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Office of the Attorney General
800 5th Ave, Ste. 2000
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RE: Scope of Work Applicable to Joining of Ductile Iron Water Main Pipes
Our File No. 3293-114

Dear Diana,

We write on behalf of our client, the Washington and Northern Idaho District Council of Laborers, to address a question that has recently arisen, regarding the proper prevailing wage scope to joining of ductile iron pipes for water main construction and water main replacement work outside of the building structure. In a conversation regarding an unrelated matter, Jim Christensen brought up a question of the interpretation of the words “under pressure” as they are used in WAC 296-127-01340 and 296-127-01364. We write to further that conversation, which has significant implications for jurisdiction over construction of ductile iron water mains, a work process that has long been performed by the Laborers. We understand that this issue is involved in pending litigation in which you represent the Department, and so we write to you to express our views on why the words “under pressure” in both scopes must be interpreted to refer to pipes that are under pressure at the time of the joining, not pipes that may be under pressure at some point in the future.

While we understand that the Department may in recent years reached a different conclusion about the impact of this language, this has been the long-standing interpretation recognized in the industry by all the affected trades and contractors. It is also the best read of the possibly applicable scopes of work using the canons of statutory construction. Additionally, a contrary interpretation will result in a major disruption to the widespread and near universally respected jurisdictional boundaries between the Laborers and the Plumbers/Fitters, causing the prevailing wage laws to dictate work assignments in a way that goes far beyond the effect prevailing laws were intended to have. It will also dramatically and unnecessarily increase the cost of critical waterline replacement work and new waterline extensions. A more detailed explanation of these concerns follows.

RELEVANT SCOPES

As a threshold matter, it is important to note that WAC 296-127-01389 creates a specific classification of work for “Utilities construction (underground sewers and water lines).” This work is defined as:

WAC 296-127-01389 Utilities construction (underground sewers and water lines).

For the purpose of the Washington state public works law, chapter 39.12 RCW, **utilities construction is defined as follows:**

The construction, alteration, repair or improvement of **water mains**, sanitary sewer mains, underground storm sewers and branch lines to buildings but not underneath buildings, within cities, towns, suburbs and subdivisions. **The work includes, but is not limited to:**

- (1) Clearance of right of way preparatory to the excavation of trenches or ditches.
- (2) Excavation and trimming of trenches or ditches (including establishing and maintaining grade).
- (3) Shoring, building of manholes, catch basins, etc.
- (4) Distribution of pipe and skids, placing of skids and pipe over the trench or ditch.
- (5) The cleaning, sealing, doping and wrapping of the pipe after the joints have been welded and before lowering the pipe into the trench and alignment.
- (6) Lowering of the pipe and the removal of the skids.
- (7) Backfilling, compaction and resurfacing of trenches or ditches (e.g., asphalt work necessary to cover the trench or ditch, but all other asphalt work is excluded).
- (8) Cleanup and restoration of right of way (e.g., restore landscaping).

(emphasis added).

As will be seen below, while WAC 296-127-01340 applies specifically to “Laborers in **utilities construction**,” WAC 296-127-01364 (plumbers) never mentions “utilities construction.”

The first scope at issue that uses the words “under pressure” is WAC 296-127-01340.

WAC 296-127-01340 Laborers in utilities construction

For the purpose of the Washington state public works law, chapter **39.12** RCW, the work for laborers includes, but is not limited to:

- (1) Pipe layer.
 - Shoring, building of manholes and catch basins.
 - Sealing, doping and wrapping of the pipe after the joints have been welded and before the pipe is lowered into the trench or ditch.
 - **Joining ductile iron pipe by using screws, bolts, fittings, caulking or any other method for making joints in the industry, when the pipe will not be under pressure.** Lowering the pipe into the trench or ditch.
- (2) Topman. Assists the pipe layer from the surface, he does not work in the trench or ditch.
- (3) General laborer.
 - Performs all other laborers' work which is not done by pipe layers and topmen.
 - Responsible for all cleanup required in connection with utilities construction work.

(emphasis added).

The second scope that uses the words “under pressure” is WA 296-127-01364:

WAC 296-127-01364 Plumbers, pipefitters, and steamfitters.

For the purpose of the Washington state public works law, chapter **39.12** RCW, plumbers, pipefitters and steamfitters assemble, install, and maintain piping systems, fixtures and equipment for the transportation of water, steam, gas, air, sewage, oil, fuels, liquids, gases, or similar substances.

