordered to pay the wages and interest stated in the NOV. Further interest is owed as of the date of the NOV to April 12, 2023. There is no interest owed as of the date of the Initial Order, April 13, 2023, until the date of service of this order. Interest is owed after the date of this Director's Order until the wages are paid.
4. Penhall is subject to a strike toward debarment under RCW 39.12.065.

IV. CONCLUSIONS OF LAW APPENDIX

The Director compares the Director's findings to the Initial Order, and concludes:

Additions

1. The Director adds Director Order Finding of Fact No. 8. The Initial Order stated that the Mini XT handheld radar unit, x-ray emitter, and x-ray detectors used by the GPR analysts and x-ray technicians "may" be "electronic measuring devices." Initial Order Conclusions of Law No. 5.19. But there is no uncertainty. These devices are "electronic measuring devices" because they are used to establish location, elevation, depth, distance, and other measurements. *See Garcia*, Tr. 90, 97 (Dec. 5, 2022). There is no contrary determination in the Initial Order, so the ability of the Presiding Officer to observe the witnesses is not involved. Penhall does not provide an argument that the GPR analysts and x-ray technicians did not use "other electronic measuring devices" in the form of Mini XT handheld radar unit and x-ray emitters. *See Penhall Br. 35-36*. The Department's briefing alleged that the GPR analysts and x-ray technicians "used

electronic measuring devices.” Department’s Opening Br. 4. Penhall does not contest this description. A party to an appeal with an opportunity to respond to an opponent’s factual claims that neglects to do so admits the accuracy of the opponent’s factual claims. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 270, 840 P.2d 860 (1992).

2. The Director adds Director Order Finding of Fact No. 9 to name lasers as a tool used on the construction site for survey work. Initial Order Conclusion of Law No. 5.19 recites in passing that the Penhall employees did not use lasers in their work. The Director disagrees with this conclusion. Although the Presiding Officer had the opportunity to observe the witnesses, the failure to include lasers was caused by overlooking the testimony of Mr. Garcia. The Initial Order found Mr. Garcia’s testimony credible (Initial Order Finding of Fact No. 5.12), and the Initial Order cited Mr. Garcia many times in support of the Initial Order’s findings. The Director relies on Mr. Garcia’s straightforward, knowledgeable, and credible description of GPR concrete scanning and digital x-ray imaging work in general and in particular about lasers. Based on this testimony, lasers were used as part of the survey tool process to establish the locations of the buried objects.
3. The Director adds Director Order Findings of Fact No. 21.1 to 21.6 and 53 to 54 to add detail. Penhall has not disputed these facts, nor do they involve the Presiding Officer’s ability to observe the witnesses, as they are undisputed fact.

Modifications

4. The capitalization of laborers, construction site surveyors, and x-ray is changed from the Initial Order to be consistent with the Director Order.
5. The Director modifies Initial Order Finding of Fact No. 4.1 (now 59), 4.4 and 4.5 (now 52), and 4.34 (now 22) to make minor wording and organizational changes. These changes don’t involve the Presiding Officer’s ability to observe the witnesses.
6. The Director modifies Initial Order Finding of Fact Nos. 4.7 (now 2), 4.15 (now 5), 4.16 (now 6), 4.17 (now 7), 4.18 (now 10), 4.21 and 4.22 (now 13), 4.24 (now 15), 4.23 (now 14), 4.32 (now 21.1), 4.34 (now 22), and 4.35 (now 31) to add more detail about undisputed facts. These changes don’t involve the Presiding Officer’s ability to observe the witnesses.
7. The Director modifies Initial Order Finding of Fact No. 4.27 (now 18) because it incorrectly states that GPR analysts and x-ray technicians did not use survey tools. This is an incorrect application of the law to the facts because it contradicts the meaning of the terms in the regulation. And because it involves interpretation of the law as applied to the undisputed facts, this change doesn’t involve the Presiding Officer’s ability to observe the witness. And the Director added information about measurement tools that was taken from the testimony. Except for lasers discussed elsewhere, none of this added information has been disputed, so it doesn’t involve the Presiding Officer’s ability to observe the witness.

8. The Director modifies Initial Order Finding of Fact No. 4.28 (now 19) to reflect the mental work of analyzing and interpreting the GPR data. To the extent it conflicts with the Presiding Officer's finding, the Presiding Officer is correct the work involved physical labor but overlooked the undisputed testimony about the other work of analyzing and interpreting the data. *See* Director Finding of Fact No. 18. No witness testified that the work was only physical. Penhall agrees that the work involves "mental" work. Penhall Br. 66.
9. The Director modifies Initial Order Finding of Fact No. 4.30 (now 21) and 4.31 (now 21) to add the responsibilities of Penhall's GPR analysts and x-ray technicians. These additions are based on the meaning of construction site surveyor under the regulation. To provide factual findings on what construction site surveyors did, the Presiding Officer relied on the testimony of Mr. Brands. The Director gives due regard to the Presiding Officer's opportunity to observe Brands. The Director disagrees with the Presiding Officer's assessment of his testimony. Although the Presiding Officer had the opportunity to observe Brands, this can be discounted because WAC 296-127-01396 determines what a construction site surveyor does, not the testimony of a witness. The Director properly discounts Brands' testimony about GPR scanning and x-ray imaging. He is an expert in the type of construction site surveying he performed, but he admitted he knew "very little" about GPR scanning. Brands, Tr. 106 (Dec. 12, 2022). The Director does rely on Brands' testimony as much as it shows overlapping responsibilities in Director Findings of Fact Nos. 26.1 to 26.7. The Director finds in Finding of Fact No. 26 that "other construction site surveyors perform GPR concrete scanning and digital x-ray imaging to determine the location, elevation, distance, and depth of embedments" by applying the meaning of the terms in the rule to the facts of the case. Because the Presiding Officer had a different view of what the rule meant, the results here differ. At bottom, the Presiding Officer and the Director draw different conclusions from Brands and other witness' testimony that doesn't rely on observing of the witnesses.
10. The Director modified Initial Order Finding of Fact No. 4.49 (now 30) because the statement, "GPR concrete scanning work is performed after the construction site survey is completed," includes an incorrect conclusion about what constitutes construction site surveyor work. It is also incorrect as a matter of fact. Mr. Brands had observed the GPR analysts and x-ray technicians working during the time he worked as a surveyor. Brands, Tr. 144-45 (Dec. 12, 2022). Although the Presiding Officer could observe the witnesses about this fact, the Presiding Officer made a mistake by overlooking Brands' testimony. The finding is also modified to clarify what the Operating Engineers union claims as construction site surveyor work. This change doesn't involve the Presiding Officer's ability to observe the witnesses.
11. The Director modifies Finding of Fact No. 4.61 (now 44) because the industrial statistician's awareness of the application of industry practice by agency staff is irrelevant in this matter because looking to industry practice is a tool of statutory construction, inapplicable when a regulation isn't ambiguous. *See Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). The awareness of the industrial statistician is also not an

element to prove whether a NOV is correct. WAC 296-127-170(1). This change doesn't involve the Presiding Officer's ability to observe the witnesses.

