DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re:	No. 2025-013-PW
LEEWENS CORPORATION,	DIRECTOR'S ORDER
Appellant,	

Joel Sacks, Director of the Washington State Department of Labor and Industries, having considered the request for arbitration filed by the Leewens Corporation, the record, and briefing submitted to the Director's Office, issues this Director's Order.

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

I. FINDINGS OF FACT

1. For several years, the Industrial Statistician of the Washington State Department of Labor and Industries (L&I) has considered what prevailing wage rate applies to the installation of composition flooring systems, with consideration reaching back to 2014. The Industrial Statistician has evaluated this issue by examining what is the applicable "scope of work" description for this work process. A scope of work description is the classification of a particular work process under various trades and occupations. WAC 296-127-013. The classification is used to determine the wage rate. *Id.*

2. Industrial statisticians issue interpretative and policy statements about various scopes of work issues. RCW 34.05.230; RCW 39.12.015. These statements are "determinations" about which scope of work a work process falls under. To issue such a determination, an industrial statistician researches the facts of the work process and then interprets the

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scopes of work regulations to determine what, in L&I's interpretation, is the best fit for the scope of work to the work process. This information is shared on-line with contractors, employees, unions, industry associations, awarding agencies, and the public and aids agency staff in interpreting the scopes of work regulations.

3. In October 2023, the Industrial Statistician issued a determination about L&I's interpretation of the best fit for the scope of work for the composition flooring systems. *See* Dep't of Lab. & Indus., Industrial Statistician, *Determination regarding the application of thin set, multi-layer, seamless composition flooring systems with aggregate materials (e.g. quartz, sand . . .) added to the epoxy compound* (Oct. 26, 2023).

4. The October 2023 Determination interpreted three regulations to conclude that the Laborers, WAC 296-127-01344, and Painters, WAC 296-127-01356, scopes of work did not apply, and it evaluated the meaning and application of the Cement Masons scope, WAC 297-01315 to find that it did apply:

> I turn to the Cement Masons scope of work (WAC 296-127-01315). It is interpreted broadly due to the language "includes, but is not limited to:". For the facts surrounding the installation of thin set, built-up resinous floors with aggregate materials added after surface preparation, the relevant phrases within this scope include: "....all work where finishing tools are used....The installation of seamless composition floors and the installation and finishing of epoxy based coatings to all surfaces, when....applied by spraying or troweling." The purposes of the tools described in the installation of built-up resinous floors are both an applicator and a finishing tool.
>
> The Cement Masons scope of work is the most appropriate scope for this type of work for two reasons: First, the Cement Masons scope is the only classification that includes the use of finishing tools and specifically lists trowels in its description. For built-up resinous floor systems, the epoxy compound is applied with squeegee trowels to gauge the amount of compound applied. Second, the Cement Masons scope also mentions specifically "The installation of seamless composition floors….". This phrase best describes 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. While the Laborers scope and Cement Masons scope both have non-exclusive language, the Cement Masons scope is the only one that specifically addresses the work.

October 2023 Determination 3-4 (citing WAC 296-127-01315). So the determination interpreted the regulations to conclude that the Cement Masons scope of work applied to the involved flooring systems.

5. The Industrial Statistician stated that the purpose of the determination was "to reaffirm the required scope of work to perform the installation of thin set, epoxy seamless composition flooring systems that incorporate aggregate following the initial surface preparation." October 2023 Determination 1. The determination stated that "[m]oving forward from the date of this determination, the department will be reviewing intents filed for such work bid after the date of this determination to ensure the Cement Mason trade is contemplated in the crew composition." *Id.* at 2.

6. In November 2023, Leewens requested a redetermination of the October 2023 Determination. The Washington and Northern Idaho District Council of Laborers and Laborers Local 242 (Union) also requested a redetermination.

7. The Industrial Statistician reevaluated the October 2023 Determination in February 2024, and affirmed the October 2023 Determination with a modification. The Industrial Statistician modified the determination after examining the language of Painter scope of work, WAC 296-127-01356. "If the products been applied do not required troweling methods to install but rather are 'applied with brushes, spray guns or rollers' for the purposes of 'waterproofing or protective coatings; even if aggregate material is added for beatification or non-skid purposes,'" then the painter scope is appropriate. February 2024 Determination 2 (quoting WAC 296-127-01356). After engaging in this statutory interpretation and application, the February 2024 Redetermination stated: "The department will be enforcing the payment of Cement Mason wage rates to 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."

