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

January 10, 2025

Sent via email:

Selena C. Smith and Daniel J. Spurgeon
Attorneys for Leewens Corporation
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 3500
Seattle, WA 98104-7055
ssmith@davisgrimmpayne.com
dspurgeon@davisgrimmpayne.com

Travis Lavenski and Ben Berger
Counsel for WNIDCL & Laborers Local 242
18 West Mercer Street, Suite 400
Seattle WA 98119
lavenski@workerlaw.com
berger@workerlaw.com

Re: Requests for reconsideration of Industrial Statistician Jody Robbins' February 13, 2024 redetermination of his October 26, 2023 determination pertaining to the preparation and installation of resinous flooring

Dear Attorneys at Law,

Thank you for the March 11, 2024 letter for Leewens Corporation and the March 14, 2024 letter for WNIDCL and Laborers Local 242 requesting reconsideration of the February 13, 2024 determination for the prevailing wage rate pertaining to the preparation and installation of MasterTop 1853 SRS CQ – a methyl-methacrylate-based (MMA) flooring system with a decorative quartz broadcast to resurface the pool deck.

On October 26, 2023, a determination was issued by Jody Robbins, Department of Labor & Industries (L&I) Industrial Statistician and Prevailing Wage Program Manager. Mr. Robbins stated the Laborers' work is in support of the installation or application of a finished floor system and the clean-up. Additionally, he noted the November 10, 2014 determination supported by the scope, the language in WAC 296-127-01344 (Laborers) allows for preparatory work to include taping and masking of areas for protection, shot blasting with the use of sandpaper, steel wool, wire brushes or wire wheel grinder, and patching work with epoxy performed when not preparatory to sacking (finishing a large surface of patched holes).

Industrial Statistician Robbins also provided that the installation work of thin set, epoxy seamless composition flooring systems that incorporate aggregate, after preparatory work, is properly compensated at the prevailing rate of wage for Cement Masons (WAC 296-127-01315) when performed on public works projects. Mr. Robbins reaffirmed the determinations dated November 10, 2014 and December 21, 2016 made by the former Industrial Statistician, along with the redetermination dated November 2, 2018 by the Deputy Director.

On February 13, 2024, Mr. Robbins issued a redetermination of his October 26, 2023 determination. In that letter he stated that he was affirming that the Laborers scope (WAC 296-127-01344) does not apply to built up, thin set floor installations involving the use of troweling as a work process.

Jody Robbins affirmed the original November 10, 2014 Armorclad determination. He confirmed that public works projects involving the installation of built up, seamless composition flooring with aggregate materials added after surface preparation and utilizing troweling methods and associated tools to apply the product. Mr. Robbins stated this work would be enforced at the Cement Masons (WAC 296-127-01315) prevailing wage rate.

In response to your request, I conducted a broad review of the issues and events surrounding this resinous epoxy flooring work performed on public works projects. My review in this matter included, but was not limited to:

- Your correspondence from November of 2023 and March of 2024 and all supporting documentation therein. The redetermination issued by Jody Robbins, Industrial Statistician, on February 13, 2024 and included enclosures.
- The determination issued by Jody Robbins, Industrial Statistician, on October 26, 2023 and included enclosures.
- The redetermination issued by Elizabeth Smith, Deputy Director, on November 2, 2018 and included enclosures.
- The redetermination issued by Jim Christensen, Industrial Statistician, on December 21, 2016 and included enclosures.
- The determination issued by Jim Christensen, Industrial Statistician, on November 10, 2014 and included enclosures.
- All supporting documentation provided by interested parties.
- Prior prevailing wage projects.
- Authoritative Sources (WAC 296-127-013) that include, but are not limited to:
    - Washington State Apprenticeship and Training Council (WSATC) approved apprenticeship standards for the three trades; Washington Cement Masons Apprenticeship Committee, Western Washington Painting Apprenticeship, and Northwest Laborers Committee.
- Scope of Work Descriptions that include, but are not limited to:
    - WAC 296-127-01315, Cement Masons;
    - WAC 296-127-01344, Laborers; and

  - WAC 296-127-01356, Painters.
- All applicable prevailing wage statutes, rules, policies, and determinations which are available on the department's website: L&I Prevailing Wage Program.

Although I understand your concerns, I must conclude the Industrial Statistician made a carefully considered analysis that provides correct guidance on how to comply with the Prevailing Wages on Public Works Act, Revised Code of Washington Chapter 39.12, and applicable Washington Administrative Code. I am affirming the February 13, 2024 redetermination issued by Industrial Statistician Jody Robbins pursuant to RCW 39.12.015.

The department intends to enforce the payment of Cement Mason prevailed wage rates on public works projects involving the installation of built up, seamless composition flooring with aggregate materials added after surface preparation and utilizing troweling methods and associated tools to apply the product.

If any party in interest disputes this redetermination, they must file a petition for arbitration of the redetermination pursuant to WAC 296-127-060 and WAC 296-127-061 within 30 days to the director of Labor & Industries at the address listed on the attached "Prevailing Wage Determination Request and Review Process".

If you have any questions about this redetermination, please feel free to contact me.

Sincerely,

Celeste Monahan

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

Attachment: Prevailing Wage Determination Request and Review Process Policy

cc: Randy Littlefield, Deputy Director, Fraud Prevention & Labor Standards
David Speer, Prevailing Wage Program Manager & Industrial Statistician
Mario Silva, Compliance Administrator, Cement Masons and Plasterers of the Northwest

BARNARD IGLITZIN & LAVITT LLP

18 West Mercer Street, Suite 400
Seattle WA, 98119
TEL (800) 238.4231
FAX (206) 378.4132

Travis Lavenski
Associate
DIR (206) 257.6032
lavenski@workerlaw.com

Sent via e-email to:
Celeste.Monahan@Lni.wa.gov

March 14, 2024

Celeste Monahan
Assistant Director
Department of Labor & Industries
Prevailing Wage
P O Box 44540
Olympia, WA 98504-4540
Celeste.monahan@Lni.wa.gov

RE: Redetermination – Resinous Flooring (02/14/2024)
Our File No. 3293-127

Dear Ms. Monahan:

I represent the Washington and Northern Idaho District Council of Laborers and Laborers Local 242 (together, Laborers) in the above-referenced matter. Pursuant to WAC 296-127-060(3), I write to request reconsideration of Industrial Statistician Jody Robbins' February 13, 2024, redetermination (hereinafter redetermination) of his October 26, 2023, determination (determination or initial determination) regarding the applicable prevailing wage for "the installation of thin set, epoxy seamless composition flooring systems that incorporate aggregate following the initial surface preparation" on public works projects.[1]

The redetermination does not address the arguments raised by the Laborers in their November 22, 2023, letter requesting modification of the initial determination. This November 22, 2023, letter is attached as **Ex. 1.** Rather, Robbins defended his determination on the basis that it was simply meant to reaffirm the agency's Armorclad determination from 2014, attached here as **Ex. 2.** However, Robbins did not have the authority to issue the October 26, 2023, determination in the first place, regardless of his intent, because there was no live dispute to issue a determination for. While Robbins' determination was made in response to a complaint raised by an individual pertaining to the installation of MMA coating by Laborers at UW Life Sciences building, L&I had previously investigated and subsequently withdrew a Notice of Violation for that matter, ending Robbins' authority to issue a ruling on the determination. Even though the withdrawal of the complaint should have ended the matter, and even though there was no live dispute over any particular work, Robbins used the since-mooted complaint as an opportunity to issue a prospective determination "that the Laborer scope does not apply to built up, thin set floor installations involving the

[1] By seeking reconsideration of the determination, the Laborers do not concede the industrial statistician's statutory authority to adjudicate disputes over scopes of work, do not waive any claims or arguments concerning the existence or non-existence of such authority, and expressly reserve the right to raise claims or arguments concerning this issue in any appropriate forum.

use of troweling as a work." Redetermination at 2. This ruling was incorrect because it was based on a broad, hypothetical description of work and purports to apply a "one-size-fits-all" determination to a broad array of composition flooring work projects in the future.

Additionally, while Robbins suggests that the determination does no more than reaffirm the agency's 2014 Armorclad decision, that argument is simply not merited where Robbins' determination was *not* a simple rehashing of the applicability of the Cement Masons', Painters', and Laborers' scopes of work to the specific facts of the Armorclad work project at issue in the 2014 determination (or the functional equivalent of the facts of that work project). Instead, in the 2023 determination, Robbins 1) artificially created a broadly worded hypothetical description of a work project, incorporating *both* the work conducted in the 2014 Armorclad decision and the work conducted by the Laborers at the UW Life Sciences building; 2) conducted a superficial and flawed analysis of the applicability of the scopes of work to that hypothetical work project; and 3) declared that his analysis will have prospective effect for future work bids. Determination at 2-6. This type of broad, prospective ruling, untethered from any specific body of work, goes far beyond the appropriate role of a determination of the correct scope of work. The determination thus applies to more than just the work described in Armorclad, and ostensibly would include future MMA flooring installation projects such as the one at issue in the initial complaint. Furthermore, as noted in the Laborers' November 23, 2023, letter, Robbins' methodology itself in applying the scopes of work to the hypothetical work description was flawed.

ARGUMENT

I. The Industrial Statistician Does Not Have Authority To "Reaffirm" Prior Agency Decisions On A Prospective Basis.

The Industrial Statistician is only authorized to issue determinations pursuant to an *actual* dispute regarding the applicable wage scope that should be applied to a particular job. *See* **Ex. 1** at 2-5 (recapping long-standing L&I authority describing the importance of limiting prevailing wage determinations to specific factual situations and avoiding issuing determinations that amount to advisory opinions). The Industrial Statistician's role is limited in accordance with the remedial nature of the Prevailing Wage statute. The text of the statute and attendant regulations make this remedial purpose exceptionally clear. For example, WAC 296-127-130 provides that interested parties that file a complaint must allege a *particular* violation of the prevailing wage statute and provides for project-specific elements that should be included in the complaint. The statute and regulations then direct L&I to investigate that complaint and to provide a limited resolution – either to issue a Notice of Violation or to conclude that the complaint has no merit. RCW 39.12.065; WAC 296-127-140 (investigation of complaints); WAC 296-127-150 (Notice of Violation). If a Notice of Violation is established, the regulations provide the alleged violator with an administrative appeal process whereby the party may contest the allegation that it has not paid the proper prevailing wage rate on a particular project. WAC 296-127-160 (providing for an appeal of a Notice of Violation); WAC 296-127-170 (governing hearings on an appeal of a Notice of Violation). The end goal of this process is thus two-fold: 1) to determine whether a particular employer has complied with the state's Prevailing Wage requirements; and 2) if not, to determine the appropriate penalty to levy against the violating employer.

L&I has recognized the importance of fact-specific analysis in the context of prevailing wage determinations, too. *See* Determination Request Requirements, page 1, *available at*

https://lni.wa.gov/licensing-permits/_docs/DeterminationRequirementsWithChecklist.pdf ("[d]etermination letters are provided to address specific factual situations and the applicable prevailing wage rates which must be paid" in specific cases); Determination – Cedar Hills Landfill, 0129019 at 2 ("Prevailing wage determinations answer specific questions about… specific project[s]…) (attached as **Ex. 3**). *See also* **Ex. 1** at 2-4. The need for specific facts is paramount – and self-evident – given the highly fact-specific nature of the inquiry.

Robbins' determination and redetermination are illustrative of precisely *why* it is necessary to take particular facts into account before making a determination. Rather than providing "clarity," the determination will only cause more confusion amongst the trades and employers regarding the applicable prevailing wage rate moving forward. As discussed further below, it is entirely unclear whether the Cement Masons' wage scope will be required for flooring installation projects utilizing MMA resin; incorporating decorative materials such as plexiglass and quartz flakes; and/or using non-metal trowels at some stage in the process. Because the determination does not actually address any particular project or body of work, it is entirely unclear what it means for future work.

II. Robbins Did Not Merely "Reaffirm" Armorclad.

In response to the initial determination, attorneys for both the Laborers and Leewens both wrote letters explaining how the determination inaccurately described MMA flooring installation work such as the work conducted by Leewens at the UW Life Sciences building. The redetermination attempts to sidestep these fundamental problems in the analysis by explaining that the determination "was not intended to be project-specific." Redetermination at 1. Rather, it was intended to merely "reaffirm the original November 10, 2014 Armorclad determination" by asserting that "the installation of cement or cement-like materials to build up a thin set, seamless composition floor with aggregate materials added after surface preparation… that require troweling methods and associated tools (metal and non-metallic) to apply the product" must be paid at the Cement Masons' rate. *Id.* However, the determination is substantially *broader* than the 2014 Armorclad decision.

In Armorclad, then-Industrial Statistician Jim Christensen issued a determination regarding the applicable scope of work to be applied to several stages of work to be conducted for pool installations. Part of this project involved the installation of flooring. **Ex. 2** at 2. After preparatory work was completed, workers were to install the flooring in layers. *Id.* Each layer consisted of four steps: rolling a thin layer of epoxy with a long-handled squeegee trowel; back-rolling the epoxy layer with a traditional paint roller; hand-broadcasting sand until the epoxy became saturated with particles; and clearing away leftover sand once the epoxy was dry. *Id.* After multiple iterations of this process, the flooring was finished with a final coat of epoxy. *Id.* Between the Laborers', Painters', and Cement Masons' scopes of work, Christensen found the Cement Mason's scope the most appropriate. *Id.* at 3. Christenson arrived at this conclusion by first noting that the language contained in the Cement Masons' scope reading "[t]he installation of seamless composition floors and the installation and finishing of epoxy-based coatings… when… applied by spraying or troweling" closely mirrored the work conducted at the project-site. *Id.* (quoting WAC 296-127-01315). Christenson found that this language in the Cement Masons' scope, coupled with Christenson's observation that the Cement Masons' scope did not begin with the same "limiting language" as the Painters' scope, meant that the work should be paid at the Cement Masons' rate, despite the fact that the aggregate used for the flooring – sand – was not the same as traditional concrete. *Id.* at 3-4. Christenson also noted that the Laborers' scope of work was most appropriate for to the preparatory work

to be conducted before the flooring was to be installed. *Id.* Notably, Christenson did not declare that the Laborers should *only* conduct preparatory work, nor did he declare that the Laborers' scope of work could not encapsulate other kinds of flooring installation using different tools, materials, and methods. *See id.* Instead, his determination was limited to the very specific facts of the particular job at issue in that determination (as is appropriate).

In contrast, the determination at issue extended the Armorclad determination by 1) seemingly applying its holding to a broader description of work than was at issue in that determination; and 2) more narrowly reading the Laborers' scope of work to only apply to preparatory work for thin set composition flooring systems, imposing a new limitation never included in the 2014 determination.

As to the first point, Robbins did not merely set out to reapply the wage scopes to a work description mirroring only the four-step flooring installation process like that which occurred in Armorclad. Instead, Robbins conflated the work at-issue in Armorclad with the flooring installation work conducted by the Laborers' at the UW Life Sciences building. Robbins' initial determination was issued in response to a wage complaint regarding the "Preparation and installation of MasterTop 1853 SRS CQ – [an MMA-based] flooring system with decorative quartz," which Robbins described as "similar" to the work conducted by the Laborers at the UW Life Sciences building. Determination at 1. Robbins, however, issued a determination pertaining to a materially different description of work regarding "the installation of thin set, **epoxy** seamless composition flooring systems that incorporate aggregate following the initial surface preparation," seemingly referencing the work description from Armorclad. *Id.* (emphasis added). As addressed in the Laborers' November 22, 2023, request for modification letter, MMA and epoxy are entirely different materials with entirely different installation methods and entirely different tools used. *See* **Ex. 1** at 4. However, when Robbins applied the scopes of work to determine which was the best fit, he conflated the two flooring installation methods by analyzing the applicability of the Laborers, Cement Masons, and Painters scopes of work to "project[s]… involve[ing] layered, epoxy (**MMA**) with aggregate (**e.g. quartz, sand**) broadcast, which is a built up flooring product" involving a "multi-step [installation] process." *Id.* at 2 (emphasis added). This work description describes *both* the Armorclad project *and* the UW Life Sciences building project, suggests that MMA resin and epoxy-based resins are interchangeable for the purposes of issuing a determination, and thus subjects both MMA flooring installation work and epoxy-based flooring installation work to the same analysis. However, the scopes of work analysis may differ significantly based on which resinous adhesive is used. See **Ex. 1** at 6 (noting the Cement Masons' scope references "epoxy based coatings," but not MMA, while the Painters' scope "refers broadly to 'the application of…resin."). Robbins' statement that he merely meant to reaffirm Armorclad thus paints with an overly broad brush and does not account for the differences in these bodies of work which could impact the analysis as to the appropriate scope of work.[2] *See* Redetermination at 2.

[2] It is also notable that Robbins cited the 19-CD-211263 Board case as evidence that industry practice has not been consistent. That case involved a 10(k) work jurisdiction dispute between the Laborers and the Cement Masons regarding the MMA floor coating work performed by Leewens at issue in the withdrawn NOV. It is puzzling to say the least that Robbins's maintains that the determination merely sought to reaffirm Armorclad, which involved the installation of flooring using epoxy and sand, while also referencing the Board decision regarding the installation of flooring involving MMA-resin and quartz as evidence that industry practice has showed mixed results. If the determination truly sought to merely reaffirm Armorclad, the Board decision would have precisely *zero* relevance to the industry practice inquiry, as the work projects involved in each of those matters were completely different. *See* **Ex. 1** at 6-8. *See supra* 7.

As to the second point, the determination and redetermination artificially narrowed the Laborers' scope of work to apply *only* to preparatory work for thin set epoxy composition flooring projects where no such limitation has ever been imposed. Determination at 2-3 (declaring that the Laborers' scope "contains no provisions for installation of built-up resinous floors other than in a support capacity."). This wholly ignores the fact that the Laborers' scope is *broader* than the Cement Masons' and Painters' scopes, covering non-preparatory work. **Ex. 1** at 8-9 (highlighting relevant language in the Laborers' scope). Thus, unlike Armorclad, which merely declared that the Laborers' scope was the most appropriate for preparatory work on that particular project, the determination seemingly pigeonholes the Laborers into conducting support and preparatory work for most future composition flooring projects, despite the long history of Laborers acting in a non-support capacity for composition flooring installation projects. *See* **Ex. 1** at 11 (describing the Laborers' past involvement in a non-preparatory role).

III. The Analysis In The Determination and Redetermination Was Fundamentally Flawed.

The determination proceeded to analyze which scope of work between the Painters, Laborers, and the Cement Masons best applied to "the installation of thin set, epoxy seamless composition flooring systems that incorporate aggregate following the initial surface preparation," a nebulous hypothetical and entirely meaningless description of work lacking any specific work procedures, methods, tools, and materials. The resulting analysis was thus both ambiguous and hollow. *See* **Ex. 1** at 6-11. Robbins attempted to clear up this ambiguity in his redetermination by adding that his scope of work analysis only applied to flooring work that "require[s] troweling methods and associated tools (metal and non-metallic) to apply the product." Redetermination at 1.

Even taking this clarification into consideration, the analysis is flawed for the simple reason that it purported to apply the wage scopes to a single set of hypothetical, amorphous facts, and then from that narrow example, declared broadly that the analysis applied to the installation of *any* built up, thin set composition flooring incorporating aggregate if trowels are involved. However, the type of tool used on the job is only *one* factor that the Industrial Statistician should take into consideration in any given case. Any robust application of the plain language of the scopes of work to a particular work description would also take into consideration *other* factors, including, but not limited to: 1) how often each tool is used; 2) the purpose of the use of a particular tool; 3) the methods utilized to complete a project; 4) all of the construction materials used; 5) the location of a particular project; etc. *Supra* 2-3. It is simply impracticable to declare that *all* built up, thin set composition flooring installation work should virtually always be awarded to the Cement Masons if troweling methods were used. There are simply too many other variables to take into account for any particular project for this sort of one-sized fits all determination to stand.

The most problematic aspect of the determination ultimately is that it clearly conflates epoxy with MMA-based resin and reads the word "aggregate" to broadly include broadcast such as quartz.[3] Under this view, future composition flooring installation projects are at risk of being declared subject to the Cement Masons' rate, even if the material used is MMA (or some other non-epoxy based-resinous material) and/or the project calls for broadcasting decorative flakes such as wood, metal, quartz, or glass, so long as trowels are *one of* the tools used in the installation process. Again, this description would seemingly incorporate the same resinous floor coating work conducted at the Laborers' and Painters' rate

[3] The word "aggregate" does not necessarily include decorative quartz flakes, as pointed out by the Laborers in the November 23, 2023 letter. **Ex. 1** at 4. However, Robbins seemingly accepted that decorative quartz could be considered an aggregate material. Determination at 2 (stating that "quartz" and "sand" are both examples of "aggregate.").

of pay and under their scopes of work for many years, including the work at issue at the UW Life Sciences building, where the primary tools used included gauge rakes, back rollers, spike rollers, and brushes, but where long-handled squeegee trowels were also minorly used.[4] Robbins' contention that this work, when conducted with troweling tools, demands that the Cement Masons wage scope should prevail is in direct conflict with long-standing industry practice, which the Department has recognized is problematic when attempting to resolve disputes over the application of scopes of work that are subject to more than one reasonable interpretation. *See* **Ex. 3** at 4 ("Because the plain language of the scope of work regulations does not resolve which regulation applies, the regulations are ambiguous, and it is appropriate to look beyond their plain language to assess their meaning."); Determination – Westwater Construction, 190702 at 4 ("Because the [scope of work] regulations are ambiguous, it is appropriate to look beyond their plain language to assess their meaning.") (attached as **Ex. 4**). Such a closed-eyed approach entirely contradicts the agency's history of conducting a careful, thoughtful analysis considering *all* the relevant facts for a particular project.

The invalidity of the determination's conclusion becomes obvious upon review of its methodology in applying the wage scopes to the formless, hypothetical work description seemingly concocted out of thin air. Inexplicably, the determination declared that looking at the plain language of the wage scopes *entirely resolved the issue*, despite the fact that there was no truly discrete work description actually being analyzed. Determination at 4 ("I believe that the plain language of the scopes of work, when read together, resolve the question here."). It is difficult to understand how the determination could broadly declare that the plain language of the Cement Masons' scope of work description could perceivably apply to the large majority of built up, thin set floor installation work *solely* by virtue of the plain language of the scopes of work given the potentially innumerable factors at play in any given project that could be encapsulated by the determination's hypothetical work description, including tool usage, construction materials, and installation methods. In effect, the determination essentially declared that there was little to no ambiguity as to the most apt work scope for a broad array of composition flooring installation work, rendering the consultation of authoritative sources provided by WAC 296-127-013 a mere formality.

In line with this perspective, Robbins only half-heartedly looked to the authoritative sources simply to bolster the conclusion that he had already settled upon. *Id.* The Laborers' November 22, 2023, letter addressed many of the flaws in Robbins' consultation of authoritative sources at length, and those points remain valid. **Ex. 1** at 10-12 (explaining that Robbins ignored the importance of the industry practice inquiry and relied too heavily on apprenticeship standards). In addition to those points made in the November 22, 2023, letter, it is extremely notable that the *only* example of industry practice that Robbins offered was the National Labor Relations Board's Decision in Case 19-CD-211263, *Skanska USA Building, Inc.*, 366 NLRB No. 161 (2018) (attached as **Ex. 5**). That decision concerned *the very MMA resinous flooring installation work at issue in the withdrawn NOV*, and the work assignment upheld there was to the Laborers, not the Cement Masons. Robbin's declaration in the redetermination that the determination was only "work-process specific to the installation of **cement or cement-like materials** to build up a thin set, seamless composition floor with aggregate materials added" when troweling methods are used is thus an incorrect statement as to the reach of the determination – Robbins clearly had more than just the installation of "cement or cement-like materials" to build thin-set composition flooring in mind when issuing the determination, considering he referred to a Board decision solely regarding the use

[4] Robbins clarified that trowels include non-metal trowels. Redetermination at 1. Long-handled squeegees, also known as "squeegee trowels," apparently meet the definition of "trowel" that Robbins is using. The Laborers make this point without conceding that Robbins' definition of "trowel" is overly broad. *See* **Ex. 1** at 7.

of *non-cementitious* MMA resin to build thin set, seamless composition flooring when considering industry practice. Redetermination at 1. The determination gave no attention to other evidence of industrial practice regarding either MMA or epoxy-based flooring installation, nor did it consult any other authoritative sources. Rather, Robbins credulously looked to the Cement Masons' apprenticeship standards, found that those standards included training on using trowels, and thus mechanically concluded that "the Cement Masons apprenticeship program work processes are the only trade that specifically discusses training apprentices to install seamless composition floors using the applicable tools." Determination at 4-5. Even if Robbins had the authority to make this determination, and even if he applied the wage scopes to a particular work description, his consultation of authoritative sources was cursory, downplayed the importance of industry practice, and contradicted one of the basic aims of the prevailing wage statute – to ensure that the scopes of work follow, rather than create, established industry practices. *See* November 12, 2020, Letter of Jim Christenson at 2 (attached hereto as **Ex. 6**).

CONCLUSION

For the foregoing reasons, the Laborers respectfully request the October 26, 2023, determination and the February 13, 2024, redetermination be withdrawn. Please contact me with any questions or concerns at (206) 257-6006.

Sincerely,

Travis Lavenski
Ben Berger

Counsel for WNIDCL and Laborers Local 242

cc: Stacy Martin
Doug Scott
Dave Hawkins
Mallorie Davies
Earl Smith
Dale Cannon
Bob Abbott

EXHIBIT 1

BARNARD IGLITZIN & LAVITT LLP

18 West Mercer Street, Suite 400
Seattle WA, 98119
TEL (800) 238.4231
FAX (206) 378.4132

BEN BERGER
Senior Associate
DIR (206) 257.6006
berger@workerlaw.com

Sent via e-email to:
Jody.Robbins@Lni.wa.gov

November 22, 2023

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

RE: Determination – Resinous Flooring (10/26/2023)
Our File No. 3293-127

Dear Mr. Robbins:

I represent the Washington and Northern Idaho District Council of Laborers and Laborers Local 242 (together, Laborers) in the above-referenced matter. Pursuant to WAC 296-127-060(3), I write to request a modification of your October 26, 2023, determination regarding the applicable scope of work's prevailing wage for "the installation of thin set, epoxy seamless composition flooring systems that incorporate aggregate following the initial surface preparation" on public works projects.[1] To the extent this determination is meant to address the work that was subject to the since-withdrawn notice of violation against Leewens Corporation in Docket No. 08-2020-LI-01503/Agency No. NOV2000501, the determination should be modified to reflect that this work falls under the Laborers' or Painters' scopes of work, not the Cement Masons'.[2]

As explained further below, the October 26 determination was both procedurally defective and incorrectly decided on the merits. The determination was procedurally defective because it rendered judgment on a hypothetical, prospective fact pattern instead of the work performed on a particular public work project. The Department of Labor and Industries (LNI) has the authority to issue determinations

[1] By seeking modification of the determination, the Laborers do not concede the industrial statistician's statutory authority to adjudicate disputes over scopes of work, do not waive any claims or arguments concerning the existence or non-existence of such authority, and expressly reserve the right to raise claims or arguments concerning this issue in any appropriate forum.
[2] To the extent this determination addresses a different work process, the determination should still be withdrawn for improperly commenting on an abstract, hypothetical scenario rather than a specific project. In the alternative, the Laborers request you clarify that "the installation of thin set, epoxy seamless composition flooring systems that incorporate aggregate following the initial surface preparation" is materially different from the work at issue in Case No. NOV2000501, and that you identify which public works project(s) is covered by the instant determination.

only as to specific cases. Moreover, the Laborers were denied due process because they were not afforded an opportunity to submit evidence or argument about these hypothetical facts. Finally, the determination is inconsistent with LNI's conclusions in the materially identical DPK and Leewens cases, thereby violating the principle that administrative agencies should apply *stare decisis* to like cases. The determination is wrong on the merits because it misconstrues the contested wage scopes, misunderstands how crews installed the resinous floor coating at the University of Washington Life Sciences Building, Animal Research and Care Building, and at similar public works projects, and ignores overwhelming reliable evidence of industry practice in favor of the least probative and most-easily manipulated evidence.

