

ORDER OF COMMISSION

JUN 26 2019

In the matter of Objection Nos. 003-051 filed by the Local 513, International Union of Operating Engineers on April 4, 2019, to Annual Wage Order No. 26 issued by the Division of Labor Standards, Department of Labor and Industrial Relations, filed with the Secretary of State on March 8, 2019, pertaining to the prevailing wage rates for the occupational title of Operating Engineer in the Missouri counties of Adair – Section 001, Audrain – Section 004, Bollinger – Section 009, Butler – Section 012, Cape Girardeau – Section 016, Carter – Section 018, Clark – Section 023, Crawford – Section 028, Dent – Section 033, Dunklin – Section 035, Gasconade – Section 037, Howell – Section 046, Iron – Section 047, Knox – Section 052, Lewis – Section 056, Macon – Section 061, Madison – Section 062, Maries – Section 063, Marion – Section 064, Miller – Section 066, Mississippi – Section 067, Moniteau – Section 068, Monroe – Section 069, Montgomery – Section 070, Morgan – Section 071, New Madrid – Section 072, Oregon – Section 075, Osage – Section 076, Pemiscot – Section 078, Perry – Section 079, Phelps – Section 081, Pike – Section 082, Pulaski – Section 085, Putnam – Section 086, Ralls – Section 087, Randolph – Section 088, Reynolds – Section 090, Ripley – Section 091, Ste. Genevieve – Section 094, Schuyler – Section 102, Scotland – Section 103, Scott – Section 104, Shannon – Section 105, Shelby – Section 106, Stoddard – Section 107, Texas – Section 111, Warren – Section 113, Washington – Section 114, Wayne – Section 115.

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 26) containing its initial determinations of the prevailing wage rates for each occupational title and, where applicable, the public works contracting minimum wage, within every locality.

On April 4, 2019, the Labor and Industrial Relations Commission (Commission) received objections filed on behalf of the Local 513, International Union of Operating Engineers (Objector); we have designated these as Objection Nos. 003-051. Therein, Objector alleged as follows: 1) the Division’s calculation of the public works contracting minimum wage (PWCMW) is in error for the counties at issue, because the rate should be equal to 120% of the average hourly wage paid to Operating Engineers as determined by the Missouri Department of Economic Development’s Missouri Economic Research and Information Center (MERIC); and 2) that for Phelps County, the Commission should set a prevailing wage rate on the basis of 1,674 hours reported by Donald Maggi, Inc., rather than the PWCMW of \$22.78 that currently appears in AWO 26. In support, Objector attached: 1) documents that appear to set forth wage data compiled by MERIC; and 2) a copy of what appears to be a Contractor’s Wage Survey showing 1,674 hours reported by Donald Maggi, Inc., to the Division with a date of “1/09/2019 Rev. 3/2019.”

On April 30, 2019, the Commission held a prehearing conference in this matter pursuant to Commission rule 8 CSR 20-5.010(3). At the prehearing conference, the parties identified the issues for hearing and filed with the Commission the direct evidence on which they would rely.

On May 1, 2019, the Commission, via its designated representative, issued a Prehearing Order of Commission reciting the actions taken at the prehearing conference, and reciting the issues for hearing as identified by the parties.

On May 16, 2019, the Division filed with the Commission an Amended Affidavit/Certification.

On May 20, 2019, the parties filed with the Commission a Stipulation of Fact. Because the parties' factual stipulations were insufficient to permit the Commission to decide these objections without a hearing, the Commission denied the parties' request to cancel the hearing in this matter. That same day, the parties jointly requested that the hearing scheduled for May 21, 2019, be continued. The Commission granted the parties' request, and scheduled the hearing to commence on May 22, 2019.

Also on May 20, 2019, the parties filed with the Commission a Joint Response to Commission's Request for Additional Information Regarding Phelps County Wage Rate. Therein, the parties agreed that if the hours identified by Objector for Phelps County were properly considered by the Commission, the appropriate prevailing hourly rate of wages for building construction for Operating Engineers in Phelps County would equal \$57.07.

On May 22, 2019, the Commission held the hearing in this matter, at which the following evidence was entered into the record.