8. In March 2024, Leewens asked the applicable Assistant Director to reconsider the February 2024 Redetermination.

9. The Assistant Director reconsidered the February 2024 Redetermination in January 2025. The January 2025 Reconsideration did not change course from the February 2024 Redetermination, stating: "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."

10. The October 2023 Determination, February 2024 Redetermination, and the January 2025 Reconsideration will be collectively referred to as the "Flooring Determination" or "determination letter."

11. Leewens timely requested arbitration by the Director over the Flooring Determination.

12. The Union moved to intervene in an unopposed motion.

13. The Flooring Determination does not concern an individual public works project. It is intended to be "work-process specific," not "project-specific." Dep't of Lab. & Indus., *L&I's Answers to the Director's Questions on Rulemaking and Standing* 5 (June 10, 2025).

14. The parties were asked to brief whether adopting the determination was rulemaking. *See City of Tacoma v. Dep't of Ecology*, 3 Wn.3d 633, 555 P.3d 390 (2024).

II. CONCLUSIONS OF LAW

Background

1. The Director has the authority to consider the request for arbitration. WAC 296-27-060(3).

2. The Director may determine the procedures in an arbitration. WAC 296-127-062(5)(c). In this case, the Director has elected to resolve a preliminary issue about the validity of the Flooring Determination.

3. Leewens and the Union are parties in interest and may request and participate in the arbitration. WAC 296-127-060(3)(a)(i).

4. The Union's motion to intervene is granted. WAC 296-127-060(3)(b).

5. The record consists of documents parties have submitted, but they will be considered only to the extent they are relevant to the issues decided in this Order.

6. The scopes of work descriptions for each trade and occupation determine what prevailing wage rate to pay. WAC 296-127-013.

7. RCW 39.12.020 requires contractors working on public works projects to pay prevailing wages using the correct scopes of work description. *See* WAC 296-127-013. RCW 39.12.065 sanctions contractors who fail to pay the correct rate of pay.

8. RCW 39.12.040 requires contractors to file statements of intents to pay prevailing wages that list work to be performed in the classifications set forth by the scopes of work. RCW 39.12.050 sanctions contractors who falsely file a statement of intent.

9. RCW 39.12.015(1) provides that: "All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries."

Rulemaking

10. Rulemaking procedures apply only if agency action fall into the Administrative Procedure Act (APA)'s definition of a rule. *Providence Physician Servs. Co. v. Dep't of Health*, 196 Wn. App. 709, 725, 384 P.3d 658 (2016).

11. "Rule" means:

> any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale.

RCW 34.05.010(16).

15. So a "rule" is "any agency order, directive, or regulation of general applicability." RCW 34.05.010(16). *City of Tacoma*, 3 Wn.3d at 642. And the rule must fall into one of the five enumerated categories. *Id.*

16. It is unclear whether L&I's disputes that the determination letter is of general applicability. Without discussion other than a claim the determination letter is an interpretative statement, it argues that the determination letter "is not binding on future projects." Dep't of Lab. & Indus., *L&I's Reply re: Director's Questions* 7 (July 10, 2025).

17. Whether an agency action is of general applicability "turns on whether the agency action (1) allows staff to exercise discretion, (2) provides for case-by-case analysis of variables

rather than uniform application of a standard, and (3) is not binding on those regulated." *City of Tacoma*, 3 Wn.3d at 643.

18. All three general applicable criteria are present. For (1) and (2), L&I admits that "if a complaint presents an identical factual scenario to one contained within a determination letter, L&I will apply the rationale and conclusions contained in the determination to that complaint." L&I Answers 2. Thus, the Flooring Determination does not allow agency discretion or a case-by-case analysis as it designed to produce a uniformity of result.

