

JUN 26 2019

ORDER OF COMMISSIONSECRETARY OF STATE
COMMISSIONS DIVISION

In the matter of Objection No. 002 filed by Cape Paint & Glass, Inc., a/k/a Cape Paint & Glass Company, on April 4, 2019, to Annual Wage Order No. 26 issued by the Department of Labor and Industrial Relations, Division of Labor Standards, filed with the Missouri Secretary of State on March 8, 2019, pertaining to the wage rate for the occupational title of Glazier in the Missouri County of Cape Girardeau – Section 016.

Introduction

On March 8, 2019, the Department of Labor and Industrial Relations, Division of Labor Standards (Division), filed with the Missouri Secretary of State a certified copy of Annual Wage Order No. 26 (AWO) containing its initial determinations of the prevailing hourly rates of wages for each occupational title and, where applicable, the public works contracting minimum wage, within every locality. As relevant to this matter, the Division set the rate for Glaziers in Cape Girardeau County at the public works contracting minimum wage (PWCMW) of \$23.12, because fewer than 1,000 hours were reported.

On April 4, 2019, the Labor and Industrial Relations Commission (Commission) received an objection filed on behalf of Cape Paint & Glass, Inc., a/k/a Cape Paint & Glass Company (Objector); we have designated this as Objection No. 002. Objector identifies 4,845.5 hours designated as Glazier construction work at the rate of \$21.88 in wages and \$12.50 in fringe benefits from January 1, 2018, through August 31, 2018, and 1,583 hours paid from September 1, 2018, through December 31, 2018, at the rate of \$21.88 in wages and \$13.39 in fringe benefits. In support, Objector attached copies of what appear to be contractor's wage surveys showing these hours as having been reported by Objector to the Division on March 28, 2019.

On April 29, 2019, the Division and Objector filed with the Commission a Stipulation of Fact. Because the parties' factual stipulations therein were not sufficient to permit the Commission to resolve the objection without a hearing, the Commission instructed the parties to submit additional stipulations. Later that same day, the Division and Objector filed with the Commission a substitute Stipulation of Fact. Because the substitute Stipulation of Fact obviated the need for a hearing in this matter, the Commission granted the parties' request to cancel the hearing and take up the legal issue presented.

Findings of Fact

Pursuant to the parties' substituted Stipulation of Fact of April 29, 2019, the parties have agreed to the following factual propositions, which we hereby adopt as our own factual findings in this matter.

During the period of January 1, 2018, through August 31, 2018, Objector paid Glaziers at the rate of \$21.88 in wages and \$12.50 in fringe benefits. During the period of September 1, 2018, through December 31, 2018, Objector paid Glaziers at the rate of \$21.88 in wages and \$13.39 in fringe benefits. These hours were worked pursuant to a collective bargaining agreement between Objector and the Painters District Council No. 58.

The hours submitted by Objector were the only building construction hours submitted for the Glazier occupational title in Cape Girardeau County.

Objector submitted its hours to the Division on March 25, 2019.

We further find that 4,845.5 hours were paid at the rates identified above during the period January 1, 2018, through August 31, 2018, and that 1,583 hours were paid at the rates identified above during the period September 1, 2018, through December 31, 2018.

Conclusions of Law

The parties agree that the issues before the Commission are: 1) whether the hours submitted by Objector should be considered by the Commission due to the date they were submitted; and 2) if the hours are considered, the appropriate rate for Glaziers in Cape Girardeau County.

Whether the Commission may consider the hours reported by Objector

By way of background, we first note that the 2018 amendments to § 290.257 RSMo task the Division with applying a public works contracting minimum wage (PWCMMW) whenever less than 1,000 hours are reported for an occupational title within a locality.¹ The Division did so here, because less than 1,000 hours were reported for Glaziers in Cape Girardeau County. Objector, of course, has identified over 1,000 hours worked in 2018 for Glaziers in Cape Girardeau County. The parties dispute whether the Commission is authorized to consider these hours to set a prevailing wage rate, where they were not reported until after January 31.