For Objector:

An affidavit containing the sworn direct testimony of Aaron Gray, Auditor and Business Agent for Objector, along with Exhibits A through E, referenced and identified in the affidavit.

Exhibit F, a two-page document that appears to be copies of Contractor's Wage Surveys from Donald Maggi, Inc., dated January 9, 2019.¹

The live testimony of Rachel Benton, Bookkeeper for Donald Maggi, Inc.

For the Division:

An affidavit containing the sworn direct testimony of Brenda Hentges, Assistant Director of the Division and Program Manager of the Division's Wage and Hour Section.

¹ The Division objected to this exhibit on the basis that it was not previously identified or filed with the Commission at the prehearing conference in this matter. The Division relies on Commission rule 8 CSR 20-5.010(4)(B)4 which provides that, "No direct evidence, other than the testimony and documents filed at the prehearing conference, will be allowed at the hearing, except at the discretion of the commission." Objector responds that Exhibit F was not in the nature of direct evidence, but instead was used for the purpose of cross-examining a Division witness. We agree with Objector, and hereby overrule the Division's objection to Objector's Exhibit F, and accept same into the record.

The amended affidavit/certification of Ms. Hentges filed May 16, 2019.

Exhibits 1 through 4 setting forth the Division's records with respect to the hours (if any) reported to the Division for the localities at issue.

The live testimony of Ms. Hentges.

On May 22, 2019, Objector filed its brief with the Commission, arguing as follows: 1) the Commission is permitted to consider hours reported after January 31, and has historically done so; 2) the Commission should consider the March 2019 submission from Donald Maggi, Inc., not as a report of new hours, but instead as a revision of hours that were previously reported, incorrectly, as highway/heavy construction, when they should instead have been designated as building construction; 3) to apply the Division's regulatory deadline of January 31 for reporting hours would constitute an improper change to the Commission's procedure without notice or comment, in violation of both the Missouri Administrative Procedure Act and the Objector's due process rights; 4) the Division failed to present any evidence to demonstrate how it established the PWCMW, and its witness testified the Division failed to perform the 120% calculation set forth under the statute; and 5) the PWCMW should equal 120% of the average hourly wages as determined by MERIC for particular occupations corresponding to the occupational titles set forth under § 290.257 RSMo, rather than the average hourly wage for all employees in a county, because this better comports with the public policy of maintaining local wages.

On June 6, 2019, the Division filed its brief with the Commission, arguing as follows: 1) the Division could not have plausibly deemed the March 2019 submission from Donald Maggi, Inc., as a revision of earlier-reported hours; 2) the January 31 deadline for reporting hours is important for the Division to timely produce the AWO; 3) the statute does not contemplate a unique PWCMW corresponding to each occupational title in each county, but rather a global PWCMW for each county based on MERIC's determination of the average hourly wages of all employees in the county; and 4) in any event, MERIC's designation of various jobs and occupations is not entirely consistent with the 20 occupational titles defined under § 290.257.6 RSMo.

For the reasons set forth below, the Commission overrules Objections Nos. 003-051.

Findings of Fact

Given the parties' agreement, at the prehearing conference, that the issue of the appropriate calculation of the PWCMW is a legal one that turns on a question of statutory interpretation (a matter that is further discussed below in our Conclusions of Law), there is no need for factual findings from the Commission with respect to this issue. Instead, the appropriate factual issues for the Commission's determination in this matter are the circumstances surrounding the March 2019 submission of a Contractor's Wage Survey from Donald Maggi, Inc., (Maggi), and the appropriate characterization of the hours reported therein for Phelps County.

Objector alleges that Maggi submitted at least 3,900 reportable hours for Operating Engineers in Phelps County to the Division on or about January 9, 2019, but that certain of said hours were mistakenly identified by Maggi as pertaining to highway/heavy construction; the Division agrees that Maggi did report many highway/heavy construction hours for Operating Engineers in Phelps County in January 2019.²

Objector alleges that Maggi filed a revised submission with the Division at some point in March 2019 in an effort to reclassify certain of the earlier-reported Phelps County hours as building construction; at the hearing, the Division's witness, Brenda Hentges, testified that she did receive the March 2019 Maggi submission. Objector requests that the Commission use the 1,674 Maggi hours identified in March 2019 to calculate a prevailing wage rate for building construction for Operating Engineers in Phelps County, as opposed to the PWCMW of \$22.78, which currently appears in AWO 26.