ARGUMENT

I. The October 26, 2023, determination was procedurally defective.

A. The determination improperly ruled on the applicable wage scope for abstract, hypothetical facts disconnected from an actually-existing public works project.

LNI has published express standards governing the circumstances under which it which issue prevailing wage determinations and the information private parties must supply in order to obtain them. *See* Determination Request Requirements, *available at* https://lni.wa.gov/licensing-permits/_docs/DeterminationRequirementsWithChecklist.pdf. Crucially, "[d]etermination letters are provided to address specific factual situations and the applicable prevailing wage rates which must be paid" in those specific cases. *Id*. at 1. *See also* Determination – Cedar Hills Landfill, Determination 01292019 (2019) at 2 ("Prevailing wage determinations answer specific questions about whether prevailing wages are required to be paid on a specific project and/or which prevailing wage rate is required for a specific body of work on that project.") (attached hereto as Exhibit 1).

To ensure the industrial statistician rules on specific factual situations, LNI requires parties seeking determinations to submit, among other things, "the project name, a description of the project, the prime contractor and awarding agency, copies of project plans, specifications and contracts, relevant financing information, the prime contractor's Statement of Intent to Pay Prevailing Wages, and any other relevant information related to the project or proposed project." Determination Request Requirements at 1. Parties must submit a checklist documenting the inclusion of this requirement information. *Id*. at 2.

When parties fail to present evidence regarding the facts of the particular project, the industrial statistician must decline to issue a determination. As the former industrial statistician wrote in 2021 in a response to an evidentiarily deficient request:

> The Department Provides Determinations Based on Fact-specific Circumstances.
>
> The director of L&I, and his or her designee (or the law's designee as in the case of RCW 39.12.015) has a quasi-judicial role. With that role comes a responsibility to decline to decide matters which are hypothetical or abstract, and in which there is no specific fact set or dispute. PLAN arbitrators also have a quasi-judicial role, and can sometimes decline to reverse a jurisdictional assignment. L&I has this option as well.

> Your letter asks a hypothetical question. There is no fact set to compare against law and rule. As mentioned above, location can be relevant. The purpose of the work can also be relevant, along with the specific tools, materials, equipment and methods involved. Here, we have no purpose, tools, materials, equipment or methods to consider…
>
> In order for me to make a determination of prevailing wage I need specific facts. I have given examples of this, with trowels and brooms and with inspections of concrete surfaces. Your request for a determination omits the needed facts. There is no genuine dispute here, no one whose wages can be decided by looking at his or her methods, materials, tools, etc. For this reason, I decline to issue a formal prevailing wage determination under RCW 39.12.015 of what wage applies to that hypothetical work. Your letter appears to ask L&I to make a broad pronouncement of policy regarding concrete finishing in tunnels. There is additional reason that I decline to issue a formal determination asking for a general pronouncement.

February 19, 2021, Jim Christensen Letter at 3–4 (attached hereto as Exhibit 2).

The determination process would be utterly meaningless if parties could invite determinations, devoid of evidentiary support, based on their preferred articulation of work processes at generic work sites. And the industrial statistician would have no means to verify the information presented by the requesting party, such as by conducting site visits and employee interviews or requesting the submission of additional documentation.

Here, the Cement Masons' request for a determination appears to have involved an entirely hypothetical scenario divorced from any particular public works project. Neither the October 26 determination nor any of the materials attached thereto disclose a project name, description, prime contractor, awarding agency, project plans, specifications, or contracts, financing documents, statements of intents, or other project-specific records. Nor is there an indication that LNI independently verified the work performed at any unnamed project the Cement Masons may have been alluding to. The Cement Masons' request is framed in purely abstract terms based on hypothetical facts of its choosing: "Preparation and installation of MasterTop 1853 SRS CQ – a methyl-methacrylate-based (MMA) flooring system with a decorative quartz broadcast to resurface the pool deck." Determination at 1.[3] Without project-specific information, there is no basis to believe this work is being or has been performed on any public works projects in Washington. The determination refers in passing to the Cement Masons' claim that employees of Leewens Corporation were not paid the proper prevailing wage "to resurface the pool deck." *Id*. But if this refers to a particular Leewens "pool deck" project, it is never identified. Moreover, the Cement Masons' request for determination apparently "note[d]" past determinations on pool deck projects, but since determinations for those projects have already issued, they cannot be the subject of requests here.

Finally, the determination states that the request implicates "similar work" to that at issue in the since-withdrawn NOV against Leewens in Case No. NOV2000501 (UW Life Science Building), and thus conceivably extends its ruling to the facts of that case. However, there are material differences between

[3] Unlike with other determinations, the Cement Masons' request for determination is not enclosed with the materials published on LNI's website. So the scope of their request must be inferred from the determination itself.

the resinous floor coating project at the UW Life Science Building and the Cement Masons' hypothetical, on the one hand, and the work performed in the Armorclad/Tukwila Pool determination, on the other. For instance, the former involve MMA, an acrylic resin; the latter, an epoxy resin. The former involve broadcasting decorative quartz or plexiglass flakes; the latter, interspersing sand. The former—at least the UW Life Science Building—involve a floor coating around 140 mils thick; the latter, a coating about 78 mils thick.

The October 26, 2023, determination appears to address the Armorclad/Tukwila Pool fact pattern, not the UW Life Science Building work or the Cement Masons' hypothetical. It pertains to "the installation of thin set, epoxy seamless composition flooring systems that incorporate aggregate following the initial surface preparation." This framing replaces terms used in the recitation of the Cement Masons' request with materially different terms. For instance, the request sought a determination on the "preparation and installation of MasterTop 1853 SRS CQ," which the Cement Masons acknowledge is a methyl-methacrylate. As noted above, MMA is an acrylic resin. The final determination, on the other hand, pertains to "thin set, epoxy," which is a different kind of resin altogether. Similarly, the request's hypothetical involved broadcasting "decorative quartz," whereas the determination referred to the incorporation of "aggregate." While "aggregate" may encompass some kinds of crushed stones, it does not necessarily include decorative quartz flakes. It is unclear whether the determination's word replacements reflect an intentional conflation of the materials under consideration, unintentional imprecision, or a deliberate effort to reorient the question posed.[4] In any case, the discrepancy among terms highlights the dangers of issuing determinations on hypothetical facts: without reference to a particular project where one can consider the actual tools, materials, and methods used, the industrial statistician is at risk of making overbroad pronouncements.

The determination also states that it is issuing its ruling to provide "clarity." But there is no statutory authority for the industrial statistician to issue mere advisory opinions. In any case, ruling on a broad speculative fact pattern reduces clarity by leaving parties guessing about whether and how the determination applies to actual resinous floor coating projects that involve different tools, materials, and methods. That is especially so when there is an unexplained discrepancy between the work described in a party's request and in the determination issued.

"Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *accord Nat'l Conservative Political Action Comm. v. Fed. Election Comm'n*, 626 F.2d 953, 959 (D.C. Cir. 1980) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures."). In this case, the October 26 determination's adjudication of the Cement Masons' hypothetical facts contradicts LNI's own procedures—embodied in the "Determination Request Requirements"—and precedents—embodied in prior responses to deficient determination requests, as exemplified by Mr. Christensen's February 19, 2021, letter. Principles of fairness and due process require LNI to apply its evidentiary standards equally to all requests for determinations. The October 26 determination undermines these principles by indulging the Cement Masons' request for a ruling on the wage scope that applies to an abstract work process untethered to any specific project, equipment, materials, or methods that can be investigated.

[4] As indicated above, to the extent this determination was not intended to encompass MMA flooring systems, the Laborers request the determination be modified to so state and further, to reaffirm that the installation of this material belongs in the Laborers' or Painters' scopes of work.

B. LNI denied the Laborers due process by failing to give them an opportunity to submit evidence or argument in response to the Cement Masons' request for determination.

Administrative proceedings must provide procedural due process. *Morgan v. United States*, 304 U.S. 1, 15 (1938). Part of due process means giving "interested parties" notice that is "'reasonably calculated to apprise [them] of the pendency of the action and afford them an opportunity to present their objections." *Guardianship Estate of Keffeler ex rel. Pierce v. State*, 151 Wn.2d 331, 342, 88 P.3d 949 (2004) (cleaned up; citation omitted). LNI normally abides by this requirement in evaluating requests for determinations. LNI's "Prevailing Wage Determination Process Flow" provides that when the assigned specialist begins researching and writing a draft determination, they should "notify impacted stakeholders." Process Flow (attached hereto as Exhibit 3). Then, when the industrial statistician reviews the draft determination, he may consult with stakeholders. *Id*. The Process Flow also advises generally that LNI staff consider whether they've been transparent with stakeholders. *Id*.

In this case, LNI did not provide any notice to, or consult with, the Laborers about the Cement Masons' request for a determination, even though they are obvious stakeholders, given the longstanding dispute between the trades about the scope of work applicable to various types of resinous floor coating work. The Laborers were put at a structural disadvantage in this proceeding by virtue of the Cement Masons initiating the request for determination and offering descriptions of work and possibly other evidence of their choosing. Had it received notice of the request, the Laborers would have submitted evidence and argument contesting the Cement Masons' characterization of the work that may have influenced the outcome of the industrial statistician's determination. Instead, the Laborers were merely informed of the industrial statistician's forthcoming decision on June 28, 2023, at a meeting between the industrial statistician and trade representatives during the WSBCTC Conference.

LNI's failure to give the Laborers an opportunity to provide evidence and argument despite their stakeholder status does not accord with due process. The determination should therefore be vacated.

C. The determination is inconsistent with LNI's prior decisions.

Although agencies are not strictly bound by the principle of *stare decisis*, they "should strive for equality of treatment." *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn. 2d 144, 174, 256 P.3d 1193, 1207 (2011) (citation omitted). LNI has already decided that the installation of MMA floor coating falls within the Laborers' or Painters' scope and not the Cement Masons'. In the DPK Inc. case, the Prevailing Wage enforcement division fielded a complaint from the Cement Masons concerning work at the UW Animal Research and Care Facility which was materially identical to their instant request for determination. That investigation involved a lengthy colloquy with DPK's principals and correspondence with the MMA manufacturer's representatives. *See* DPK investigation summary (attached hereto as Exhibit 4). As a result of those discussions, LNI declined to issue a notice of violation. Bolden email to DPK principals (attached hereto as Exhibit 5).

Likewise, as a result of a similar complaint by the Cement Masons in connection with Leewens' MMA floor coating work on the UW Life Sciences Building, LNI issued a notice of violation against Leewens for which a hearing was scheduled. The hearing was eventually stayed so the industrial statistician could collect evidence and argument from interested stakeholders on the application of the

prevailing wage work scopes to Leewens' MMA work at the Life Sciences Building. As a result of that investigation, LNI withdrew its NOV against Leewens, found no prevailing wage violation concerning Leewens' rate of pay for the work at issue, and concluded that the Painters' or Laborers' scopes likely applied. *See* October 6, 2021, Withdrawal of Notice of Violation (attached hereto as Exhibit 6); Leewens Case File Excerpts (attached hereto as Exhibit 7).

To the extent the October 26, 2023, determination finds the Cement Masons' wage scope applicable to the same MMA floor coating work at issue in the UW projects, it clearly contradicts the Prevailing Wage enforcement division's prior findings. It would prejudice all relevant stakeholders, raise doubt over the finality of LNI's interpretation, and confusion over the wage scopes' prospective application to treat this case differently from materially similar prior cases.

II. The October 26, 2023, determination was, on the merits, incorrectly decided.

A. The determination erred in its description of the MMA floor coating process.

To the extent the determination purports to encompass the work of applying MMA to floor surfaces, its description of the work process errs in several critical respects. These errors have important bearing on the identification of the correct scope of work.

First, the determination incorrectly suggests that MMA is a type of epoxy, juxtaposing the term MMA parenthetically next to epoxy in the work description. But the two materials cannot be conflated. MMA is a base material necessary for the production of acrylic resins or plastics. *See* RS Means Illustrated Dictionary, Student Ed. (2012) (attached hereto as Exhibit 8 at 197) ("methyl methacrylate (MMA)" is "[a] rigid, transparent material widely used in the manufacture of acrylic resins and plastics, as well as in surface-coating resins, emulsion polymers, and impact modifiers."). Although MMA and epoxy are both resinous adhesives used to coat floor surfaces, in the construction industry, the two are treated as competing coating options with different properties, benefits, and drawbacks. *See*, e.g., Forgeway, "Epoxy adhesives vs methyl methacrylate adhesives; Which is right for you?" (attached hereto as Exhibit 9). For instance, epoxy resins are stronger but require more extensive preparation and take longer to cure. *Id*.

This is significant because while the Cement Masons' scope references "finishing of epoxy based coatings," WAC 296-127-01315, it does not mention MMA, acrylics, or resins more generally. This demonstrates that the only kind of resinous material within the Cement Masons' scope of work is epoxy-based. Meanwhile, the Painters' scope refers broadly to the "application of…resin," WAC 296-127-01356(4), and therefore captures acrylic resins such as MMA.[5] Indeed, in the course of the Animal Research Building investigation, BASF—the manufacturer of the MMA product at issue—informed the prevailing wage investigator that MMA was most properly classified as a "resin" and opined that the Painters' scope best fit the nature of the material and the purpose to which it was being put. Exhibit 4 at 2–3.

Second, the October 26 determination incorrectly described quartz as a kind of aggregate material. The hallmark of an "aggregate" is the "granular" composition of the material. Exhibit 8 at 20 (defining

[5] Notably, the Painters' scope also references the application of "epoxy," WAC 296-127-01356(4), confirming that LNI treats "resin" and "epoxy" as distinct concepts. The fact that the Painters' scope listed both resin and epoxy, while the Cement Masons' scope lists only epoxy, must be accorded significance.

aggregate as a "[g]ranular material such as sand, gravel, crushed gravel, crushed stone, slag, and cinders"). Stone qualifies as aggregate only when it is crushed into grains, *id*., and thus loses any aesthetic character. Conversely, decorative quartz is broadcast by hand in flake form and retains a distinct appearance to give the floor visual appeal. *See* Leewens Life Sciences Building Work Processes (attached hereto as Exhibit 10).

Third, the October 26 determination asserts that trowels "are the typical tool used to meter the spread of epoxy flooring solution" and "are utilized during the installation of built-up, thin set, resinous floor." But trowels were not used in either of the MMA projects LNI has investigated. In both the UW Animal Research and the Life Sciences Building projects, workers spread the primer, base coat, intermediate coats, and topcoats of MMA using long-handled squeegees, gauge rakes, back rollers, spike or "porcupine" rollers, and brushes. Exhibit 4 at 1; Exhibit 10 at 1.[6] Metal trowels were not used for this work for two reasons: (a) the metal interacts with the MMA to create greyish streaks which upset the MMA's uninform appearance, Exhibit 10 at 1; and (b) MMA flooring systems—at least those of the "flow applied flooring" thickness—are "self-leveling," William R. Ashcroft, *Industrial Polymer Applications,* Royal Society of Chemistry, at 29 (2019) (excerpts attached hereto as Exhibit 11), which obviates the need for finishing tools like trowels, which by definition, are used to level and smooth surfaces. Exhibit 8 at 121 ("finishing" means "[l]eveling, smoothing, compacting, and otherwise treating surfaces of fresh or recently placed concrete or mortar to produce the desired appearance and service"). The absence of trowels in the application of MMA has been confused by parties' occasional reference to a "squeegee trowel." But this is a misnomer. As Leewens' work process document explains, the term "squeegee trowel" is used interchangeably with long-handled squeegees with flat rubber blades. Exhibit 10 at 1. These squeegees are not used to level the MMA on the floor surface but to spread the material out. *Id*. A "trowel," meanwhile, refers in the flooring context exclusively to "[a] flat, broad-blade *steel* hand tool used in the *final stages of finishing operations* to *impart a relatively smooth surface* to concrete floors and other uniformed concrete surfaces." Exhibit 8 at 325 (emphasis added). The so-called "squeegee trowel" is used for a completely different purpose.[7] In any case, a basic Google search reveals that commercially available squeegee trowels are short-handled devices, not the long-handled ones used on the UW projects, so true "squeegee trowels" were not used by Leewens or DPK employees to spread MMA.

Fourth, the determination claims that "seamless composition flooring system" is the most appropriate term to describe "the work of building up and creating a flooring system by applying successive layers of epoxy and solids to achieve a new floor that is of a prescribed thickness." This finding misconstrues the term "seamless composition flooring," which is a term of art related to a particular kind of cementitious flooring. The term first appeared in the early 20th century, when trade journals in the U.S. and Britain described "seamless composition floors" as a "durable, inorganic, non-absorbent" covering that could be placed over traditional wooden floor boards when they began to wear out, rather than replacing them. Charles James Fox, "Seamless Composition Floors," *The Metal Worker, Plumber and Steam Fitter,* Vol. LXIX, No. 4, at 36 (Jan. 25, 1908) (attached hereto as Exhibit 12); *see also* Unknown, *The Journal of the Society of Estate Clerks of Works,* Vol. XXI, No. 243 at 186 (Sept. 1, 1908) (quoting Fox) (attached hereto as Exhibit 13). These journals specifically noted that "the basis of all these floors is Sorel's cement," an admixture of magnesium chloride and magnesia, to which could be added "[s]awdust,

[6] At most, metal trowels were used to spread a pre-installation level of epoxy. Exhibit 4 at 1. But that pre-installation work is not the subject of the Cement Masons' request for determination.

[7] Indeed, even the Armorclad determination withheld judgment on whether squeegee trowels constitute finishing tools. *See* Determination – Preparation to Swimming Pool and Pool Deck Prior to Painting, 12212016 (Dec. 21, 2016), at 2, n.2.

asbestos, sand and other materials, including coloring matter," in various proportions. *Id*. The admixture of various disparate materials is consistent with RS Means' Construction Dictionary's definition of "composite construction," Exhibit 8 at 71, but inconsistent with the uniform nature of MMA. Although the term has eluded definition in modern times, other state regulatory regimes that designate "seamless composition floors" as part of the Cement Masons' scope of work explain the term by way of example, citing quartzite (a rock compound) and Dex-O-Tex (a company that produces various cementitious, urethane, terrazzo, and epoxy compounds) as types of "seamless composition floors." *See* MN ADC 5200.1102, subp. 6, Code No. 706(B)(6) (Minnesota); 8 CRS 30-3.060(7)(E)(1)(E) (Missouri).[8]

Conversely, for the reasons explained in greater detail in the Laborers' August 13 and September 10, 2021, position statements concerning the UW Life Sciences Building investigation, attached hereto as Exhibit 15 and 16, respectively, the terms "penetrating sealer," "primer protective coating,"—which appear in the Laborers' scope of work, WAC 296-127-01344—or "protective coatings," which appears in the Painters', WAC 296-127-01356(4)—more accurately describe the purpose served by the MMA floor coatings.

B. The determination misinterpreted the plain language of the scopes of work.

When deciding which prevailing wage rate applies to a project, the industrial statistician looks first to the plain language of each scope of work as set out in WAC 296-127. The October 26, 2023, determination's analysis of this language was flawed. For the reasons described below, the facial language supports the applying the Laborers' or Painters' scopes of work to MMA floor installation. At the very least, it is ambiguous as to which scope of work applies to the disputed work.

1. The Laborers' scope of work applies to MMA floor coating installation.

The October 26, 2023, determination found that the disputed work is not covered by the Laborers' scope of work, WAC 296-127-01344, because (a) the Laborers' scope of work is limited to preparatory work, foreclosing the ability for the Laborers to install built up resinous floors outside of a support capacity; and (b) the language in the Laborers' scope does not provide for "the application/installation of built-up resinous floor systems with aggregate materials added."

The plain language does not support a reading confining the Laborers' work to preparatory activities. The Laborers' scope is in fact much broader than the Cement Masons' or the Painters'. It provides that Laborers "perform a variety of tasks," WAC 296-127-01344, but unlike the Cement Masons' scope of work, that language is not prefaced by any qualifying clause specifying which kinds of tools Laborers use or otherwise constraining the Laborers' scope of work to preparatory and support activities. While the Laborers' scope of work captures some support and preparatory work, the ensuing bullet points cover an array of tasks from beginning to end of work processes. Examples of such beginning to end tasks incorporated in the Laborers' scope includes work such as "[e]rect[ing] and repair[ing] guard rails," "mix[ing], pour[ing] and spread[ing] asphalt, gravel and other materials," "position[ing], join[ing], align[ing], wrap[ping], and seal[ing] pipe sections," and "spray[ing] material… through hoses to clean,

[8] Strictly speaking, Dex-O-Tex is a company, not a material. Although the company currently sells a wide array of floor covering and waterproofing products, its original product was a mix of rubber and cement. *See* Exhibit 14 (company history). When referred to generically, Dex-O-Tex can reasonably be identified as this cementitious compound. At any rate, there is no evidence that Dex-O-Tex produces an MMA product.

coat or seal surfaces." The most natural reading of the Laborers' scope is that Laborers conduct a variety of work, including, *but not limited to*, preparatory work, in both a support capacity and as the main trade on the job.

The determination fails to address the most on-point Laborers' task listed in their scope: "[t]he application of penetrating sealer and primer protective coatings to concrete floors and steps when safe to walk on." Without explanation, the determination lumps this task in with other allegedly preparatory activities. But "penetrating sealer" is an apt umbrella term for the MMA floor coating at issue, and "primer protective coating" covers a subset of MMA layers used for primer purposes. Exhibit 15 at 2–3.

Finally, the fact that the Laborers' scope does not provide for "the application/installation of built-up resinous floor systems *with aggregate materials added*" is beside the point. (emphasis added). The installation of resinous floors at the UW projects did not involve aggregate materials, but decorative flakes made of plexiglass. Exhibit 4 at 1.

2. The Painters' scope of work applies to MMA floor coating installation.

The October 26, 2023, determination stated that the Painters' scope of work does not apply because (a) that scope of work covers work applied with brushes, spray guns, or rollers, but not trowels; and (b) the scope does not anticipate the Painters applying epoxy for purposes other than waterproofing or protective coating.

That the Painters' scope does not incorporate the use of trowels is immaterial because trowels are not used for MMA floor coating installation, other than for discrete preparatory and coving work. *Supra*, 7. In fact, the Painters' scope specifically lists two of the main tools used for the job—rollers and brushes. WAC 296-127-01356. Furthermore, the Painters' scope, unlike the Cement Masons', specifically mentions the application of "resin," of which MMA and other synthetic acrylics are subsets. *Supra,* 6.

3. The Cement Mason's scope of work does not apply to MMA floor coating installation.

WAC 296-127-01315 sets out the scope of work for the Cement Masons. The October 26, 2023, determination notes that the Cement Masons' scope of work includes "all work where finishing tools are used." The determination focused in particular on the Cement Masons' task of performing "[t]he installation of seamless composition floors and the installation and finishing of epoxy based coatings…, when… applied by spraying or troweling." WAC 296-127-01315. This language, combined with the fact that the Cement Masons' scope was the only one that "includes the use of finishing tools and specifically lists trowels in its description," resulted in the conclusion that the Cement Masons' scope of work was the most applicable to the disputed work. This analysis is flawed in two respects.

First, the language cited in the scope of work for the Cement Masons is prefaced by the declaration that the Cement Masons "perform all work where finishing tools are used," which "includes, but is not limited to" that work. WAC 296-127-01315. As noted above, "finishing" in this context means leveling and smoothing recently placed concrete or mortar. *Supra*, 7. Those tools were not used in the UW projects because MMA is self-leveling. *Id*. Further, MMA is an acrylic resin, not a concrete or mortar, material. *Supra,* 6.

Second, the supposedly decisive bullet point in the Cement Masons' scope of work is not applicable to MMA floor coating work. The foregoing bullet point can be disaggregated into two separate clauses: one providing for "the installation of seamless composition floors," and the other providing for "the installation and finishing of epoxy based coatings…, when… applied by spraying or troweling."

As to the first clause, the term "seamless composition floors" has historically referred to a covering involving an admixture of cement, aggregate, and other non-resinous materials. *Supra,* 7–8. MMA, on the other hand, is a uniform, acrylic material, and does not contain such aggregate materials. *Supra,* 6–7.

Meanwhile, the language in the second clause is limited to the installation and finishing of *epoxy-based* coatings. MMA is not an epoxy-based material, but an acrylic resin. *Supra,* 6. Even if MMA was epoxy-based, the Cement Masons scope would only cover the disputed work if the MMA was applied by spraying or troweling. However, the MMA installation work at the UW projects was conducted with long-handled squeegees, gauge rakes, back rollers, spike rollers, and brushes, not trowels. *Supra,* 7.

C. The determination misapplied the industry practice inquiry.

As the October 26, 2023, determination correctly noted, it is proper for the industrial statistician to consult the authoritative sources enumerated in WAC 296-127-013 to aid the identification of the correct scope of work applied to a particular job when the plain language of the scopes are ambiguous. *See* OAH No. 11-2020-LI-01557, April 11, 2023, Order, ¶ 11 (attached hereto as Exhibit 17). This exercise is based on the presumption that the scope of work drafters consulted these very sources when devising the work processes associated with each trade. *Id*. The available authoritative sources include apprenticeship standards, collective bargaining agreements, dictionaries of occupational titles, experts, and, critically, "[r]ecognized labor and management industry practice." WAC 296-127-013(2).