This issue turns on the meaning and application of the following language from Division rule 8 CSR 30-3.010(4), which, during all relevant times herein,² provided as follows:

The annual wage order issued by the department contains the current applicable wage rates in the locality at the time the annual wage order is issued. Hours worked during the calendar year are used to set the prevailing wage rates in the annual wage order issued in March of the following year. The department will consider hours submitted for use in its

¹ Specifically, § 290.257.4 RSMo provides as follows: "(1) If the total number of reportable hours that are paid pursuant to a collective bargaining agreement and the total number of reportable hours that are not paid pursuant to a collective bargaining agreement equal or exceed, in the aggregate, one thousand hours for any particular occupational title within a locality, workers engaged in that occupational title in such locality shall be paid the prevailing wage rate determined by the department pursuant to this section. (2) If the total number of reportable hours that are paid pursuant to a collective bargaining agreement and the total number of reportable hours that are not paid pursuant to a collective bargaining agreement do not equal or exceed, in the aggregate, one thousand hours for any particular occupational title within a locality, workers engaged in that occupational title in such locality shall be paid the public works contracting minimum wage."

² We note that this rule was amended by an emergency order of rulemaking which went into effect on December 1, 2018, and expired on May 29, 2019; we have quoted the language as it appears therein. However, we note that the language creating a January 31 deadline predated the December 2018 emergency order of rulemaking, and was not materially altered thereby, and thus the recent amendments to this rule do not affect our analysis herein.

initial determination of the prevailing wage rates to be included in a particular year's wage order only if those hours are received from a contractor, by either paper submission on a form provided by the department or in electronic format, no later than January 31 of that year.

By way of its brief filed May 20, 2019, Objector argues as follows: 1) neither Chapter 290 or the Division's rules prohibit reportable hours submitted after January 31 from consideration in the context of an objection filed with the Commission; 2) the Commission has previously considered hours first reported via objection; and 3) to hold otherwise would constitute an impermissible administrative change to Commission procedure without going through the notice/comment period for promulgating a rule.

The Division responds in its brief of June 6, 2019, as follows: 1) past practice of the Commission in accepting hours submitted after January 31 is irrelevant following the 2018 amendments to Chapter 290; 2) the Division has a limited staff and narrow turnaround to produce the initial AWO before March 10 each year, so there must be a reasonable timeline; 3) that if the Commission considers hours first submitted in the context of an objection, this will work the effect of invalidating the Division's rule; and 4) that the objection process should not be used as a work around to avoid the January 31 deadline.

In an effort to better understand the meaning and intended application of the Division's rule, we began by consulting the edition of the Missouri Register wherein the January 31 deadline was first publicly announced:

The annual wage order issued by the department contains the current wage rates prevailing in the locality at the time the annual wage order is issued. Hours worked during the calendar year are used to set the prevailing wage rates in the annual wage order issued in March of the following year. The department will consider hours submitted for use in its initial determination of the prevailing wage rates to be included in a particular year's wage order only if those hours are received by it, by either paper submission or in electronic format, no later than January 31 of that year.

Missouri Register, Vol. 40, No. 24, pg.1865.

The language set forth in italics above was added to 8 CSR 30-3.010(4) via an emergency order of rulemaking that went into effect on November 20, 2015, and was thereafter made permanent effective April 30, 2016. At the time, the Division identified the following purpose for adding the January 31 deadline:

The department receives thousands of submissions identifying wage rates paid for millions of hours worked in the various occupational classifications throughout the state each year. ... In order for it to reasonably be able to consider the impact of the hours submitted ... the department needs to set a cutoff date by which the submissions must be made so that it can then

complete the task of sorting and tabulating the hours submitted and then assess what wage rates prevail as defined by statute.

Id., at 1864.