To explain the revised March 2019 submission, and to identify the 1,674 hours as being performed on tasks properly designated as building, as opposed to highway/heavy construction, Objector relies on the testimony of its witnesses Aaron Gray and Rachel Benton. In his affidavit, Mr. Gray testified that he believed Maggi had worked a number of Operating Engineer building construction hours in Phelps County, so after reviewing the Division's AWO 26, he contacted Maggi; that Maggi realized after speaking with Mr. Gray that it had made a mistake in classifying certain Phelps County hours as highway/heavy construction; and that Maggi tried to correct that mistake with the March 2019 submission. The Division waived any cross-examination of Mr. Gray, and we deem these statements to be generally credible. Critically, though, Mr. Gray did not describe the actual jobs at issue, or identify the basis for his belief that said jobs involved building construction work. Nor did he provide any testimony to connect the specific alleged amount of 1,674 hours to his generalized belief that Maggi performed some building construction jobs in Phelps County in 2018. As a result, we find Mr. Gray's testimony to be of little assistance in evaluating the proper characterization of the hours at issue.

Turning to the testimony from Maggi's bookkeeper Rachel Benton, we find her to be entirely credible with regard to her actions leading up to, and her purpose in submitting, the revised March 2019 submission. We find that Ms. Benton reported numerous Operating Engineer hours to the Division in January 2019 as heavy/highway construction work. We find that Ms. Benton filed the revised March 2019 submission because Mr. Gray contacted her and suggested certain of the Phelps County hours were properly designated as building construction. We find that the March 2019 submission was intended as a revision of certain of the earlier-reported hours for Phelps County.

On the other hand, we do not deem Ms. Benton's testimony to be particularly persuasive as to the underlying issue whether the 1,674 hours identified in March 2019 are properly characterized as building construction hours. Ms. Benton forthrightly conceded that she is not an expert on what work is properly deemed as constituting

² By way of background, 8 CSR 30-3.040 tasks the Division with classifying all public works construction as either "building" or "highway and heavy." The criteria for whether work falls in one or another category are set forth in this regulation.

building construction versus highway/heavy, but instead relies on others to inform her of this. In this case, Ms. Benton relied on Mr. Gray, and an unidentified person with the Division, to tell her these hours were properly classified as building construction. *Transcript*, at 29-30. Ms. Benton did identify two construction jobs involving a hospital and a fraternity house, and suggested that, for the hospital at least, “the parking lot and a lot of the other work is up to the building.” *Id.* She did not provide any other details as to the type of construction work performed on these jobs, however, and in that same exchange, she conceded that “because the [hospital] job was – there’s so many different pieces to this job that we ended up just going with building because it was hard to determine where the heavy highway cut off and the building started.” *Id.* at 31. In other words, Objector’s own evidence supports a finding that certain of the 1,674 hours may not properly be designated as building construction hours, after all.

We acknowledge Ms. Benton’s testimony that Maggi reimbursed the public entity for the difference between the highway/heavy and the building construction rates, after the choice was made that these hours should have been paid as such; it appears this was done for the hospital job, although it’s not particularly clear from the record. It stands to reason that Maggi would not have chosen to absorb this cost without a good basis for doing so. However, this line of reasoning once again places us in the position of having to defer to a conclusory opinion from Maggi, or Mr. Gray, or an unidentified person with the Division as to the proper classification of these hours, when Objector should have instead provided evidence sufficient to permit us to make our own factual findings about the actual work at issue.

In sum, as it stands, the record before us is sufficient to support, and we so find, the following facts with regard to the appropriate classification of the 1,674 Maggi hours: 1) Maggi performed construction jobs in Phelps County in 2018 involving a hospital and a fraternity; 2) the hospital job involved a parking lot, and some other work, that was adjacent to the building; and 3) based on the opinion of Mr. Gray and/or an unidentified individual with the Division, one or both jobs involved some construction work that reasonably could be classified as highway/heavy construction, but because it was too complicated to parcel the hours out, all of the 1,674 hours identified in the revised March 2019 submission were designated as building construction hours.