Considering industry practice is especially important to ensure the scopes of work follow, rather than create, established industry practice. *See* November 12, 2020, Letter of Jim Christensen at 2 (attached hereto as Exhibit 18). Prevailing wage laws exist to make sure that employees are not paid substandard wages on public works projects. *Everett Concrete Products, Inc. v. Department of Labor & Industries*, 109 Wn.2d 819, 823–24, 748 P.2d 1112 (1988); *D.W. Close, Inc. v. Dep't of Labor & Indus.,* 143 Wn. App. 118, 129 (2008) (*citing Heller v. McClure & Sons, Inc.,* 92 Wn. App. 333 (1998)). Looking to current industry practice to confirm whether LNI's interpretation of the scopes of work is correct ensures that the scopes are enforced consistently with that objective. If LNI's interpretation is inconsistent with the thousands of intents and affidavits being filed with the department, that should cause LNI to pause and take a closer look at the scope to assess whether another reasonable interpretation that harmonizes with industry practice is possible. *See* OAH No. 10-2019-LI-01202, Hearing Transcript from September 21, 2021, at Tr. 805:11-16 (excerpt attached hereto as Exhibit 19) (recognizing that if the scopes of work are "out of step" with industry practice, that "would suggest that L&I either needs to interpret the existing scopes differently or change the language of the scopes."). Indeed, the Director recently recognized the importance of industry practice in interpreting the scopes in reversing an Initial Order after finding that the scopes in question were "subject to more than one reasonable interpretation and [] thus ambiguous." *See* Exhibit 17, ¶ 8. In that case, the Director relied upon the fact that "the recognized industry practice has been to use [L]aborers, not plumbers" to conclude that the Laborers' scope of work applied to a particular body of work. *Id.* at ¶¶ 7-9.

For the reasons discussed above, the plain language of the Laborers' and Painters' scopes of work encompasses the disputed MMA floor coating installation work. However, to the extent the industrial statistician believes there is some language favoring the Cement Masons, consulting industry practice definitively rules this out.

Yet the October 26 determination seriously misconstrued industry practice when it found this source "not helpful" because, supposedly, "this installation work is being assigned to multiple crafts." The only evidence the determination cited in support of this proposition was the National Labor Relations Board's (NLRB or Board) Decision in Case 19-CD-211263, *Skanska USA Building, Inc.*, 366 NLRB No. 161 (2018) (attached hereto as Exhibit 20), which concerned the very MMA floor coating work performed by Leewens at issue in the since-withdrawn NOV. But that decision shows instead that the overwhelming industry practice in the Seattle metropolitan area has been to assign MMA floor coating work to Laborers, not Cement Masons. For instance, the Board credited testimony from both Leewens' and Local 242 representatives that "Seattle-area floor coating companies [did not] us[e] any craft but Laborers" for resinous flooring work. *Id*. at 4. Further, the Board found that "between 2010 and 2017, 42 out of 47 resinous flooring projects [conducted by Skanska] were awarded… to Laborers-affiliated subcontractors." *Id.* at 4; *see also* (Skanska's 2010-2017 job list, attached hereto as Exhibit 21). This trend has only strengthened over time, with 30 out of 31 latest resinous flooring jobs by Leewens being awarded to Laborers at the time of the Board decision in 2018. In fact, the Board found that "Leewens almost exclusively uses Laborers-represented employees for epoxy floor coating work." Exhibit 19 at 4. Thus, concluded the Board, "employer preference, *current assignment… past practice… and industry and area practice*" all favored assigning the work to the Laborers. *Id*. (emphasis added). Likewise, the Board found that the Laborers, have actual training in both "the general aspects of floor coating and in installing methyl methacrylate (MMA) in particular." *Id*. Meanwhile, there was no evidence introduced suggesting the Cement Masons possessed the necessary certifications or training. *Id*. In sum, the Board's 10(k) decision refutes the notion that industry practice is in any way disputed.

Other indicia of industry practice in the Seattle metropolitan area confirm that Laborers have historically performed the disputed work. For instance, public works job bids and their associated affidavits of paid wages show that contractors performing MMA and other resinous floor coating work have regularly paid workers at Laborers and Painters prevailed rates. Exhibit 16 at 1–2 (citing Exhibits P–Y). Indeed, a search on LNI's affidavit database for hours spent on public works projects by Epoxy Technicians—the Laborers classification that generally performs resinous floor coating work—yields 29,362.67 hours since 2003. *See* Spreadsheet of Hours (attached hereto as Exhibit 22). Similarly illustrative of the industry recognition accorded Laborers is the 2003 Award pursuant to NABTU's Plan for the Settlement of Jurisdictional Disputes (Plan Award) (attached hereto as Exhibit 23). That decision awarded resinous floor coating work to the Laborers over the Painters based on Leewens' established practice of hiring the former for said work. *Id*. at 5.

Rather than examining highly probative evidence of which trade actually performs the relevant work in the field, the determination instead examined a far less probative source: the formal descriptions of apprenticeship training standards utilized by the Cement Masons', Laborers', and Painters' affiliated apprenticeship programs. Even assuming the Cement Masons' standards correspond to MMA floor coating installation, the fact that the Masons' managed to include this work in their apprenticeship program says very little about how the scopes of work were meant to be understood when drafted. The Washington State Apprenticeship and Training Council, which is responsible for approving new and amended

standards, does not police jurisdictional disputes between trades and so does reject proposed standards because another trade has historically performed the tasks in which programs seek to train apprentices. WSATC's laissez faire approach makes it easy for apprenticeship standards to be strategically amended by trades hoping to expand their jurisdictions. These amended standards can then later be invoked in prevailing wage disputes as "evidence" of the trade's supposed expertise in a given area of work—exactly what the Cement Masons have done here. It is inappropriate to weigh easily-manipulated apprenticeship training standards as an authoritative source in the face of objective evidence that the Laborers—not the Masons—have performed resinous floor coating work in the Seattle metro area.

CONCLUSION

For the foregoing reasons, the Laborers respectfully request the October 26, 2023, determination be withdrawn or amended as described above. Please contact me with any questions or concerns at (206) 257-6006.

Sincerely,

Ben Berger
Counsel for WNIDCL and Laborers Local 242

cc: Stacy Martin
Doug Scott
Dave Hawkins
Mallorie Davies
Earl Smith
Dale Cannon
Celeste Monahan

EXHIBIT 2

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
Prevailing Wage
PO Box 44540 • Olympia, Washington 98504-4540
360/902-5335 Fax 360/902-5300

November 10, 2014

Judd H. Lees
Williams, Kastner & Gibbs PLLC
Two Union Squart
601 Union Street, Suite 4100
Seattle, WA 98101

Dear Judd;

Thank you for your letter dated June 17, 2014 addressing prevailing wage rates that are applicable to work performed by Armorclad on the projects known as Tukwila Pool Ph. 1 for the Department of Enterprise Services, and John's Prairie Operations Center for Mason County Public Utility District No. 3. This determination originates from an investigation and audit performed by Mario Silva, Industrial Relations Agent, pursuant to a worker complaint that was filed with the Department of Labor and Industries (L&I.) Thank you for your patience as this matter has been under review.

In preparing this determination, I reviewed a number of materials including but not limited to your prior correspondence to the program dated June 26, 2013, September 23, 2013 and June 17, 2014, along with correspondence submitted by Rebound dated September 10, 2013. As you know, an Industrial Relations Agent and Industrial Relations Specialist from our program conducted a visit to Armorclad's facility on May 31, 2013 and observed a demonstration of the installation process for the floor product.

This is a determination of the Industrial Statistician regarding coverage of the referenced work under Washington's prevailing wage laws and is made pursuant to RCW 39.12.015. It is based on the facts presented. If the facts change, the answer could be different. See the enclosed document, "Prevailing Wage Determination Request and Review Process."

Process Reviewed

Based on the information that I have been able to review, both projects involve a similar layered, epoxy and sand, built-up flooring product, and its installation in a multi-step process. Associated with this installation process is some preparatory taping and masking, shot blasting, grinding, and patching work, as well as the shaping of some coves. Additionally, the Tukwila Pool project involved the grinding down and resurfacing of tile walls. I will review the work on floors and the work on walls separately.

Flooring
The flooring installation process at issue involves multiple steps and multiple layers following the initial preparation. For the John's Prairie Operations Center I understand that five total layers of epoxy and sand were used, whereas for the Tukwila Pool project there were three layers of epoxy and sand (in each the bottom and top layer are epoxy). First is a preparatory process that involves taping and masking of areas for protection; shot blasting with the use of sandpaper, steel wool, wire brushes or a 4" standard wire wheel grinder; and patching work with an epoxy performed with hand-held trowels and squeegees. On the Tukwila pool project you refer to 4" and 7" inch grinders.

Following this preparatory work, the flooring product is applied in layers. An initial layer of the epoxy is applied using a long-handled squeegee trowel, and then "back-rolled" using traditional paint rollers. Following this, a layer of sand is broadcast evenly across the surface by hand to the point of refusal. The surface is allowed to dry and the remaining loose sand is then vacuumed or swept off of the surface. As described in your June 23, 2013 letter, for the work on the John's Prairie Operations center, second layers of epoxy and sand were then applied in similar manner, followed by sweeping and vacuuming. With or without these second layers of epoxy and sand, a final "top coat" of epoxy is applied with long-handled squeegees and then back-rolled using paint rollers to create the finished surface. The result is a textured, non-skid surface that includes either three layers of epoxy and two layers of sand, or two layers of epoxy and one layer of sand. A sample tile provided by Armorclad at the May 31 meeting shows a product that is approximately 2 mm thick.

Coves
Around the bottom of the wall, the product is applied by trowels to create a seamless cove. I understand that this process involves a pre-mix of sand and epoxy. In your June 23, 2013 letter you describe a worker using a trowel "to take the liquid material from the floor up to the wall to form a several inch cove."

Walls
For the Tukwila Pool project, Armorclad performed work to grind and resurface tile walls, in addition to the work on the floors. You describe the grinding work in your June 17, 2014 letter to include the use of paint remover, scrapers, and wire brushes. I understand that small grinders were also used. Following this preparation a layer of epoxy was applied by trowel and, to this, the workers applied a fiberglass mesh cloth using a brush. Finally a roller is used to achieve a finished surface where necessary.

Scopes of Work
After reviewing the correspondence noted above and based on the above descriptions of the relevant processes, I have reviewed our scope of work descriptions found under WAC 296-127-013. I understand that in your view, the work on the floors and walls can mainly be performed under the classification for Painters, WAC 296-127-01356. The scope of work description for Cement Masons is broadly worded using the phrase "....work includes, but is not limited to:...". The scope of work description for Painters however is written with limiting language which

states that the "job description for painters is as follows…" Based on my review, the scopes that are applicable to certain aspects of the described work are those for Cement Masons, WAC 296-127-01315, Laborers, WAC 296-127-01344, and Painters, WAC 296-127-01356. The tasks and their respective classifications are outlined below.

Cement Masons, WAC 296-127-01315
The scope of work for Cement Masons describes a variety of tasks including "all work where finishing tools are used." The scope of work also specifies "[t]he installation of seamless composition floors and the installation and finishing of epoxy based coatings…when…applied by spraying or troweling." The scope of work does not limit itself to work in which the use of a traditional cement finishing tool is the last step in the process. The flooring product at issue here constitutes a "seamless composition floor." Here, the use of the term "installation" is important. That term is inclusive of the multiple steps necessary to create such a floor, having a broader meaning than a term like "application" or "coating." This flooring system, while not made with traditional concrete, incorporates aggregate (sand) which would suggest a Cement Mason material. The Cement Mason prevailing wage is applied to the installation of this seamless composition floor including the distribution of the epoxy using a squeegee trowel, the smoothing of the epoxy coating using a roller and the broadcasting of sand.

The sample tile provided to me shows that it is approximately 2 mm thick and provides independent structure. Therefore the installation of this seamless composition (epoxy) floor, including the distribution of epoxy using a squeegee trowel, the smoothing of the epoxy coating using a roller and the broadcasting of sand is properly categorized under the classification for Cement Masons. The troweling work necessary to form the coves is also included in this classification.

Laborers, WAC 296-127-01344
The scope of work for Laborers includes "[t]he 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)." This language is applicable to the preparatory work described above to include taping and masking of areas for protection; shot blasting with the use of sandpaper, steel wool, wire brushes or a 4" standard wire wheel grinder; and patching work with epoxy performed with hand-held trowels and squeegees.

Painters, WAC 296-127-01356
The scope of work for Painters is not applicable to the installation of a multi-layer floor product including sand and epoxy. However, the scope includes "[a]pplication of…. wallpaper and other materials of whatever kind or quality applied to walls or ceilings with paste or adhesive using brushes, spray gun or paint rollers." Application of epoxy and fiberglass mesh to walls using epoxy as an adhesive, followed by rolling with paint rollers, falls within this Painters scope of work description.

Additionally, the scope of work for Painters includes preparation of surfaces and specifically "[w]ashing, cleaning and smoothing of surfaces, using sandpaper, brushes or steel wool," along with "[r]emoval of old paint or other coatings from surfaces, using paint remover, scraper, wire brush or by sandblasting." This language covers the preparatory work that you described to include the use of paint remover, scrapers, wire brushes, and a small handheld grinder. Accordingly, the work on the walls on the Tukwila Pool project is properly categorized under the Painters classification.

To summarize, the preparatory work involving shot blasting, grinding, etc., is properly paid at no less than the prevailing wage for Laborers (WAC 296-127-01344). The installation of the composition floor system involving epoxy and sand is properly paid at no less than the prevailing wage for Cement Masons (WAC 296-127-01315). The Cement Mason wage also applies to the coves. The wall coating system involving epoxy and fiberglass is properly paid at no less than the prevailing wage for Painters (WAC 296-127-01356).

I appreciate the opportunity to provide this somewhat challenging determination and, as mentioned above, I have appreciated your patience. Please do not hesitate to contact me by phone or email if you have further questions, or for any other reason.

Washington State prevailing wage information, including the WACs, are available on the Department's web site: http://www.lni.wa.gov/TradesLicensing/PrevWage/default.asp

Sincerely,

Jim Christensen
Program Manger
Industrial Statistician

cc: Eric Coffelt
Miriam Moses

Enclosures

Prevailing Wage Determination Request and Review Process

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

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

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

> (3) Any party in interest who is seeking a modification or other change in a wage determination under RCW 39.12.015, and who has requested the industrial statistician to make such modification or other change and the request has been denied, after appropriate reconsideration by the assistant director shall have a right to petition for arbitration of the determination.
>
> (a) For purpose of this section, the term "party in interest" is considered to include, without limitation:
>
> (i) Any contractor, or an association representing a contractor, who is likely to seek or to work under a contract containing a particular wage determination, or any worker, laborer or mechanic, or any council of unions or any labor organization which represents a laborer or mechanic who is likely to be employed or to seek employment under a contract containing a particular wage determination, and
>
> (ii) Any public agency concerned with the administration of a proposed contract or a contract containing a particular wage determination issued pursuant to chapter 39.12 RCW.
>
> (b) For good cause shown, the director may permit any party in interest to intervene or otherwise participate in any proceeding held by the director. A petition to intervene or otherwise participate shall be in writing, and shall state with precision and particularity:
>
> (i) The petitioner's relationship to the matters involved in the proceedings, and
>
> (ii) The nature of the presentation which he would make. Copies of the petition shall be served on all parties or interested persons known to be participating in the proceeding, who may respond to the petition. Appropriate service shall be made of any response.

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

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

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

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

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

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

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

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

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

(a) The public agency or agencies involved,

(b) The industrial statistician, and

(c) Any other person (or the authorized representatives of such person) known to be interested in the subject matter of the petition.

(2) The director shall under no circumstances request any administering agency to postpone any contract performance because of the filing of a petition. This is a matter which must be resolved directly with the administering agency by the petitioner or other party in interest.

(3) A petition for arbitration of a wage determination shall:

(a) Be in writing and signed by the petitioner or his counsel (or other authorized representative), and

(b) Identify clearly the wage determination, location of project or projects in question, and the agency concerned, and

(c) State that the petitioner has requested reconsideration of the wage determination in question and describe briefly the action taken in response to the request, and

(d) Contain a short and plain statement of the grounds for review, and

(e) Be accompanied by supporting data, views, or arguments, and

(f) Be accompanied by a filing fee of $75.00. Fees shall be made payable to the department of labor and industries.

WAC 296-127-01315
Cement masons.

For the purpose of the Washington state public works law, chapter 39.12 RCW, cement masons perform all work where finishing tools are used.

The work includes, but is not limited to:

The setting of screeds, the rodding (buildings), shaping, smoothing and finishing of the surfaces of freshly poured concrete floors, walls, sidewalks, curbs, steps and stairways, the finishing of extruded barrier rails, or any other concrete surface requiring finishing, using hand tools or power tools, including floats, trowels, screeds and straightedge.

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 preparatory to sacking. (The finishing of a large surface of patched holes.)

The moulding of expansion joints and edges, using edging tools, jointers and straightedge.

The application of penetrating sealer and primer protective coatings to concrete floors and steps for the first twenty-four hours after pouring, when part of the finishing process.

The installation of seamless composition floors and the installation and finishing of epoxy based coatings or polyester based linings to all surfaces, when the coatings or linings are applied by spraying or troweling.

Sandblasting or waterblasting for architectural finish or preparatory to patching.

The setting of all forms one board high.

The cutting of joints with concrete saw for the control of cracks in buildings and contiguous to buildings.

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

All cleanup work required in connection with the above work.

[Statutory Authority: Chapter 39.12 RCW, RCW 43.22.270 and 43.22.051. 00-15-077, § 296-127-01315, filed 7/19/00, effective 7/19/00.]

WAC 296-127-01344
Laborers.

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.

[Statutory Authority: Chapter 39.12 RCW, RCW 43.22.270 and 43.22.051. 00-15-077, § 296-127-01344, filed 7/19/00, effective 7/19/00.]

WAC 296-127-01356
Painters.

For the intents and purposes of the Washington state public works law, chapter 39.12 RCW, the job description for painters is as follows:

(1) Preparation of surfaces.

(a) Washing, cleaning and smoothing of surfaces, using sandpaper, brushes or steel wool.

(b) Removal of old paint or other coatings from surfaces, using paint remover, scraper, wire brush or by sandblasting.

(c) Filling of nail holes, cracks and joints with putty, plaster or other fillers.

(2) Color matching and mixing.

(3) Application of paint, varnish, stain, enamel, lacquer, vinyl, wallpaper and other materials of whatever kind or quality applied to walls or ceilings with paste or adhesive using brushes, spray gun or paint rollers.

(4) Application of polyurethane elastomers, vinyl plastics, neoprene, resin, polyester and epoxy as waterproofing or protective coatings to any kind of surfaces (except roofs) when applied with brushes, spray guns or rollers.

(5) Application of sprayed on fire retardant foam.

(6) Texturing and decorating.

(7) Erecting of scaffolding or setting up of ladders to perform the work above ground level.

(8) Responsible for all the cleanup required in connection with painters work.

[Statutory Authority: Chapter 39.12 RCW, RCW 43.22.270 and 43.22.051. 00-15-077, § 296-127-01356, filed 7/19/00, effective 7/19/00.]

WILLIAMS KASTNER™

June 26, 2013

27777.0101

Marcus Ehrlander
Industrial Relations Specialist-Prevailing Wage
WA Department of Labor & Industries
7273 Linderson Way SW
Tumwater, Wash. 98501-5414

Re: Work Classifications Applicable to Armorclad Floor Applications

Dear Marcus:

Thanks for your willingness to accompany Mario Silva to Armorclad's headquarters and warehouse to view the broadcast application process involved in painting floors. Based on your email of April 30, 2013, the Department is currently of the opinion that the prep work belongs to the Laborers classification and that all other work except for the final coating belongs to the Terrazzo workers and/or the Cement Masons. The final coating (and I assume other coating work involving a paint roller) belongs to the Painters. It is Armorclad's position that its past and current practice of treating the entire broadcast application process as Painters' work is correct. Based on the demonstration you witnessed, here is the basis for that claim.

Step 1:Prep

In this step, the worker uses a diamond grinder on the floor surface to clean up small debris but primarily to ensure a good bond for the paint by removing any finishes to the floor surface. This is similar to the sanding process when painting wood which has been previously painted. On larger projects, Armorclad employees use shotblasters.

Applicable Classification:

The Painters' scope of work, WAC 296-127-01356, includes the "preparation of surfaces" and, in particular, the "removal of old paint or *other coatings* from surfaces using paint remover, scraper, wire brush or by sandblasting." Employees involved in marine painting use all sorts of heavy equipment to remove rust or finishes from ships in preparation for painting. A grinder is one of those devices, although not listed in this WAC.

While the Laborers scope of work, WAC 296-127-01344, does list the "cleaning and grinding of concrete floors" this is limited to "high pressure waterblasting or sandblasting preparatory to the *application of waterproofing*" which is not the case here. The use of a "grinder" is mentioned elsewhere but only for "removing of rough or defective spots from concrete surfaces."[1] As you saw in the pictures you viewed on Mark Hoefer's computer, a grinder was used on a beautifully finished concrete floor in order to create a bondable surface for the paint. While it can smooth

[1] Similarly, the mention of "grinders" in the Cement Masons scope of work, WAC 296-127-01315, limits its use to "removing of rough or defective spots from concrete surfaces."

Williams, Kastner & Gibbs PLLC
Two Union Square
601 Union Street, Suite 4100
Seattle, Washington 98101
main 206.628.6600 fax 206.628.6611
www.williamskastner.com
SEATTLE . TACOMA . PORTLAND

rough spots, the grinder is primarily used by Armorclad employees to prepare the surface to receive paint.

Step 2: Vacuum
Since this involves cleanup of the surface residue (similar to wiping a sanded surface prior to painting), this step is part and parcel of the "surface preparation" expressly covered by the Painters' scope of work.

Step 3: Mixing of Paint
This clearly is Painters' work.

Step 4: Spread of Epoxy Paint with Squeegee
Since the epoxy mix cures quickly, it is imperative on a large surface for the employee to get a layer of epoxy spread on the floor as quickly as possible. While application largely involves a paint roller (see below), the favored method to get the paint in place for the roller is to spread it out using a squeegee.

Applicable Classification
While the Painters' classification expressly covers application of paints utilizing "brushes, spray guns or rollers," it does not rule out the use of squeegees to get the paint in place for rolling. Indeed "squeegees" are not mentioned in any other classification. For instance the Terrazzo Worker classification, WAC 296-127-01379 is limited to the spreading of "sand, cement and water with trowel" to form a base for Terrazzo. Similarly, the Cement Mason scope of work is limited to the "installation of seamless composition floors and the installation and finishing of epoxy based coatings or polyester based linings to all surfaces, when the coatings or linings are applied by spraying or troweling." A trowel is not used by the Armorclad employee in this phase.[2] Indeed, a trowel is an unusable tool to apply to quickly thickening paint.

Step 5: Spread of Epoxy Paint with Paint Roller
The Department has conceded that this work falls within the Painters' scope of work.

Step 6: Broadcast of Sand to "Refusal"
In this step the Armorclad employee throws sand-like material on the wet surface of the paint for thickening, texturing and decorative purposes. The sand is thrown by hand until it is all absorbed by the liquid. It is then "cured" for 24 hours.

Applicable Classification
The Painters' classification references "texturing and decorating." The variety and color of quartz, paint chips or other granules is chosen by the owner depending on whether they are

[2] As discussed at the 5/31/13 meeting, Armorclad employees do occasionally use a trowel to patch walls or floors but this work is limited and the trowel is used like a putty knife to place the filler where it is required to go. Similarly, the use of grinders on walls does not convert this work to Laborers or Cement Masons work since the application under both is expressly tied to concrete surfaces.

seeking only texture or also decoration. While, as you've pointed out, the sand becomes part of the floor covering, the epoxy which is painted on, is the primary floor covering.

Moreover, no other classifications expressly describe the throwing of sand onto a wet paint surface. While the scope for Terrazzo workers does include the "spreading of any other kind of mixture of …quartz,…and all other kinds of chips or granules," this is expressly limited to premixed materials—not the coating of a wet application with sand.

Step 7: Sweeping and Vacuuming of Unabsorbed Sand
After the coating has cured for 24 hours, the employee returns to remove the unabsorbed granular material. This involves first sweeping, then vacuuming the surface.

Applicable Classification
Under the Painters' scope of work, the employee is "responsible for all the cleanup required in connection with painters' work." This step falls within that scope of work.

Step 8: Repeat Same Steps for Second Coat
The same processes of mixing the paint, squeegee then rolling the liquid material on the surface, then the broadcast of sand, 24-hour cure, then removal of excess sand is repeated. As discussed above, the Painters' classification applies to all of these steps.

Step 9: Finish with Top Coat
Once the second layer has dried, the final steps are to sweep and vacuum the excess sand and apply a final coat via the mixing, squeegee and rolling process engaged in previously. Again, for the reasons set forth previously, this is Painters' work.

Step 10: Cove at Base of Wall
One of the processes you asked about involved the application of the paint material to the bottom of the wall to create a cove. Typically, the painter uses a trowel to take the liquid material from the floor up the wall to form a several inch cove. Again, the Painter's use of a trowel does not convert creation of this cove to another classification's work. The Painter could, just as easily, use a paint brush or other device to move the paint to its location for finishing. As a result, it remains Painters' work.

Terrazzo Work
As explained at the 5/31 meeting, Armorclad employees also apply terrazzo and are paid the prevailing wage rate as Terrazzo workers when this work is performed. As a result, the Company is familiar with this work and how it differs from Painters' work. The primary difference is the premixing of resinous material with granite aggregate to provide a single thick layer which, after it dries, is then polished to a fine sheen.

Industry Practice
It is Armorclad's position that other companies—both union and non-union—utilize Painters for the entire process described above. Indeed the IUPAT web page (attached) lists "floor covering"

as one of the Painters' principal activities, and has "floor covering" local unions who specialize in this activity. Cement Masons, on the other hand, are limited to placement of *concrete* floors utilizing cement.[3]

With regard to the applicable scopes of work, it is important to note that, under WAC 296-127-013, these scopes of work are authored "using authoritative sources available to the department." These include collective bargaining agreements, dictionaries of occupational titles, and "recognized labor and management industry practice." This guidance should also be used in construing the resulting scopes of work.

A review of the relevant classifications reveals the presence of overlapping tools, work processes and materials. It is the overall process which should guide the Department's interpretation of the scopes. A review of all the scopes reveals that they typically cover everything involved in a given process, from preparing surfaces, to application, to clean-up. The scopes do not appear to contemplate a hop-scotching of classifications by the same employee based on the use of certain tools (i.e. only Cement Masons use grinders or trowels) since this is not reflected in the governing industry practice.

Again, I appreciate your careful consideration of this information since it affects a large number of employers and, typically, involves smaller businesses. If you have any questions or require any additional information, please contact me.

Very truly yours,

Judd H. Lees
(206) 233-2893
jlees@williamskastner.com

JHL:jh
cc: Bryan Oakes

[3] The web site describing Cement Masons' work (attached) states that "[c]ement masons, concrete finishers, and terrazzo workers all work with concrete, one of the most common and durable materials used in construction. Once set, concrete—a mixture of Portland cement, sand, gravel, and water—becomes the foundation for everything from decorative patios and floors to huge dams or miles of roadways."