12. The Director modifies Initial Order Finding of Fact No. 4.62 (now 45) by not adopting the second sentences: "The Department has a custom and practice of utilizing site visits whenever possible." This sentence cites Greg Mowat's testimony. Although the Presiding Officer had the opportunity to observe Mr. Mowat, this finding was based on a failure to consider the circumstances. Mowat is a former employee from 22 years ago who was never an industrial statistician. Mowat, Tr. 75 (Dec. 13, 2022). Even under that testimony, a site visit isn't always necessary, and the former employee reported site visits only 50 percent of the time. Mowat, Tr. 41 (Dec. 13, 2022).

Deletions

13. The Director does not adopt Initial Order Findings of Fact No. 4.33 and 4.36 because they confuse Brands' description of construction site surveyor work in his occupation and the definition of construction site surveyor work under the scope. The Presiding Officer recognized the distinction, Tr. 110 (Dec. 12, 2022), but then conflated the concepts. Job titles don't determine the applicable scope. WAC 296-127-013.
 - 13.1 The Director does not adopt Initial Order Findings of Fact No. 4.33 because it relies on an understanding of a surveyor (such as warranting work and using independent judgment) that is not found in the regulation, and it impermissibly adds terms to the regulation. *See City of Seattle v. Fuller*, 177 Wn.2d 263, 269, 300 P.3d 340 (2013) (words can't be added to provision). The finding appears to impermissibly import standards from RCW 18.43, which don't apply. WAC 296-127-01396(2). The error in 4.33 isn't related to the Presiding Officer's ability to observe the witnesses.
 - 13.2 The Director does not adopt Initial Order Findings of Fact No. 4.36, which states "construction site surveyors do not perform GPR analysis or x-ray imaging work." The conclusion that GPR analysis and x-ray imaging work is not construction site surveyor work incorrectly applies the meaning of the rule to the facts of this case. The Presiding Officer cannot construe the facts to conflict with the regulation. "If an administrative rule or regulation is clear on its face, its meaning is to be derived from the plain language of the provision alone." *Cannon*, 147 Wn.2d at 56. The error in 4.36 isn't related to the Presiding Officer's ability to observe the witnesses but with the failure to properly construe WAC 296-127-01396.
14. The Director does not adopt Initial Order Finding of Fact No. 4.37 because it is unnecessary. This change doesn't involve the Presiding Officer's ability to observe the witnesses.

DATED in Tumwater this 31 day of October 2023.


JOEL SACKS

DIRECTOR'S ORDER

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

Director

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 file a 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 thereof, should be filed by emailing it to 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 the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (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.

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Penhall Company,

Appellant.

Docket No. 06-2021-LI-01655

INITIAL ORDER

Agency: Department of Labor and
Industries

Program: Prevailing Wage

Agency No. NOV210201

1. ISSUES

- 1.1. Did Penhall Company fail to pay prevailing wages, thereby violating RCWs 39.12.010, 39.12.020, 39.12.030, 39.12.065 and WAC 296-127-011 and 296-127-013?
- 1.2. Did Penhall Company fail to pay overtime wages, thereby violating RCWs 49.28.010, 49.28.065, 49.46.130 and WACs 296-127-0022 and 296-128-015(1)?
- 1.3. Did Penhall Company file false certified pay records, thereby violating RCW 39.12.050 and WAC 296-127-320?
- 1.4. If so, what are the appropriate penalties?

2. ORDER SUMMARY

- 2.1. Yes. Penhall Company failed to pay prevailing wages, in violation of RCWs 39.12.010, 39.12.020, 39.12.030, 39.12.065 and WACs 296-127-011 and 296-127-013.
- 2.2. Yes. Penhall Company failed to pay overtime wages, in violation of RCWs 49.28.010, 49.28.065, 49.46.130 and WACs 296-127-0022 and 296-128-015(1).
- 2.3. Yes. Penhall Company filed false pay records, in violation of RCW 39.12.050 and WAC 296-127-320.
- 2.4. Penhall Company has met its burden to prove, by a preponderance of the evidence, that the foregoing violations were inadvertent. Accordingly, Penhall Company is not liable for civil monetary penalties under RCWs 39.12.065 and/or 39.12.050.
- 2.5. Notice of Violation No. NOV210201 is **MODIFIED** to reflect that the affected workers performed work under the Laborers scope of work classification, WAC 296-127-01344. The Construction Site Surveyor classification, WAC 296-127-01396, does not apply to the work at issue in this case.

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- 2.6. The amount of wages and interest owed is **REMANDED** to the Department for calculation, based upon the escalated prevailing wage rate for Laborers, with credit for "fringe benefits," and accounting for overtime owing for hours exceeding 8 per day.

3. HEARING

- 3.1. Hearing Dates: December 5-9, 12-14 & 22, 2022
- 3.2. Record Close: February 11, 2023
- 3.3. Administrative Law Judge: Micah Larripa
- 3.4. Appellant: Penhall Company
- 3.4.1. Representatives: Eric Laiho and Christopher Hilgenfeld,
Davis Grimm Payne & Marra
- 3.4.2. Observer: Jennifer Black, Vice President & General Counsel
- 3.4.3. Witnesses:
- 3.4.3.1. Elisabeth Doser
- 3.4.3.2. Jim Wiltshire
- 3.4.3.3. Peter Brands
- 3.4.3.4. Stacy Martin
- 3.4.3.5. Greg Mowat
- 3.4.3.6. Craig Galloway
- 3.5. Agency: Department of Labor and Industries
-
- 3.5.1. Representatives: Travis Alley and Aryna Anderson,
Assistant Attorneys General
- 3.5.2. Witnesses:
- 3.5.2.1. Thomas Garcia
- 3.5.2.2. Hecmali De Lourdes ("Barbie") Lima Gierbolini
- 3.5.2.3. Jim Christensen
- 3.5.2.4. Francis DeRose
- 3.5.2.5. Daniel Plemel
- 3.5.2.6. Jeffrey Renati

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- 3.6. Court Reporters: Gretchen Paletta, Sierra Zanghi, Patricia Blevins
Rue, Andrea Clevenger, and April Biedermann, of
Central Litigation Services
- 3.7. Exhibits: Department Exhibits 1 through 109 were admitted. Appellant Exhibits A
through O; R through FF; and HH through JJ were admitted.

4. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Jurisdiction

- 4.1. On February 11, 2021, the Department of Labor and Industries ("Department") issued Notice of Violation No. NOV210201 ("NOV"). Therein, the Department alleged that Penhall Company ("Penhall") failed to pay prevailing wages and overtime to 37 employees, and failed to file certified payroll records, as required. *Exhibits ("Ex") 1 & F.*
- 4.2. The NOV alleged that the affected workers performed work under the Construction Site Surveyor scope of work classification, WAC 296-127-01396, and were entitled to overtime pay for hours worked in excess of 8 per calendar day. *Id.*
- 4.3. The NOV assessed \$501,758.70 in unpaid prevailing wages; \$146,850.98 in interest for unpaid prevailing wages; a \$100,351.74 civil monetary penalty for failure to pay prevailing wages; and a \$54,000.00 civil monetary penalty for an alleged certified payroll records violation. *Id.* The NOV assessed a total of \$804,961.42 in wages, interest, and penalties. *Id.*
- 4.4. On March 10, 2021, Penhall timely appealed the NOV. *Ex 104.*
- 4.5. On June 3, 2021, the Department referred this matter to the Office of Administrative Hearings ("OAH"). *Record.*

Penhall Company

- 4.6. Penhall is a concrete drilling and saw cutting company. *Doser testimony.*
- 4.7. Penhall began its operations in 1957. It has 40 offices throughout the United States and Canada. Penhall has performed ground penetrating radar ("GPR") concrete scanning services in Seattle for approximately 13 years. *Wiltshire testimony.* In addition to GPR scanning, Penhall utilizes X-ray concrete imaging to detect concrete embedments. *Id.*

E-130 Project

- 4.8. The work at issue was performed on-site as part of the Sound Transit East Link Extension Project ("E-130 Project"). *Ex 2.* The parties stipulated that the E-130

Project is a public works contract, and Sound Transit is a public agency. *Hearing Record of 12/6/2022.*

- 4.9. The prime contractor for the E-130 Project was Kiewit-Hoffman. *Lima Gierbolini Testimony.* On or about July 14, 2017, Penhall entered into a subcontract with Kiewit-Hoffman to perform bridge demolition, GPR scanning, barrier cutting, and core drilling in support of the E-130 Project. *Ex 2.*

Project Labor Agreement – Wage Escalation and Overtime

- 4.10. Work on the E-130 Project is governed by the Sound Transit Project Labor Agreement (“PLA”). *Christenson Testimony; Ex 28.* The PLA includes a provision that construction work for Sound Transit “shall be contracted exclusively to contractors who agree to execute and be bound by the terms of the PLA.” *Ex 28.*
- 4.11. Notwithstanding its arguments to the contrary, Penhall expressly agreed to the terms of the Labor Compliance Manual and PLA when it entered into the July 14, 2017 subcontract with Kiewit-Hoffman. *Ex 2.*
- 4.12. Among its terms, the PLA provides that, “[a]ll hours worked in excess of eight (8) daily on a 5x8 schedule... shall be paid for at one and one-half times the straight time rate of pay.” *Ex 28.* The PLA also provides that “[a]n alternative four (4) day ten (10) hour shift may be elected by the Contractor and will be Monday-Thursday.” *Id.* However, “[p]rior to changing a shift from 5x8 hours to 4x10 hours, a contractor must give at least five (5) calendar days advance notice to the employees.” *Id.*
- 4.13. Penhall’s GPR analysts and X-ray technicians routinely worked 10-hour days, without overtime compensation for hours in excess of 8. *Ex 21.* There was no written agreement or advanced notice of a 4x10 work week. Indeed, schedule changes often occurred with short notice, mostly the day before. *Plemel Testimony.*
- 4.14. Both the PLA and Penhall’s contract with Kiewit-Hoffman provide for wage-escalation. Indeed, the contract states that “[a]djustments for labor escalation shall be included by [Penhall], and wage rates paid to its employees shall be adjusted twice annually based on the updated Prevailing Wage per the [PLA]....” *Id.*

GPR Scanning and X-Ray Concrete Imaging

- 4.15. GPR concrete scanning and digital x-ray imaging identify and locate subsurface embedments in concrete. *Wiltshire Testimony.* GPR and digital X-ray tools offer greater precision than ferro scanning and non-digital X-ray devices, or “defensive drilling” methods, alternatively employed for the same purpose. *Wiltshire Testimony; Doser Testimony.*

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- 4.16. On the E-130 Project, Penhall's GPR analysts used the Mini XT, a self-contained electronic unit with radar emitting antenna, to scan areas of concrete pre-marked for drilling. *Garcia Testimony*. The GPR units measure the time-delay between the emission and return of the radar and display data on a digital screen. *Id.* GPR analysts interpret the data to determine the location and depth of embedments from the scanned surface. *Id.*
- 4.17. Digital X-ray imaging involves workers, in teams of two, placing an X-ray tube on one side of a concrete slab and aligning it with a digital detector plate on the other. *Id.* The X-ray tube emits radiation to produce a digital image of the concrete interior to identify and locate embedments, such as post-tension cable, rebar, and conduit. *Id.*
- 4.18. After scanning or imaging an area, GPR analysts and X-ray technicians create a diagram of their findings on the surface of the concrete, marking the location and depth of embedments within the target area. *Id.* Penhall's standard marking protocols include the use of different colors to distinguish types of identified embedments. *Garcia Testimony; Plemel Testimony; Doser Testimony; Ex Y.*
- 4.19. Conditions of the site, such as moisture, harder aggregate, and environmental or weather conditions can affect GPR measurements. *Wiltshire Testimony*. Marking protocols include an extra 2" barrier for rebar, and a 3" barrier for post-tension cables. *Garcia Testimony*. This buffer is known as an exclusion zone, which drillers should avoid. *Doser Testimony*.
- 4.20. Crews performing concrete cutting and core drilling on the E-130 project utilized GPR and digital X-ray markings to help avoid striking embedments within the target area. *Garcia Testimony; Plemel Testimony*.
- 4.21. The primary purpose of GPR scanning and X-ray concrete imaging, in connection with core drilling, is to prevent "drill strikes" on subsurface embedments, such as rebar or post-tension cables, while boring holes in concrete. *Garcia Testimony; DeRose Testimony; Doser Testimony; Martin Testimony; Mowat Testimony*.
- 4.22. The central activity for the GPR analyst and X-ray technician relates to drilling and cutting concrete. *Christensen Testimony*. The work involves locating rebar or other reinforcing steel embedded in concrete, for the purpose of drilling holes. *Id.* "Almost always, [GPR scanning occurs] because [the customer] is going to be drilling a hole in concrete." *Plemel Testimony*.
- 4.23. GPR analysts and X-ray technicians do not exercise independent judgment to determine where to scan. *Garcia Testimony*. Instead, an engineer places a blue dot or an "X" to mark target areas for scanning. *Garcia Testimony; Doser Testimony*.