19. For (3), the determination contemplates a prospective binding application as shown by the January 2025 Reconsideration that specifically stated that "The department *intends to enforce* the payment of Cement Mason prevailed wage rates [for the work at issue]." Likewise, the February 2024 Redetermination stated the Prevailing Wage Program "will be *enforcing* the payment of Cement Mason wage rates." And the October 2023 Determination stated that the purpose of the determination was "to reaffirm the *required* scope of work" and that it would be "reviewing intents filed . . . to *ensure* the Cement Mason trade is contemplated in the crew composition." "[I]ntends to enforce," "will be enforcing," "required," and "ensure" are words and phrasing showing an intent to enforce the determination letter and have a binding effect.

20. A finding of general applicability does not end the inquiry of whether there is rulemaking;[1] there must also be one of the five enumerated standards under Subsection (16).

21. To be a rule under Subsection (16), an agency action must add a requirement to the law beyond an existing regulation or statute. *Providence Physician*, 196 Wn. App. at 727-26; *see Budget Rent A Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 896-98, 31 P.3d 1174 (2001); *Glacier Nw. Inc. v. Dep't of Lab. & Indus.*, 32 Wn. App. 2d 189, 208, 555 P.3d 896 (2024); *Loyal Pig LLC v. Dep't of Ecology*, 13 Wn. App. 2d 127, 145, 463 P.3d 106 (2020); *Sudar v. Dep't of Fish & Wildlife Comm'n*, 187 Wn. App. 22, 33, 347 P.3d 1090 (2015); *Regan v. Dep't of Licensing*, 130 Wn. App. 39, 55, 121 P.3d 731 (2005); *McGee Guest Home v Dep't of Soc. & Health Servs.*, 96 Wn. App. 804, 811-12, 981 P.2d 459 (1999). In *Providence Physician*, the agency applied an exemption for a certificate of need for a proposed surgical facility. 196 Wn. App. at 713. The interpretation was generally applicable, but this did not end the inquiry. *Id.* at 727. Instead, the court found

[1] The Union argues that the determination letter is rulemaking because of its general applicability, alleging rulemaking because "the stated purpose is to articulate standards that will apply broadly to all parties moving forward." Washington & N. Idaho District Council of Laborers & Laborers Local 242, *Union's Br. in Resp. to Req. for Briefing* 7 (Mar. 20, 2025). But "general applicability" is only one element of the definition of a rule. *See City of Tacoma*, 3 Wn.3d at 642. Issues "of interpretation frequently have some general effect," but that does not "transform that resolution into rule making" unless "an agency adds a new requirement to an already well defined regulation." *Providence Physician*, 196 Wn. App. at 727-26. There is no additional requirement here.

no rulemaking because the agency did not attempt to promulgate an additional requirement; rather, it exercised interpretative authority to give meaning to existing language. *Id.* at 727-28. Thus, in applying the definition of "rule" to agency actions, "Washington courts have repeatedly held that agencies are empowered to interpret a statute or regulation without going through formal rule making procedures." *Id.* at 726. "[A]n administrative agency's practice does not qualify as a rule, for purposes of the [APA], when the practice does not create a new standard, formula, or requirement, but simply applies and interprets a statute." *Loyal Pig*, 13 Wn. App. 2d at 145.

22. L&I argues that the Flooring Determination doesn't add a new requirement, but merely interprets the Cement Masons scope of work and other regulations. Leewens argues that the determination letter "seeks to create substantive criteria to force resinous flooring work into one particular trade." Leewens Corp., *Leewens Corporation's Br. Re Rulemaking Requirement* 15 (June 10, 2025). The determination letter does not add new substantive criteria but interprets and applies WAC 296-127-01315 and other regulations to composition flooring. Among other interpretations, the Industrial Statistician interpreted the phrase "installation of seamless composition floors." October 2023 Determination 3 (quoting WAC 296-127-01315). The Industrial Statistician did not add "a new standard, formula, or requirement, but simply applie[d] and interpret[ed] a [regulation]." *See Loyal Pig*, 13 Wn. App. 2d at 145.

23. To determine if an enumerated statute applies, there are two potential subsections at issue: RCW 34.05.010(16)(a) and .010(16)(c).

24. The first option, Subsection (16)(a), provides that a rule is a regulation of general applicability "the violation of which subjects a person to a penalty or administrative sanction." A rule is enforceable if it "'subjects a person to a penalty or administrative sanction,'" but conversely, a "document that aids and assists in compliance with the law or interprets a statutory phrase without adding any requirements does not constitute a rule." *Nw. Pulp & Paper Ass'n v. Dep't of Ecology*, 200 Wn.2d 666, 675, 520 P.3d 985 (2022).