WILLIAMS KASTNER™

September 23, 2013

27777.0101

L. Ann Selover
Industrial Statistician
State of Washington
Department of Labor & Industries
Prevailing Wage
P.O. Box 44540
Olympia, WA 98504-4540

Re: Work Classifications Applicable to Armorclad Floor Painting

Dear Ann:

I appreciate the opportunity to review Rebound's view on the work classifications applicable to the Tukwila Pool and John's Prairie work performed by Armorclad employees. It may come as a surprise to the Department but we agree with Miriam Moses' position that the broadcast step of the work at issue does not constitute Terrazzo work since Terrazzo work, by definition, involves application of pre-mixed aggregate compound rather than the broadcast application at issue. As you may be aware, Armorclad employees perform Terrazzo work and when they do so, they are paid the Terrazzo wages and fringe benefits, so Armorclad is familiar with this work.

However, we strongly disagree with Rebound's ultimate position that the correct wage rate for the grinding, broadcast, and spreading portion of the Tukwila Pool and John's Prairie Operations Center constitutes Cement Masons work. It is first important to note that the photos of the Tukwila Pool project are limited to the pool deck work. This work differed from the Armorclad work performed in the locker room since the existing surfaces were quite different. The pool deck involved an existing exposed aggregate of concrete with pea gravel with existing control joints and drains; the locker room involved an existing ceramic tile floor. As a result, much of the thickness and the texture seen in the photos were already in place before Armorclad employees applied a protective coating to seal the existing concrete. The preparation work involved the use of a common painting tool – a shotblast machine – coupled with wire brushes for the exposed edges. The application of the epoxy with various aggregates by the Armorclad employees did involve a broadcast, but the large bumpy texture and tooled joints you see in the pictures were already in the pool deck.

By contrast, the work in the locker room involved a protective coating/decorative coating over ceramic tile. As a result, there was no grinding of concrete, but merely the grinding of the surface to break the glaze on the ceramic tile similar to sanding a wood surface in order to ensure paint adherence. This preparation, far from smoothing the surface like the fine grinding and polishing involved in Cement

Williams, Kastner & Gibbs PLLC
Two Union Square
601 Union Street, Suite 4100
Seattle, Washington 98101
main 206.628.6600 fax 206.628.6611
www.williamskastner.com
SEATTLE . TACOMA . PORTLAND

Mason work, uses a lower grit to remove contamination and roughen the surface of a floor to ensure that the protective coating adheres to the floor. The floor painting application for the locker room involved the decorative quartz broadcast as described in Mr. Ehrlander's letter. Similarly, the John's Prairie prep work was limited to shotblasting a polished concrete floor to remove the chemical hardener and roughen the surface to ensure proper adhesion of the decorative epoxy system.

The following is a more specific rebuttal to some of the points raised by Rebound. First, preparatory work aimed at preparing paint surfaces is covered by the Painters scope of work, whether a wall or a floor. WAC 296-127-01356. The written scope expressly includes the use of sand paper, brushes, steel wool, scrapers, wire brushes and sand blasting. Although grinders are not expressly mentioned, they are clearly subsumed under the "sanding" umbrella. Moreover, in the case at issue, the prep on the Tukwila pool deck and John's Prairie involved a shotblaster – a device common to surface preparation by painters in the industrial and marine setting. By contrast, the Cement Masons classification does mention "grinders" but this is limited to the removal of "rough or defective spots from concrete surfaces." WAC 296-127-01315. In the case of the work at issue, the preparatory work was aimed at breaking the glaze or seal and creating roughness to the entire surface, rather than removing any rough or defective spots and later polishing the floor. Moreover, the locker room of the Tukwila Pool did not involve a concrete surface – it was all ceramic tile. As I indicated in an earlier letter to Mr. Ehrlander, grinders are used by Armorclad employees on perfectly smooth and finished surfaces with no "rough or defective spots" in order to prepare for painting. Again, the easiest illustration is the sanding of wood before painting. There are typically no defective spots but, if the wood has a finish or any other contamination on it, the paint will not stick.

With regard to the Armorclad employees' use of a squeegee to quickly spread the liquid compound out prior to the rolling of the paint on the floor, the Painters scope of work description clearly covers the application of this protective coating "when applied with brushes, spray guns or rollers". Squeegees are the same as rollers. The Department has voiced a concern that a "squeegee" is not expressly mentioned as a tool for the Painters classification. However, nowhere does the Cement Mason scope of work mention "squeegees." The Cement Masons' scope of work is limited to "spraying or troweling".

The Department has indicated that it may consider a squeegee a "trowel." However, the dictionary definition of a "squeegee" is "an implement edged with rubber or the like, for removing water from windows after washing or sweeping water from wet decks." Indeed, Armorclad purchases its squeegees from a window washing company. By contrast the dictionary definition of "trowel" is a "small hand tool with a short handle and a flat, usually pointed blade used for spreading, shaping, and smoothing plaster, cement, or mortar." These are clearly two different tools. I'm obviously aware of the determination in your June 19, 2013 letter regarding Beynon Sports' use of a squeegee, but note in that case that "[t]he use of the squeegee involves the use of a finishing tool to produce a smooth,

finished surface." In this case the squeegee is used as a quick spreading tool to distribute the paint before it hardens so that it can be applied evenly and finished using a paint roller. It is not being used as a "long handled trowel." In addition, many classifications such as carpet layers, brick layers, Terrazzo workers and tile setters use trowels without being considered "Cement Masons." Finally, the work at issue is limited to fluid-applied protective coating–an application for which a trowel is totally unusable. As a result, this step constitutes Painters work.

Rebound also mentions in several locations in their e-mail that Armorclad employees were not applying a "protective coating". However, it is clear that the paint application provides a cover for the surface and is designed to mitigate wear and tear on structural substrate.

Finally, with regard to the broadcast step, the Rebound letter is largely silent since neither the Painters' scope of work nor the Cement Masons scope of work expressly discusses "broadcast". However, the Painters scope, unlike the Cement Masons, does expressly include "texturing and decorating." WAC 296-127-01356(6). Moreover, the use of broadcasting is common in painting work, for example on deck coatings, to provide texture and, as a result, it has always been a part of the painting process. Potential Departmental concern regarding the resulting thickness of the paint due to the addition of sand is misplaced. There is nothing in any of the scope of work descriptions regarding thickness of protective coatings which would remove the work from one scope and place it in another. The application process, the skill level required, and the equipment are all the same. In addition to texture, the broadcast quartz materials may be selected by an owner based on its decorative qualities.

For these reasons and for the common sense reason that the entire process is performed by one employee from prep to finish, we would ask that the Department determine that the Painters' scope of work applies. Thank you again for the opportunity to provide data to you regarding this issue.

Very truly yours,

Judd H. Lees
(206) 233-2893
jlees@williamskastner.com

JHL:klm
cc: Bryan Oakes

EXHIBIT 3

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
PO Box 44000 • Olympia Washington 98504-4400

April 11, 2023

Sent via E-Mail & US Mail

Daniel R. Hutzenbiler
McKanna Bishop Joffe, LLP
1635 NW Johnson St
Portland, OR 97209
dhutzenbiler@mbjlaw.com

UA Local 32
597 Monster Rd. SW
Renton, WA 98057

Laborers International Union of North America
c/o Bob Abbott, Northwest Regional Manager & Vice President
12201 Tukwila Int. Blvd Ste. 140
Seattle, WA 98168

Washington State Association of the UA
P.O. Box 111360
Tacoma, WA 98411

Washington & Northern Idaho District Council of Laborers
c/o Jermaine Smiley, Business Manager & Secretary Treasurer
12101 Tukwila Int. Blvd Ste. 300
Seattle, WA 98168

James Mills, AAG
Office of the Attorney General
P.O. Box 2317
Tacoma, WA 98401
James.Mills@atg.wa.gov
Carolyn.Currie@atg.wa.gov
litaccal@atg.wa.gov

Danielle Franco-Malone
Sarah E. Derry
Barnard Iglitzin & Lavitt, LLP
18 W Mercer St Ste 400
Seattle, WA 98119
Franco@workerlaw.com
Derry@workerlaw.com
Valenzuela@workerlaw.com

RE: UA LOCAL 32 and the Washington State Association of the UA
OAH No. 11-2020-LI-01557
Director No. 2023-006-PW

Dear Parties:

Please find enclosed the Director's Order, which is served on the date of mailing. UA LOCAL 32 and the Washington State Association of the UA

Sincerely,

Joel Sacks
Director

Enclosure

cc: Lisa Dublin, ALJ
Hailey Miles, Tacoma OAH
Anastasia Sandstrom, AAG

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

In re: UA LOCAL 32; and THE WASHINGTON STATE ASSOCIATION OF THE UA, Appellants. OAH Docket No. 11-2020-LI-01557	No. 2023-006-PW DIRECTOR'S ORDER

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Initial Order, the petition for review filed by UA Local 32 and the Washington State Association of the UA (UA) with the Director's Office, the briefing submitted to the Director's Office by the parties, including the intervenors' briefs, and the record developed at the Office of Administrative Hearings, issues this Director's Order.

The parties are the Department, UA, and intervenors Washington & Northern Idaho District Council of Laborers and LIUNA Northwest Region (Laborers).

The Director makes these Findings of Fact, Conclusions of Law, and Final Decision and Order:

I. FINDINGS OF FACT

1. The Director adopts and incorporates the Initial Order's findings of facts 4.1 through 4.62.

2. The Office of Administrative Hearings issued and served the Initial Order on February 1, 2022, following the petition for arbitration, hearings, and taking briefing from the parties. The administrative law judge affirmed Department's August 26, 2020 redetermination,

which adopted the Department's August 22, 2019 determination. The administrative law judge looked to the Pipefitters' scope of work (WAC 296-127-01364) and rejected UA's arguments because subsection (1) of WAC 296-127-01364 did not apply to the work because the work was "entirely outdoors" and because section (2) only potentially described certain types of work performed.

3. On March 3, 2022, UA timely filed a petition for review with the Director.

4. The Director adopts and incorporates the Initial Order's "Hearing" summary.

II. CONCLUSIONS OF LAW

1. There is jurisdiction to hear and decide this matter under Chapter 39.12 Revised Code of Washington ("RCW"), Chapter 34.05 RCW, and Chapter 296-127 Washington Administrative Code ("WAC").

2. The purpose of Washington State's prevailing wage law is to preserve and protect local wages on public works contracts. *Everett Concrete Products, Inc. v. Dept. of Lab. and Indus.*, 109 Wn. 2d 819, 823-24, 748 P.2d 1112 (1988); *Southeastern Wash. Bldg. and Const. Trades Council v. Dept. of Lab. and Indus.*, 91 Wn. 2d 41, 45, 586 P.2d 486 (1978).

3. 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) (quoting *City of Kent v. Beigh*, 145 Wn.2d 33, 45, 32 P.3d 258 (2001)). Under 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 fundamental objective in interpreting a statute is to give effect to the drafter's intent. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). If the statute's meaning is plain on its face, then the court gives effect to that plain meaning as an expression of legislative intent. *Associated Press v. Wash. State Legislature*, 194 Wn.2d 915, 920, 454 P.3d 93 (2019). If there is more than one reasonable interpretation of the statute, the statute is ambiguous and the court uses canons of construction. See *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

4. The source of scope of work descriptions are apprenticeship standards, collective bargaining agreements, dictionaries of occupational titles, labor and contractor experts, and recognized industry practice. WAC 296-127-013(2).

5. WAC 296-127-01364 provides:

> For the purpose of the Washington state public works law, chapter 39.12 RCW, plumbers, pipefitters and steamfitters assemble, install, and maintain piping systems, fixtures and equipment for the transportation of water, steam, gas, air, sewage, oil, fuels, liquids, gases, or similar substances.
>
> The work includes, but is not limited to:

(1) Piping systems installed in structures (e.g., buildings, industrial plants, etc.).
(a) The handling and moving of any plumbing, pipefitting and steamfitting materials, supplies, and equipment on the job site.
(b) Cutting, threading, and bending pipe.
(c) Joining pipes by use of screws, bolts, fittings, solder, welding and caulking, or any other method of making joints in the pipefitting industry.
(d) Assembling, installing, and repairing valves, pipe fittings, and pumps.
(e) Testing the piping system.
(f) Installing and repairing plumbing fixtures, such as sinks, bathtubs, water heaters, and water softeners.
(g) Cutting holes in floors and walls for pipes:
• With point and hammer.
• Core-drilled.
(h) Responsible for all cleanup required in connection with plumbers, pipefitters and steamfitters work.

(2) Distribution lines (e.g., water mains, sewer mains, oil and gas lines, etc.).
(a) The handling and moving of any plumbing, pipefitting and steamfitting materials, supplies, and equipment on the job site.
(b) Steel pipe: Welding of pipe joints and joining pipes with screws, bolts, fittings, solder, caulking, or any other method for making joints in the industry.
(c) Ductile iron pipe: Joining pipes by using any method for making joints in the industry, when the pipe will be under pressure.
Assembling, installing, and repairing valves and pumps.
(d) Testing the piping system.
(e) Responsible for all cleanup required in connection with plumbers, pipefitters and steamfitters work.

6. WAC 296-127-01344 provides in pertinent part:

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

   • Position, join, align, wrap and seal pipe sections.

7. The scopes of work for Utilities Construction (WAC 296-127-01389) and Laborers in Utilities Construction (WAC 296-127-01340) also apply to certain pipework, but none of the parties contend that these scopes apply to the work at issue, and the language of those rules do not reference the type of work at issue in the Cedar Hills project. Although the rules do not apply to the work at issue here, they do show that the Department has recognized multiple scopes of work involve pipework outside the Pipefitters' scope of work.

8. UA contends that the Pipefitters' scope of work applies to piping systems at Cedar Hills because the introductory paragraph of the scope of work includes a "broad description of

work, relating to assembly, installation and maintenance of 'piping systems, fixtures and equipment' for a broad range of substances" and that "among those substances are 'water, steam . . . gas . . . fuel . . . gases or other similar substances.'" UA Opening Br. 10 (quoting WAC 296-127-01364). UA suggests that because the two types of work in sections (1) and (2) are only examples, the introductory paragraph's language —"piping systems . . . used for the transportation of water . . . [and] gas"—covers all such pipework. UA also contends that the portions of the rule that explicitly apply to "piping systems installed in structures" (section 1) and "distribution lines" (section 2) should also apply. UA Opening Br. 10-12.

9. While the language of the Pipefitters' scope of work could arguably apply to the work at issue here, UA's interpretation that all work relating to the assembly, installation, and maintenance of piping systems falls within this scope of work is not reasonable. Such an interpretation is inconsistent with the language of other scope of work regulations involving piping work. Piping work is included within the Laborers' scope for "positioning, joining, and aligning of pipes" (WAC 296-127-01344), Utilities Construction (WAC 296-127-01389), and Laborers in Utility Construction (WAC 296-127-01340). UA's interpretation would render these scope of work regulations meaningless.

10. The leachate and gas line work at Cedar Hills involved simple HDPE fusion. Contrary to UA's contention, the piping was not installed within a "structure," and neither the leachate piping nor the landfill gas piping were "distribution lines" within the meaning of WAC 296-127-01364.[1] Rather, the work involved positioning, aligning, and joining large lengths of HDPE pipe—work encompassed with the language of the Laborers' scope of work. While the workers also trimmed pipe as part of the joining process, there was some pipe that needed to be cut or prefabricated to match specific lengths, and some of the pipe was bent as part of a prefabricated process off-site, none of these activities is inconsistent with the Laborers' scope of work.

11. Because the plain language of the scope of work regulations does not resolve which regulation applies, the regulations are ambiguous, and it is appropriate to look beyond their plain language to assess their meaning. The purpose of the prevailing wage laws is to protect employees from substandard wages and "preserve local wage standards." *Everett Concrete Products, Inc. v. Dep't of Lab. & Indus.*, 109 Wn.2d 819, 823-24, 748 P.2d 1112 (1988). At the time the Department adopted the scope of work regulations, it was required to look to approved apprenticeship standards, collective bargaining agreements, dictionaries of occupational titles, construction industry experts, and recognized industry practice. WAC 296-127-013. The parties agree that, for ambiguous scope of work descriptions, it is proper to look to historical industry practice at the time of adoption when determining the meaning of those scopes.

---

[1] The Department's redetermination applied pipefitter rates to a small amount of pipefitter work associated with the valve and pump installations at the pump structures at the top of cell and any joining of threaded pipe. *See* Initial Order Finding of Facts 4.41, 4.42, 4.43. No party contested these portions of the modified August 22, 2019 determination or the August 26, 2020 redetermination adopting it.

12. Here, the record demonstrates that both pipefitters and laborers train at least some of their apprentices in the work at issue here and that both laborers and pipefitters have done such at a public landfill. However, the record reflects that historically, in Washington, laborers have overwhelmingly performed the work at issue since the time the rule was adopted in 2000.

13. Given this historical industry practice, the Director concludes that the proper rate for the work at issue is the laborer rate. Therefore, the determination made by the Department as particularly expressed collectively in: the Cedar Hills Regional Landfill Determination letter dated January 29, 2019, signed by Jim P. Christensen; the letter dated August 22, 2019, and signed by Jim P. Christensen, responding to the UA's request for modification of the January 20, 2019, determination; and the letter dated August 26, 2020, signed by Assistant Director Chris Bowe, denying on reconsideration to reverse or modify Mr. Christensen's determination – should all be affirmed.[2]

III. ORDER

1. Consistent with the above Findings of Fact and Conclusions of Law, the Initial Order dated February 1, 2022, is AFFIRMED AS MODIFIED.

2. The determination by the Department of Labor and Industries expressed in Jim Christensen's determination letter dated August 22, 2019, and Chris Bowe's redetermination letter dated August 26, 2020, relating to Cedar Hills Regional Landfill Leachate and Landfill Gas Piping and Collection Systems, are AFFIRMED.

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

JOEL SACKS
Director

[2] UA contends that the Department took an inconsistent position in this case compared to the appeal in Westwater Construction Company (OAH Docket No. 10-2019-LI-0202) about the application of industry practice. After reviewing the briefing, it is clear that work at issue is very different in the two matters and that the Department's position is not inconsistent.

SERVICE

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

APPEAL RIGHTS

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

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

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

DECLARATION OF MAILING

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

Daniel R. Hutzenbiler
McKanna Bishop Joffe, LLP
1635 NW Johnson St
Portland, OR 97209

UA Local 32
597 Monster Rd. SW
Renton, WA 98057

Laborers International Union of North America
c/o Bob Abbott, Northwest Regional Manager & Vice President
12201 Tukwila Int. Blvd Ste. 140
Seattle, WA 98168

Washington State Association of the UA
P.O. Box 111360
Tacoma, WA 98411

Washington & Northern Idaho District Council of Laborers
c/o Jermaine Smiley, Business Manager & Secretary Treasurer
12101 Tukwila Int. Blvd Ste. 300
Seattle, WA 98168

James Mills, AAG
Office of the Attorney General
P.O. Box 2317
Tacoma, WA 98401
James.Mills@atg.wa.gov
Carolyn.Currie@atg.wa.gov
litaccal@atg.wa.gov

Danielle Franco-Malone
Sarah E. Derry
Barnard Iglitzin & Lavitt, LLP
18 W Mercer St Ste 400
Seattle, WA 98119
Franco@workerlaw.com
Derry@workerlaw.com
Valenzuela@workerlaw.com

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

Lisa Deck
LISA DECK

EXHIBIT 4

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
PO Box 44000 • Olympia Washington 98504-4400

April 11, 2023

Sent via E-Mail & US Mail

Michael Murphy
Allison Murphy
Groff Murphy PLLC
300 East Pine Street
Seattle, WA 98122-2029
amurphy@groffmurphy.com
mmurphy@groffmurphy.com
rleigh@groffmurphy.com
ssanh@groffmurphy.com

Diana Cartwright, AAG
Office of the Attorney General
800 5th Ave Ste. 2000
Seattle, WA 98104
Diana.Cartwright@atg.wa.gov
Shara.Wusstig@atg.wa.gov
lniseaeservice@atg.wa.gov

Danielle Franco-Malone
Barnard Iglitzin & Lavitt
18 W Mercer St, Ste 400
Seattle, WA 98119
franco@workerlaw.com
valenzuela@workerlaw.com

Ryan Gompertz
Office of the Attorney General
800 5th Ave Ste. 2000
Seattle, WA 98104
ryan.gompertz@atg.wa.gov
angie.faulkner@atg.wa.gov
lniseaeservice@atg.wa.gov

Merchants Bonding Company (Mutual)
USI Kibble & Prentice
601 Union St Ste 1000
Seattle, WA 98101

Washington and Northern Idaho District
Council of Laborers
4803 South M Street
Tacoma, WA 98408

Rebound – A Building Trades
Organization
2800 First Avenue, Suite 116
Seattle, WA 98121
rebound@rebound.org

Paul Byrne
Bothell City Attorney
18415 101st Ave NE
Bothell, WA 98011
Paul.Byrne@bothellwa.gov
Julie.Evans@bothellwa.gov

City of Bothell
Attn: Nduta Mbuthia
18415101st Ave NE
Bothell, WA 98011

Westwater Construction Company
31833 Kent Black Diamond Road
Auburn, WA 98002

RE: Westwater Construction Company
OAH No. 10-2019-LI-01202
Director No. 2023-005-PW

Dear Parties:

Please find enclosed the Director's Order, which is served on the date of mailing.

Sincerely,

Joel Sacks
Director

Enclosure

cc: Lisa Dublin, ALJ
Hailey Miles, Tacoma OAH
Anastasia Sandstrom, AAG

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: WESTWATER CONSTRUCTION COMPANY, Appellant/Employer. Agency No. NOV190702 OAH Docket No. 10-2019-LI-01202	No. 2023-005-PW DIRECTOR'S ORDER

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

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

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

I. FINDINGS OF FACT

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

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

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

2. On April 8, 2022, Westwater and the Intervenor timely filed petitions for administrative review with the Director.

3. The Director adopts and incorporates the Initial Order's "Hearing" summary.

4. The Director adopts and incorporates the Initial Order's findings of fact 4.1 through 4.11.

5. A pipelayer works as part of a pipelaying crew. A typical pipelaying crew includes two operators, one with an excavator for digging, one with an excavator for compacting the trench. A top man (another laborer classification) rigs and handles the pipe to get it prepared. A pipelayer is in the trench, confirming that the grade is good so that the pipe can be laid to grade, checking the bell of the pipe to ensure it is clean, making sure the gasket is in the correct place, and then setting the new pipe into the bell and completing the joint. The actual joining of the pipe is a relatively quick process that involves aligning the pipe, moving the spigot end into the bell end, and ensuring that the pipe has been pushed all the way in to ensure a proper seal. There are no unique plumbers' tools that are used to connect the pipe.

6. Laborers install ductile-iron-pipe water mains on civil road and utility projects. Ductile iron is the most predominant material used for water mains.

7. Utility contractors consistently use laborers to install ductile iron pipes when the pipes are not under pressure. The industry practice of pipelayers installing ductile-iron-pipe water mains dates back at least 25-30 years.

8. When the pipes will be joined while under pressure, the industry practice is to use plumbers and to pay the plumber/pipefitter rate of pay. A hot tap involves joining pipe to a live system, and is performed when the pipe is being joined to a system that cannot be turned off for some reason. Hot tapping entails fitting a T-strap around the pipe, placing a new valve on the tee, opening the valve, and using a specialized drill unit that can operate under pressure to drill through the valve. Hot tapping is significantly more complex than installing ductile-iron-pipe water mains. When there is a need to do a hot tap, many companies bring in specialty subcontractors like Speer Taps or Master Tap, which employ plumbers/pipefitters.

9. WAC 296-127-013 provides in part that industry practice is a factor when creating scope of work descriptions. The Department uses industry practice both to create and interpret the scopes.

10. The Director adopts and incorporates the Initial Order's findings of fact 4.17 and 4.18.

11. Many labor union organizations, utility owners, and contractors testified that industry practice reflects that laborers scope of work applies to joining of ductile iron pipe that is not under pressure, even if the pipe will be under pressure in the future.

12. This industry practice has existed since at least 1989.

13. Plumbers and pipefitters have joined ductile iron pipe, but this is typically in special circumstances, such as when there is a hot tap, when there is scope gap, or when ductile-iron-pipe water mains are being installed in a structure like a tunnel.

14. The Director adopts and incorporates the Initial Order's findings of fact 4.22 through 4.37.

15. The Director adopts and incorporates the Initial Order's findings of fact 4.60 through 4.75.

II. CONCLUSIONS OF LAW

1. The Director adopts and incorporates the Initial Order's conclusions of law 5.1 through 5.22.

2. The ALJ erred when he concluded that he lacked authority to address the Department's interpretation of the subject regulations.

3. 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) (quoting *City of Kent v. Beigh,* 145 Wn.2d 33, 45, 32 P.3d 258 (2001)). Under 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 fundamental objective in interpreting a statute is to give effect to the drafter's intent. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). If the statute's meaning is plain on its face, then the court gives effect to that plain meaning as an expression of legislative intent. *Associated Press v. Wash. State Legislature*, 194 Wn.2d 915, 920, 454 P.3d 93 (2019). If there is more than one reasonable interpretation of the statute, the statute is ambiguous and the court uses canons of construction. *See Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

4. Whether the laborer/pipelayer or plumber/pipefitter wage rate applies turns on whether the ductile iron pipe "will be under pressure" or "will not be under pressure." The laborer/pipelayer wage rate applies to "[j]oining ductile iron pipe by using screws, bolts, fittings, caulking or any other method for making joints in the industry, *when the pipe will not be under pressure*." WAC 296-127-01340 (emphasis added). The plumber/pipefitter wage rate, by contrast, applies to "[j]oining [ductile iron] pipes by

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

5. In the Department's view, the phrases "will be under pressure" and "will not be under pressure" refer to the time when the system is operating. It contends that if the system will be pressurized once in operation, the plumber/pipefitter wage rate applies, and that the laborer/pipelayer wage rate applies only to work on systems that are unpressurized during operation. The Department asserts that the regulations are unambiguous, so no evidence about industry practice should be considered.

6. Westwater and the Intervenor say that the phrase "will be under pressure" refers to the time when the work is performed. So if the ductile iron pipe will be under pressure during the joining of the pipe, the plumber/pipefitter wage rate applies. But if pipe is not under pressure during the joining, even if it will ultimately be under pressure during operation, the work should be paid at the laborer/pipelayer rate.

7. The scope of work regulations for pipefitter and laborer are subject to more than one reasonable interpretation and are thus ambiguous. While the use of the future tense in the phrases "will be under pressure" and "will not be under pressure" denotes some point in the future, this language does not indicate what point in the future is being referenced. On the one hand, it could refer to the point in time when the system is in operation, as the Department argues. Or it could mean that the pipe will be under pressure during performance of the work, as argued by Westwater and the Intervenor. This means the regulation is ambiguous.

