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SECRETARY OF STATE
COMMISSIONS DIVISION

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

ORDER

In the matter of Objection No. 002 (OBJ 002) filed by City of Kirksville on April 8, 2025 to Annual Wage Order No. 32 issued by the Division of Labor Standards, Department of Labor and Industrial Relations; filed with the Secretary of State on March 10, 2025, pertaining to the wage rate for occupational title of Operating Engineer in the Missouri County of Adair – Section 001.

Preliminaries

On March 10, 2025, the Missouri Division of Labor Standards (Division) filed Annual Wage Order No. 32 (AWO 32) with the Missouri Secretary of State. As provided in § 290.262.2 RSMo and 8 CSR 20-5.010, the deadline for filing objections to AWO 32 was April 9, 2025.

Prior to that deadline, the City of Kirksville, Missouri (Objector), by counsel, filed its timely objection (OBJ 002) to AWO 32 on April 8, 2025. In its objection, Objector asserted that the "determination of the prevailing hourly rate of wage rate for an Operating Engineer in heavy and highway construction work in Adair County is improperly skewed by the fact that almost 90% of the wages including [sic] came from one contractor (working on one project, the Ameren solar farm)" and "[a]s a result, the prevailing wage rate for Operating Engineer in Adair County is driven by the hourly rate paid by a single contractor."

In a May 2, 2025 order, the Commission postponed the scheduled June 4, 2025 hearing on OBJ 002 to AWO 32 pending the parties' submission of arguments on briefs on June 13, 2025. On June 13, 2025, the parties timely filed their briefs with the Commission and submitted the matter to the Commission for resolution without a hearing. We deem the matter submitted on June 13, 2025 and the previously scheduled hearing cancelled on that date.

On May 12, 2025, the Commission held a scheduled prehearing conference pursuant to 8 CSR 20-5.010(3). At the prehearing conference, the parties prefiled exhibits, including sworn written testimony. The parties identified the following as the sole issue for the Commission to resolve:

> Objector asserts that the Division's determination of the hourly wage rate for Operating Engineer – Heavy and Highway Construction in Adair County is improperly skewed because approximately 90% of the wages reported were from a single contractor. In light of that assertion:
>
> 1) What is the prevailing wage rate for Operating Engineer – Heavy and Highway Construction in Adair County?

Analysis

We have reviewed the parties' prefiled exhibits and briefs. We find there is no dispute between the parties that when the Division calculated the prevailing wage rate for Operating Engineer – Heavy Highway Construction in Adair County, the Division included 3,920 hours submitted by KPL, Inc. for work in that county. The only dispute presented to us concerns whether the Division was required to exclude or allocate a different weight to those 3,920 hours as compared to the other hours submitted for the occupational title of Operating Engineer in Adair County.[1]

In its brief, Objector asserts that the Division's calculation "does not reflect the rates paid by various contractors in Adair County instead it reflects mainly the rates paid by a single contractor given that nearly 90% of the wages included in the AWO determination came from one contractor…[.]" Based on that assertion, Objector argues the Division "should recalculate the prevailing wage for an Operating Engineer in Adair County to properly reflect the average rate paid in Adair County for Operating Engineers by granting a more balanced allocation of weight to the wages paid by the various contractors working in Adair County."

Section 290.257 RSMo provides for the determination of the prevailing wage in an AWO. In relevant part, that statute directs:

> 1. (1) In determining the prevailing wage rate, the department shall accept and consider information submitted in either paper or electronic format regarding local wage rates for construction projects that occurred during the year preceding the annual wage order to be issued, provided that information regarding local wage rates for entry-level workers and federally registered apprentices shall not be considered.
>
> (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:

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[1] Through a footnote in its brief, Objector asserts for the first time that the Division may have made a mathematical error in calculating the prevailing wage rate:

> The annual wage rate for an Operating Engineer in Heavy and Highway Construction work set by the AWO is $73.71. It is unclear how the Department calculated that rate. As can be seen in Exhibit A.E, when the City used the Department's Records to calculate the average hourly wage paid to Operating Engineers, the resulting average hourly wage is $73.57, more than ten cents below the annual wage rate set by the Department.

The issue for resolution by the Commission, as framed by the parties' stipulations at the prehearing conference, did not include a dispute as to whether the Division made a mathematical error in determining the prevailing wage rate. The parties agreed to simultaneous briefing. As such, the Division was not afforded an opportunity to respond to the allegation that was raised for the first time in a footnote in Objector's brief. Because that allegation was not raised in Objector's OBJ 002 or at the prehearing conference, the issue was not properly presented to the Commission for resolution. Regulation 8 CSR 20-5.010(3)(F) directs that the prehearing "order will limit the issues for the hearing to those not disposed of by admissions or agreements of counsel. Such order, when entered, controls the subsequent course of the hearing, unless modified thereafter to prevent manifest injustice." Objector does not assert that manifest injustice will result if we decline to include an alleged mathematical error as an additional issue for resolution. We find that no manifest injustice will result and decline to consider the issue raised in Objector's footnote.

> 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).

Without any reference to the statute's definition of "weighted average wage," Objector argues:

> By basing the prevailing wage for Operating Engineer in the AWO on data comprised almost 90% of wages paid by one contractor on one project, the Department has given undue weight to the wages paid on that one project by one contractor and too little weight to wages paid on other projects by other contractors.

Objector further argues:

> The imbalance of weight given to one particular contractor's wage choices, a contractor who is not even located within the same state as Adair County and may be less familiar with wage rates in Adair County, is a relevant factor that the Department must consider when issuing a wage order.

In support of its "relevant factor" argument, Objector relies on statements in *Woodman Engineering Co. v. Butler*, 442 S.W.2d 83, 88 (Mo. App. 1969) and *City of Joplin v. Indus. Comm'n of Mo.*, 329 S.W.2d 687, 695 (Mo. 1959) that the Prevailing Wage Act "makes it clear that all relevant factors are to be considered in determining the prevailing wage applicable to any contract or project." In those decisions, the courts focused on the relevant factors as expressly identified in the applicable statute.

For purposes of the AWO, the relevant factors for determining the prevailing wage rate are identified in § 290.257 RSMo and its direction that "the department shall accept and consider information ...regarding local wage rates for construction projects that occurred during the year preceding the annual wage order to be issued, provided that information regarding local wage rates for entry-level workers and federally registered apprentices shall not be considered." Objector does not allege that the Division failed to consider those relevant factors.

Objector's argument that an "imbalance of weight" is a relevant factor to be considered has no basis in the express language of § 290.257 RSMo. To the contrary, § 290.257.1(2)(b).b RSMo establishes the formula for determining the "weighted average wage" that does not include, as Objector advocates, considering the percentage of "wages paid by one contractor on one project."

In the absence of an express statutory directive to exclude or weigh differently the hours submitted by an entity based on the percentage of those hours in relation to the whole, we conclude the Division did not err in including 3,920 hours submitted by KPL when the Division determined the prevailing wage rate for Operating Engineer– Heavy and Highway Construction in Adair County.

Order

For the reasons stated, we overrule OBJ 002 to AWO 32.

Given at Jefferson City, State of Missouri this 26th day of June 2025.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

Rodney J. Campbell, Chairman

Kathryn Swan, Member

Lauren Arthur, Member

Attest:

Secretary