Conclusions of Law

The public works contracting minimum wage

As part of the 2018 amendments to Chapter 290, when less than 1,000 hours are reported for an occupational title in a county, the PWCMW applies:

- (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,³ workers engaged in that occupational

³ For purposes of our discussion herein, the word “locality” is synonymous with “the county where the physical work upon public works is performed.” § 290.210(5) RSMo.

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.

§ 290.257.4 RSMo.

The first issue presented in these objections is Objector's proposal that the Division's calculation of the PWCMW for Operating Engineers for the counties at issue is in error, because the PWCMW should equal 120% of the average hourly wage for each occupational title as determined by MERIC, rather than 120% of MERIC's determination of the average hourly wage for all employees within each county. The issue turns on the following language, set forth in § 290.257.2 RSMo:

The department shall annually calculate the public works contracting minimum wage in each locality. The public works contracting minimum wage shall be equal to one hundred twenty percent of *the average hourly wage in a particular locality*, as determined by the Missouri economic research and information center within the department of economic development, or any successor agency.

(emphasis added).

We believe the foregoing language is unambiguous, and that it does not task the Division with calculating a unique PWCMW for each occupational title within each county. Instead, it plainly tasks the Division with calculating a single PWCMW for each county. This becomes all the more obvious when we contrast the foregoing provision with the following legislative formula for calculating a prevailing wage rate under § 290.257.1(2):

(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.

(emphasis added).

In our view, the legislature's repeat usage of the phrase "for each occupational title" in the above provision, and the absence of said phrase within § 290.257.2, makes clear that the Division is tasked with calculating a unique rate only where the prevailing wage rate is applicable, i.e., where more than 1,000 hours are reported in a county for a particular occupational title. Objector's brief appeals to the general public policy underlying Chapter 290 of protecting local wage rates, and asks that we infer that the legislature intended a unique PWCMW be calculated for each of the 20 occupational titles for each Missouri county. We are not persuaded. If the legislature had so intended, it would have plainly said so with the 2018 amendments. In sum, we find no basis for requiring the Division to calculate a PWCMW specific to each occupational title in every county.

Objector also alleges that the Division failed to present evidence at the hearing sufficient to support its calculation of the PWCMW for the counties at issue. However, in its objection and at the prehearing in this matter, Objector did not make clear that it wished to challenge the Division's math in calculating 120% of the average hourly wage as reported by MERIC for all employees in a county. Instead, the sole issue regarding the PWCMW identified by the parties, and agreed-to at the prehearing (as memorialized in the Prehearing Order of Commission issued May 1, 2019) was the above-described legal argument by Objector that unique PWCMWs should be calculated on the basis of MERIC data specific to the individual occupational titles.⁴

While we agree that the Division certainly *should have* introduced the actual MERIC data that it used to calculate the PWCMWs for the counties at issue,⁵ we disagree that the remedy for this failure means the Commission must either: 1) adopt Objector's legal argument and proposed rates; or 2) invalidate each of the PWCMWs identified by the Division for the counties at issue, with no record to permit calculation of new rates. Instead, we will invoke the rule in Missouri that "it is to be presumed that everything

⁴ The prehearing order, which "controls the subsequent course of the hearing," 8 CSR 20-5.010(3)(B), recited the issue as follows: "Objector proposes that the Division's calculation of the public works contracting minimum wage (PWCMW) for Operating Engineers in the localities identified above is in error, because the PWCMW should be equal to 120% of the average hourly wage for the occupational title at issue ... rather than 120% of MERIC's determination of the average hourly wage for all employees within each locality. ... The Division takes the position that the PWCMW equals 120% of the average hourly wage for all employees within each locality, as determined by MERIC. In light of the foregoing, the parties agreed that their dispute as to the appropriate PWCMW for Operating Engineers appears to turn solely upon an issue of statutory interpretation." There was no subsequent effort to correct this statement by Objector, or to otherwise raise a factual issue regarding the Division's handling of the 2018 MERIC data.