- 4.24. The record contains no evidence that GPR concrete scanning is part of an established apprenticeship program. GPR analysts learn to use and interpret the Mini XT through on-the-job training. *Garcia Testimony.*
- 4.25. X-ray technicians receive approximately 40 hours of classroom radiography and radiation safety instruction prior to on-the-job training. *Id.* The record contains no evidence of an apprenticeship program for X-ray technicians.
- 4.26. GPR analysts and X-ray technicians disclaim any responsibility for striking objects; instead, their scans and images provide a best estimate of what lies beneath the surface of concrete. *Ex 31.*
- 4.27. GPR analysts and X-ray technicians do not use survey tools, such as transits, tripod mounted levels, electro tape, and theodolites. *Garcia Testimony.*
- 4.28. GPR scanning and X-ray concrete imaging work is physical in nature and performed exclusively on the construction site. *Ex 9.*
- 4.29. Mr. Garcia, the complainant in this case, had no prior technical knowledge or experience with GPR scanning or X-ray imaging equipment or processes before joining Penhall as an analyst and technician. *Garcia Testimony.*

Construction Site Surveyors

- 4.30. The purpose of Construction Site Surveyor work is to generate control points and mark positions based upon mathematical coordinates derived from building plans, so other construction trades can build improvements in the correct site locations. *Brands Testimony.*
- 4.31. A construction site surveyor is responsible for laying positions on the construction site based upon the general contractor's building plans. *Id.*
- 4.32. Survey work is generally the understanding of geometry and mathematics and applying it to the earth. *Id.*
- 4.33. Construction Site Surveyors use independent judgment, and direct where physical improvements will occur. *Id.* In contrast to Penhall's GPR analysts and X-ray technicians, Construction Site Surveyors warrant their work. *Id.*
- 4.34. Construction Site Surveyors use survey tools, such as transits, tripod mounted levels, electro tape, and theodolites. *Christensen Testimony; Ex DD & EE.*
- 4.35. Operating Engineers claim construction site surveyor work. *Ex N.* Construction Site Survey work is included in the Operating Engineers' 6,000-hour apprenticeship program. *Mowat Testimony; Ex M.*
- 4.36. Construction Site Surveyors do not perform GPR analysis or X-ray imaging work. *Brands Testimony.*

- 4.37. The Department's prevailing wage rates for the Construction Site Surveyor trade include three job classifications: Assistant Construction Site Surveyor, Chainman, and Construction Site Surveyor. *Ex 17.*

Laborers

- 4.38. The Laborers scope of work is a non-exhaustive list of tasks performed by Laborers. *Christensen Testimony; Ex 23; WAC 296-127-01344.* The list of work processes contained in the Laborers' scope of work is preceded with, "[f]or the intents and purposes of the Washington state public works law, chapter 39.12 RCW, laborers perform a variety of tasks such as: ..." *WAC 296-127-01344. [emphasis added].*
- 4.39. Laborers claim several occupations that are not specifically enumerated in the Laborers' scope of work. These occupations include concrete core driller, concrete saw operator, air tac drill operator, brush cutters, hydraulic diamond cutters, and electric air & gas. *Christensen Testimony.*
- 4.40. In addition to concrete core drilling and saw cutting, laborers claim all work associated with the same. *Martin Testimony.* This includes grade checking and ferro scan, as well as GPR concrete scanning and X-ray concrete imaging performed in connection with concrete drilling and sawing. *Wiltshire Testimony.*
- 4.41. The Department's prevailing wage rates for the Laborer trade include several job classifications not enumerated in WAC 296-127-01344. *Ex 18.*

Technical or Craft Work

- 4.42. In May 2016, Penhall participated in a pre-job meeting related to the E-130 project. *Galloway Testimony.* A pre-job meeting includes union representatives and the contractor, who assigns work to a particular trade/craft. *Id.* During the May 2016 pre-job meeting, Laborers claimed Penhall's concrete core drilling and sawing work. *Ex T.* However, no unions claimed GPR concrete scanning and X-ray concrete imaging. *Galloway Testimony.*
- 4.43. On May 31, 2016, Seattle Building Trades Council communicated its agreement, in an email to Penhall, that GPR scanning and X-ray analysis is non-craft work, outside of the PLA's scope. *Ex A.*
- 4.44. Beginning in November 2016, Penhall sought a determination from the Department regarding concrete scanning and its classification. *Ex 105.* On December 20, 2016, Laura Herman, Industrial Relations Specialist, advised Penhall that GPR scanning and X-ray imaging fell within the Construction Site Surveyor scope of work. *Id.*

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- 4.45. On February 13, 2017, in response to Ms. Herman's technical guidance, Penhall requested a formal determination from the Department's Industrial Statistician, Jim Christenson. *Id.* Receiving no response, Penhall renewed its request on March 14, 2017. *Id.*
- 4.46. Mr. Christenson had no memory of ever responding to Penhall's request for a determination. *Christenson Testimony.* The record contains no evidence of any response from the Department's Industrial Statistician.
- 4.47. On July 17, 2017, Penhall filed a "Statement of Intent to Pay Prevailing Wages." *Ex 5.* Therein, Penhall identified Laborers, in the occupations of "concrete saw operator/core driller" and "general laborer" as its employees entitled to prevailing wage. *Id.* Penhall's Statement of Intent did not include its GPR analysts or X-ray technicians. *Id.*
- 4.48. During or about the first quarter of 2019, Laborers contacted Penhall to claim GPR scanning and X-ray concrete imaging work. *Galloway Testimony.* During or about July 2019, Penhall's GPR analysts and X-ray technicians joined the Laborers union. *Wiltshire Testimony.*
- 4.49. The Operating Engineers union, which claims Construction Site Surveyor work, did not dispute the Laborer's 2019 claim for Penhall's GPR concrete scanning work. *Martin Testimony.* GPR concrete scanning work is performed after the construction site survey is completed. *Id.*
- 4.50. Based upon the Seattle Building Trades' assessment that GPR scanning and X-ray imaging was non-craft work, Penhall did not submit certified payroll records for GPR analysts and X-ray technicians until Laborers claimed this work, beginning in 2019. *Galloway Testimony.*