8. Because the regulations are ambiguous, it is appropriate to look beyond their plain language to assess their meaning. The purpose of the prevailing wage laws is to protect employees from substandard wages and "preserve local wage standards." *Everett Concrete Products, Inc. v. Dep't of Lab. & Indus.*, 109 Wn.2d 819, 823-24, 748 P.2d 1112 (1988). At the time the Department adopted the scope of work regulations, it was required to look to approved apprenticeship standards, collective bargaining agreements, dictionaries of occupational titles, construction industry experts, and recognized industry practice. WAC 296-127-013. The Department agrees that, for ambiguous scope of work descriptions, it is proper to look to industry practice when determining the meaning of those scopes.

9. Here, the recognized industry practice has been to use laborers, not plumbers, to install ductile-iron-pipe water mains when the pipe is not under pressure at the time the work is being done. This practice has existed for decades, since at least 1989. It was the recognized practice at the time the scope of work regulations were codified.

10. WAC 296-127-01364 does not apply to the installation of ductile-iron-pipe water mains when the pipe is not "under pressure" when the pipe is being installed. WAC 296-127-01340 governs that work.

11. WAC 296-127-01364 does apply to "hot taps" or "live taps" of ductile-iron-pipe water mains when the pipe is "under pressure" when the work is being done.

12. The ALJ erred by affirming the Department's application of plumber/pipefitter wage rates to the installation of the ductile-iron-pipe water mains at issue, since those water mains were not under pressure at the time of construction.

13. The proper wage rate for the ductile-iron-pipe water main work at issue was the laborer/pipelayer rate.

14. The Director adopts and incorporates the Initial Order's conclusions of law 5.30 through 5.31.

15. In this case, the prevailing wage rates for ironworker, cement mason, as well as flagger, overtime, and double time hours and rates applied to the City of Bothell, at the time of the Mainstreet Enhancement Project. The ironworker prevailing wage rate was $65.53 per hour. The cement mason prevailing wage rate was $55.56. In addition, Westwater did not have any four-ten agreements in place with its workers. Westwater argues that the Department's hours were not accurate and relies on its testimony and the certified payroll records, paystubs, foreman reports, and timesheets.

16. The Director adopts and incorporates the Initial Order's conclusions of law 5.33 through 5.34.

17. Westwater argues that equitable estoppel bars the Department from pursuing the alleged violation regarding application of the plumber/pipefitter rate because the Department approved Westwater's Statements of Intent to Pay Prevailing Wage. Because the Director reverses the Department's Notice of Violation with respect to application of the plumber/pipefitter rate, the Director need not reach this issue. The Director notes, however, that Westwater has failed to prove the elements of estoppel by clear, cogent and convincing evidence. It was not reasonable for Westwater to have relied upon the Department's approval of statements of intent to pay prevailing wage and affidavits of wages paid when all contractors that submit intents and affidavits must acknowledge the disclaimer that approvals do not signify approvals of classifications. In addition, application of estoppel on this basis would severely impair the exercise of governmental functions by undermining L&I's ability to enforce prevailing wage laws.

18. The Director adopts and incorporates the Initial Order's conclusions of law 5.36 through 5.37, and conclusion of law 5.41.

19. This matter is remanded to the Office of Administrative Hearings for the purpose of determining the amount of wages owed to Westwater employees in light of the Director's determination that the Department erred in finding that the plumber/pipefitter rate of pay applied to the joining of ductile-iron-water mains when the pipes are not under pressure at the time of joining.

III. ORDER

1. Consistent with the above Findings of Fact and Conclusions of Law, the Director reverses the March 11, 2022 Initial Order to the extent that it concludes that the plumber/pipefitter rate of pay applied to the installation of ductile-iron-pipe water mains.

2. This matter is remanded to the Office of Administrative Hearings for further proceedings consistent with this order pursuant to WAC 296-127-170(7). The Administrative Law Judge shall recalculate the amount of wages owed to Westwater employees and issue an Amended Initial Order in light of the Director's conclusion that the laborer/pipelayer rate of pay applies to the joining of ductile-iron-pipe water mains that are not under pressure at the time of joining.

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

JOEL SACKS
Director

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).

DECLARATION OF SERVICE

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

Michael Murphy
Allison Murphy
Groff Murphy PLLC
300 East Pine Street
Seattle, WA 98122-2029
amurphy@groffmurphy.com
mmurphy@groffmurphy.com
rleigh@groffmurphy.com
ssanh@groffmurphy.com

Diana Cartwright, AAG
Office of the Attorney General
800 5th Ave Ste. 2000
Seattle, WA 98104
Diana.Cartwright@atg.wa.gov
Shara.Wusstig@atg.wa.gov
lniseaeservice@atg.wa.gov

Danielle Franco-Malone
Barnard Iglitzin & Lavitt
18 W Mercer St, Ste 400
Seattle, WA 98119
franco@workerlaw.com
valenzuela@workerlaw.com

Ryan Gompertz
Office of the Attorney General
800 5th Ave Ste. 2000
Seattle, WA 98104
ryan.gompertz@atg.wa.gov
angie.faulkner@atg.wa.gov
lniseaeservice@atg.wa.gov

Merchants Bonding Company (Mutual)
USI Kibble & Prentice
601 Union St Ste 1000
Seattle, WA 98101

Washington and Northern Idaho District Council of Laborers
4803 South M Street
Tacoma, WA 98408

Rebound – A Building Trades Organization
2800 First Avenue, Suite 116
Seattle, WA 98121
rebound@rebound.org

Paul Byrne
Bothell City Attorney
18415 101st Ave NE
Bothell, WA 98011
Paul.Byrne@bothellwa.gov
Julie.Evans@bothellwa.gov

City of Bothell
Attn: Nduta Mbuthia
18415101st Ave NE
Bothell, WA 98011

Westwater Construction Company
31833 Kent Black Diamond Road
Auburn, WA 98002

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

Lisa Deck
LISA DECK

EXHIBIT 5

Washington and Northern Idaho District Council of Laborers and Skanska USA Building, Inc.[1] ***and*** **Operative Plasterers and Cement Masons International Association, Local 528.** Case 19–CD–211263

August 16, 2018

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN RING AND MEMBERS PEARCE AND KAPLAN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Employer Skanska USA Building, Inc. (the Employer) filed an unfair labor practice charge on December 8, 2017,[2] alleging that the Respondent, Washington and Northern Idaho District Council of Laborers (Laborers), violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Operative Plasterers and Cement Masons International Association, Local 528 (Cement Masons). A hearing was held on March 21, 2018, before Hearing Officer John Fawley. Thereafter, the Employer, Laborers, and Cement Masons filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[3]

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer is a Delaware corporation engaged as a general contractor in the building and construction industry with a place of business located in Seattle, Washington. During the past year, the Employer provided services in excess of $50,000 directly to entities located outside the State of Washington. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that Laborers and Cement Masons are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is a general contractor in the building and construction industry and is signatory to collective-bargaining agreements with five unions, including Laborers and Cement Masons. As the general contractor on a construction project at the Life Sciences Building at the University of Washington, the Employer needed to perform several jobs, including installing resinous flooring (the disputed work) in the lab. Because the University of Washington is a public entity, State law requires that a subcontract bid package shall be awarded to the lowest qualified bidder. The lowest responsive bid for the resinous flooring work was submitted by the Leewens Corporation (Leewens), and it was therefore awarded the work. The Leewens employees who began performing the disputed work on approximately September 27, 2016, were represented by Laborers. Leewens and the Employer have entered into a number of project agreements during the last 10 years whereby epoxy and resinous flooring work has been performed by employees represented by Laborers.

On July 17, a telephone conversation occurred between Cement Masons' business agent, Justin Palachuk, and the vice president of Leewens, Patrick Leewens. The substance of the conversation is in dispute. According to Patrick Leewens, Palachuk claimed the disputed work for Cement Masons based on a ruling from the state Department of Labor and Industries (L&I)[4] and the fact that Cement Masons uses the equipment required to perform the disputed work. Patrick Leewens informed Palachuk that Leewens had performed this type of work for years using employees represented by Laborers and that he would continue employing Laborers for the Life Sciences project. Afterwards, Patrick Leewens sent an email to the Employer recounting his recollection of the phone conversation with Palachuk. Palachuk testified that he never claimed the disputed work for Cement Masons but, rather, that he had asked Patrick Leewens about the scope of the work and what tools were being used.

Cement Masons subsequently filed a grievance alleging that the Employer had breached the subcontracting clause in its collective-bargaining agreement with Cement Masons by subcontracting the disputed work to Leewens. Upon learning of the grievance, Laborers notified the Employer that it was prepared to use all means necessary, including picketing and economic action, to

[1] The name of the Employer appears in the caption as amended at the hearing.

[2] All dates are in 2017 unless otherwise indicated.

[3] Member Emanuel is recused and took no part in the consideration of this case.

[4] On April 27, Cement Masons sent the Employer a letter generally claiming various classes of work, including "floor coating," based on certain prevailing wage determinations made by L&I.

ensure that the Employer continued to assign the disputed work to employees represented by Laborers.

The work is approximately 95 percent complete. In a letter to Leewens just prior to the originally scheduled 10(k) hearing date,[5] Cement Masons disclaimed the disputed work, but it did not withdraw its grievance, which is scheduled for arbitration.

B. Work in Dispute

The parties stipulated that the disputed work is correctly identified in the notice of hearing as "[t]he installation of the resinous flooring in the lab areas at the Life Sciences Building at the University of Washington."

C. Contentions of the Parties

The Employer and Laborers contend that there are competing claims for the work in dispute. They also assert that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated in light of the threat by Laborers to take adverse action against the Employer, including picketing and economic action, concerning the assignment of the resinous flooring work at the Life Sciences Building. They further contend that the work in dispute should be awarded to the employees represented by Laborers based on the factors of employer preference and past practice, relative skills and training, area and industry practice, and economy and efficiency of operations.

Cement Masons contends that it has not made a claim for the resinous flooring work. Relying on *Laborers* (*Capitol Drilling Supplies*), 318 NLRB 809 (1995), it argues that it has merely pursued a contractual grievance against the Employer for failing to honor the subcontracting clause in the collective-bargaining agreement. Cement Masons further argues that this dispute involves a representational issue, not a jurisdictional issue. Additionally, Cement Masons contends that the notice of hearing should be quashed because the threats to picket were not authentic but rather were made by Laborers, in collusion with the Employer, in order to fabricate a jurisdictional dispute. Finally, Cement Masons argues that even if it made a claim for work, it properly and effectively disclaimed interest in the disputed work.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work and that a party has used proscribed means to enforce its claim to the work in dispute. Additionally, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute. *Operating Engineers Local 150* (*R&D Thiel*), 345 NLRB 1137, 1139 (2005). We find that these requirements have been met.

1. Competing claims for work

We find reasonable cause to believe that both Unions have claimed the work in dispute for the employees they respectively represent. Laborers has claimed the work by its letters from its business manager, Jermaine Smiley, to the Employer objecting to any assignment of the resinous flooring work to Cement Masons–represented employees. In addition, "[its] performance of the work indicates that [it claims] the work in dispute." *Sheet Metal Workers Local 54* (*Goodyear Tire & Rubber Co.*), 203 NLRB 74, 76 (1973); see also *Operating Engineers Local 513* (*Thomas Industrial Coatings*), 345 NLRB 990, 992 fn. 6 (2005) (citing *Laborers Local 79* (*DNA Contracting*), 338 NLRB 997, 998 fn. 6 (2003)).

We also find, despite its claims to the contrary, that Cement Masons has claimed the disputed work. We find no merit in the contention that, under *Capitol Drilling*, it made no claim to the disputed work because it merely filed a subcontracting grievance against the Employer, the general contractor. In *Capitol Drilling*, supra, 318 NLRB at 811–812, the Board found that a jurisdictional dispute arises when a union seeking enforcement of a contractual claim both pursues its contractual remedies against the general contractor with which it has an agreement and makes a claim for the work directly to the subcontractor that has assigned the work. Id. at 809. There is reasonable cause to believe that Cement Masons did precisely that here.

Cement Masons made a claim for the resinous flooring work directly with the subcontractor, Leewens, as well as with the general contractor, the Employer. During a phone conversation, Palachuk informed Patrick Leewens that L&I had assigned the work to Cement Masons and that Cement Masons claimed all work requiring the tools used in the disputed work, specifically rollers, squeegees, cover trowels and other trowels. The subsequent email from Patrick Leewens to the Employer, stating that Palachuk informed him that L&I had assigned the disputed work to Cement Masons, corroborated his testimony that Palachuk claimed the work. Although Cement Masons disputes this testimony, we find that it is sufficient to establish reasonable cause to believe that Cement Masons made a claim for the disputed work directly with Leewens. *Electrical Workers Local 71* (*US Utility Contractor Co.*), 355 NLRB 344, 346 (2010) (citing *J.P. Patti Co.*, 332 NLRB 830, 832 (2000)) (finding that in

[5] The hearing, originally noticed for January 25, was held on March 21.

10(k) proceedings, a conflict in testimony does not prevent the Board from finding reasonable cause and proceeding with a determination of the dispute).

We also find no merit in the assertion that no claim for work occurred because this involved a representational issue, not a jurisdictional issue. Cement Masons has failed to provide any evidence that it sought to represent the Leewens employees at issue. Therefore, this is not a dispute about which of two competing unions will represent a single group of workers currently performing work and instead involves an attempt by one group of employees to take a work assignment away from another group of employees. For that reason, this dispute is jurisdictional, not representational. *DNA Contracting*, supra, 338 NLRB at 999; cf. *Carpenters Local 275* (*Lymo Construction Co.*), 334 NLRB 422, 424 (2001) (unlike situation here, dispute found to be representational because composite crew from both unions was used by the employer until the completion of the job).

Finally, we find no merit in the contention that Cement Masons has sufficiently disclaimed interest in the disputed work. On January 18, 2018, the eve of the original 10(k) hearing date, Cement Masons wrote Leewens saying that it was not seeking the disputed work. Cement Masons, however, has continued to pursue its grievance against the Employer. We find that the continuance of the grievance is inconsistent with any assertion of a disclaimed interest in the work and that Cement Masons' attempted disclaimer is ineffective as it is not a true renunciation of interest in the work. *Plumbers District Council16* (*L&M Plumbing*), 301 NLRB 1203, 1204 (1991).

2. Use of proscribed means

We find reasonable cause to believe that Laborers used means proscribed by Section 8(b)(4)(D) to enforce its claims to the work in dispute. As set forth above, Business Manager Smiley wrote the Employer stating that Laborers would use all means necessary, including picketing and economic action, to ensure that the Employer continued to assign the resinous flooring work to members of Laborers. These statements constitute threats concerning the assignment of the resinous flooring work, and the Board has long considered such threats to be a proscribed means of enforcing claims to disputed work. See, e.g., *Operating Engineers, Local 150* (*Patten Industries*), 348 NLRB 672, 674 (2006).

Further, we find no merit in the assertion that the Employer has colluded with Laborers to create a sham jurisdictional dispute. The Board has consistently rejected this argument absent "affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion." *Operating Engineers Local 150* (*R&D Thiel*), supra, 345 NLRB at 1140. There is no evidence on this record that the written threats to strike or picket over the assignment of the disputed work were the result of collusion with the Employer or were otherwise not genuine.

3. No voluntary method for adjustment of dispute

The parties stipulated, and we find, that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound.

Based on the foregoing, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and there is no agreed-upon method for the voluntary adjustment of the dispute. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212* (*Columbia Broadcasting*), 364 U.S. 573, 577–579 (1961). The Board has held that its determination in a jurisdictional dispute is "an act of judgment based on common sense and experience," reached by balancing the factors involved in a particular case. *Machinists Lodge 1743* (*J.A. Jones Construction*), 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.[6]

1. Board certifications and collective-bargaining agreements

The work in dispute is not covered by any Board orders or certifications.

As noted above, the Employer is signatory to collective-bargaining agreements with both Laborers and Cement Masons. Both agreements contain a craft classification that incorporates epoxy work.[7] We find that the language in each of these contracts covers the work in dispute. Leewens does not have a collective-bargaining agreement with either Laborers or Cement Masons.

Accordingly, the factor of board certifications and collective-bargaining agreements does not favor an award to either group of employees.

[6] Cement Masons argues that there is no jurisdictional dispute warranting a Board determination. It does not alternatively argue that, if the Board disagrees, employees it represented should be awarded the work under the Board's multifactor test, nor did it introduce evidence relevant to those factors.

[7] Both the Employer and Laborers confirmed at the hearing that Laborers' "Epoxy Technician" classification pertains to the resinous flooring coating work on the Life Sciences project.

2. Employer preference, current assignment, and past practice

The Employer assigned the disputed work, via Leewens, to employees represented by Laborers, and both the Employer and Leewens prefer that the work in dispute continue to be performed by employees represented by Laborers. In addition, the Employer testified that assignment of this work to Laborers-represented employees is consistent with its past practice. Between 2010 and 2017, 42 out of 47 resinous flooring projects were awarded by the Employer to Laborers-affiliated subcontractors, and since 2014, 30 out of 31 of the Employer's resinous flooring projects have utilized Laborers. Furthermore, Leewens almost exclusively uses Laborers-represented employees for epoxy floor coating work.

We find, therefore, that the factor of employer preference, current assignment, and past practice favors an award of the work in dispute to employees represented by Laborers.

3. Industry and area practice

The Employer and Laborers argue that industry and area practice supports an award of the disputed work to employees represented by Laborers. Dale Cannon, business agent for Laborers Local 242, testified that area competitors use Laborers-represented employees to perform resinous flooring work. Foreman Larry Vance, of Leewens, also testified that he was not aware of Seattle-area floor coating companies using any craft but Laborers.

We find that on this record this factor favors an award of the work in dispute to employees represented by Laborers.

4. Relative skills

The evidence presented at the hearing demonstrates that the employees represented by Laborers possess the required skills and training to perform the disputed work and have performed this type of project in the past. Vance testified that Laborers available to perform the disputed work have been trained in the general aspects of floor coating and in installing methyl methacrylate (MMA) in particular, which is the resinous coating being used on the Life Sciences project. MMA requires certification training on proper installation and safety hazards. No evidence was presented concerning the skills of the employees represented by Cement Masons. Accordingly, we find that on this record this factor favors awarding the disputed work to employees represented by Laborers.

5. Economy and efficiency of operations

Representatives of the Employer testified that it is more efficient and economical to assign the disputed work to employees represented by Laborers because the installation is 95 percent completed. One of the Employer's project executives, Lewis Guerrette, testified that replacing Laborers with Cement Masons would disrupt the project schedule because Cement Masons would be required, pursuant to specification requirements, to produce a mockup of the resinous coating they would install, which would need to be approved by the architect and University of Washington representatives.

We therefore find this factor favors an award of the disputed work to employees represented by Laborers.

Conclusion

After considering all of the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, current assignment, and past practice; industry and area practice; relative skills; and economy and efficiency of operations. In making this determination, we award the work to employees represented by Laborers, not to that labor organization or its members.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Leewens Corporation, represented by Washington and Northern Idaho District Council of Laborers, are entitled to perform the installation of the resinous flooring in the lab areas at the Life Sciences Building at the University of Washington in Seattle, Washington.

Dated, Washington, D.C. August 16, 2018

_____

John F. Ring, Chairman

_____

Mark Gaston Pearce, Member

_____

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

EXHIBIT 6

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
Prevailing Wage
PO Box 44540 ● Olympia, Washington 98504-4540
360/902-5335 Fax 360/902-5300

November 12, 2020

Mark Riker, Executive Secretary
Washington State Building and Construction Trades Council
906 Columbia St SW, Suite 207
Olympia, Washington 98501

Dear Mr. Riker,

Thank you for your letter dated July 17, 2019 in which you expressed concern about improper use of "industry practice" information in interpreting and applying prevailing wage scope of work descriptions found in chapter 296-127 WAC. You may be suggesting L&I faithfully apply the plain language of scope of work descriptions and, if so, I could not agree more. Industry knowledge is needed in order to fully understand and apply that plain language. Consider the following:

Chapter 296-127 WAC
L&I uses scope of work descriptions to classify various bodies of work for purposes of applying and enforcing prevailing wage rates on public works projects under chapter 39.12 RCW. L&I does not make prevailing wage classification decisions which are in conflict with those scope descriptions.

L&I scope of work descriptions are not exhaustive "definitions."[1] Instead they are called "descriptions" because they offer a general description of the work of a trade (often a single sentence) followed by examples of that trade's typical work. Many of them use this phrase: "The work includes, but is not limited to:"

If scopes were comprehensive and exhaustive definitions there would be few prevailing wage classification disputes. It is conservatively estimated that L&I's prevailing wage program makes over a hundred classification decisions per day. The presence of classification questions (and disputes) tells us the scopes can be misinterpreted. Something beyond the plain language of the scope is needed. That something may include the use of industry practice for context to assist interpretations.

[1] Exhaustive definitions would be large, cumbersome documents which would need frequent revisions to address new industry developments such as changes in materials, tools, equipment and processes.

The terms and phrases used in scope descriptions are mostly understood by L&I and applied consistent with their use in the industry. It is good for L&I to understand how those terms are used in practice in the construction industry. For instance, in recent correspondence involving piping, L&I was asked to distinguish between what is a valve and what is a machine. Was the actuator a distinct machine or a component of the valve? The presence of this dispute suggests something more than the plain language of the scope was needed. L&I needed to understand and apply the terms "valve" and "machine" as they are used in the construction industry, consistent with industry practices. A party to that dispute, an affiliate of your Council, provided documents to L&I showing industry practice information[2], presumably so that L&I would consider that information.

Industry Practice in Case Law

L&I has a longstanding practice of considering industry practice to interpret scope of work descriptions. There are several examples in Director's Orders and in case law as well: The main issue in DLI v. Ray's HVAC involved whether prefabricated HVAC duct parts are nonstandard items for which prevailing wages apply. L&I considered industry practice in arriving at its decision that prefabrication of HVAC duct parts requires the payment of prevailing wages. L&I's use of industry practice did not stop there. Considering industry practice, L&I applied the Sheet Metal Worker prevailing wage to shop fabrication work despite an absence of the terms "fabrication" or "prefabrication" in WAC 296-127-01372.

In *Lockheed v. DLI*, the pipefitter prevailing wage was applied to the joining of 60-foot pipe stems at a shipyard, performed by boilermakers, to serve as outfall pipe from a waste water treatment plant. In *DLI v. Jesse Engineering* the piledriver prevailing wage was applied to very similar work, also performed in a shipyard. In these cases and in others, L&I went beyond merely applying scope language by conducting research, taking testimony, reading documents and visiting work sites. Public agencies and courts of law have this in common: They consider both law and facts. Industry practice facts.

Construction Labor Unions

L&I does not create or change local industry wage standards but instead, applies prevailing wage law to protect and preserve *existing* wage standards. The industry, not L&I, establishes wage standards. In its duty to understand established wage standards, L&I looks to various sources including and especially the unionized segment of the industry. Generally, trade unions prefer that L&I have information concerning plan decisions and agreements so that prevailing wage decisions might be made consistent with their traditional jurisdictional boundaries.

[2] Agreements of record, decisions of record, contractor assignments, excerpts from training programs, etc.

In the unionized segment of the construction industry, an established classification system exists and also a mechanism to prevent erosion of those classification and wage standards. The Plan for the Settlement of Jurisdictional Disputes ("The Plan")[3], is a team of arbitrators who adjudicate disputes between labor unions regarding which labor un ion has "jurisdiction" over the work in dispute. Because of this system to protect established trade classification and wage standards, where work is performed by local union craft workers under a local collective bargaining agreement, the likelihood that established wage standards (and prevailing wage requirements) are being violated is reduced.

Project Labor Agreements (PLAs) and community workforce agreements (CWAs) are locally-negotiated labor agreements to which multiple unions and multiple contractors are signatory. They contain a stipulation requiring the parties to refer jurisdictional disputes to The Plan. If, under these agreements, a labor representative believes the contractor has assigned the work to the wrong union, (and that therefore the established industry practice wages would not be paid for that work) the dispute must be resolved by The Plan. When work is performed under these PLA or CWA agreements, the likelihood that local wage standards are being eroded or prevailing wage law is being violated is even further reduced.

Improper Use of Prevailing Wage Law

Occasionally, a labor union local might decline to pursue the jurisdictional dispute resolution process required under the labor agreement to which it is signatory, preferring instead to seek action from L&I which would apply its wage standard to that work. The net effect of an L&I decision to apply that labor local's wage standard to the disputed work might be to cause the work to be assigned to that local's members, both in the near term and in the future. In this way, a favorable decision by L&I has an effect similar to that of a favorable jurisdictional award, but with less perceived risk. [4]

When unions decline to pursue a jurisdictional claim, particularly when this occurs under a PLA or CWA, but instead ask L&I to apply their wage to that work, L&I wonders if prevailing wage decisions and jurisdictional boundaries are out of step with one another. L&I hopes to avoid making prevailing wage classification decisions which are in conflict with established union jurisdictional boundaries and, therefore, also in conflict with established wage standards. Where one or more labor organizations decline to follow the prescribed jurisdictional dispute resolution process, L&I may be unable to accurately discern the existing wage standard to be protected.

[3] Formerly known as The Impartial Board for the Resolution of Jurisdictional Disputes and before that, The National Board for Jurisdictional Awards in the Building Industry.

[4] Requests for L&I involvement are considered to be less risky than jurisdictional hearing requests, though the actual risks may be similar.

Conclusion

Scope descriptions may require interpretation in order to be properly applied. Since L&I is directed to protect established wage standards (industry practice), L&I must understand those standards. Terms and phrases in scope descriptions sometimes have industry-specific meanings which L&I must understand (industry practice). Construction industry labor unions have a long and well-documented history of jurisdictional boundaries between those unions. Local union representatives rely on L&I to notice those boundaries, to understand established industry practice, and thereby preserve established wage standards. Adjudication of disputes about those boundaries are best made by Plan arbitrators. With those protections established by the unionized segment of the industry, L&I's role to preserve wage standards is not changed to the creation of wage standards.

As I say, you may be suggesting L&I faithfully apply the plain language of scope of work descriptions and, if so, I could not agree more. Industry practice does not trump the plain language of a scope of work description. Where a scope is thought to be out of step with established local wage standards, the remedy is to amend the scope. Your letter mentions rule-making. If, at any time, you feel one or more scope of work descriptions should be amended, please bring those requests to me. L&I appreciates your leadership in the construction industry, and especially your support for worker protection laws such as prevailing wage, chapter 39.12 RCW.

Sincerely,

Jim P. Christensen

Jim P. Christensen
Department of Labor & Industries
Prevailing Wage Program Manager/Industrial Statistician
360.480.5755
jim.christensen@lni.wa.gov

Attachments: DLI v. Ray's HVAC
DLI v. Jesse Engineering, Inc.