In its statement explaining the need for the emergency rule, the Division provided these additional comments:

[S]ection 290.262, RSMo, was amended effective in August 2013. This change significantly increased the complexity of, and time needed for, completing the initial wage order filed in March 2014. Due to the increased complexity and difficulties in preparing the initial order filed in March 2014, the department set an internal cutoff of January 31, 2015, and used only wage and hour submissions received before that date in the preparation of the initial wage order filed March 2015. ... Not long after the final wage order was filed in late May 2015, the department learned of hours submitted after the cutoff date that would have resulted in a different prevailing wage in a county for an occupational title had they been submitted before January 31, 2015, *or during the subsequent period during which objections could be filed with the Labor and Industrial Relations Commission*. The department determined that giving formal notice of the date by which it needs to cutoff consideration of additional information through a regulation would give all parties submitting wage and hour information better knowledge of the need to get this information to the department within the time needed for it to complete the initial wage order.

Id. (emphasis added).

The foregoing reveals that the Division did not contemplate, at the time the January 31 deadline was added to this rule, that the Commission would be constrained from considering hours first identified during the objection and hearing process—in fact, the Division publicly took the *opposite* position, by suggesting that submitting hours via an objection filed with the Commission would have been sufficient to support a change to the relevant wage rate in 2015.

In its brief, the Division suggests that the 2018 amendments to Chapter 290 justify a new interpretation of 8 CSR 30-3.010(4) that would apply the January 31 cutoff to the Commission's objection and hearing process. However, the Division's brief doesn't cite any language from the statutory amendments to explain how or why this is so. After our own thorough review of Chapter 290 both before and after the 2018 amendments, we are not persuaded.

By its language, 8 CSR 30-3.010(4) only applies the January 31 cutoff to "the department's ... initial determination." Nothing in the 2018 amendments to Chapter 290 suggest that we should read these words to mean anything other than what they say. We recognize, of course, that the 2018 amendments to § 290.257 did significantly adjust the criteria for which hours are considered; specifically, only "reportable hours"

are now permitted to be used in the calculation of a prevailing wage rate, with these defined as hours “reported by a contractor.”³ But there is nothing in the statute to suggest we should read the words “reported by a contractor” to mean “reported to the Division of Labor Standards before January 31.” Instead, the statute is wholly silent as to whom the hours must be reported (i.e. whether to the Division directly or via objection filed with the Commission), and there is no reference to January 31 anywhere in the 2018 amendments, or in the statute as a whole.

Meanwhile, the 2018 amendments did not affect any of the provisions of Chapter 290 which create and authorize an objection and hearing process before the Commission following the issuance of the Division’s initial AWO. In fact, aside from the addition of a gender-neutral designation for who may file an objection, the relevant statutory language was not changed at all.⁴ The pertinent Commission rule continues to provide, in relevant part, as follows:

Objections. Within thirty (30) days after the certified copy of a wage order has been filed with the secretary of state and the commission, any person who may be affected by the wage order may object, in writing, to the wage order, or any part thereof that the party considers objectionable by filing the objections in triplicate with the commission. If the objection is to a wage rate, the objector shall set forth in writing, the specific grounds of objection and not merely a conclusion that the wage rate is too high or too low, but shall set out in detail how the objector reaches the conclusion that the rate is either too high or too low.

8 CSR 20-5.010(1).

In sum, as it stands today, none of the applicable statutory or regulatory criteria require that an objection filed with the Commission be premised upon hours that were reported to the Division before January 31. This is true both before and after the 2018 amendments. For this reason, we are unable to adopt the Division’s argument invoking the 2018 amendments to Chapter 290 as requiring that we read or apply 8 CSR 30-3.010(4) to mean anything other than what it says.

The Division alternatively advances a public policy argument: that the Division needs a reasonable cutoff date for preparation of the initial AWO, and that following the 2018 amendments to Chapter 290, it is more imperative than ever that contractors timely and accurately report hours worked. But the need for timeliness and accuracy has always been present, both before and after the 2018 amendments. Meanwhile, the objection and hearing process before the Commission has always been utilized by parties

³ “For purposes of this section, the term ‘reportable hours’ shall mean hours reported by a contractor for work performed under such contractor in a particular occupational title within a particular locality.” Section 290.257.5 RSMo.