Prevailing Wage Complaint

- 4.51. On February 7, 2019, Thomas Garcia filed a Prevailing Wage Worker Complaint ("complaint") against Penhall. *Ex 19 & 20.* Therein, Mr. Garcia asserted that he was entitled to prevailing wage, as a Construction Site Surveyor, for work performed as a Penhall GPR analyst and X-ray technician from April 2, 2018 until December 26, 2018. *Garcia Testimony; Ex 19 & 21.*
- 4.52. Penhall paid Mr. Garcia \$38.57 per hour, fringe benefits in the amount of \$2.43 per hour, and overtime for hours in excess of 40 per week. *Id.* In his complaint, Mr. Garcia contended that he was owed \$60.49 per hour and overtime for hours in excess of 8 per day. *Id.*
- 4.53. Mr. Garcia's rate of pay, including fringe benefits, was less than the prevailing wage for Laborers or Construction Site Surveyors. *Dosier Testimony.*

- 4.54. On February 18, 2019, the Department assigned Mr. Garcia's complaint to Industrial Relations Agent, Barbie Lima Gierbolini. *Lima Gierbolini Testimony; Ex 20.*
- 4.55. On February 19, 2019, Ms. Lima Gierbolini printed off the construction site surveyor scope of work, WAC 296-127-01396. *Id.* Ms. Lima Gierbolini did not print, review, or consider any other scopes of work after commencing her investigation. *Lima Gierbolini Testimony.*
- 4.56. On May 7, 2019, Ms. Lima Gierbolini emailed Penhall, identifying GPR concrete scanning and X-ray concrete imaging as construction site surveyor work, "because the work is taking place while the construction is taking place and not during the phase of consulting." *Ex 20.*
- 4.57. On May 21, 2019, Ms. Lima Gierbolini received instructions from "headquarters," stating that GPR or X-ray work in support of a construction contract is classified under the construction site surveyor scope of work, WAC 296-127-01396. *Ex 20.*
- 4.58. Industrial Relations Agent Ramona Christensen-Russell directed Ms. Lima Gierbolini to apply the Construction Site Surveyor scope of work in her investigation. *Lima Gierbolini Testimony.* In doing so, Ms. Christensen-Russell forwarded a 2017 email communication from Industrial Relations Agent Laura Herman, which also asserted that the surveyor classification applied to the work at issue. *Lima Gierbolini Testimony; Ex 105.*
- 4.59. Ms. Lima Gierbolini did not independently analyze the classification of GPR scanning and X-ray imaging as Construction Site Survey work. *Lima Gierbolini Testimony.* Ms. Lima Gierbolini specializes in math, not scope of work classifications. She does not purport to have an opinion regarding the appropriate classification for the work at issue. *Id.*
- 4.60. The Department did not call Laura Herman or Ramona Christensen-Russell to present first-hand testimony regarding their scope of work analysis or the basis for the Department's classification decision in this case. *Record.*
- 4.61. The Department stipulated that it did not consider industry practice in its classification decision in this case. *Record, Dec. 8, 2022.* When he signed the NOV, Mr. Christensen was not aware that the Department failed to consider industry practice. *Christensen Testimony.*
- 4.62. A site visit helps identify the purpose of the work being performed, which is an important factor in its classification. *Id.* The Department has a custom and practice of utilizing site visits whenever possible. *Mowat Testimony.* The Department did not conduct a site visit as part of its investigation in this case. *Christensen Testimony.*

- 4.63. During her investigation, Ms. Lima Gierbolini requested records from Sound Transit, Kiewit-Hoffman, and Penhall. *Lima Gierbolini Testimony*. Responsive certified payroll records did not include Penhall's employees who performed GPR scanning and/or X-ray imaging work in support of the E-130 Project. *Id.*
- 4.64. Penhall subsequently provided the Department with daily timecards and weekly pay statements for its GPR analysts and X-ray technicians. *Id.* Using these records, Ms. Lima Gierbolini conducted an audit to calculate wages owing Penhall's 37 GPR analysts and X-ray technicians, at the prevailing wage rate for Construction Site Surveyors. *Id.*
- 4.65. Through its investigation and audit, the Department determined that Penhall failed to pay 37 GPR analysts and X-ray technicians prevailing wages for Construction Site Surveyors, and that a violation occurred. *Ex 1 & 21*. On February 11, 2021, the Department issued the NOV here on appeal. *Ex 1*.

5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

Jurisdiction

- 5.1. OAH has jurisdiction over the persons and subject matter in this case under Chapter 296-127 WAC, and Chapters 39.12 and 34.05 RCW.

Prevailing Wage Law – Coverage

- 5.2. The hourly wages to be paid to laborers, workers, or mechanics, upon all public works of the state shall not be 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 39.12.020.
- 5.3. "Public work" means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state. RCW 34.04.010(4).
- 5.4. RCW 39.12 is remedial and must be construed liberally in order to fulfill its purposes, which are: (1) to protect employees working on public projects from substandard wages and (2) to preserve local wages. *Heller v. McClure & Sons, Inc.*, 92 Wn.App. 333, 338 (1998).
- 5.5. "Those workers on public works projects who are classified as 'laborers, workers, or mechanics,' are entitled to the prevailing wage when their work directly relates to the prosecution of the work that is contracted to be performed and [is] necessary for the completion of that work." *Id.* at 340.