WASHINGTON BUILDING TRADES

SCANNED

July 17, 2019

Mr. Jim Christensen, Industrial Statistician
Prevailing Wage Program Manager
WA Department of Labor and Industries
PO Box 44450
Olympia, WA 98504-4540

RECEIVED
JUL 26 2019
Prevailing Wage Section

Dear Mr. Christensen:

Re: Issuing of Wage Determinations

I am writing to you on behalf of the Washington State Building and Construction Trades Council (WSBCTC) and its affiliate members. The WSBCTC is concerned that the Department is improperly using "industry practice" as a factor when interpreting existing Scope of Work Descriptions in order to issue wage determinations.

The Department is charged with the responsibility to issue "scope of work descriptions for each trade and occupation recognized as being involved in public work." WAC 296-127-013(1). In creating the scopes, the Department is specifically directed to look to "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;
(e) Recognized labor and management industry practice.

WAC 296-127-013(2). Using these five criteria, the Department has issued over sixty Scope of Work Descriptions through the formal regulatory process. *See* WAC 296-127-01301-01398. WSBCTC has no objection or issue with this process.

The problem comes when the Department is asked to issue a wage determination, and in doing so, uses the "industry practice" criteria to interpret the Scope of Work Description in a manner that amounts to an amendment of the WAC Scope of Work Description. Contractors, trades, project owners and other interested parties are increasingly trying to advocate for changes to the

906 Columbia St SW, Suite 107 – Olympia, WA 98501 • 360-357-6778 PHONE • 360-357-6783 FAX
Todd Mitchell, President • Mark Riker, Executive Secretary

Scope of Work Descriptions through informal requests to the Department for interpretation of the Scopes. In the course of reviewing these requests, the Department has recently begun to look to "industry practice" to interpret the Scopes. This is a dangerous practice and runs afoul of the legal rule making process. Contractors, trades, project owners, and other interested parties are well versed in the required process for requesting and implementing reviews and amendments to the Scope of Work Descriptions.

"Industry practice" is not a reasonable basis for the interpretation of established Scope of Work Descriptions in order to provide wage determinations. Once there is an established Scope of Work Description (of which industry practice is an influencing criterion) that Scope of Work Description should stand as the determinate criteria for wage determinations. There is no set definition for how "industry practice" is measured or what sources must be consulted or surveyed. The outcome of using "industry practice" to interpret Scope of Work Descriptions in order to issue wage determinations is that the Scopes shift over time, based on who submits information about "industry practice," which can allow parties to "game" the system to obtain a more favorable wage determination through the backdoor of securing an interpretation that has not gone through the formal multi-step rule making process. Lost in the process is the consistent, predictability and transparency needed for the prevailing wage laws to work fairly for all involved. This process is akin to adjusting the speed limit due to the fact that most drivers exceed the speed limit. The correct method for adjusting the speed limit would be to seek legislative authorization to do so, which would trigger studies regarding the safety of doing so.

I hope you reconsider your recent approach and discontinue the informal solicitation of information regarding "industry practice" when issuing wage determinations. The consideration of "industry practice" is appropriately placed within the establishment, review, and adjustment of Scope of Work Descriptions processes. Alternatively, I ask that you advise interested parties of the process to seek revisions to the Scope of Work Descriptions if and when they disagree with your wage determinations based upon Scope concerns. Please contact me if you want to discuss this matter further.

Sincerely,

Mark Riker, Executive Secretary
Washington State Building and Construction Trades Council
360-522-6844

opeiu8/afl-cio

DAVIS GRIMM
PAYNE & MARRA

LABOR AND EMPLOYMENT LAW

Selena C. Smith
Daniel J. Spurgeon
206-447-0182
ssmith@davisgrimmpayne.com
dspurgeon@davisgrimmpayne.com

March 11, 2024

Via U.S. Mail and E-Mail to: MOCF235@LNI.WA.GOV

Celeste Monahan, Assistant Director
Department of Labor & Industries
Fraud Prevention and Labor Standards
P 0 Box 44278
Olympia, WA 98504-4278

Via U.S. Mail and E-Mail to: ROJO235@LNI.WA.GOV

Jody Robbins, Industrial Statistician/Program Manager
Department of Labor & Industries
Prevailing Wage
P 0 Box 44540
Olympia, WA 98504-4540

RE: Leewens Corporation's Request for Reconsideration of the Department's February 13, 2024 Response to Leewens Corporation's Request for Modification

Dear Ms. Monahan:

I am writing on behalf of Leewens Corporation ("Leewens") with respect to the October 26, 2023 prevailing wage determination (the "Determination") issued by L&I's Industrial Statistician Jody Robbins and the subsequent February 13, 2024 response by the same author. Leewens hereby requests that the Department reconsider its October 26, 2023 Determination and issue a redetermination that properly finds the scope of work at issue fully falls within the Laborers' scope.

The February 13, 2024 response by Mr. Robbins does not address the points raised below. It also omits any new factual or legal support for the Department's new 2023 Determination

interpreting certain floor coating tasks contrary to the factual evidence, recent Department position, and legal authorities. Leewens asks that you review all of the points below and render your de novo determination of the October 26, 2023 Determination.

The Determination issued on October 26, 2023 is premised upon a misapplication of appropriate standards, ignores industry practices, and arbitrarily reverses course. Let me explain:

I. The Preparation and Installation of MMA Flooring Has Properly Been Encompassed Within the Laborers' Scope of Work for Years. That Remains the Case Today.

The scope of work at issue here for the Seattle Aquarium Project was previously the subject of litigation on the UW Life Science Building Project, initiated by L&I's Notice of Violation No. NOV200501. However, in that prior proceeding, L&I ultimately concluded that this work is properly within the Laborers' scope. In its October 1, 2021 correspondence rescinding its Notice of Violation No. NOV200501, L&I expressly stated that:

> **The above-referenced Notice of Violation is rescinded. After review of the materials received, L&I finds no violation of prevailing wage law for this project.**
>
> **We appreciated the documents and materials provided by Leewens, which included a sufficiently detailed description of the work performed including tools and methods used and materials applied. L&I also requested and received substantial materials from four labor organizations, which were also appreciated and reviewed.**

L&I's October 1, 2021 Rescission of Notice of Violation NOV200501.

The scope of work pertaining to the Seattle Aquarium Ocean Pavilion Project ("Seattle Aquarium Project"), and referenced in the Department's October 26, 2023 Determination, involves the same preparation and installation of resinous flooring, the same tools, and the same application process as the scope of work performed on the Life Science Building Project.

Leewens has utilized Laborers to perform this scope of work for decades. Leewens has properly paid the Laborers' prevailing wage rate for this work. That was the case on the Life Science Building Project, which L&I ultimately approved. The same determination that the work at issue properly falls within the Laborers' scope is equally warranted here.

The work at issue involves the preparation and installation of resinous flooring. In particular, Methyl Methacrylate (MMA) resins or epoxy are applied to the floor and base of the wall with a squeegee to spread it out, and brushes and rollers to even out each coat to the proper thickness/texture. Vinyl flake or colored quartz is broadcast into the basecoat to provide a decorative and textured property to the system. This work is properly classified under Laborers (or Laborers, Epoxy Technician). (Leewens recognizes that this work could also be classified under the Painters' scope of work.) A plastic blade or steel cove tool can be used on the cove base.

As was the case two years ago when L&I previously determined this issue, again, nothing here falls within the Cement Masons' scope of work. The closest the Cement Masons' scope comes to this particular work is: "The installation of seamless composition floors and the installation and finishing of epoxy based coatings or polyester based linings to all surfaces, when the coatings or linings are applied by spraying or troweling." WAC 296-127-01315 (Cement Masons). Here, however, no spraying or troweling was utilized to apply the floor coating. Instead, squeegees, brushes, and rollers were used. It is optional to use a steel or plastic cove tool on the cove base only, not the floor.

Applying MMA is not specifically covered by the Cement Masons' scope, nor does it fall within its intended reach. The Cement Masons' scope primarily focuses on work with concrete and cement-based product. Instead, the MMA material and application process is more consistent with the Laborers' or Painters' scopes of work: "Application of polyurethane elastomers, vinyl plastics, neoprene, resin, polyester and epoxy was waterproofing or protective coatings to any kind of surfaces (except roofs) when applied with brushes, spray guns or rollers." WAC 296-127-01356(4) (Painters). Or: "The application of penetrating sealer and primer protective coatings to concrete floors...." WAC 296-127-01344 (Laborers).

In fact, installing an MMA or epoxy flooring system is entirely different from the work traditionally performed by the Cement Masons. MMA and cement-based products have radically different cure times. Hydrogen peroxide is added to MMA to initiate the curing process. Once mixed, MMA is rolled and squeegeed into place. The curing begins just 10 to 20 minutes after the hydrogen peroxide is added, and it is fully cured within one hour. Epoxies are two-component systems and cure overnight. By contrast, concrete and cementitious mortars can take up to 28 days to fully cure.

Because of how quickly epoxy and MMA cures, applying it requires a unique, continuous application technique in order to create a seamless coating. If the applicator fails to maintain a wet edge or proper technique, unwanted transition lines will be created instead of a seamless floor. In this sense, the application of epoxy and MMA is more similar to applying paint, rather than finishing concrete.

The technique involved in applying epoxy and MMA is different from Cement Masons' work. MMA manufacturer BASF recognizes the distinction of applying MMA compared to other material. BASF requires extensive training and five years of experience before BASF will certify an applicator to use MMA. MMA applicators are trained on, among other things, how to mix the product, how to properly roll it while maintaining a wet edge, how to properly cove the product, and even how to pour the product from the bucket onto the work floor in a manner consistent with the quick curing time and unique properties of MMA.

The material, epoxy or MMA, is not traditionally used by the Cement Masons, nor is it a cement-based product. Nor does the application of MMA involve the typical trowels and tools of the Cement Masons' trade, except for the optional cove tool.

Simply put, this work has traditionally been performed by Laborers (and sometimes by Painters). The Cement Masons' claim that such work falls within their scope is frankly part of a larger jurisdictional campaign by the Cement Masons. Dissatisfied with their results before the National Labor Relations Board and the Plan for Jurisdictional Disputes, the Cement Masons are using L&I for leverage in their jurisdictional disputes. The NLRB ruled against the Cement Masons specifically for MMA flooring, with decorative broadcast, and urethane flooring, with aggregate broadcast, and epoxy coatings.

Here, no materials containing cement and no cement or concrete finishers' tools were used. Rather, the nature of the work and material, as well as the tools used, do not support a classification in the Cement Masons' favor. Instead, Leewens' classification of its employees under the Laborers' scope of work was entirely reasonable. L&I's recent Wage Determination concluding otherwise must be reversed.

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II. Relevant Jurisdictional Proceedings Before the National Labor Relations Board Further Support the Conclusion that the Laborers' Scope of Work Applies.

Although not necessarily binding on L&I, the decision by the National Labor Relations Board ("the Board" or "NLRB") in *Washington and Northern Idaho District Council of Laborers and Skanska USA Building, Inc., et al.*, 366 NLRB No. 161 (2018), is highly relevant to L&I's determination here. The referenced Board decision reviewed a jurisdictional dispute between the Cement Masons and the Laborers under Section 10(k) of the National Labor Relations Act. In that decision, the Board ruled that the work performed on the same Project at issue in this L&I matter was properly within the Laborers' jurisdiction – not the Cement Masons.

In reaching its conclusion that the disputed work properly belonged to the Laborers, the Board relied on the parties' past practice, the industry and area practice, relative skills, economy and efficiency of operations, and employer preference. Notably, the Board found that, not only has Leewens almost exclusively relied upon Laborers to perform the disputed work, but that the prevailing industry practice among other subcontractors also favored the Laborers. In fact, the Cement Masons failed to identify a single project on which they performed the work at issue. A copy of the Board's decision is enclosed.

The Board properly concluded that the Laborers – not the Cement Masons – were entitled to the disputed work at issue here. The same conclusion is warranted with respect to prevailing wage rates and L&I's scopes of work. Just as the Board found, the Cement Masons have not worked with MMA or performed the resinous floor coating at issue here. The Cement Masons do not have the required training or years of experience necessary to perform the work in question. If the Cement Masons are unqualified to perform this work, how can L&I reasonably assign this to the Cement Masons' scope? It cannot.

Furthermore, it makes no logical sense to conclude the MMA floor coating work is Cement Masons' work when the Cement Masons have not identified a single instance of working with this product. As the Board found, it is the Laborers who have historically performed this work, both for Leewens and within the industry. To declare that this scope of work belongs to the Cement Masons with respect to prevailing wages runs completely counter to the realities of the industry, and places L&I squarely within the Cement Masons' unfounded jurisdictional grab for this work.

III. A Prior Jurisdictional Award for the Laborers Additionally Supports Leewens' Position.

A prior jurisdictional dispute arose in 2003 involving Leewens' installation of epoxy resin floors at the Seattle Public Library. The Library project involved decorative epoxy broadcast flooring with epoxy coving. The dispute was submitted to the Plan for Settlement of Jurisdictional Disputes in the Construction Industry ("the Plan"). Both the Laborers and the Painters claimed the work. The Cement Masons also had the opportunity to make a claim for this work at the time, but they did not do so.

Following an arbitration reviewing industry and company practices, the arbitrator awarded the work to the Laborers. The arbitrator found that Leewens had relied on Laborers extensively in the performance of this work – not other crafts. Industry practices further supported the arbitrator's conclusion. Following this 2003 award Leewens has consistently performed its floor coating work with the Laborers. It has not been until the last couple of years that the Cement Masons have suddenly sought to expand their jurisdiction to encompass resinous floor coating work. It is the Laborers (or, in some cases, the Painters) who have performed this work for decades. The Cement Masons' sudden interest in this work does not justify a prevailing wage determination in their favor. L&I should refrain from being used as a pawn by the Cement Masons in the Masons' jurisdictional overreach.

IV. The Prevailing Industry Practice Does Not Favor the Cement Masons.

As mentioned above, Leewens has historically relied on the Laborers to perform the resinous floor coating work at issue here. Leewens is not alone in this. In fact, the vast majority of Leewens' competitors in the industry also heavily rely on the Laborers to perform resinous floor coating work. (See the enclosed NLRB Decision and the Plan Arbitration Award discussions on this point.) Some companies instead utilize Painters. Prior to around 2016, the Cement Masons had not even attempted to claim this work.

Leewens is not alone in its practices of utilizing Laborers for this work. In fact, Leewens is aware of a dispute over the similar application of MMA by another subcontractor, DPK Inc., on the University of Washington Animal Research and Care Facility in or around 2017. The Cement Masons sought the resinous floor coating work, including the application of MMA. Although L&I concluded that a small portion of the work fell under the Cement Masons' scope (the leveling with cementitious materials prior to the application of the floor coating system), L&I concluded that the Cement Masons' scope of work did not apply to the floor coating system at the Animal

Research and Care Facility. The Cement Masons' scope similarly does not apply to Leewens' MMA or epoxy floor coating work.

L&I's conclusion that the disputed work at issue here falls within the Cement Masons' scope runs completely counter to the prevailing practices within the industry. Leewens is prepared to present additional testimony and evidence of prevailing practices within the industry, as well as its own past practice, in support of its position.

V. L&I's Own Industrial Statistician/Prevailing Wage Program Manager Acknowledged and Agreed that This Work is Properly Within the Laborers' Scope.

Just over two years ago, L&I explicitly acknowledged that Leewens is not running afoul of the prevailing wage rules by paying the Laborers' rate for this exact work. L&I's Industrial Statistician/Prevailing Wage Program Manager Jim Christensen acknowledged that the information provided by Leewens in response to Notice of Violation No. NOV200501 "included a sufficiently detailed description of the work performed including tools and methods used and materials applied," sufficient to find "no violation of prevailing wage law" concerning this scope of work. L&I's October 1, 2021 Letter Rescinding Notice of Violation.

To stand here today and disregard this explicit determination two years ago, and to arbitrarily flip flop on the appropriate scope of work, completely undermines the legitimacy of this current Determination. It is contrary to industry practice, contrary to L&I's own conclusions concerning the application of MMA and epoxy to flooring systems with respect to both Leewens and DPK in the past. If L&I believes there is a need for "clarity" as asserted in its October 26, 2023 Determination, which departs from its well-established position previously on this very topic, then it needs to instead engage in appropriate rulemaking rather than arbitrarily hiding behind wage determinations to change its mind on the interpretations of scopes of work.

VI. L&I's Prior *Armorclad* Wage Determination Has No Bearing on Leewens' Work.

L&I's October 26, 2023 Determination claims it is reaffirming a prior determination concerning work performed by Armorclad on the Tukwila Pool project. In that determination, L&I concluded that certain epoxy floor coating work fell within the Cement Masons' classification. L&I concluded that certain preparatory work fell within the Laborers' scope, that the Painters' scope applied to the work on walls, and the floor coating system fell within the Cement Masons' scope on that particular project.

Leewens does not dispute that the Painters' scope could apply to certain work it has assigned to Laborers. However, Leewens disagrees with L&I's conclusion that the floor coating system installed by Armorclad belonged to the Cement Masons. That being said, the work performed by Armorclad on the Tukwila Pool project is distinguishable from the disputed work performed by Leewens.

The Tukwila Pool project underlying the *Armorclad* determination was distinct. That project was epoxy, pre-mixed with aggregate prior to putting on the floor. That contractor, reportedly, placed and finished the materials with steel trowels or steel power trowels. The aggregate was applied as a grout, not a liquid with decorative broadcast. L&I's *Armorclad* determination emphasized the nature of the material used, including the mixture of a cement-based epoxy and sand. L&I heavily relied on its interpretation that such material is more traditionally affiliated with the Cement Masons' work.

Although Leewens disagrees with L&I's conclusion concerning Armorclad, Leewens points out that the product at issue here is different. Leewens' Laborers are not working with a cement-based product. Instead, Leewens' work involves applying an entirely different material, MMA or epoxy. Leewens' work at the Seattle Aquarium Project has not involved product containing sand or aggregate except colored quartz as a broadcast. As described in more detail above, epoxy or MMA requires a significantly different application process than the type of work traditionally performed by the Cement Masons. The technique, skill set, experience, and certifications required to apply epoxy or MMA are notably distinguishable from the application or installation of cement-based products, or grout by trowel.

VII. Reversing Course on the Scope of Work at Issue Here is Arbitrary and Capricious and an Inappropriate Attempt to Avoid Agency Rulemaking.

An agency must act fairly and impartially in the performance of its duties. *Nationscapital Mortg. Corp. v. Dept. of Fin. Inst.*, 133 Wn. App. 723, 758, 137 P.3d 78 (2006). The agency must consider the record as a whole, and interpret it in a fair-minded rational manner. *Teamsters Local Union No. 117 v. Dep't of Corr.*, 179 Wn. App. 110, 121 (2014). An agency acts in an arbitrary and capricious manner when its action is willful and unreasoning and does not consider surrounding facts or circumstances. *Tucker v. Columbia River Gorge Comm'n*, 73 Wn. App. 74, 78, 867 P.2d 686 (1994).

Agencies are not categorically precluded from changing prior determinations. However, an agency must provide a reasoned explanation for changing course, particularly when such change occurs within a short time frame upon the same facts.

> ....[A]n agency also "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010) (emphases and internal quotation marks omitted). Under certain circumstances, an agency's prior factual findings or conclusions may be "relevant data" such that an agency must "articulate a satisfactory explanation" when it changes its mind.

Defenders of Wildlife v. Zinke, 856 F.3d 1248, 1262 (9th Cir. 2017).

Here, the resinous flooring installation process has not changed, the tools and nature of the work and the material have not changed, and the scope of work definitions have not changed since L&I's 2021 conclusion that this was properly within the Laborers' scope. Changing course now, on a whim, particularly without reasoned justification, is exactly the type of arbitrary and capricious action that runs afoul of the APA.

It does not provide "clarity" to announce a new Determination which contradicts the Department's prior conclusions, only two years after abandoning the same Cement Masons' claim against Leewens. This purported attempt at "clarity" only creates a disruptive seesaw effect in the public works community. It prejudices not only Leewens, but the industry as a whole, when L&I changes the rules at the whim of union pressure and enforces a prevailing wage determination that ignores industry practices.

In fact, the Determination's selective citation to apprenticeship standards, while ignoring all available contrary industry evidence that recognizes the Laborers' longstanding performance of this work, completely disregards the very industry practice L&I claims it should be taking into consideration. An agency cannot ignore relevant evidence by arbitrarily designating it as "unhelpful." This is particularly true when 100% of the evidence and precedent determinations and NLRB rulings which are summarily ignored are those that favor Leewens and the Laborers over the Cement Masons' baseless claims to this work.

VIII. The February 13, 2024 Response Concedes the Flaws in the October 26, 2023 Determination.

The points raised in Sections I through VII of this submission were presented to the Industrial Statistician, who either could not or would not address them. Likewise, the Laborers, through their counsel, submitted a timely November 22, 2023 request for modification to the October 2023 Determination. The facts, legal constraints, and reasons set forth in the Laborers' request were not addressed in the Industrial Statistician's February 13, 2024 reply. Administrative agencies, unlike elected legislative bodies, must always justify their actions based upon factual evidence and a lawful rationale. The concurrent challenge by the Laborers' representatives provided extensive factual information to the Industrial Statistician, who ignored it entirely. For example, the difference between acrylic and epoxy, and the difference in materials at issue in *Armorclad*, was wholly ignored.

Comparing the new February 13 response to the November 10, 2014 *Armorclad* determination it purports to affirm, there are many fundamental conflicts. Nowhere did the latest response address the significant factual differences between the Tukwila Pool project relevant to an earlier determination and the Seattle Aquarium project, nor the clear error and misstatements of law challenged by Leewens.

Two examples of the patent conflicts between the February 13, 2024 response and the *Armorclad* decision it purports to affirm are the tools and the use of aggregate.

This latest response ignores the fact that Leewens' two-part pre-mixed (not broadcasted) floor coating is applied with squeegees and not trowels. Even if the Laborers had used trowels, it would not conflict with the Laborers' recognized craft. WAC 296-127-01344 expressly recognizes the Laborers' use of "hand tools" to spread all types of materials. If, as the October 2023 Determination and *Armorclad* suggest, the use of trowels results in Cement Masons' sole jurisdiction, why does the current array of WAC regulations recognize the use of trowels by many different trades? The logic is faulty in asserting that a single tool, used by many trades, somehow justifies a reversal of the Department's course in the disputed scope of work. For example; Tile Setters do not become Cement Masons by using a trowel to manipulate grout. Plasterers do not become Cement Masons by using trowels to smooth plaster.

Equally questionable is the October 2023 Determination's inconsistent and arbitrary recognition of industry practices when it favors the pre-determined outcome, and refusal to

consider the same factor when it does not. The October 2023 Determination cites selectively-chosen industry practices in stark contrast to the February 13, 2024 response which ignores the *RS Means*' definitions of trowels and squeegees as separate tools. These definitions were highlighted in the Laborers' November 22, 2023 request for modification, Exhibit 8. Page 425 of the Laborers' exhibit contains the *RS Means*' page 325 definition of "trowel" as follows: "1. A flat, broad-blade, steel hand tool used in the final stages of finishing operations to impart a relatively smooth surface to concrete floors and other unformed concrete surfaces. 2. Also a flat, triangular blade tool used for applying mortar to masonry." *Id*. The February 13, 2024 response, page 1, states that "as noted above" "troweling tools" are not limited to those made of metal. However, there was no citation provided "above" or anywhere to justify the opinion that trowels may be made of non-metal or flexible materials.

Is there any basis whatsoever for the opinion that tools with flexible rubber working ends for distributing liquids and gels rather than leveling or shaping concrete, should be considered a "trowel"? If so, it must be disclosed by the Department, not assumed. Furthermore, the WACs use "squeegee" and "trowel" as two different types of tools. The Department cannot assert that its own terminology is meaningless. Surely the Department would not use "squeegee" to describe a non-existent tool. The Department must provide explanations and justifications for this new approach, not merely conclusory statements. This is particularly true when the Department is attempting to take away the Laborers' decades of proficient application of MMA and epoxy floor coating work. This is their livelihood, and has never been consistently nor exclusively performed by Cement Masons.

The new response also appears fixated upon trowels, despite such tool being inapplicable to the tasks at issue. Even if the Department's classification regulations were enforceable, trowels are not exclusive to the Cement Masons. The WACs treat squeegees and trowels as two separate terms, and even the Roofers' use of trowels and squeegees is recognized. Mr. Christensen's February 25, 2021 deposition in the prior Department proceeding described trowels as a "very rigid sheet of metal." *Id*., p.92:9. That was the Department's authorized representative's description, and precludes the Department from arbitrarily reversing its opinion now.

The February 13, 2024 response states that the addition of aggregate for beautification or non-skid purposes does not remove the epoxy or MMA work from the Painters' classification. This response proceeds to state that it is affirming the *Armorclad* determination. This is entirely inconsistent. That decision relied upon the use of sand additives,

alternating with epoxy for five layers, as evidence of Cement Masons' jurisdiction. The *Armorclad* determination describes the purpose of the sand layers as anti-skid. *Id.*, page 2, end of second paragraph. Use of sand, regardless of purpose, is also cited as evidence of the Cement Masons' trade in the *Armorclad* case. Here, there is no sand or aggregate additive to the MMA floor coating, except as a broadcast after the liquid resin is applied. The new Determination is irreconcilable with the decision it purports to affirm.

The new Determination criticizes the Laborers' training and qualifications in a conclusory, arbitrary fashion without any evidence or citations. If the Laborers were insufficiently qualified to perform the floor coating work, how did they successfully complete all such tasks for Leewens continuously back to 1995? The Laborers are clearly qualified, despite the arbitrary and capricious statements to the contrary. General contractors, project owners, material manufacturers, and Leewens' management have all endorsed the decades of quality application by the Laborers. The *Armorclad* determination opined that Laborers were restricted to preparatory or patching tasks, despite no authority so limiting the Laborers' scope of work. The February 13, 2024 conflicts with this aspect of *Armorclad* also, instead focusing only on the tools used and absence of structural aggregate. The new Determination also abandons *Armorclad*'s floor-versus-wall distinction between Painters and other trades. Neither the October 2023 nor February 2024 Determinations or responses are consistent with *Armorclad*, nor any facts, law, or reason. The Department should abandon this result-oriented determination and instead initiate an APA and RFA-compliant rulemaking process if it desires to take work away from the Laborers and transfer it to the Cement Masons. That would be an unjust endeavor, likely without legislative authorization, but at least it would allow stakeholders to participate and obtain clarity.

When responding to Leewens' November 22, 2023 letter, the Industrial Statistician avoided explaining any basis for refusing to modify the Determination, and contrary to the professed goal of creating clarity, has exacerbated the disruptive seesaw effect antithetical to the Legislature's policy goals.

IX. The Laborers' Scope of Work is the Appropriate Conclusion Here.

In sum, L&I's assertion that the disputed work falls within the Cement Masons' scope is completely unsupported. The Cement Masons do not have the appropriate training or experience necessary to work with MMA, in particular. They have not historically performed this work with Leewens or otherwise within the industry. Both the NLRB and the Plan for Jurisdictional Disputes have found the work at issue properly belongs to the Laborers.