⁴ Section 290.262.2 RSMo now provides, with the 2018 addition in italics: “At any time within thirty days after the certified copies of the determinations have been filed with the secretary of state and the department, any person who is affected thereby may object in writing to a determination or a part thereof that he *or she* deems objectionable by filing a written notice with the department, stating the specific grounds of the objection.”

(including the Division itself in the form of annual motions to amend) to correct errors in the *initial* AWO, so that all parties can be confident that the wage rates set forth in the *final* AWO are as accurate as possible.

The Division further suggests that if the Commission considers these hours, contractors and other interested parties will be invited to wholly disregard its January 31 deadline, making it harder for the Division to set appropriate wage rates. We are not convinced. Submitting hours via an objection filed with the Commission requires hiring an attorney to gather evidence and prepare for a hearing. It also involves the inherent risk that the Commission won't be persuaded to sustain the objection. Parties with hours ready to submit on or before January 31 can avoid these expenses, risks, and procedural hurdles by simply complying with the Division's rule, and reporting the hours to the Division before the initial AWO is issued. We believe parties will continue to be incentivized to comply with the Division's January 31 deadline.

Finally, the Division suggests that if the Commission considers these hours, this will work the effect of the Commission invalidating the Division's rule. This is incorrect. We need not invalidate the Division's rule to consider these hours and grant these objections, because the Division's rule says nothing about the Commission's process and does not constrain the Commission in any way. Rather, the Division's rule will continue to require contractors to report hours to the Division before January 31 if they wish them to be considered in the Division's preparation of the initial AWO. These hours will need to satisfy the new statutory criteria introduced in the 2018 amendments. And if parties fail to comply with the Division's January 31 deadline, they will face the expense and inherent risk of litigation before the Commission to secure any relief. Meanwhile, the process before the Commission will continue to provide an opportunity for all parties to vindicate another, equally compelling public policy—that the final AWO be as accurate as possible.

In sum, we are unable to find support for the Division's argument in 8 CSR 30-3.010(4), the 2018 amendments to Chapter 290, or any other relevant statute or regulation. Nor are we persuaded that the Division has identified any novel public policy concern that would justify an application of 8 CSR 30-3.010(4) that departs from its plain language and the official statements the Division made to stakeholders when the rule was first announced in 2015. Given that the Division advances no other reason why we should not consider these hours and use them to calculate a prevailing wage rate for Glaziers in Cape Girardeau County, we hereby sustain Objection No. 002.

We turn now to our calculation of the appropriate rate.

Prevailing wage rate for Glaziers in Cape Girardeau County

The prevailing wage rate must be calculated using the new, weighted average method set forth under the 2018 amendments to § 290.257(2) RSMo:

- (a) The prevailing wage rate for each occupational title shall be equal to the weighted average wage for that occupational title.
- (b) For purposes of this subdivision, the following terms shall mean: a. "Reported wage sum", for each occupational title, the sum of every product of each reported

wage rate, which shall include fringe benefits, multiplied by the total number of reportable hours at such wage rate; and b. "Weighted average wage", the reported wage sum for each occupational title divided by the total number of reportable hours for that occupational title.

In its objection and brief, Objector fails to recognize that the foregoing calculation is applicable here. Instead, Objector appears to invite us (absent any argument or authority in support) to utilize the prior "mode" method of setting the prevailing wage.⁵ Objector also alleges that, because the rates identified were paid pursuant to a collective bargaining agreement which included an incremental increase, the Commission should consider the different rates to be a single rate, with the higher rate prevailing, citing § 290.262.8 RSMo.⁶ But this provision does not allow for that, nor does it authorize a departure from the weighted average method of determining the prevailing wage rates; instead, it authorizes the Division to alter an AWO once each year to account for any incremental increase set forth in a collective bargaining agreement. Objectors have failed to identify the effective date or amount of any such increase expected for this year. As a result, there is insufficient evidence before us that would support an order from the Commission pursuant to § 290.262.8 memorializing any incremental increase. Instead, such relief may be requested from the Division in accordance with that section and any applicable regulatory procedures.