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Analysis - Coverage

- 5.6. As a preliminary matter, there is no dispute that the E-130 Project is a public works project, or that Penhall's 37 GPR analysts and X-ray technicians performed the work at issue on site and in direct support of the same. At issue is whether employees who performed GPR scanning and/or X-ray imaging on the E-130 project are due prevailing wages because they are among the "laborers, workers, and mechanics" prevailing wage laws are meant to protect.
- 5.7. "Determinations as to whether individuals are workers, laborers, or mechanics are based on the scope of work actually performed by the individuals, rather than the title of their occupations." WAC 297-127-015.
- 5.8. Under the Davis Bacon Act, the term "laborer or mechanic" includes at least those workers whose duties are manual or physical in nature, as distinguished from the mental or managerial. 29 CFR § 5.2(m).
- 5.9. The federal Davis Bacon Act is instructive to Washington's Prevailing Wage Act. *Everett Concrete Products, Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 824, 748 P.2d 1112 (1988). Insofar as the language of Washington's Prevailing Wage Act differs, it supports "the conclusion that the Legislature intended the scope of the State prevailing wage law to be broader." *Id.* at 826.
- 5.10. RCW 39.12.030 includes "workers" in addition to "laborers or mechanics;" thereby, broadening the Davis Bacon Act's scope of employees entitled to prevailing wage protections in Washington.
- 5.11. Although it may be probative of Penhall's liability for civil monetary penalties in this case, especially in conjunction with the Industrial Statistician's failure to respond to Penhall's 2017 requests for a classification determination, the Seattle Building Trade Council's opinion regarding what constitutes craft and non-craft work is not relevant for determining whether RCW 39.19 applies. No private party can waive the requirement to pay laborers, workers, or mechanics the prevailing rate of wages, or acquiesce to payments below the prevailing rate of wages. *AK-WA, Inc. v. Dear*, 66 Wn. App. 484, 490, 832 P.2d 877 (1992), *review denied*, 121 Wn.2d 1004, 848 P.2d 1263 (1993).
- 5.12. Penhall's assertion that the work in question is "technical in nature," and therefore not covered under RCW 39.12, is unpersuasive. Mr. Garcia's credible testimony regarding his lack of experience or specialized knowledge related to the work, prior to becoming a Penhall GPR analyst and learning through on-the-job training at the E-130 Project worksite, is contrary to any notion that workers conducting GPR scanning and X-ray imaging are "learned professionals," "computer employees," or otherwise exempt from classification as "laborers, workers, or mechanics." Indeed, the work performed was manual and physical in

nature, and Penhall itself asserted that the employees who performed it lacked authority to exercise independent judgment.

- 5.13. Based on the foregoing and the findings of fact herein, the Department has met its burden to establish that the work at issue is covered under RCW 39.12, and that prevailing wages are owing.

Prevailing Wage Law – Classification

- 5.14. WAC 296-127-011(1) provides in part: "Prevailing wage rates for all public work contracts will be determined by the industrial statistician and published on the first business day of February and the first business day of August of each year. These rates shall become effective thirty days after the date of publication."

- 5.15. WAC 296-127-013 provides:

- (1) In order to determine applicable prevailing wage rates, the director or the director's designee will issue scope of work descriptions for each trade and occupation recognized as being involved in public work.
- (2) The scope of work descriptions shall be created using authoritative sources available to the department, such as:
 - (a) Washington state apprenticeship and training council approved apprenticeship standards;
 - (b) Collective bargaining agreements;
 - (c) Dictionaries of occupational titles;
 - (d) Experts from organized labor, licensed contractors, and contractors' associations; and
 - (e) Recognized labor and management industry practice.
- (3) The applicable prevailing wage rates for workers employed on public works projects shall be determined by the scopes of work performed by those workers, and not by their specific job titles.
- (4) The applicable scope of work description for a public works contract is the scope of work description that is in effect on the date that the bids are due to be submitted to the contract awarding agency. If the contract is not awarded within six months of the bid due date, then the applicable scope of work description shall be that which is in effect on the date that the contract is awarded. The same scope of work description shall remain in effect for the duration of the contract.
- (5) In the event a dispute arises regarding a scope of work description following the award of a public works contract, the aggrieved party may request an

arbitration hearing pursuant to the provisions of RCW 39.12.060, WAC 296127-060, 296-127-061, and 296-127-062.

Analysis - Classification

5.16. Having decided the issue of coverage, the analysis turns to whether the Department applied the proper classification, Construction Site Surveyor, in its NOV and calculation of wages owing therein.

5.17. WAC 296-127-01396 sets forth the scope of work for Construction Site Surveyor. It states:

For the purpose of the Washington state public works law, chapter 39.12 RCW, construction site surveyors perform **survey work** which **requires** the use or utilization of transits, tripod mounted levels, lasers, electrotape **and** other electronic measuring devices or theodolites to establish a location, an elevation or grade, distances, and other measurements.

(1) The work of the construction site surveyor includes, but is not limited to:

- Survey work performed after the contract is awarded and during the actual construction in direct support of construction crews when the worker is in the employ of and working under the direction of a construction contractor to survey check points of location and grade on a construction site using a variety of measurement tools, instruments, and procedures.

(2) The construction site surveyor scope of work does not include surveying services not within the description in subsection (1) of this section that are required by specification or contract or state law to be performed under the direct supervision of individuals registered under chapter 18.43 RCW.

-WAC 296-127-01396 [emphasis added].

5.18. WAC 296-127-01344 sets forth the scope of work for Laborers. It states:

For the intents and purposes of the Washington state public works law, chapter 39.12 RCW, **laborers perform a variety of tasks such as:**

- Erect and repair guard rails, median rails, guide and reference posts, sign posts and right of way markers along highways.
- Mix, pour and spread asphalt, gravel and other materials, using hand tools, and mix, pour, spread and rod concrete.
- Lift, carry and hold building materials, tools and supplies.
- Measure distances from grade stakes, drive stakes and stretch tight line.
- Bolt, nail, align and block up under forms.

- Signal operators of construction equipment to facilitate alignment, movement and adjustment of machinery to conform to grade specifications.
- Level earth to fine grade specifications, using pick and shovel.
- Mix concrete, using portable mixer.
- Position, join, align, wrap and seal pipe sections.
- The placement and testing of plastic conduit for electrical cable, when the conduit is buried underground.
- Erect scaffolding, shoring and braces.
- Mop, or spread bituminous compounds over surfaces for protection (outside buildings).
- Spray material such as water, sand, steam, vinyl, or stucco through hoses to clean, coat or seal surfaces.
- Apply caulking compounds by hand or with caulking gun to seal crevices.
- The application of penetrating sealer and primer protective coatings to concrete floors and steps when safe to walk on.
- Installation of plastic panels on the inside of existing window frames for insulation (instead of storm windows). The panels are held in place magnetically (with metal brackets) and with self-taping screws.
- The cleaning and grinding of concrete floors and walls by high pressure waterblasting or sandblasting preparatory to the application of waterproofing.
- The removing of rough or defective spots from concrete surfaces, using grinder or chisel and hammer and patching holes with fresh concrete or epoxy compound when not preparatory to sacking (finishing a large surface of patched holes).
- The setting of concrete curb, gutter and sidewalk forms as a composite crew with cement masons.
- The laying of concrete, granite and brick pavers in beds of sand.
- General cleanup required after damage caused by water or fire.
- All clean-up work required in connection with the above work. Clean tools, equipment, materials and work areas:
 - (1) When the cleanup is performed for more than one trade (usually employed by general contractor).