The work includes, but is not limited to:

(1) Piping systems installed in structures (e.g., buildings, industrial plants, etc.).

(a) The handling and moving of any plumbing, pipefitting and steamfitting materials, supplies, and equipment on the job site.

(b) Cutting, threading, and bending pipe.

(c) Joining pipes by use of screws, bolts, fittings, solder, welding and caulking, or any other method of making joints in the pipefitting industry.

(d) Assembling, installing, and repairing valves, pipe fittings, and pumps.

(e) Testing the piping system.

(f) Installing and repairing plumbing fixtures, such as sinks, bathtubs, water heaters, and water softeners.

(g) Cutting holes in floors and walls for pipes:

- With point and hammer.

- Core-drilled.

(h) Responsible for all cleanup required in connection with plumbers, pipefitters and steamfitters work.

(2) Distribution lines (e.g., water mains, sewer mains, oil and gas lines, etc.).

(a) The handling and moving of any plumbing, pipefitting and steamfitting materials, supplies, and equipment on the job site.

(b) Steel pipe: Welding of pipe joints and joining pipes with screws, bolts, fittings, solder, caulking, or any other method for making joints in the industry.

(c) Ductile iron pipe: Joining pipes by using any method for making joints in the industry, when the pipe will be under pressure.

Assembling, installing, and repairing valves and pumps.

(d) Testing the piping system.

(e) Responsible for all cleanup required in connection with plumbers, pipefitters and steamfitters work.

(emphasis added).

ARGUMENT

I. Canons of statutory construction make clear that the words “will be under pressure” refer to pipes that will be under pressure at the time of the joining, not at any point in the future.

Both the plumbers’ and utilities laborers’ scopes of work use the future tense when referring to the pressurized state of ductile iron piping, so it is understandable why the Department has previously concluded that “the phrase ‘will be’ suggests a future state. Had the department meant to say ‘is under pressure,’ it could have done so.” Cedar Hills Determination, n.6 (Aug. 22, 2019). However, the reference to ductile pipes that “will be” under pressure can just as easily be read to refer to pipes that

“will be” under pressure at the time of the joining. This appears to be a case of inartful wording. While the Department’s previous interpretation that “will be” suggests a future state is not necessarily unreasonable, at the very least, interpreting those words to refer to the state of pressure at the time of construction is another “rational, sensible interpretation,” such that the principles of statutory construction must be used to determine the appropriate meaning of those words. *State, Dep’t of Licensing v. Cannon*, 147 Wn.2d 41, 57, 50 P.3d 627, 636 (2002).

Interpreting the regulations to refer to joining of ductile iron pipe when the piping system will be under pressure at any point in the future would read the utilities laborers’ scope under WAC 296-127-01340 out of existence, an outcome the Department is unlikely to have intended when it crafted the scope of work descriptions referencing ductile iron pipe. This is because ductile iron piping is now very commonly used for water mains, and water mains will inevitably be under some form of pressure.¹ Water distribution lines are the most ubiquitous use of this material. This can be verified by projects advertised for bid under the Daily Journal of Commerce (DJC) which is used by owners, contractors, developers and unions throughout the industry. Ductile Iron Pipe is used for new water mains, replacement of A/C pipe, and cast iron pipe water main replacement projects outside of the building structures, underground, and fire hydrants. In fact, water distribution lines is the most ubiquitous use of this material for underground water main and underground water main replacement, which has not changed since the Scopes of Work were created and became Rule.

WAC 296-127-01340(1) very clearly provides that utilities laborers will be responsible for joining ductile iron pipe... “when the pipe will not be under pressure.” It is clear that the Department thus intended for the utilities laborers’ scope of work to be applied to *some* body of work joining ductile iron pipe – the only question is what body of work the Department intended to be joining “when the pipe will not be under pressure.” Because all ductile iron water mains will eventually be under some pressure, interpreting the “will be under pressure” to refer to a pipe’s eventual state rather than the state at the time of the joining would have the effect of reading a portion of WAC 296-127-01340(1) out of existence as to water main construction and water main replacement projects, despite decades of industry practice in Washington State. “[A] statute should, if possible, be so construed that no clause, sentence or word shall be superfluous, void, or insignificant.” *City of Kent v. Beigh*, 145 Wn.2d 33, 39, 32 P.3d 258 (2001). It must be assumed that the Department intended for some work joining ductile iron pipes for water main construction and water main replacement projects outside the building structure to be paid at the utilities laborers’ scope, otherwise it would not have included that work in WAC 296-127-01340. The only interpretation of the words “will be” under pressure that would result in any ductile iron pipe joining being covered under the utilities laborers’ scope is one that refers to the pipe’s pressure state at the time of construction.