Furthermore, the Cement Masons' scope of work is distinguishable from the actual work performed at the Seattle Aquarium Project.

Simply put, the disputed floor coating work is not Cement Masons' work. L&I's contrary conclusion is incorrect and warrants reversal. This letter shall not be construed in any way as a limitation on or a waiver of Leewens' right to present additional evidence, facts, or arguments in support of its position that it properly classified its employees in the performance of the disputed work.

The Cement Masons have no basis for claiming this work belongs to them, nor that the Cement Masons' prevailing wage rate applies. They have lost this battle in multiple forums, and on numerous projects. The same conclusion is warranted here: The Cement Masons have no claim to this work, and this work properly falls within the Laborers' (or Painters') scope of work and prevailing wage rate(s).

As such, Leewens respectfully requests that the Department withdraw the October 26, 2023 Determination, rescind the February 13, 2024 refusal to modify or rescind, and find instead that such work continues to be properly designated as within the Laborers' scope of work. In the event L&I decides to engage in agency rulemaking, Leewens and other industry groups must be provided an opportunity to provide relevant factual information through the mandatory notice-and-comment process.

Enclosed with this submission are the Exhibits originally provided to the Department with Leewens' request to modify the Determination. We welcome your *de novo* review of the Department's ongoing consideration of this matter.

Sincerely,

Selena C. Smith and
Daniel J. Spurgeon
Attorney for Leewens Corporation

Encl. Exhibits A through E.

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2024, I served the above and foregoing ***Leewens Corporation's Request for Reconsideration of the Department's February 13, 2024 Response to Leewens Corporation's Request for Modification*** with the following individual(s) in the manner indicated below:

Via U.S. Mail and E-Mail to: MOCF235@LNI.WA.GOV

Celeste Monahan, Assistant Director
Department of Labor & Industries
Fraud Prevention and Labor Standards
P 0 Box 44278
Olympia, WA 98504-4278

Via U.S. Mail and E-Mail to: ROJO235@LNI.WA.GOV

Jody Robbins, Industrial Statistician/Program Manager
Department of Labor & Industries
Prevailing Wage
P 0 Box 44540
Olympia, WA 98504-4540

Annalise R. Field
Paralegal to Attorneys for Defendant

EXHIBIT A

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
Prevailing Wage
PO Box 44540 ● Olympia, Washington 98504-4540
360/902-5335 Fax 360/902-5300

NOTICE OF VIOLATION

**THIS NOTICE IS APPEALABLE PURSUANT TO WAC 296-127-160.
FAILURE TO APPEAL WITHIN 30 DAYS OF THE ISSUANCE
OF THIS NOTICE WILL WAIVE APPEAL RIGHTS.**

PW Notice of Violation No. NOV200501

May 12, 2020

Leewens Corporation Po Box 2549 Kirkland, WA, 98083	UBI No. : 601356857 Contractor Reg. No.: LEEWEC*075JZ Certified Mail Number: 9489 0090 0027 6077 8700 92

Leewens Corporation 630 7th Ave Kirkland, WA, 98033	UBI No. : 601356857 Contractor Reg. No.: LEEWEC*075JZ Certified Mail Number: 9489 0090 0027 6077 8701 08

Leewens Corporation 11008 Mt View Road NE Bainbridge Island, WA, 98110	UBI No. : 601356857 Contractor Reg. No.: LEEWEC*075JZ Certified Mail Number: 9489 0090 0027 6077 8701 15

Davis Grimm Payne & Marra Attn: Selena C Smith 7 – 1 Fifth Avenue Suite 4040 Seattle, WA 98104	Certified Mail Number: 9489 0090 0027 6066 6437 06

Fidelity & Deposit Co of MD, Zurich American Ins Co, Performance/Payment Bond No. 09063909
Berkshire Hathaway Specialty Ins Co, Federal Ins Co, Certified Mail Number:
The Continental Ins Co, Liberty Mutual Ins Co 9489 0090 0027 6077 8701 22
Attn: Nathan Varnold
60 S Market Suite 1100
San Jose CA 95113

Fidelity & Deposit Co of MD, Zurich American Ins Co, Performance/Payment Bond No. 09063909
Berkshire Hathaway Specialty Ins Co, Federal Ins Co, Certified Mail Number:
The Continental Ins Co, Liberty Mutual Ins Co 9489 0090 0027 6077 8701 39
Attn: David Harrison
390 N Broadway
Jericho NY 11753

RE: PERFORMANCE UNDER PUBLIC WORKS CONTRACT SUBJECT TO PREVAILING WAGE—

PROJECT:	Life Science Building - MACC 04
CONTRACT NUMBER:	204746
BID DUE DATE:	09/01/2016
AWARD DATE:	10/31/2016
AWARDING AGENCY:	University of Washington
PRIME CONTRACTOR:	Skanska USA Building Inc
DATE COMPLAINT FILED:	09/21/2018

Violations

A. Failure to Pay Prevailing Wage Violation – RCW 39.12.010, RCW 39.12.020, RCW 39.12.030, RCW 39.12.065, WAC 296-127-011, WAC 296-127-013

1. The L&I investigation established that 9 workers employed by Leewens Corporation were not compensated at the required prevailing rate of wage for the classification of labor performed.
2. The gross amount of unpaid prevailing wages owed to the workers on this project was $17,323.60.
3. Attached to and made part of this Notice of Violation is a listing of the affected worker(s), scope of work classifications, and gross unpaid prevailing wages. (See Attachment A.)
4. 9 workers performed job duties on this project under the General Laborer scope of work classification (WAC 296-127-01344) and were not compensated for all hours of work at the required journey level rate of $55.56 per hour.

I. Penalties

A. Civil Money Penalty – RCW 39.12.065

1. A civil money penalty may be assessed under RCW 39.12.065(3) for failure to pay prevailing wages. The amount of the penalty is $3,464.72, which represents a 20% civil penalty.

II. Hearing and Appeal

A. Rights of Employer and Surety – WAC 296-127-150

1. Your firm or any of its interested sureties may request a hearing on these violations, the amount of unpaid prevailing wages owed, or the penalties assessed. In the absence of any party filing or a surety filing a request for such a hearing within 30 days of the date of issuance of this Notice, the director shall issue a final, unappealable Order finding the violation did occur, ordering payment of prevailing wages determined by the department as owed and assessing penalties.
2. The request for hearing must be in writing and the original and four copies must be filed with the director within 30 days of the department's issuance of the Notice of Violation. The request for hearing must specify:
   a. The name and address of the parties requesting the hearing;
   b. The Notice of Violation that is being appealed;
   c. The items of violation believed to be erroneous; and
   d. The reasons the Notice of Violation is erroneous.
3. The party filing the request for hearing must also serve a copy of the request upon all interested sureties, or, if a surety makes the request, upon all other interested sureties and the violator.
4. The request for hearing must be filed with the Director, Department of Labor and Industries, mailing address: P. O. Box 44001, Olympia, WA 98504-4001, physical address: 7273 Linderson Way SW, Olympia, Washington 98501.

III. Employee Rights and Employer Penalties Assessed

A. No Waiver of Employee Rights and Employer Debarment – WAC 296-127-150, RCW 39.12.065, RCW 39.12.050

1. An employee cannot, by contract or agreement, waive the right to receive the prevailing wages required under the Public Works Act.
2. In the event that the employer is found to have violated the Public Works Act by failing to pay the required prevailing rate of wage, the employer will have a "strike" toward debarment under RCW 39.12.065(3). If the employer is found to have violated the Prevailing Wage Act by failing to pay the required prevailing rate of wage for a second time within a five-year period from the date this violation becomes final, the employer will be precluded from bidding on public works contracts for two years pursuant to RCW 39.12.065(3).
3. In the event that the employer is found to have violated the Public Works Act by filing false documents and failing to file documents, the employer will have a "strike" toward debarment under RCW 39.12.050(1). If the employer is found to have filed false

documents or failed to file documents (i.e., Statement of Intent to Pay Prevailing Wages, Affidavit of Wages Paid Statement, or certified payroll), for a second time within a five-year period from the date this violation becomes final, the employer will be precluded from bidding on public works contracts for one year pursuant to RCW 39.12.050(2).

Issued on this **12th** day of **May 2020**.

Jim P. Christensen

Jim Christensen, Program Manager/Industrial Statistician
Prevailing Wage Program
Department of Labor and Industries

cc: University of Washington, Awarding Agency
Skanska USA Building Inc, Prime Contractor
REBOUND, Interested Party
Amanda Goss, Assistant Attorney General
Christopher Bowe, Assistant Director, Fraud Prevention and Labor Standards
Melissa Grondahl, Compliance Specialty Supervisor
Barbie Lima-Gierbolini, Industrial Relations Agent

ATTACHMENT A

PROJECT: Life Science Building - MACC 04
CONTRACT NO.: 204746
AWARDING AGENCY: University of Washington
PRIME CONTRACTOR: Skanska USA Building Inc

Name of Worker(s)	Prevailing Wage Scope of Work Classification(s)	Gross Unpaid Prevailing Wages	Interest
Boutwell, Joel	Cement Masons	$3,225.68	$921.13
Brown, William	Cement Masons	$3,052.16	$887.37
Hagen, Todd	Cement Masons	$109.23	$31.76
Hayes, Trevor	Cement Masons	$2,376.98	$665.11
Kessler, Charles	Cement Masons	$755.16	$208.30
Olson, Eric	Cement Masons	$2,526.72	$722.80
Sampson, James	Cement Masons	$2,329.62	$670.46
Vance, Larry	Cement Masons	$94.40	$29.83
Wright, Josha	Cement Masons	$2,853.65	$805.08
TOTAL UNPAID PREVAILING WAGES =		**$17,323.60**	**$4,941.84**

CERTIFICATE OF MAILING

I certify that on this day I caused this Notice of Violation to be mailed by delivering it to Consolidated Mail Services for placement in the United States Postal Service for certified mail and/or first class mail delivery, as indicated, postage prepaid, to the parties listed below.

Leewens Corporation Po Box 2549 Kirkland, WA, 98083	CERTIFIED MAIL NUMBER : 9489 0090 0027 6077 8700 92 and FIRST CLASS MAIL
Leewens Corporation 630 7th Ave Kirkland, WA, 98033	CERTIFIED MAIL NUMBER : 9489 0090 0027 6077 8701 08 and FIRST CLASS MAIL
Leewens Corporation 11008 Mt View Road NE Bainbridge Island, WA, 98110	CERTIFIED MAIL NUMBER : 9489 0090 0027 6077 8701 15 and FIRST CLASS MAIL
Davis Grimm Payne & Marra Attn: Selena C Smith 7 – 1 Fifth Avenue Suite 4040 Seattle WA 98104	CERTIFIED MAIL NUMBER : 9489 0090 0027 6066 6437 06 and FIRST CLASS MAIL
Fidelity & Deposit Co of MD, Zurich American Ins Co, Performance/Payment Bond No. 09063909 Berkshire Hathaway Specialty Ins Co, Federal Ins Co, The Continental Ins Co, Liberty Mutual Ins Co Attn: Nathan Varnold 60 S Market Suite 1100 San Jose CA 95113	CERTIFIED MAIL NUMBER : 9489 0090 0027 6077 8701 22 and FIRST CLASS MAIL
Fidelity & Deposit Co of MD, Zurich American Ins Co, Performance/Payment Bond No. 09063909 Berkshire Hathaway Specialty Ins Co, Federal Ins Co, The Continental Ins Co, Liberty Mutual Ins Co Attn: David Harrison 390 N Broadway Jericho NY 11753	CERTIFIED MAIL NUMBER: 9489 0090 0027 6077 8701 39 and FIRST CLASS MAIL
University of Washington Attn: Cindy Magruder PO Box 352210 Seattle WA 98195	FIRST CLASS MAIL
Skanska USA Building Inc Attn: Ike Burkett 211 Yale Avenue N Suite 400 Seattle WA 98109	FIRST CLASS MAIL
REBOUND PO Box 3852 Spokane WA 99220	FIRST CLASS MAIL

Dated at Tumwater, Washington, on this **12th** day of **May 2020**

DEPARTMENT OF LABOR AND INDUSTRIES

By: Chuck Ziegert

Chuck Ziegert
Industrial Relations Specialist

EXHIBIT B

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
800 Fifth Avenue • Suite 2000 • MS TB-14 • Seattle WA 98104-3188 • (206) 464-7740

October 6, 2021

Joni Derfield, Administrative Law Judge
Office of Administrative Hearings
949 Market Street, Suite 500
Tacoma, WA 98402

RE: ***Leewens Corporation, Appellant v. Dep't of Labor & Indus., Respondent***
Prevailing Wage Case
Notice of Violation No.: NOV200501
Project: Life Science Building-MACC 04
OAH Docket No. 08-2020-LI-01503

Dear Judge Derfield:

After further consideration, the Department has decided to vacate the notice of violation no. NOV200501. Please see enclosure. The Department requests cancellation of all litigation deadlines and events and issue a notice of case closure.

Sincerely,

Jessica So

JESSICA SO
Assistant Attorney General
(206) 587-5167

Enclosure

cc: Erik Laiho and Selena Smith, Attorneys for Employer, Leewens Corporation
Benjamin Berger and Danielle Franco-Malone, Attorneys for Intervenors, WNIDCL and Local 242
Daniel Hutzenbiler and Noah Barish, Attorneys for Intervenor, OPCMIA Local 528
Barbie Lima Giergolini, Industrial Relations Agent
Cindy Magruder for Awarding Agency, University of Washington
Ike Burkett for Prime Contractor, Skanska USA Building Inc.

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
Prevailing Wage
PO Box 44540 • Olympia, Washington 98504-4540
360/902-5335 Fax 360/902-5300

October 01, 2021

Patrick Leewens
Leewens Corporation
630 Seventh Avenue
Kirkland, Washington 98033

Re: **PROJECT:** Life Science Building - MACC 04
CONTRACT NUMBER: 204746
BID DUE DATE: 09/01/2016
AWARD DATE: 10/31/2016
AWARDING AGENCY: University of Washington
PRIME CONTRACTOR: Skanska USA Building, Inc.
NOTICE OF VIOLATION NO. NOV200501

Dear Mr. Leewens,

The above-referenced Notice of Violation is rescinded. After review of the materials received, L&I finds no violation of prevailing wage law for this project.

We appreciated the documents and materials provided by Leewens, which included a sufficiently detailed description of the work performed including tools and methods used and materials applied. L&I also requested and received substantial materials from four labor organizations, which were also appreciated and reviewed.

Sincerely,

Jim P Christensen

Jim P. Christensen

Industrial Statistician/Prevailing Wage Program Manager
Cell: 360.480.5755
jim.christensen@lni.wa.gov

cc: Selena C. Smith, Davis Grimm Payne & Marra
Nathan V Arnold, Fidelity & Deposit Co. of MD, Zurich American Ins. Co., Performance/Payment Bond No. 09063909 Berkshire Hathaway Specialty Ins. Co., The Continental Ins. Co., Liberty Mutual Ins. Co.
David Harrison, Fidelity & Deposit Co. of MD, Zurich American Ins. Co., Performance/Payment Bond No. 09063909 Berkshire Hathaway Specialty Ins. Co., The Continental Ins. Co., Liberty Mutual Ins. Co.
Cindy Magruder, University of Washington
Ike Burkett, Skanska USA Building Inc.
REBOUND

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington, that on the date indicated below, I caused to be served true and correct copies of the Department's Closure letter to the parties and/or their counsel of record listed below, via the method indicated:

Joni Derfield, Administrative Law Judge Office of Administrative Hearings 949 Market Street, Suite 500 Tacoma WA 98402 ***Administrative Law Judge***	❑ Hand Delivery via Messenger ❑ First Class Mail, Postage Prepaid ❑ Facsimile ☑ E-File
Selena Smith Erik Laiho Davis Grimm Payne & Marra 701 5th Avenue Suite 4040 Seattle, WA 98104 ssmith@davisgrimmpayne.com Elaiho@davisgrimmpayne.com ***Counsels for Employer/Appellant***	❑ Hand Delivery via Messenger ☑ First Class Mail, Postage Prepaid ❑ Facsimile ☑ E-mail:
University of Washington Attn: Cindy Magruder PO Box 352210 Seattle, WA 98195 ***Interested Party/Awarding Agency***	❑ Hand Delivery via Messenger ☑ First Class Mail, Postage Prepaid ❑ Facsimile ❑ E-mail
Skanska USA Building Inc. Attn: Ike Burkett 211 Yale Ave. N. Ste. 400 Seattle, WA 98109 ***Interested Party/Prime Contractor***	❑ Hand Delivery via Messenger ☑ First Class Mail, Postage Prepaid ❑ Facsimile ❑ E-mail
Barbie Lima Giergolini Department of Labor & Industries 729 100th Street SE Everett WA 98208-3727 ***Industrial Relations Agent***	❑ Hand Delivery via Messenger ☑ First Class Mail, Postage Prepaid ❑ Facsimile ❑ E-mail
Daniel Hutzenbiler & Noah Barish McKanna, Bishop & Joffe, LLP 1635 NW Johnson Street Portland OR 97209 dhutzenbiler@mbjlaw.com nbarish@mbjlaw.com ***Counsels for Intervenor, OPCMIA Local 528***	❑ Hand Delivery via Messenger ☑ First Class Mail, Postage Prepaid ❑ Facsimile ☑ E-mail

Benjamin Berger Danielle Franco-Malone Barnard Iglitzin & Lavitt LLP 18 W Mercer St, Ste. 400 Seattle WA 98119 berger@workerlaw.com franco@workerlaw.com ***Counsels for Intervenors, WNIDCL and Local 242***	☐ Hand Delivery via Messenger ☑ First Class Mail, Postage Prepaid ☐ Facsimile ☑ E-mail

DATED this 6th day of October, 2021, at Seattle, Washington.

Doris Rogers

DORIS ROGERS, Legal Assistant
Attorney General's Office
Phone: (206) 587-5166
E: doris.rogers@atg.w

EXHIBIT C

Washington and Northern Idaho District Council of Laborers and Skanska USA Building, Inc.[1] ***and*** **Operative Plasterers and Cement Masons International Association, Local 528.** Case 19–CD–211263

August 16, 2018

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN RING AND MEMBERS PEARCE AND KAPLAN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Employer Skanska USA Building, Inc. (the Employer) filed an unfair labor practice charge on December 8, 2017,[2] alleging that the Respondent, Washington and Northern Idaho District Council of Laborers (Laborers), violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Operative Plasterers and Cement Masons International Association, Local 528 (Cement Masons). A hearing was held on March 21, 2018, before Hearing Officer John Fawley. Thereafter, the Employer, Laborers, and Cement Masons filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[3]

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer is a Delaware corporation engaged as a general contractor in the building and construction industry with a place of business located in Seattle, Washington. During the past year, the Employer provided services in excess of $50,000 directly to entities located outside the State of Washington. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that Laborers and Cement Masons are labor organizations within the meaning of Section 2(5) of the Act.

[1] The name of the Employer appears in the caption as amended at the hearing.

[2] All dates are in 2017 unless otherwise indicated.

[3] Member Emanuel is recused and took no part in the consideration of this case.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is a general contractor in the building and construction industry and is signatory to collective-bargaining agreements with five unions, including Laborers and Cement Masons. As the general contractor on a construction project at the Life Sciences Building at the University of Washington, the Employer needed to perform several jobs, including installing resinous flooring (the disputed work) in the lab. Because the University of Washington is a public entity, State law requires that a subcontract bid package shall be awarded to the lowest qualified bidder. The lowest responsive bid for the resinous flooring work was submitted by the Leewens Corporation (Leewens), and it was therefore awarded the work. The Leewens employees who began performing the disputed work on approximately September 27, 2016, were represented by Laborers. Leewens and the Employer have entered into a number of project agreements during the last 10 years whereby epoxy and resinous flooring work has been performed by employees represented by Laborers.

On July 17, a telephone conversation occurred between Cement Masons' business agent, Justin Palachuk, and the vice president of Leewens, Patrick Leewens. The substance of the conversation is in dispute. According to Patrick Leewens, Palachuk claimed the disputed work for Cement Masons based on a ruling from the state Department of Labor and Industries (L&I)[4] and the fact that Cement Masons uses the equipment required to perform the disputed work. Patrick Leewens informed Palachuk that Leewens had performed this type of work for years using employees represented by Laborers and that he would continue employing Laborers for the Life Sciences project. Afterwards, Patrick Leewens sent an email to the Employer recounting his recollection of the phone conversation with Palachuk. Palachuk testified that he never claimed the disputed work for Cement Masons but, rather, that he had asked Patrick Leewens about the scope of the work and what tools were being used.

Cement Masons subsequently filed a grievance alleging that the Employer had breached the subcontracting clause in its collective-bargaining agreement with Cement Masons by subcontracting the disputed work to Leewens. Upon learning of the grievance, Laborers notified the Employer that it was prepared to use all means necessary, including picketing and economic action, to

[4] On April 27, Cement Masons sent the Employer a letter generally claiming various classes of work, including "floor coating," based on certain prevailing wage determinations made by L&I.

ensure that the Employer continued to assign the disputed work to employees represented by Laborers.

The work is approximately 95 percent complete. In a letter to Leewens just prior to the originally scheduled 10(k) hearing date,[5] Cement Masons disclaimed the disputed work, but it did not withdraw its grievance, which is scheduled for arbitration.

B. Work in Dispute

The parties stipulated that the disputed work is correctly identified in the notice of hearing as "[t]he installation of the resinous flooring in the lab areas at the Life Sciences Building at the University of Washington."

C. Contentions of the Parties

The Employer and Laborers contend that there are competing claims for the work in dispute. They also assert that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated in light of the threat by Laborers to take adverse action against the Employer, including picketing and economic action, concerning the assignment of the resinous flooring work at the Life Sciences Building. They further contend that the work in dispute should be awarded to the employees represented by Laborers based on the factors of employer preference and past practice, relative skills and training, area and industry practice, and economy and efficiency of operations.

Cement Masons contends that it has not made a claim for the resinous flooring work. Relying on *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995), it argues that it has merely pursued a contractual grievance against the Employer for failing to honor the subcontracting clause in the collective-bargaining agreement. Cement Masons further argues that this dispute involves a representational issue, not a jurisdictional issue. Additionally, Cement Masons contends that the notice of hearing should be quashed because the threats to picket were not authentic but rather were made by Laborers, in collusion with the Employer, in order to fabricate a jurisdictional dispute. Finally, Cement Masons argues that even if it made a claim for work, it properly and effectively disclaimed interest in the disputed work.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work and that a party has used proscribed means to enforce its claim to the work in dispute. Additionally, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). We find that these requirements have been met.

1. Competing claims for work

We find reasonable cause to believe that both Unions have claimed the work in dispute for the employees they respectively represent. Laborers has claimed the work by its letters from its business manager, Jermaine Smiley, to the Employer objecting to any assignment of the resinous flooring work to Cement Masons–represented employees. In addition, "[its] performance of the work indicates that [it claims] the work in dispute." *Sheet Metal Workers Local 54 (Goodyear Tire & Rubber Co.)*, 203 NLRB 74, 76 (1973); see also *Operating Engineers Local 513 (Thomas Industrial Coatings)*, 345 NLRB 990, 992 fn. 6 (2005) (citing *Laborers Local 79 (DNA Contracting)*, 338 NLRB 997, 998 fn. 6 (2003)).

We also find, despite its claims to the contrary, that Cement Masons has claimed the disputed work. We find no merit in the contention that, under *Capitol Drilling*, it made no claim to the disputed work because it merely filed a subcontracting grievance against the Employer, the general contractor. In *Capitol Drilling*, supra, 318 NLRB at 811–812, the Board found that a jurisdictional dispute arises when a union seeking enforcement of a contractual claim both pursues its contractual remedies against the general contractor with which it has an agreement and makes a claim for the work directly to the subcontractor that has assigned the work. Id. at 809. There is reasonable cause to believe that Cement Masons did precisely that here.

Cement Masons made a claim for the resinous flooring work directly with the subcontractor, Leewens, as well as with the general contractor, the Employer. During a phone conversation, Palachuk informed Patrick Leewens that L&I had assigned the work to Cement Masons and that Cement Masons claimed all work requiring the tools used in the disputed work, specifically rollers, squeegees, cover trowels and other trowels. The subsequent email from Patrick Leewens to the Employer, stating that Palachuk informed him that L&I had assigned the disputed work to Cement Masons, corroborated his testimony that Palachuk claimed the work. Although Cement Masons disputes this testimony, we find that it is sufficient to establish reasonable cause to believe that Cement Masons made a claim for the disputed work directly with Leewens. *Electrical Workers Local 71 (US Utility Contractor Co.)*, 355 NLRB 344, 346 (2010) (citing *J.P. Patti Co.*, 332 NLRB 830, 832 (2000)) (finding that in

[5] The hearing, originally noticed for January 25, was held on March 21.

10(k) proceedings, a conflict in testimony does not prevent the Board from finding reasonable cause and proceeding with a determination of the dispute).

We also find no merit in the assertion that no claim for work occurred because this involved a representational issue, not a jurisdictional issue. Cement Masons has failed to provide any evidence that it sought to represent the Leewens employees at issue. Therefore, this is not a dispute about which of two competing unions will represent a single group of workers currently performing work and instead involves an attempt by one group of employees to take a work assignment away from another group of employees. For that reason, this dispute is jurisdictional, not representational. *DNA Contracting*, supra, 338 NLRB at 999; cf. *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 424 (2001) (unlike situation here, dispute found to be representational because composite crew from both unions was used by the employer until the completion of the job).

Finally, we find no merit in the contention that Cement Masons has sufficiently disclaimed interest in the disputed work. On January 18, 2018, the eve of the original 10(k) hearing date, Cement Masons wrote Leewens saying that it was not seeking the disputed work. Cement Masons, however, has continued to pursue its grievance against the Employer. We find that the continuance of the grievance is inconsistent with any assertion of a disclaimed interest in the work and that Cement Masons' attempted disclaimer is ineffective as it is not a true renunciation of interest in the work. *Plumbers District Council16 (L&M Plumbing)*, 301 NLRB 1203, 1204 (1991).

2. Use of proscribed means

We find reasonable cause to believe that Laborers used means proscribed by Section 8(b)(4)(D) to enforce its claims to the work in dispute. As set forth above, Business Manager Smiley wrote the Employer stating that Laborers would use all means necessary, including picketing and economic action, to ensure that the Employer continued to assign the resinous flooring work to members of Laborers. These statements constitute threats concerning the assignment of the resinous flooring work, and the Board has long considered such threats to be a proscribed means of enforcing claims to disputed work. See, e.g., *Operating Engineers, Local 150 (Patten Industries)*, 348 NLRB 672, 674 (2006).