Rather, the appropriate result is to calculate a single prevailing wage rate using the weighted average method set forth above. The 2018 amendments require that we calculate a single "weighted average wage" which "shall include fringe benefits." In other words, rather than in past years where a basic hourly wage was set forth in an AWO with fringe benefits listed separately, the 2018 amendments contemplate and require that we set a single, hourly rate, derived by adding the basic hourly rate to the fringe benefit amount.

Applying the calculation set forth in § 290.257(2) to the figures presented, we conclude that the "reported wage sum" = \$222,420.70.⁷ We further conclude that the "weighted average wage" = \$34.60.⁸

⁵ Prior to the 2018 amendments, prevailing wages were set based on the most-often paid wage rate. See *Branson R-IV Sch. Dist. v. Labor & Indus. Relations Comm'n*, 888 S.W.2d 717 (Mo. App. 1994).

⁶ Section 290.262.8 provides: "Any annual wage order made for a particular occupational title in a locality, that is based on the number of hours worked under a collective bargaining agreement, may be altered once each year, as provided in this subsection. The prevailing wage for each such occupational title may be adjusted on the anniversary date of any collective bargaining agreement which covers all persons in that particular occupational title in the locality in accordance with any annual incremental wage increases set in the collective bargaining agreement. If the prevailing wage for an occupational title is adjusted pursuant to this subsection, the employee's representative or employer in regard to such collective bargaining agreement shall notify the department of this adjustment, including the effective date of the adjustment. The adjusted prevailing wage shall be in effect until the next final annual wage order is issued pursuant to this section. The wage rates for any particular job, contracted and commenced within sixty days of the contract date, which were set as a result of the annual or revised wage order, shall remain in effect for the duration of that particular job."

⁷ Where $4845.5 \text{ hours} \times \$34.38 = \$166,588.29$; $1583 \text{ hours} \times \$35.27 = \$55,832.41$; and $\$166,588.29 + \$55,832.41 = \$222,420.70$.

⁸ Where $\$222,420.70 \div 6428.5 \text{ total hours reported} = \34.60 .

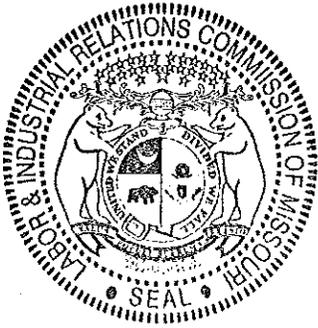
Accordingly, we conclude that the prevailing hourly rate of wages for Glaziers in Cape Girardeau County is \$34.60.

Order

We sustain Objection No. 002.

The prevailing hourly rate of wages for Glaziers for building construction in Cape Girardeau County under Annual Wage Order No. 26 shall be \$34.60.

Given at Jefferson City, State of Missouri, this 26th day of June 2019.



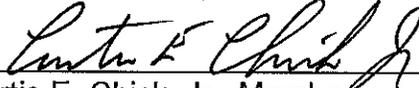
LABOR AND INDUSTRIAL RELATIONS COMMISSION



Robert W. Cornejo, Chairman

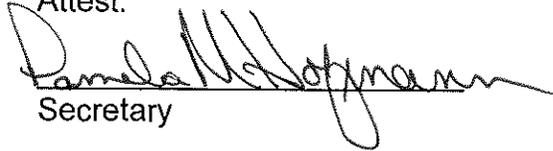
DISSENTING OPINION FILED

Reid K. Forrester, Member



Curtis E. Chick, Jr., Member

Attest:



Secretary

DISSENTING OPINION

After my own review of the recent legislative amendments to Chapter 290 of the Revised Statutes of Missouri, in conjunction with the persuasive policy arguments set forth in the brief filed by the Division of Labor Standards (Division), I disagree with the Commission majority's choice to disregard the January 31 deadline for submitting hours.

I begin from the well-established proposition that this Commission, as a creature of statute, is invested with authority to act only where the legislature has specifically so provided:

A cardinal principle of all administrative law cases is that an administrative tribunal is a creature of statute and exercises only that authority invested by legislative enactment.

