

FILED

JUN 01 2020

LABOR AND INDUSTRIAL  
RELATIONS COMMISSION

ANNUAL WAGE ORDER NO. 27

**MOTION TO REVISE ANNUAL WAGE ORDER NO. 27  
TO CORRECT A SCRIVENER'S ERROR  
WITH SUGGESTIONS IN SUPPORT**

The Missouri Department of Labor and Industrial Relations, Division of Labor Standards, through counsel, respectfully advises the Commission that the Division inadvertently provided an incorrect page when filing its Motion to Amend Annual Wage Order No. 27 on April 1, 2020. The Division asks the Commission to revise Annual Wage Order No. 27 to correct the error.

The Division asks the Commission to post this Motion on the appropriate webpage, and file it with the Secretary of State. The Division further asks the Commission, after allowing sufficient time for any objection limited to the correction of the scrivener's error, and ruling on such objection, to file with the Secretary of State a revised final Annual Wage Order that corrects the scrivener's error as requested in this motion. The correction can be accomplished by substituting the inadvertently filed duplicate page with the correct page that is filed with this Motion.

The Division files this motion in good faith to assure that the final Annual Wage Order 27 is reliable and timely filed by July 1, 2020, as required by the Prevailing Wage Law. This motion is not intended, and is not expected, to prejudice the rights, duties and privileges of any person under the Prevailing Wage Law.

In support of this motion, the Division states:

1. On March 10, 2020, the Division filed the initial Annual Wage Order No. 27 with the Secretary of State. The initial Annual Wage Order No. 27 set forth by county the initial wage rate determination for the occupational titles involved in the construction of public works projects.

2. After filing the initial Annual Wage Oder No. 27, the Division discovered a computer malfunction. This malfunction affected the rate sheets for seventy three (73) counties.

3. On April 1, 2020, the Division filed its Motion to Amend to provide corrections detailed in pages 101 pages attached thereto. The Division advised that the corrections were necessary to accurately reflect the information that was on file with the Division before March 10, 2020.

4. The Commission promptly posted the Motion to Amend to its website on April 2, 2020.

5. There were no objections to the Motion to Amend.

6. On May 20, 2020, the Commission issued its Order sustaining the Motion to Amend. The Commission attached the 101 pages to the Order and incorporated them by reference.

7. On May 20, 2020, the Commission filed Annual Wage Order 27, with the approved amendment, with the Secretary of State.

8. The Commission has posted on its website this statement: “As of May 20, 2020, the Labor and Industrial Relations Commission has disposed of all pending motions and objections in connection with Annual Wage Order No. 27.” [https://labor.mo.gov/LIRC/Forms/PW\\_Decisions#2020](https://labor.mo.gov/LIRC/Forms/PW_Decisions#2020)

9. Section 290.262.6, RSMo, provides that the final decision is subject to review under Chapter 536, RSMo, by any person affected, whether or not the person participated in the proceedings resulting in the final determination. Section 290.262.6, RSMo, further provides: “The filing of the final determination with the secretary of state shall be considered a service of the final determination on persons not participating in the administrative proceedings resulting in the final decision.”

10. Section 536.110.1, RSMo, provides that a petition for judicial review of a contested case must be filed within 30 days of the agency’s final decision. Accordingly, judicial review of the Commission’s May 20, 2020 notice that all issues have been resolved may be sought no later than June 20, 2020.

11. Section 536.110.2, RSMo, provides:

Such petition may be filed without first seeking a rehearing, but in cases where agencies have authority to entertain motions for rehearing and such a motion is duly filed, the thirty-day period aforesaid shall run from the date of the delivery or mailing of notice of the agency's decision on such motion.

12. Section 290.257.3, RSMo, provides that a final determination of the prevailing hour rate of wages and the public works contracting minimum wage applicable to every locality to be contained in an annual wage order shall be made annually on or before July 1 of each year.

13. Before the Commission's actions on May 20, 2020, the Division found a scrivener's error in its Motion to Amend. Specifically, the Division found that the Motion to Amend had two building rate sheets for Jefferson County, and that the second building rate sheet should have been replaced with a heavy construction worksheet for Jefferson County. The substitution page is filed with this motion.

14. To correct this error, the Division requests that the Commission issue an order substituting the attached page for the duplicate page in the Annual Wage Order.

15. Public policy is served by making the attached corrections to reflect the proper wage rates.

#### **Suggestions in Support of this Motion**

Section 290.257.3, RSMo, gives the Department of Labor and Industrial Relations a deadline of July 1 of each year to file a final annual wage order. The Commission therefore has time to post on its website notice of this Motion, accept objections within a reasonable time, and rule that the inadvertently duplicated building wage rate page for Jefferson County be replaced with the attached wage rate page for heavy construction for Jefferson County, before July 1, 2020.