(2) When assisting those trades for which laborers have been specifically designated as tenders, e.g., carpenter tender, cement finisher tender, etc.

-WAC 296-127-01344 [emphasis added].

- 5.19. Here, the plain language of WAC 296-127-01396 fails to support the Department's contention that Penhall's GPR analysts and X-Ray technicians are Construction Site Surveyors. Under the unambiguous terms of WAC 296-127-01396, to fit within the description of Construction Site Surveyor, a worker must (i) perform survey work (ii) which requires the use or utilization of transits, tripod mounted levels, lasers, electrotape and other electronic measuring devices or theodolites (iii) to establish a location, an elevation or grade, distances, and other measurements." The foregoing establishes that "survey work" requires the use or utilization of survey tools, which are expressly enumerated. Although a Mini XT or X-ray assembly may fit within the broader category of "other electronic measuring devices," the Penhall employees in this case *did not* use or utilize transits, tripod mounted levels, lasers, or electrotape in their work. Thus, the Department's interpretation of WAC 296-127-01396 disregards the word, "and," preceding "other electronic measuring devices," or presumes that it means "or."
- 5.20. Generally, courts give "substantial weight ... to the agency's view of the law if it falls within the agency's expertise in that special field." *Purse Seine Vessel Owners Ass'n v. Washington Dep't of Fish & Wildlife*, 92 Wn.App. 381, 389, 966 P.2d 928 (1998). However, "[w]here a regulation is clear and unambiguous, a court should apply its plain language and may not look beyond the language to consider the agency's interpretation." *Children's Hosp. & Med. Ctr. V. Washington State Dep't of Health*, 95 Wn App 858, 868-69, 975 P.2d 567 (1999) (citing *Multicare Medical Center v. Department of Soc. And Health Servs.*, 114 Wn.2d 572, 790 P.2d 124 (1990). "When faced with an unambiguous regulation the court may not speculate as to the intent of the regulation or add words to the regulation." *Multicare Medical Center v. Department of Soc. And Health Servs.*, 114 Wn.2d 572, 591, 790 P.2d 124 (1990).
- 5.21. The Department's view of the applicable law is entitled to substantial weight; however, its interpretation of WAC 296-127-01396 is contrary to the clear and unambiguous language therein. Adopting the Department's interpretation of "and" to mean "or" necessarily looks beyond the scope of work's plain language and replaces a conjunctive with a disjunctive within the same. A preponderance of the evidence fails to establish that Penhall's GPR analysts and X-ray technicians performed survey work which requires the use of the tools enumerated in the Construction Site Surveyor scope of work description. Accordingly, WAC 296-127-01396 does not apply.

- 5.22. In contrast with WAC 296-127-01396, the Laborers scope of work applies broadly. WAC 296-127-01344 is consistent with the work at issue in this case. Laborers perform a variety of tasks. The Laborers' scope of work specifically describes some of these tasks, but the predicate "such as," plainly indicates that the list is non-exhaustive. Indeed, the Department has established prevailing wage rates for the Laborer trade that include several job classifications not enumerated in WAC 296-127-01344, including Concrete Saw Operator/Core Driller. See *Ex 18*.
- 5.23. Here, Penhall's GPR analysts and X-ray technicians performed work in direct support of concrete drilling. GPR and X-ray tools perform precisely the same function – detecting embedments in concrete-drilling target areas – as ferro scan, non-digital X-rays, and defensive drilling, but with newer technology and greater precision. Laborers perform concrete sawing, drilling, and associated tasks, and a preponderance of the evidence establishes that GPR scanning and X-ray imaging is part of the same work process. The work at issue in this case is consistent with the plain language of WAC 296-127-01344. Furthermore, the Laborer union's uncontested claim to the work indicates that industry practice supports classification of the same under the Laborers' scope of work. WAC 296-127-01344 applies.
- 5.24. Accordingly, the NOV on appeal will be MODIFIED to reflect that the affected workers performed work under the Laborers' scope of work classification, WAC 296-127-01344, and Penhall failed to pay prevailing wage thereunder.

Wage Escalation and Overtime – applicable law and analysis

- 5.25. The Prevailing Wage Act, Chapter 39.12 RCW, empowers the Department with the authority to ensure compliance therewith. RCW 34.12.065. To realize the intent and purpose of the Prevailing Wage Act, the Department may order payment for all wages owed, including those owed pursuant to contractual provisions. "Unless workers or representatives of workers who are not parties to such a contract but whose wages and expectancies are affected by its terms can be heard to complain of prevailing wage determinations, the interest of such workers may very well be left unprotected." *Southeastern Wash. Bldg. & Const. Trades Council v. Dep't of Labor & Indus.*, 91 Wn.2d 41, 46, 586 P.2d 486 (1978).
- 5.26. Work performed on the E-130 Project is governed by the PLA. Based on the findings herein, Penhall is bound by the terms of the same, pursuant to its subcontract with Kiewit-Hoffman. Both agreements provide for escalation of prevailing wage. Accordingly, the Department correctly applied escalated prevailing wage rates in its calculations.

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5.27. The PLA similarly applies in determining whether overtime wages are owing Penhall's employees for hours worked in excess of 8 per day. The PLA provides that all hours worked in excess of 8 daily on a 5x8 schedule shall be paid at one and one-half times the straight time rate of pay. The PLA allows a contractor to elect an alternative 4x10 schedule; however, a preponderance of the evidence fails to establish that Penhall fulfilled the PLA's notice requirement prior to exercising this option. Accordingly, overtime wages are owing for all hours worked in excess of 8 daily.