25. In Leewens' view, Subsection (16)(a) applies because Leewens argues that violation of the determination letter is what leads to sanctions under RCW 39.12. L&I argues Subsection (16)(a) does not apply because violation of the determination letter itself does not subject anyone to penalty or sanction, RCW 39.12 does. Here because no new standard is added, when there is a violation, it is of the statutes and regulations, not the determination letter. *See Loyal Pig*, 13 Wn. App. 2d at 145. A contractor violates RCW 39.12.020 and .065 by failing to pay wage rates under the correct classification provided in the scope of work regulations. *See also* WAC 296-127-150. Because any violation is under the statutes and regulations and no additional requirement has been added to the statutes and regulations, it is not the determination letter that subjects a person to a

penalty or administrative sanction. Even Leewens admits: "No notice of violation, citation, assessment, government complaint, or prosecution of any kind underlies this Determination." Leewens Br. 15.

26. As to the second option, Subsection (16)(c) provides that a rule "establishes . . . [a] requirement relating to the enjoyment of benefits or privileges conferred by law." *Budget* holds a benefit is only conferred if something extra outside the statute or rule is added. 144 Wn.2d at 898. In *Budget*, the agency interpreted the phase "the total of all passenger cars in the fleet." The Court held that "by giving its interpretation of the phrase 'total ....fleet,' cannot reasonably be said to have 'establishe[d], alter[ed], or revoke[d] any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law.' The requirement arose from the terms of the IRP, not by action of DOL." 144 Wn.2d at 898 (quoting RCW 34.05.010(16)); *see also Regan*, 130 Wn. App. at 54-55 (agency did not "establish, alter, or revoke any qualification related to a benefit or privilege conferred by law; rather, it was a rudimentary interpretation of statutory language."). As in *Budget* and *Regan*, the Industrial Statistician added nothing new to the rule—it is a straightforward interpretation of applicable regulations.

27. Because the test laid forth in *City of Tacoma* does not show a rule, there is no violation of the rulemaking procedures under the APA.

28. There is, however, a violation of another statute under the APA—RCW 34.05.230(1).

Interpretative and Policy Statements

29. As the Union observes, "[t]he APA expressly excludes from its definition of a 'rule' some agency actions falling short of a rule, including making 'interpretative statement[s]' of the law and statement of agency policy." Union Br. 8. Leewens concurs: "[t]wo subsets of non-binding advisories, interpretative statements and policy statements, are excluded from the definition of a rule." Leewens Br. 7. Under RCW 34.05.230(1), interpretative or policy statements are permissible without rulemaking procedures. RCW 34.05.230(1) states that: "An agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements."

30. Policy and interpretive statements inform the public of how an industrial statistician views the scopes of work and are invaluable guides, satisfying legislative intent to inform the public about the Industrial Statistician's approach to prevailing wage laws. The Legislature encourages the use of policies that "emphasize[] education and assistance before the imposition of penalties," with "sufficient information" given to those regulated so they may "comply with the law." RCW 43.05.005.

31. L&I agrees that the determination letter is a form of policy under RCW 34.05.230(1). L&I Answers 9 ("Rather than being a 'rule,' the Industrial Statistician's determination better fits the [APA's] definitions for a 'policy statement' or 'interpretive statement' [under RCW 34.05.230(1)].").

32. The Industrial Statistician has accepted determination requests on scopes of work issues unrelated to specific projects like here. RCW 39.12.015. The Union argues that the Industrial Statistician can only issue project-specific determination letters. RCW 39.12.015 plainly gives industrial statisticians the ability to make determinations related to the prevailing wage rate. RCW 39.12.015(1) provides that: "All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries." Scopes of work descriptions aid the determination of prevailing wage rates, WAC 296-127-013, and the Industrial Statistician may issue determination letters about work processes to aid in determining wage rates for various trades and occupations. RCW 39.12.015. Besides RCW 39.12.015, such determination letters are authorized by RCW 34.05.230(1), which allows agencies to issue interpretative and policy statements "to advise the public of its current opinions, approaches, and likely courses of action."