⁵ Pursuant to Commission rule 8 CSR 20-5.010(4)(a), where an objection pertains to a wage rate in a county, the Division is required to introduce in evidence "any information received by the Division of Labor Standards which was considered by it at the time the wage order was issued." Objector is correct that the Division failed to introduce in evidence the actual MERIC figures it used to calculate the PWCMWs.

done by an officer, in connection with the performance of an official act in the line of his duty, is legally done, and, a fortiori, absent proof to the contrary, all things are presumed to have been rightfully and lawfully done.” *United Mo. Bank v. March*, 650 S.W.2d 678, 680 (Mo. App. 1983). Although the Division’s witness, Ms. Hentges, appears to have been somewhat confused by the questions pertaining to the PWCMW, we infer from her testimony (and so find) that the Division did nothing to set these rates other than perform a 120% calculation on the raw data that MERIC provided. *Transcript*, page 13.

Turning to the affidavit of Objector’s Auditor/Business Agent Aaron Gray, we note that Mr. Gray testified therein that Exhibit C was provided to him by Tim Blackwell (an attorney with the Department of Labor and Industrial Relations Office of General Counsel) in response to Mr. Gray’s request for the 2018 MERIC data the Division used to calculate the PWCMWs. Although Mr. Gray generally testified he doesn’t know how these figures were arrived at, Exhibit C appears to set forth average hourly wages for each county, along with the Division’s 120% calculation in a separate column. Each of the relevant figures matches the PWCMW set forth in AWO 26 for each of the 49 counties at issue herein. We conclude that Exhibit C, when combined with the testimony from Ms. Hentges, is sufficient to invoke the presumption that the Division, via its agents and officers, appropriately fulfilled the purely ministerial function of calculating 120% of the average hourly rates reported to it by MERIC.

The only evidence Objector advances to rebut this presumption are MERIC figures from 2017. Where the statute contemplates that the Division use the 2018 data from MERIC in creating this year’s AWO 26,⁶ we conclude that the figures from 2017 are essentially irrelevant. We note that Objector could have pursued the 2018 MERIC data it now complains is lacking via the discovery process in advance of the hearing in this matter.⁷ Alternatively, Objector could have alerted the Commission (and the Division) prior to the hearing on these objections that the Prehearing Order of Commission was not comprehensive of the issues involved in this matter, where said order omitted any reference to a factual challenge to the Division’s math in calculating 120% of the average hourly wage for all employees as reported by MERIC. Rather than pursue either of these routes, Objector has waited until the briefing stage to inject some doubt into the accuracy of the Division’s calculations. In this posture, we conclude that we do not require a record that contains evidence from the Division showing the 2018 MERIC data it used to take up and resolve these objections.⁸

Rather, we will hold Objector to its legal argument as identified in its objection and at prehearing. We conclude that said legal argument fails. For this reason, we hereby overrule that portion of these objections requesting that the Commission calculate a PWCMW specific to Operating Engineers.

⁶ See § 290.257.1(1) RSMo, instructing that the Division’s annual wage order is to be premised upon data relevant to “the year preceding the annual wage order to be issued.”

⁷ The Missouri Administrative Procedure Act provides parties to a contested case (like this one) the right to pursue discovery, including compulsory process such as the issuance of subpoenas. See § 536.077 RSMo.

⁸ The Division, and its legal representatives, are hereby instructed to take better care to fully comply with Commission rule 8 CSR 20-5.010(4)(a) in any future proceedings before the Commission.

Phelps County – Maggi hours

As referenced above, the Division's rule 8 CSR 30-3.040 tasks the Division with classifying all public works construction as either "building" or "highway and heavy," and provides as follows:

- (1) All public works construction, for which the prevailing hourly rate of wages of workers are to be determined, shall be classified as either—
 - (A) Building construction; or
 - (B) Highway and heavy construction.
- (2) Building construction shall mean the following:
 - (A) Building structures, including modification, additions or repairs, or both, to be used for shelter, protection, comfort, convenience, entertainment or recreation, or for protection of people or equipment;
 - (B) Buildings at an airport project, such as terminal buildings, freight buildings and any other construction necessary for the operation of the airport facilities;
 - (C) Stadiums, athletic fields, dressing rooms, bleachers and all other buildings needed in connection with an athletic or entertainment facility;
 - (D) Entire buildings that are built aboveground in connection with highway, subway or tunnel projects, such as tool stations or housing for mechanical equipment;
 - (E) Excavation for the building itself, including backfilling inside and outside the building;
 - (F) Storm and sanitary sewers inside the building and to the curb line;
 - (G) Work in connection with telephone, electrical, water, oil, gas or fuel lines, or other utility or communication lines inside a building and to the curb line;
 - (H) Sidewalks other than those that are poured in connection with a street or road project;
 - (I) Driveways that are built to serve a building;
 - (J) Parking lots connected to a building and all structures built as parking facilities;
 - (K) Retaining walls built in conjunction with a building project;

- (L) Demolition of a building(s) as part of the site preparation for new building construction;
 - (M) Landscaping of building sites or the planting of all shrubbery that is incidental to building construction as defined in section (2); and
 - (N) Work on water and wastewater treatment plants within the fence line.
- (3) Highway and heavy construction shall mean the following:
- (A) Work in connection with roads, streets, parkways, alleys and highways including, but not limited to, grading, paving, curbing, signs, fences, guard rails, bridges, lighting, retaining walls and landscaping;
 - (B) Work on viaducts, overpasses, underpasses, drainage projects, aqueducts, irrigation projects, flood control projects, reclamation projects, reservoir filtration and supply projects, water power, duct lines, distribution lines, pipe lines, locks, dikes, levees, revetments projects, excluding work specifically defined as building construction;
 - (C) Work in connection with underground construction on tunnels and shafts;
 - (D) Railroad work in its entirety, including elevated railroads;
 - (E) Main and side sewers;
 - (F) Work in connection with airports, such as runways, roads and streets, but excluding that which is listed as building construction;
 - (G) Work in connection with telephone, electrical, water, oil, gas or fuel lines, or any other utility or communication lines from the curb line;
 - (H) Sidewalks when poured incidental to a street or road project;
 - (I) Parking lots not incidental to a building construction project; and
 - (J) Demolition of all buildings as part of site preparation for any highway and heavy construction as is otherwise defined in section (3).

The Division's form Contractor's Wage Survey allows for the reporting of hours as having been worked under one or the other category. The Division then sets forth the building rates and highway/heavy rates separately in the AWO.⁹

⁹ We note that the "highway and heavy" construction defined under 8 CSR 30-3.040 and set forth in the AWO is distinct from the rates set forth in the annual General Wage Order the Division is tasked with creating for the Missouri Highways and Transportation Commission, see § 290.260 RSMo.

The parties agree that the Division used many hours reported by Maggi in January 2019 to set a prevailing wage rate of \$55.76 for highway/heavy work for Operating Engineers in Phelps County. Objector now requests that the Commission take 1,674 of those hours and treat them instead as building construction hours for the purpose of setting a prevailing wage rate for building construction in Phelps County. In its brief, Objector focuses much of its argument on the issue whether the Commission may consider the hours where they were not reported as building construction hours until after the Division's January 31 deadline for reporting hours to the Division.¹⁰ We agree with Objector that, given the current state of the relevant statutory and regulatory provisions, the January 31 deadline in the Division rule does not constrain the Commission from considering hours first reported in an objection filed with the Commission, but we believe the focus on January 31 is misplaced, here.

Rather, the determinative issue is whether there is sufficient evidence before the Commission to justify our correcting an alleged error by a contractor in reporting hours as highway/heavy construction rather than as building construction. We conclude the record created by Objector is insufficient to support such relief from the Commission, for the following reasons.

First, Objector has failed, at hearing and in its brief, to guide the Commission to the relevant criteria for construing hours as building versus highway/heavy construction, or to make a persuasive case that the 1,674 hours identified in March 2019 should properly be deemed building construction hours. As recounted above, Objector relies on testimony from its witnesses Aaron Gray and Rachel Benton to identify the 1,674 hours as being worked on building construction jobs. However, we have found Mr. Gray's testimony lacking in pertinent detail, and Ms. Benton's testimony unpersuasive with regard to the actual work at issue. We have also found that certain of the 1,674 hours could reasonably have been classified as highway/heavy construction, but because it was deemed too complicated to parcel the hours out, all of the 1,674 hours identified in the revised March 2019 submission were designated as building construction hours.¹¹ In sum, because we have found Objector's evidence insufficient to support the relevant factual findings, we are unable to conclude pursuant to 8 CSR 30-3.040 that all of the 1,674 hours are appropriately classified as building construction hours.