The Commission already issued its final Annual Wage Order no. 27 on May 20, 2020, and this triggered a 30-day time for any affected person to seek judicial review under Section 536.110.1, RSMo. But Section 536.110.2, RSMo, provides that where an agency has authority to consider a motion for rehearing, the 30-day period for filing a petition for judicial review runs from the date of the agency's ruling on the motion.

This motion does not seek a rehearing, although it is similar. This motion merely asks that the Commission correct a clerical error in the organizing and filing of 101 pages that accompanied the Division's Motion to Amend – the motion that the Commission sustained on May 20, 2020, to correct errors caused by a computer malfunction. The July 1 deadline for the filing of a final annual wage order would appear to trump the Commission's timing of filing Annual Wage Order no. 27 on May 20. The July 1 deadline suggests that the

Commission may reconsider its order within the 30-day time frame for an affected person to seek review, and Section 536.110.2, RSMo, would allow the Commission, by ruling on the motion, to set another 30-day clock for purposes of judicial review.

*Wood v. Director of Revenue*, 8 S.W.3d 154 (Mo. App. W.D. 1999) held that the Administrative Hearing Commission has implied authority to reconsider a decision during the 30-day clock for a person to seek judicial review, but held that the AHC would have to act within that time to toll the clock. Under this ruling, the Labor and Industrial Relations Commission has the apparent authority to act on this Motion before June 20 to correct the error. Irrespective of whether an order to correct the error would restart or toll the 30-day clock for a party to seek judicial review, the Commission can still meet the July 1 deadline for a final Annual Wage Order No. 27 that would not prejudice any party by rectifying the scrivener's error.

The United States Supreme Court and other courts have recognized an implied authority in agencies to reconsider and rectify errors even though the applicable statute and regulations do not expressly provide for such reconsideration. For example, in concluding that the Interstate Commerce Commission ("ICC") could order a refund to correct a prior error, the Supreme Court stated that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 229, 86 S.Ct. 360, 364, 15 L.Ed.2d 284, 289 (1965); *see also American Trucking Assoc. v. Frisco Trans. Co.*, 358 U.S. 133, 145, 79 S.Ct. 170, 177, 3 L.Ed.2d 172, 180–81 (1958) ("the presence of authority in administrative offices and tribunals to correct [inadvertent ministerial] errors has long been recognized—probably so well that little discussion has ensued in the reported cases."). Other courts have similarly recognized this implied authority. *See Iowa Power and Light Co. v. United States*, 712 F.2d 1292, 1294–97 (8th Cir.1983) (ICC could retroactively impose higher tariff to correct legal error), *cert. denied*, 466 U.S. 949, 104 S.Ct. 2150, 80 L.Ed.2d 536 (1984); *Bookman v. United States*, 453 F.2d 1263, 1265, 197 Ct.Cl. 108 (1972) (allowing agency to reconsider decisions in absence of statutory or regulatory authorization after noting general rule that "[e]very tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriate to modify its judgment, decree, or order.") (quoting 2 K. Davis, *Administrative Law Treatise*, § 18.09 (1958)).

WHEREFORE, the Missouri Department of Labor and Industrial Relations, Division of Labor Standards, respectfully requests that the Commission enter an Order to substitute the attached page for the duplicate page in Annual Wage Order No. 27 filed with the Secretary of State on May 20, 2020.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

Notice of this Motion will be posted on the Labor and Industrial Relations Commission web site at [www.labor.mo.gov/LIRC](http://www.labor.mo.gov/LIRC).

June 1, 2020  
DATE

/s/ Timothy P. Duggan  
Timothy P. Duggan

Heavy Construction Rates for  
JEFFERSON County

Section 050

OCCUPATIONAL TITLE	**Prevailing Hourly Rate
Carpenter	\$56.89
Millwright	
Pile Driver	
Electrician (Outside Lineman)	*\$22.58
Lineman Operator	
Lineman - Tree Trimmer	
Groundman	
Groundman - Tree Trimmer	
Laborer	\$47.23
General Laborer	
Skilled Laborer	
Operating Engineer	\$63.21
Group I	
Group II	
Group III	
Group IV	
Truck Driver	*\$22.58
Truck Control Service Driver	
Group I	
Group II	
Group III	
Group IV	

PRELIMINARY ONLY

Use Heavy Construction Rates on Highway and Heavy construction in accordance with the classifications of construction work established in 8 CSR 30-3.040(3).

Use Building Construction Rates on Building construction in accordance with the classifications of construction work established in 8 CSR 30-3.040(2).

If a worker is performing work on a heavy construction project within an occupational title that is not listed on the Heavy Construction Rate Sheet, use the rate for that occupational title as shown on the Building Construction Rate Sheet.

\*The Division of Labor Standards received less than 1,000 reportable hours for this occupational title. Public works contracting minimum wage is established for this occupational title using data provided by Missouri Economic Research and Information Center.

\*\*The Prevailing Hourly Rate includes any applicable fringe benefit amounts for each occupational title.