¹ We note that one could argue in the alternative that ductile iron water mains will *never* be under pressure, because those piping systems do not involve water being moved through pipes as a result of pump and valve systems. Instead, the water is “pressurized” primarily as a result of gravity with reservoirs and water towers being placed on high ground. While pumps are often used to move water to higher reservoirs and tanks, and pressure reducing valves are sometimes used to lower pressure, water mains are primarily powered by mere gravity. Therefore, an alternative plausible reading of WAC 296-127-01340 and 296-127-01364 is that water mains are not “under pressure” within the meaning of those scopes at all.

Importantly, interpreting the scopes to refer to the pressure state of the pipes at the time of construction ensures that no part of any scope is rendered superfluous, and ensures that both scopes find application to some body of work. The utilities laborers' scope applies to pipe joining when the pipes are not actively under pressure, and the plumbers/fitters scope applies when the pipes are being tied into a live source, e.g. when the pipes are connected to the water source (a "hot tap," "wet tap," or "live tie in²") or for work performed inside of building structure. One interpretation results in each scope applying to certain work, whereas the other scope would effectively result in the fitters' scope applying to *all* ductile iron pipe joining and the utilities laborers' scope applying to no work whatsoever.

This interpretation of the regulations is also consistent with the legislative history. When the Department adopted permanent rules in 2000, codifying various scopes of work, it explicitly stated that the purpose of the rules was to require contractors to pay the prevailing or "market" rate. WSR 00-15-077 (July 19, 2000). The scope of work descriptions were intended to "stabilize and protect local wage standards." *Id.* The Department thus was clear that its goal in adopting the scopes was not to modify the prevailing wage applicable to various work processes.

The Department articulated that in crafting the scope of work descriptions, the Department would rely upon sources including:

- (a) Washington state apprenticeship and training council approved apprenticeship standards;
- (b) Collective bargaining agreements;
- (c) Dictionaries of occupational titles;
- (d) Experts from organized labor, licensed contractors, and contractors' associations;
- (e) Recognized labor and management industry practice.

WAC 296-127-013. Each of these factors, and in particular, recognized labor and management industry practice makes clear that the Department intended for work joining ductile iron water mains to be the work of the Laborers.

Laborers have installed ductile iron piping for several decades, including in 2000 when the Department adopted the current scopes. Given that this was the well-known and uncontested industry practice at the time just as it is today, it is reasonable to assume that the Department intended for ductile iron pipe joining to be performed at the utilities laborers' scope unless the pipes would be under pressure at the time of the joining.

² Moreover, basing a scope of work on what may happen to the material involved at some point in the future, as opposed to its state at the time of the work, is illogical. If the same criteria were used on road construction, all asphalt and concrete roads would be paid at the Teamsters rate of pay because at some point in the future trucks would be using the road or highway.

II. To the extent the Department finds any ambiguity as to whether the regulations refer to the present or the future pressure status of pipes, the widespread and industry practice makes clear that the Laborers perform the joining of ductile iron water mains that will be under pressure at some point in the future.

As you have recently recognized, “Union jurisdictional boundaries are studied by L&I because they reflect established industry practice, and are therefore reflected in the scope of work descriptions within chapter 296-127 WAC. L&I also considers these facts as it interprets and applied those scopes.” (Letter from J. Christensen to E. Coffelt, Feb. 19, 2021). While the Laborers contend that ordinary canons of statutory construction make clear that the work of joining ductile iron water main pipes falls within the utilities laborers scope of work, actual industry practice confirms that this interpretation is the one that also confirms with longstanding historical practice.

To the best of the Laborers’ knowledge, installation of ductile iron water mains and water main replacement projects outside of building structure has been performed predominantly, if not exclusively, at the utilities laborers’ rate of pay. This industry practice is reflected by the body of evidence contained in the Department’s Prevailing Wage Intents and Affidavits database. A search of that database for “water main” demonstrates that this work has been performed nearly exclusively at the utilities laborers’ rate. Specifically, there are 177 projects with laborers - underground sewer and water utilities hours, totaling over \$80 million. In fact, based upon Daily Journal of Commerce research, there have been over 2,000 projects that involved ductile iron piping with Laborers dating back to 1995.