Farmer v. Barlow Truck Lines, 979 S.W.2d 169, 170 (Mo. 1998).

In this context, § 290.262 RSMo authorizes the Commission to entertain objections only where the filing party is able to identify part of an initial Annual Wage Order (AWO) that is deemed to be "objectionable":

1. A certified copy of any initial wage determinations made pursuant to section 290.257 shall be filed immediately with the secretary of state and with the department in Jefferson City. Copies shall be supplied by the department to all persons requesting them within ten days after the filing.
2. At any time within thirty days after the certified copies of the determinations have been filed with the secretary of state and the department, any person who is affected thereby may object in writing to a determination or a part thereof that he or she deems objectionable by filing a written notice with the department, stating the specific grounds of the objection. If no objection is filed, the determination is final after thirty days.

The parties have stipulated that Objector failed to report its hours to the Division prior to the January 31 deadline established pursuant to the Division's regulation. The parties have also stipulated that the Division did not receive any other reportable hours for Glaziers in Cape Girardeau County. It follows that the Division's personnel did exactly what was required of them, by setting the rate for Glaziers in Cape Girardeau County at the public works contracting minimum wage (PWCMW).

Objector now asks the Commission to find that the Division's action was "objectionable," to the extent that the Commission should amend the AWO and set a prevailing wage rate. But I fail to see how Objector can credibly claim that the Division's actions were in any way objectionable. In fact, the Division's action of applying the PWCMW for Glaziers in Cape Girardeau County was the only step the Division was authorized to take, in light of the 2018 amendments to Chapter 290 and associated regulations.

Critically, Objector has failed to prove—and has not even alleged—any good cause or good faith reason for the failure to report these hours prior to January 31. This Commission is often requested, in the context of appeals and other actions related to workers' compensation and employment security cases, to consider evidence that was not previously submitted to an administrative decision-maker. In each case, the Commission requires that the proponent of additional evidence demonstrate that the evidence was newly discovered or that it otherwise could not, with the exercise of reasonable diligence, have been provided earlier.⁹ I perceive no reason why we should not require the same sort of showing, here.

To hold otherwise results in exactly what the Division suggests: a “work around” that serves to invalidate the Division’s January 31 deadline, and by extension, serves to frustrate the Division’s overall timeline for creating an AWO. The Commission majority believes parties will continue to be incentivized to comply with the January 31 deadline, even though the Commission has disregarded it here, by setting a prevailing wage rate on the basis of hours first reported on March 25, 2019. The Commission majority suggests that the costs and inherent risks involved in litigation before the Commission will serve to incentivize parties to comply with the January 31 deadline. I fail to see how this is so, given that this Objector has demonstrated the relative ease of securing relief by simply attaching contractors’ wage surveys to an objection, with no explanation whatsoever for why these hours were not previously identified and reported. Where the legislature took significant steps to streamline and curtail the process for creating an AWO with the 2018 amendments, I cannot imagine a result like this was ever intended.

I further deem it unfair to require that the Division be dragged into litigation before the Commission on the basis of hours that have essentially materialized out of nowhere. By appealing to the inherent risk and cost of litigation to invalidate the Division’s deadline, the Commission majority fails to recognize that the Division incurs its own costs in defending each of these objections. This places a further strain on the Division’s limited administrative resources, over and above the already difficult task of sorting through the voluminous information necessary to create the AWO every year. Can it be so much to ask that, before the Division be required to defend an objection, the objecting party be required to identify *some* reason why these hours were not reported previously?

In sum, I would overrule these objections because Objector has failed to identify any part of AWO 26 that I should deem “objectionable,” and has failed to allege any reason whatsoever why I should disregard the Division’s January 31 deadline for reporting hours. Because the Commission majority has decided otherwise, I respectfully dissent.



Reid K. Forrester, Member

⁹ See, e.g., 8 CSR 20-3.030(2) and 8 CSR 20-4.010(5).