Second, Objector has failed to recognize that to sustain its objection will require us to recalculate the \$55.76 per hour prevailing wage rate for Operating Engineers currently set forth in AWO 26 for highway/heavy construction in Phelps County, and Objector has failed to provide the Commission with a record sufficient to accomplish this. Because

¹⁰ Pursuant to 8 CSR 30-3.010(4), "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 ... no later than January 31 of that year."

¹¹ Particularly where the statute requires a threshold of 1,000 hours before a prevailing wage rate is even applicable, see § 290.257.4, we simply cannot accept Objector's implied invitation to lump all of these hours together based on a perceived difficulty in classifying them as highway/heavy versus building construction.

we must use the weighted average method for calculating prevailing wage rates under the 2018 amendments to § 290.257 RSMo, every single hour included in a calculation of the weighted average rate will have an effect on the outcome.¹²

If we were to accept the characterization of the 1,674 hours as having been performed on building construction, it necessarily follows that these hours could no longer be used to calculate a highway/heavy rate for Phelps County. Because the weighted average method requires us to consider *all* reportable hours, and the record before us does not include a stipulation or evidence sufficient to identify all highway/heavy hours reported to the Division for Operating Engineers in Phelps County, it follows that the calculation cannot be performed in accordance with the statute. We believe it was incumbent upon Objector to seek this information via the discovery process, and then provide all the evidence necessary to sustain its objection. Objector has failed to do so, here.

For the foregoing reasons, we overrule the Phelps County portion of these objections.

Order

For the reasons set forth above, we hereby overrule Objection Nos. 003-051 in full.

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



LABOR AND INDUSTRIAL RELATIONS COMMISSION

Robert W. Cornejo, Chairman

SEPARATE OPINION FILED

Reid K. Forrester, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

¹² Pursuant to § 290.257(2) RSMo, the following calculation is used to determine the prevailing wage rate: "(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."

SEPARATE OPINION

CONCURRING IN PART AND DISSENTING IN PART

I agree with the Commission majority's choice to overrule these objections. However, I write separately because I disagree with the Commission's majority's conclusion that the January 31 deadline for submitting hours to the Division of Labor Standards is essentially irrelevant to this matter. This is because § 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.

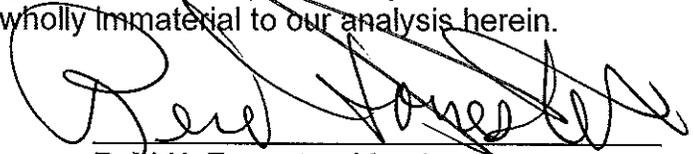
Division rule 8 CSR 30-3.010(4) provides as follows:

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 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.

I believe that where an objection is premised upon hours not reported to the Division before the foregoing January 31 deadline, an objector can hardly claim that an annual wage order is "objectionable," because the Division cannot be said to have erred in failing to consider hours that are not timely reported. To hold otherwise results in exactly what the Division suggests in its brief: 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. In my view, if an objector wants to rely upon hours that were not reported to the Division prior to the January 31 deadline, it is incumbent upon the objector to plead and prove both a good cause for failing to comply with the deadline, and a good faith effort to correct said failure as soon as it was discovered.

Arguably, here, a contractor's alleged mistake in improperly classifying hours as highway/heavy rather than as building construction could constitute the requisite good cause for failing to report hours prior to the January 31 deadline. However, for all of the reasons identified by the Commission majority, I deem Objector's evidence insufficiently developed to persuade me to find, as a factual matter, that there was either a legitimate mistake with regard to the classification of these hours, or a good faith attempt to correct same.

For this reason, I join the Commission majority in overruling these objections; however, I disagree that the January 31 deadline is wholly immaterial to our analysis herein.



Reid K. Forrester, Member