Further, we find no merit in the assertion that the Employer has colluded with Laborers to create a sham jurisdictional dispute. The Board has consistently rejected this argument absent "affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion." *Operating Engineers Local 150 (R&D Thiel)*, supra, 345 NLRB at 1140. There is no evidence on this record that the written threats to strike or picket over the assignment of the disputed work were the result of collusion with the Employer or were otherwise not genuine.

3. No voluntary method for adjustment of dispute

The parties stipulated, and we find, that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound.

Based on the foregoing, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and there is no agreed-upon method for the voluntary adjustment of the dispute. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577–579 (1961). The Board has held that its determination in a jurisdictional dispute is "an act of judgment based on common sense and experience," reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.[6]

1. Board certifications and collective-bargaining agreements

The work in dispute is not covered by any Board orders or certifications.

As noted above, the Employer is signatory to collective-bargaining agreements with both Laborers and Cement Masons. Both agreements contain a craft classification that incorporates epoxy work.[7] We find that the language in each of these contracts covers the work in dispute. Leewens does not have a collective-bargaining agreement with either Laborers or Cement Masons.

Accordingly, the factor of board certifications and collective-bargaining agreements does not favor an award to either group of employees.

[6] Cement Masons argues that there is no jurisdictional dispute warranting a Board determination. It does not alternatively argue that, if the Board disagrees, employees it represented should be awarded the work under the Board's multifactor test, nor did it introduce evidence relevant to those factors.

[7] Both the Employer and Laborers confirmed at the hearing that Laborers' "Epoxy Technician" classification pertains to the resinous flooring coating work on the Life Sciences project.

2. Employer preference, current assignment, and past practice

The Employer assigned the disputed work, via Leewens, to employees represented by Laborers, and both the Employer and Leewens prefer that the work in dispute continue to be performed by employees represented by Laborers. In addition, the Employer testified that assignment of this work to Laborers-represented employees is consistent with its past practice. Between 2010 and 2017, 42 out of 47 resinous flooring projects were awarded by the Employer to Laborers-affiliated subcontractors, and since 2014, 30 out of 31 of the Employer's resinous flooring projects have utilized Laborers. Furthermore, Leewens almost exclusively uses Laborers-represented employees for epoxy floor coating work.

We find, therefore, that the factor of employer preference, current assignment, and past practice favors an award of the work in dispute to employees represented by Laborers.

3. Industry and area practice

The Employer and Laborers argue that industry and area practice supports an award of the disputed work to employees represented by Laborers. Dale Cannon, business agent for Laborers Local 242, testified that area competitors use Laborers-represented employees to perform resinous flooring work. Foreman Larry Vance, of Leewens, also testified that he was not aware of Seattle-area floor coating companies using any craft but Laborers.

We find that on this record this factor favors an award of the work in dispute to employees represented by Laborers.

4. Relative skills

The evidence presented at the hearing demonstrates that the employees represented by Laborers possess the required skills and training to perform the disputed work and have performed this type of project in the past. Vance testified that Laborers available to perform the disputed work have been trained in the general aspects of floor coating and in installing methyl methacrylate (MMA) in particular, which is the resinous coating being used on the Life Sciences project. MMA requires certification training on proper installation and safety hazards. No evidence was presented concerning the skills of the employees represented by Cement Masons. Accordingly, we find that on this record this factor favors awarding the disputed work to employees represented by Laborers.

5. Economy and efficiency of operations

Representatives of the Employer testified that it is more efficient and economical to assign the disputed work to employees represented by Laborers because the installation is 95 percent completed. One of the Employer's project executives, Lewis Guerrette, testified that replacing Laborers with Cement Masons would disrupt the project schedule because Cement Masons would be required, pursuant to specification requirements, to produce a mockup of the resinous coating they would install, which would need to be approved by the architect and University of Washington representatives.

We therefore find this factor favors an award of the disputed work to employees represented by Laborers.

Conclusion

After considering all of the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, current assignment, and past practice; industry and area practice; relative skills; and economy and efficiency of operations. In making this determination, we award the work to employees represented by Laborers, not to that labor organization or its members.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Leewens Corporation, represented by Washington and Northern Idaho District Council of Laborers, are entitled to perform the installation of the resinous flooring in the lab areas at the Life Sciences Building at the University of Washington in Seattle, Washington.

Dated, Washington, D.C. August 16, 2018

John F. Ring, Chairman

Mark Gaston Pearce, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

EXHIBIT D

From: Dale W. Cannon Dale@laborerslocal242.com
Subject: FW: Leewens Laborers
Date: February 5, 2015 at 8:33 AM
To: Patrick Leewens (pat@leewens.com) pat@leewens.com

FYI.

From: Dale W. Cannon
Sent: Thursday, February 05, 2015 8:24 AM
To: 'McFarland, Dale'
Cc: Frederick, Dan; Abbott, Bob (rabbott@liuna.org)
Subject: RE: Leewens Laborers

Dale,

Local 242 has been doing this work with Leewens since 1995. Leewens has assigned this work to the Laborers for the past 20 years and we have gone to the Plan for settlement of jurisdictional disputes and prevailed with the contractors assignment of floor prep and epoxy floor coatings. The letter from L&I that I believe you have been given by the Cement Masons does not trump any Plan decision of record. Contractor assignment and area practice is what the Plan gives weight to when these disputes go to arbitration. In the meantime the work continues as assigned without any interruptions until the Plan renders a decision. If the Cement Mason wishes to go to the Plan for remedy then they should file for that through the two International Unions. If you would like to set a meeting to discuss with the Cement Masons then I would be happy to attend.

Dale W. Cannon
Secretary-Treasurer
Business Manager
Laborers Local 242
2800 First Ave., Room 50
Seattle, WA 98121
206-441-0470 Phone
206-728-8756 Fax

From: McFarland, Dale [mailto:Dale.McFarland@skanska.com]
Sent: Wednesday, February 04, 2015 1:44 PM
To: Dale W. Cannon
Cc: Frederick, Dan
Subject: Leewens Laborers

Hi Dale,
We are trying to get some resolution as to the need for laborers or finishers for the install of the epoxy floor coatings. I know you have been working on this issue and we are interested on your take on it. Please give me an e mail or call when you can.
Thanks

Dale McFarland
Superintendent

PLAN FOR SETTLEMENT OF JURISDICTIONAL DISPUTES IN THE CONSTRUCTION INDUSTRY

Arbitration Between:

International Union of Painters and Allied Trades

and

Laborers' International Union of North America

and

Leewens Corporation

regarding the installation of epoxy resin floors at the Seattle Public Library, Seattle, Washington

Case No. WA 11/14/03

BEFORE: PAUL GREENBERG, Arbitrator

Appearances:
For Leewens Corporation:
Patrick Leewens, *Kirkland, Washington*

For the Painters:
William Courtien, *Executive Assistant to the General President, Washington, D.C.*

For the Laborers:
Gregory Davis, *Assistant Director, Construction Department, Washington, D.C.*

DECISION

This matter is brought by the International Union of Painters and Allied Trades (Painters) as a jurisdictional dispute under the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (Plan) and its Procedural Rules and Regulations (Procedural Rules). A hearing in this case was held at the Plan offices in Washington, D.C., on December 2, 2003.

The disputed work involves the installation of epoxy resin flooring materials as part of the construction of the Seattle Public Library. The project is being implemented pursuant to a Project Labor Agreement (PLA) between the prime contractor and the Seattle/King County Building and Construction Trades Council. The responsible contractor in this case, Leewens Corporation

(Leewens), assigned the disputed flooring work to employees represented by the Laborers' International Union (Laborers). Leewens is stipulated to the Plan through the PLA.

BACKGROUND

The Seattle Public Library is a multi-story building with concrete floors. Under Leewens' contract, the company is responsible for installing epoxy resin flooring in 33 bathrooms using a multi-step process:

> **First**, the concrete floors are shotblasted to create a clean, solid concrete surface free from any materials that will impair the adhesion of the floor coating materials to the slab.
>
> **Second**, a waterproof membrane is installed over the concrete slab. This membrane consists of a 2-part epoxy finish that is poured onto the floor and then squeegeed into place. The project specifications require the finished waterproof membrane to be no less than 25 dry mils thick.
>
> **Third**, flooring material is installed over the waterproof membrane. This layer also is based on a 2-part epoxy material, but it is heavily bulked-up with sand. The material is installed to a thickness of 1/4", primarily using trowels. In addition to creating the floor itself, this coating also is troweled several inches up the wall to provide a base. The bulked-up flooring material contains colored pigment.
>
> **Fourth**, a final coating is applied as a finish surface. This top coat also consists of a 2-part epoxy material, and includes pigment (for the finished appearance of the floor) and a granular material to give the finished floor a non-slip surface. This final coating is poured in place and spread with a squeegee, then backrolled to provide a uniform finish.

See generally Painters Exhibit (Exh.) 2.

In this instance, the Painters do not challenge the employer's assignment of the shotblasting work to the Laborers. However, the Painters contend that Steps 2, 3 and 4 of the flooring process all involve the application of coating materials to the bathroom floors, and this coating work historically falls within the jurisdiction of the Painters. In support of their position, the Painters provide photographs of the jobsite and the coating materials that are being used. Painters Exh. 3. In addition, the Painters provide copies of sections of the Washington State Administrative Code that describe generally the jurisdiction of painters and laborers under the Washington State prevailing wage law. Painters Exh. 4. Additional materials include a copy of a collective bargaining agreement between the Painters and Leewens dating from the early 1990s, and an extensive list of construction projects performed in Washington State by Long Painting Company between 1993 and 1998 in which members of the Painters installed epoxy resin floors. Painters Exhs. 5, 6.

The Laborers contend that the contractor's work assignment is proper under the standards

of the Plan. While not conceding that the Washington State Administrative Code descriptions have any particular weight in this case, the Laborers note that largest component of the floor is being installed with trowels – a technique that arguably falls with the "laborer" classification under the Code, and is not found within the "painter" job description. With regard to area practice, the Laborers provide documentary evidence that Leewens previously has performed similar types of projects within Washington State using members of the Laborers; the Laborers also argue that trade practice in installing epoxy resin flooring materials is thoroughly mixed, with the work being performed and claimed at various times by the Painters, Laborers, Cement Masons and Bricklayers. There also was testimony suggesting that the Roofers have claimed and performed this type of work.

ISSUE PRESENTED

Whether Leewens' assignment of the epoxy resin flooring installation at the Seattle Public Library to the Laborers shall be sustained under the Plan's standards?

DISCUSSION

Article V, §8 of the Plan (as amended in December 2002) provides the following standard for making a jurisdictional award:

> In rendering his decision, the Arbitrator shall determine:
>
> a) First whether a previous agreement of record or applicable agreement, including a disclaimer agreement, between the National or International Unions to the dispute governs;
>
> b) Only if the Arbitrator finds that the dispute is not covered by an appropriate or applicable agreement of record or agreement between the crafts to the dispute, he shall then consider whether there is a previous decision of record governing the case;
>
> c) If the Arbitrator finds that a previous decision of record governs the case, the Arbitrator shall apply the decision of record in rendering his decision except under the following circumstances. After notice to the other parties to the dispute prior to the hearing that it intends to challenge the decision or record, if a trade challenging the decision of record is able to demonstrate that the recognized and established prevailing practice in the locality of the work has been contrary to the applicable decision of record, and that historically in that locality the work in dispute has not been performed by the other craft or crafts, the Arbitrator may rely on such prevailing practice rather than the decision of record. If the craft relying on the decision of record demonstrates

that it has performed the work in dispute in the locality of the job, then the Arbitrator shall apply the decision of record in rendering his decision. If the Arbitrator finds that a craft has improperly obtained the prevailing practice in the locality, through raiding, the undercutting of wages or by the use of vertical agreements, the Arbitrator shall rely on the decision of record rather than the prevailing practice in the community;

d) If no decision of record is applicable, the Arbitrator shall then consider the established trade practice in the industry and prevailing practice in the locality; and

e) Only if none of the above criteria is found to exist, the Arbitrator shall then consider that because efficiency, cost or continuity and good management are essential to the well being of the industry, shall not be ignored.

The Parties stipulated that there are no agreements of record or applicable agreements between the two unions governing the assignment of the disputed work. In addition, the Parties stipulated that there were no decisions of record addressing this conflict. Therefore, this dispute is not resolved under Art. V, §8(a)-(c) of the Plan.

If there are no agreements of record or applicable agreements between the unions, nor an applicable decision of record, the next factor to be considered is whether there is an ***established trade practice in the industry or a prevailing practice in the locality***. Art. V, §8(d).

Based on the evidence presented, this Arbitrator cannot conclude that any of the Parties has established a clear trade practice or locally prevailing practice. While the Painters' documentary evidence identifies a much larger number of jobsites where painters have performed this work, the fact remains that this evidence comes from only a single employer (Long Painting), and the most recent data is from 1998. Similarly, the Laborers present documentary evidence from only one contractor using laborers on these types of projects – Leewens. The Laborers' evidence identifies only a few jobsites, and is unclear regarding when these projects were performed. Based on the oral presentations, it is this Arbitrator's impression that members of both the unions have performed considerably more epoxy flooring work than the documentary evidence would suggest, but that a more-complete presentation of data (contractors, projects, etc.) likely would result in the same conclusion: trade practice and prevailing practice are mixed.

With regard to the Washington State Administrative Code materials provided by the Painters, I do not find these materials to be controlling evidence of trade or prevailing practice. It is unclear how these jurisdictional descriptions are compiled, *i.e.*, whether the descriptions simply are extracted from the texts of collective bargaining agreements, or whether they are based on actual survey data documenting trade practices on construction projects in Washington State. Even if based on such

survey data, there is no indication when the State reached its conclusions, and thus it is unclear whether the State's allocation of work reflects current prevailing experience. Finally, as the Laborers correctly note, the Code descriptions of work allocation between the two crafts are mixed as they apply to the disputed flooring work at the Library site.

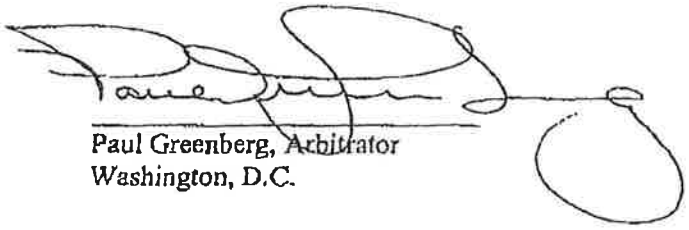
Based on the foregoing, I conclude that this dispute is not resolved under the trade practice or prevailing local practice criterion on Plan Art. V, §8(d).

Because this dispute is not resolved under any of the factors of §8(a) through (d), the Plan directs the Arbitrator to decide the case based on "***the interests of the consumer or the past practices of the employer***." Art. V, §8(e).

I find that the interests of the consumer favor neither of the Unions. Both crafts have members capable of performing the disputed work efficiently and skillfully.

Although there is some evidence that Leewens used members of the Painters on this type of work several years ago, the stronger evidence suggests that Leewens typically has hired workers represented by the Laborers in recent years. I therefore find that Leewens' assignment of the disputed flooring work at the Seattle Public Library to the Laborers shall be sustained pursuant to Plan Article V §8(c). The Painters' challenge to the work assignment therefore is **DENIED**.

This decision shall apply only to the job in dispute.



Paul Greenberg, Arbitrator
Washington, D.C.

Date: December 5, 2003

LAW OFFICES

SHERMAN, DUNN, COHEN, LEIFER & YELLIG, P.C.

1125 FIFTEENTH STREET, N.W.

SUITE 801

WASHINGTON, D.C. 20005

LAURENCE J. COHEN
ELIHU I. LEIFER
TERRY R. YELLIG
RICHARD M. RESNICK
ROBERT D. KURNICK
VICTORIA L. BOR
NORA H. LEYLAND
MARTIN J. CRANE
SUE D. GUNTER
JONATHAN D. NEWMAN

LOUIS SHERMAN
(1912-1996)
THOMAS X. DUNN
(1911-1991)

AREA CODE 202
785-9300

FACSIMILE
(202) 775-1950

MULTIPLE DESTINATION FACSIMILE

December 8, 2003

FROM:	Richard M. Resnick	
RE:	WA 11/14/03	
TO:	Gen. Pres. Williams – IUPAT	(202) 637-0771
	Gen. Pres. O'Sullivan – LIUNA	(202) 737-2754
	Leewens Corporation	(425) 827-8358

Arbitrator Greenberg made a minor revision to page 5 of his decision, in the above matter. I have attached the revised copy for your files. Please replace this version for the one received on Friday, December 5, 2003. Thank you.

THIS TRANSMISSION CONSISTS OF 1 PAGE(S) PLUS A COVER PAGE. IF THERE ARE ANY PROBLEMS WITH THIS TRANSMISSION, PLEASE CONTACT MY ASSISTANT, DEBORAH NELSON, AT (202) 785-9300. THANK YOU.

documenting trade practices on construction projects in Washington State. Even if based on such survey data, there is no indication when the State reached its conclusions, and thus it is unclear whether the State's allocation of work reflects current prevailing experience. Finally, as the Laborers correctly note, the Code descriptions of work allocation between the two crafts are mixed as they apply to the disputed flooring work at the Library site.

Based on the foregoing, I conclude that this dispute is not resolved under the trade practice or prevailing local practice criterion of Plan Art. V, §8(d).

Because this dispute is not resolved under any of the factors of §8(a) through (d), the Plan directs the Arbitrator to decide the case based on "***the interests of the consumer or the past practices of the employer.***" Art. V, §8(e).

I find that the interests of the consumer favor neither of the Unions. Both crafts have members capable of performing the disputed work efficiently and skillfully.

Although there is some evidence that Leewens used members of the Painters on this type of work several years ago, the stronger evidence suggests that Leewens typically has hired workers represented by the Laborers in recent years. I therefore find that Leewens' assignment of the disputed flooring work at the Seattle Public Library to the Laborers shall be sustained pursuant to Plan Article V, §8(e). The Painters' challenge to the work assignment therefore is **DENIED**.

This decision shall apply only to the job in dispute.

Paul Greenberg, Arbitrator
Washington, D.C.

Date: December 5, 2003

EXHIBIT E

From: Bolden, Joseph (LNI)
To: Christensen, Jim P (LNI); Hart, Beatriz G.(LNI)
Subject: DPK Meeting Summary
Date: Wednesday, June 7, 2017 12:58:00 PM
Attachments: DPK Meeting notes - results.docx

Hello Jim and Bea,

I have attached the summary for the meeting we had with DPK on June 1, 2017. A lot of this information is reiterated from last reports and notes I have written previously, but I feel the reiteration helps the context to the consensus that the MMA installation (for this specific project) fits into the painter's scope of work.

Let me know if you want any other details included, or excluded, in this summary. Once I get the okay to move forward, I will convert this summary into an email and send it to Dave Kiyohara and Skanska (with instructions on separating any hours in needed). Later on, an iteration of this summary will also be given to the complainant explaining our reasoning behind the decision with the closure letter.

Again, thanks to the both of you for the support in this long and somewhat complicated case.

Joseph Bolden
Prevailing Wage Program Industrial Relations Agent
Department of Labor & Industries
12806 Gateway Dr.
Tukwila, WA 98168
Phone: 206-835-1133
Fax: 206-835-1077
BOLK235@LNI.WA.GOV

DPK Meeting Summary CASE # 112210
UW Animal Research and Care Facility

On June 1, 2017 a meeting was held at the L&I Tukwila Service location with IRA Joseph Bolden, Industrial Statistician Jim Christensen, Compliance Specialty Supervisor Beatriz Hart, DPK Inc. President Dave Kiyohara, and Skanska Senior Project Manager Pete Maslenikov. The intention of this meeting was to clarify the Methyl Methacrylate product used on the UW Animal Research and Care Facility. Specifically, the process of applying this product, the tools used to apply this product, and chemical makeup of the MMA substance.

The complaint that started this investigation alleges DPK Inc. was installing an Epoxy/Resinous flooring with Cement Mason tools, but the employees were paid the painter's prevailing wage rates. After receiving the records from DPK, IRA Bolden found that DPK had split their workers into two different classifications: One was a painter's scope of work, and the other was a general laborer scope of work. The complainant also referenced the recent redetermination dated December 21, 2016 signed by Industrial Statistician Jim Christensen regarding the installation of a Pool Deck Composition Floor installed by Amorclad. In this case, Jim Christensen did determine that this type of work should fall under the Cement Mason scope of work (at least significant parts of the work).

IRA Bolden sent Dave Kiyohara this redetermination on February 12, 2017 and asked Dave to send any clarifying information on the products, tools, and methods of the flooring system DPK was tasked to install on the project. DPK responded with a thorough breakdown of their installation. The breakdown is as follows:

- Installation of a Vapor Barrier (VB 240 – Mastertop): Work performed with Paint Rollers, Paint Brushes, and mixers
- Installation of Masterseal 350 unfinished pre level install: This is the pre-level installation product **that was only applied to the holding cells**. According to DPK's description, employees used Rodding Rods; however, the photos provided by the complainant contradict this point as there are videos and phots of employees using trowels, straight edge trowels, and rodding rods (screed rods).
    - According to the manufacturer, this product is a "Rapid-Setting, Epoxy-based concrete overlay system. **This will be the only application of an epoxy based material on the project.**
- Installation of the Methyl Methacrylate Flooring products (P51, BC 61, TC71): The MMA product is applied in multiple coats using a Porcupine roller, Paint Brushes and Paint Rollers, and **Gauge Rakes (which was new information discovered during the meeting and not included in this DPK's summary given to IRA Bolden).** The MMA also includes Plexiglas flake-type material, which is broadcasted until failure, cleaned, and covered with a top protective layer (using the same tools).

Even after presenting this information, the complainant's photos and videos capturing DPK's employees installing the Masterseal 350 Unfinished pre level contradicted some of this information provided by DPK. However, these photos did not explicitly say that the floor being installed in the photos are not of the MMA flooring system but ONLY of the pre level for the 24 holding cells in the projects. The corridors and other areas the MMA flooring system was install did not require the pre level installation.

DPK Meeting Summary CASE # 112210
UW Animal Research and Care Facility

Because of this contraction in the photographs, IRA Bolden continued to gain more information of the project. After visiting the jobsite, IRA Bolden was told by the Skanska Superintendents escorting the agent during the jobsite visit that these photos (which IRA Bolden showed the superintendents) was only for the holding cells. This means that only a portion of the work done by DPK Inc was using this epoxy based pre level material, and using the required screed or rodding rods and trowels for this material.

After the jobsite visit, IRA Bolden reached out to the manufacturer to gain more information about the MMA flooring system. Although we have gain more information of what that material is made from, IRA Bolden, nor any others in the prevailing wage program could confidently suggest they knew the make up of the MMA system. Initially, I asked the manufacturer if the MMA system fell into one of these categories: **Polyurethane Elastomers, Vinyl Plastics, Neoprene, Resin, Polyester or Epoxy.** I asked the manufacturer about these type of products because the painter's scope is as follows:

> Application of polyurethane elastomers, vinyl plastics, neoprene, resin, polyester and epoxy as waterproofing or protective coatings to any kind of surfaces (except roofs) when applied with brushes, spray guns or rollers.

Initially, the manufacturer responded with:

> "The MMA chemistry doesn't fall into any of the polymer categories you listed. MasterTop SRS 1851 CF is definitely a protective coating for concrete. Waterproofing, other than protecting the concrete from water intrusion, wouldn't really be considered a primary function."

However, this answer was someone contradictory, so IRA Bolden followed up with another question of clarifying the makeup of the MMA, and the Manufacturer responded with:

> The MasterTop SRS 1851 CF system is based upon a type of acrylic chemistry. I missed the comma after "Neoprene". "Resin" is extremely general. You could have epoxy or polyurethane or polyester or whatever resin. I suppose you could say that the components of SRS 1851 are methyl-methacrylate resin based. I think that the flakes are latex.

The chemical makeup of the MMA material continued to be complicated and difficult for a non-chemist, so IRA Bolden asked a question more specific to the investigation:

> I am currently trying to determine if the installation of the MasterTop SRS 1851 CF flooring system falls under Washington States' scope of work definition of the Cement Masons (WAC 296-127-01316) or the Painters (WAC 296-127-01356) classifications.

> The Painters' scope of work includes:
>
> (4) Application of polyurethane elastomers, vinyl plastics, neoprene, resin, polyester and epoxy as waterproofing or protective coatings to any kind of surfaces (except roofs) when applied with brushes, spray guns or rollers.
>
> Whereas, the Cement Masons' scope of work includes:

DPK Meeting Summary CASE # 112210
UW Animal Research and Care Facility

> The installation of seamless composition floors and the installation and finishing of epoxy based coatings or polyester based linings to all surfaces, when the coatings or linings are applied by spraying or troweling.

The manufacture replied, "The MasterTop SRS Flooring Systems would be more aligned with the Painters' scope of work".

During this interaction between IRA Bolden and the Mastertop manufacturer, IRA Bolden had a discussion with Industrial Statistician Jim Christensen, IRS Laura Herman, and CSS Beatriz Hart concluded with the determination that the flooring system should be considered the Cement Mason scope of work. IRA Bolden informed DPK President Dave Kiyohara, and we set up an in person meeting at Dave's request on 6/1/2017.

During this meeting, clarifications were made by Dave Kiyohara about the Methyl Methacrylate flooring system. Specifically, that no aspect of the MMA floor is made up of Epoxy or concrete. Dave pointed out the mixture processes, the tools used – which includes the use of gauge rakes – the makeup of the pre level material, and the duties of the different employees on the certified payroll records. Dave also informed us that all of the MMA material is self-leveling. The usual process of application is dumping the mixed MMA coat, using a gauge rake to spread, the use of a porcupine roller and regular rollers, and the fine detailing with paintbrushes.

Dave explained that the material cures so fast that you need multiple employees using multiple rollers due to the possibility of the MMA hardening and creating "angel hair".

To summarize the process and next steps:

- A vapor barrier coat is applied to all concrete using rollers and brushes,
- Holding cells are equipped with a pre-level epoxy material for elevations purposes using screed/rodding rods,
- The different coats of the MMA are poured, then raked, then rolled using paint rollers (with the use of Porcupine rollers, and finally finely detailed with paintbrushes.

The details provided by Dave Kiyohara during our 6/1/2017 meeting did not necessary bring new information that vastly changed what we knew, but he was able to point out certain vital information. The MMA flooring system is not epoxy/concrete based. Dave's explanation of how the MMA flooring system was applied clarifies a lot of information, and this was definitely difficult to understand before this meeting. And, there is a much better understanding of what employees were doing which duties.

There seemed to be a consensus between the L&I staff after the meeting that this type of flooring is different than the situation dealing with Armorclad and the Tukwila Pool project. There also seems to be consensus that the application of the MMA flooring does fit into the Painter's and Laborer's Scope of work. An outstanding question is whether the pre-level installation in the holding cells using rodding and straight edges are considered Cement Mason. If this is the case, the employer will be required to separate the hours spent installing this pre-level material.