Civil Monetary Penalties – applicable law and analysis

- 5.28. A contractor or subcontractor that is found, in accordance with RCW 39.12.065(1), to have violated the requirement to pay the prevailing rate of wage is subject to a civil penalty of not less than five thousand dollars or an amount equal to fifty percent of the total prevailing wage violation found on the contract, whichever is greater, interest on all wages owed at one percent per month, and is not permitted to bid, or have a bid considered, on any public works contract until such civil penalty has been paid in full to the director. RCW 39.12.065(3).
- 5.29. The civil penalty and sanctions under RCW 39.12.065 do not apply to a violation determined by the director to be an inadvertent filing or reporting error. The burden of proving, by a preponderance of the evidence, that an error is inadvertent rests with the contractor or subcontractor charged with the error. *Id.*
- 5.30. An "inadvertent filing or reporting error" is a mistake and is made notwithstanding the use of due care by the contractor, subcontractor, or employer. An inadvertent filing or reporting error includes a contractor who, in good faith, relies on a written determination provided by the Department and pays its workers, laborers, and mechanics accordingly, but is later found to have not paid the proper prevailing wage rate. RCW 39.12.010.
- 5.31. Based on the findings and conclusions above, Penhall indeed violated the requirement to pay the prevailing wage rate to its 37 GPR analysts and X-ray technicians. A preponderance of the evidence also establishes that Penhall's failure was inadvertent. The record demonstrates that Penhall relied upon the Seattle Building Trades Council's characterization of GPR scanning and X-ray imaging as technical, non-craft work, and trade unions' initial decision not to claim it. Penhall's reliance was misplaced, and its theory that the work at issue is outside the scope of Chapter 39.12 did not prevail; however, when considered in conjunction with the Industrial Statistician's failure to respond to Penhall's February 2017 request, and its renewed request a month later, for a written determination, Penhall's actions demonstrate due care.

- 5.32. Accordingly, the civil monetary penalty assessed pursuant to RCW 39.12.065 should be set aside.
- 5.33. Under Washington's prevailing wage laws, contractors are required to maintain accurate payroll records for each laborer, worker, and mechanic employed for work on a public works project. WAC 296-127-320. When the Department or any interested party makes a written request, a contractor is required to file a certified copy of its payroll records with the agency that awarded the public works contract and with the Department. *Id.*
- 5.34. "Any contractor or subcontractor who files a false statement or fails to file any statement or record required to be filed ... shall ... forfeit as a civil penalty the sum of five hundred dollars for each false filing or failure to file." RCW 39.12.050(1).
- 5.35. The civil penalty under RCW 39.12.050 does not apply to a violation determined by the director to be an inadvertent filing or reporting error. The burden of proving, by a preponderance of the evidence, that an error is inadvertent rests with the contractor or subcontractor charged with the error. RCW 39.12.050(1).
- 5.36. The provisions of RCW 39.12.050(1) mirror those of RCW 39.12.065(3), and so does the analysis. Here, Penhall failed to file certified payroll records for 37 GPR analysts and X-ray technicians because it believed they were not covered "workers, laborers, or mechanics." For the reasons stated in paragraph 5.31 above, a preponderance of the evidence establishes that Penhall exercised due care, acted in good faith, and that its failure to file was inadvertent.
- 5.37. Accordingly, the civil monetary penalty assessed pursuant to RCW 39.12.050 should be set aside.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

- 6.1. Notice of Violation No. NOV210201 is **MODIFIED** and **REMANDED** for recalculation.
- 6.2. Penhall Company failed to pay prevailing wages, in violation of RCWs 39.12.010, 39.12.020, 39.12.030, 39.12.065 and WACs 296-127-011 and 296-127-013.
- 6.3. Penhall Company failed to pay overtime wages, in violation of RCWs 49.28.010, 49.28.065, 49.46.130 and WACs 296-127-0022 and 296-128-015(1).
- 6.4. Penhall Company filed false pay records, in violation of RCW 39.12.050 and WAC 296-127-320.
- 6.5. Penhall Company has met its burden to prove, by a preponderance of the evidence, that the foregoing violations were inadvertent. Accordingly, Penhall

Company is not liable for civil monetary penalties under RCWs 39.12.065 and/or 39.12.050.

- 6.6. Notice of Violation No. NOV210201 is **MODIFIED** to reflect that the affected workers performed work under the Laborers' scope of work classification, WAC 296-127-01344. The Construction Site Surveyor classification, WAC 296-127-01396, does not apply to the work at issue in this case.
- 6.7. The amount of wages and interest owed is **REMANDED** to the Department for calculation, based upon the escalated prevailing wage rate for Laborers, with credit for "fringe benefits," and accounting for overtime owing for hours exceeding 8 per day.

Issued from Tacoma, Washington on the date of mailing.



Micah Larripa
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

APPEAL RIGHTS

PETITION FOR REVIEW

Under WAC 296-127-170 and RCW 34.05.464, any party that disputes this Proposed Order may file a notice of appeal, also called Petition for Review, with the Director of the Department of Labor and Industries. A Petition for Review may be mailed to the Director or delivered to the Director at the Department's physical address listed below.

Mailing Address:

Director
Department of Labor and Industries
PO Box 44001
Olympia, WA 98504-4001

Physical Address:

7273 Linderson Way SW
Tumwater, WA 98501


Whether you mail or deliver the Petition for Review, the Director must actually receive the Petition for Review during office hours at the Director's office within 30 days of the date this Proposed Order was mailed to the parties. Under WAC 296-127-170(6), you must file with the Director an original and two copies of your Petition for Review. The Petition for Review must specify which findings and conclusions are erroneous. You must attach to the Petition for Review the written arguments supporting its appeal. You must serve a copy of your Petition for Review by delivery or mail to the other parties within the same time period listed above. The Director will conduct an administrative review in accordance with Chapter 34.05 RCW.

If no Petition for Review is received by the Director of the Department of Labor and Industries within 30 days from the date of the Proposed Order, under WAC 296-127-170(5) and Chapter 34.05 RCW, the Proposed Order shall be final and binding and cannot be reviewed or appealed.

<p>Aryna Anderson, AAG Office of Attorney General MS: WT-31 PO Box 2317 Tacoma, WA 98401 Agency Representative</p>	<p><input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: aryna.anderson@atg.wa.gov Tracy.LanePatton@atg.wa.gov LI TacCal@atg.wa.gov</p>
<p>Travis Alley, AAG Office of the Attorney General MS: TB-14 800 5th Ave Ste 2000 Seattle, WA 98104 Agency Representative</p>	<p><input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: Travis.Alley@atg.wa.gov Lisa.Henley@atg.wa.gov Iniseaeservice@atg.wa.gov</p>

Date: Thursday, April 13, 2023

OFFICE OF ADMINISTRATIVE HEARINGS



Mallory Jordan
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