33. Leewens argues that the determination letter is not an interpretative or policy statement because it is not titled as such. This elevates form over substance. The determination letter gives the opinion of the agency "as to the meaning of a statute or other provision of law." RCW 34.05.010(8). And it gives "the current approach of an agency . . . to implementation of a statute or other provision of law." RCW 34.05.010(15). The courts have recognized that agency interpretative statements that didn't have the words "Interpretative Statement" or "Policy Statement" in the title were subject to RCW 34.05.230. *See Aventis Pharm., Inc. v. State*, 5 Wn. App. 2d 637, 640, 646, 428 P.3d 389 (2018) ("Excise Tax Advisory 3180.2013" was an interpretative statement under RCW 34.05.230); *Teamsters Loc. Union No. 117 v. Wash. Hum. Rts. Comm'n*, 157 Wn. App. 44, 49, 235 P.3d 858 (2010) ("[O]pinion letter is an advisory interpretative statement" under RCW 34.05.230); *J.E. Dunn Nw., Inc. v. Dep't of Lab. & Indus.*, 139 Wn. App. 35, 48, 52-53, 156 P.3d 250 (2007) ("WISHA Regional Directive (WRD) 27.00 (2001)" is "policy statement" under RCW 34.05.010(15)). Leewens also argues that there is no evidence that the Industrial Statistician is the designee of the Director authorized to issue such a statement. RCW 39.12.015 and RCW 43.22.260 authorize industrial statisticians to issue interpretative and policy statements.

34. The crux of the matter is that under RCW 34.05.230(1) the Legislature directs that "Current interpretive and policy statements are advisory only." But the Flooring Determination contemplates a prospective enforcement of the determination, giving it a

non-advisory application. As discussed above in Conclusion of Law No. 19, the determination letter contains language of enforcement and as such it is non-advisory.

35. The Director determines that the Flooring Determination should be "advisory only" and accordingly remands to the Industrial Statistician to withdraw the determination letter. If the Industrial Statistician reissues the determination, it should be amended to conform with RCW 34.05.230(1) and describe and apply the Industrial Statistician's interpretation of the relevant statutes and regulations. The Industrial Statistician should remove language of enforcement, requirement, and other non-advisory expressions. This approach will inform interested parties as to the Industrial Statistician's approach to the flooring issue consistent with RCW 34.05.230, and it will maintain an advisory effect.

Other Matters

36. Determinations as to the parties to a specific project are authorized by RCW 39.12.015, RCW 39.12.060, WAC 296-127-013, and WAC 296-127-060. Such a determination is a specific application, and neither rulemaking requirements under RCW 34.05 nor policy requirements under RCW 34.05.230(1) are implicated.

37. Leewens raises several arguments that go to the merits of the Flooring Determination. *See* Leewens Br. 16-21. Because the Flooring Determination is remanded, consideration about the merits is unnecessary.

38. If Leewens and the Union wish to seek arbitration of any substantially similar reissued determination, they may do so without seeking a redetermination or reconsideration under WAC 296-127-060(3). *See* WAC 296-127-062(5)(c).

III. DECISION AND ORDER

The Flooring Determination is **REMANDED** to the Industrial Statistician for action consistent with this decision. The Director does not retain jurisdiction over this matter.

JOEL SACKS
Director

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SERVICE

This Director's Order was served on you the day it was deposited in the United States mail. WAC 296-127-062(5)(c).

APPEAL RIGHTS

Agency statutes and rules do not provide a judicial appeal right for an arbitration decision, but the court may otherwise provide review. *See Lockheed Shipbuilding Co. v. Dep't of Lab. & Indus.*, 56 Wn. App. 421, 425-27, 783 P.2d 1119 (1989). The Director will grant the parties the opportunity to request reconsideration if filed within 10 days of service of the Director's Order. WAC 296-127-062(5)(c). Service means mailing. *Id.*

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DECLARATION OF MAILING

I, Lisa Deck, hereby declare under penalty of perjury under the laws of the State of Washington, that the **DIRECTOR'S ORDER** was served on the date below to the following via regular, postage prepaid, U.S. Mail, and email:

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DATED this 22 day of July, 2025 at Tumwater, Washington.

Lisa Deck
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