Further, we recognize that the intents and affidavits unfortunately do not contain a level of specificity that would necessarily make clear that ductile iron was involved on these projects. However, water main projects nearly *always* involve ductile iron. Moreover, because the Department’s database only reflects the project descriptions in the Prevailing Wage Intents and Affidavits, and those descriptions often do not expressly say “water main,” especially when the water main work is part of a road project, these figures understate the true magnitude. While a handful of projects may involve other materials, such as HDPE piping, anyone familiar with the industry can testify that most water mains are constructed from ductile iron. For example, both Bellevue and Seattle call for ductile iron pipe for water mains.

In contrast to the high number of utilities laborers’ hours reported on water main projects, there are very few plumber & pipefitter hours reported. A search for “water main” projects in which there were plumbers and pipefitters yields only 15 projects, totaling less than \$150,000.

In contrast, the plumber/pipefitter rate of pay has been applied when ductile iron pipe is being joined to a system that is “live” or pressurized.

Notably, this division is well-established and recognized in the industry, even by the United Association of Plumbers and Pipefitters. In the course of communicating about a burgeoning jurisdictional dispute regarding the Cedar Hills landfill, Jeff Owens, Business Manager of UA 32, wrote to Bob Abbott, Vice President and Regional Manager for the Northwest Region of the Laborers International Union of North America. In that communication, Owens sought to assuage the Laborers’ concern about the significance of the jurisdictional dispute at issue in Cedar Hills by making clear that the UA did not seek to claim water utilities: “The misunderstanding seems to be thinking we are

claiming the utilities, which we are not. We are not claiming or interested in the water, sewer, etc.” It is clear, then, that not even the Union representing plumbers and fitters has laid a claim to the work that the Department’s interpretation dictates be paid at the plumber/fitter rate.

III. A contrary interpretation will wreak havoc on jurisdictional boundaries between the crafts.

While Washington’s prevailing wage law does not require employers to hire any particular craft, it must nonetheless be recognized that prevailing wage determinations may have an impact on work assignments. Prevailing wage laws and scopes of work should reflect historical and industry work assignments, to ensure that employers pay workers appropriately. They should not serve as a vehicle to change those historical work assignments or arbitrarily modify pay scales. As you recently recognized:

L&I does not determine industry practice. Rather, it follows and reflects those practices. It is proper for L&I to look toward established union jurisdictional boundaries, reflected in inter-union agreements and Plan decisions of record.... L&I seeks to follow, but not determine or influence, jurisdiction.

Letter from J. Christensen to E. Coffelt, Feb. 19, 2021. In this case, interpreting scope of work descriptions in way that is at odds with that the long-standing and near universal practice of the utilities laborers’ scope being applied to installing and joining ductile iron water mains will have the exact effect warned against in your recent letter – it would have the effect of dramatically reshaping jurisdictional assignments.

Not only would this practice put the cart before the horse by allowing prevailing wage scopes to dictate work assignments, it would also have the effect of dramatically increasing the costs of municipal water main replacement projects, by imposing new and never before applied prevailing wages to the work of installing ductile iron water mains.³ For instance, the current prevailing wage for “Laborers – Underground Sewer and Water” in King County is \$52.39 (\$53.35 for a pipe layer), it is \$92.19 for Plumber & Pipefitters. This significant change in the amount municipalities would have to pay to install and replace water mains will have a catastrophic effect on municipal finances. Similarly, it will adversely affect other important public policy goals. For example, counties, water districts, cities and towns have been replacing Asbestos Concrete water mains with ductile iron pipe for public health and safety reasons for years. Dramatically increasing labor costs for that critical infrastructure work would slow down the process of replacement given the limited budgets of municipalities and the long planning lead times involved. For example, Bellevue alone is replacing five miles of asbestos water mains every year according to its water system plan. This type of dramatic reshaping of the landscape is inconsistent with the purpose of prevailing wage laws, which is to prevent the erosion of local wages, not to impose new and dramatically higher labor costs than have ever before been paid for a certain type of work.

Finally, it has been suggested that if Laborers have in fact consistently been performing the work of installing ductile iron water mains, then the regulations defining the scope of work assignments must be amended in order to conform to industry practice. Opening and revising the scopes of work is

³ The only contrary example of which we are aware involves CCT construction. This anomaly does not negate the long-standing industry practice establishing the utilities laborers’ scope as the appropriate prevailing wage for this work.

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unnecessary in light of the fact that best reading of WAC 296-127-01340 and 296-127-01364 already confirms that the work of joining ductile iron pipes for water mains is within the utilities laborers' scope.

Thank you for taking our comments and concerns into consideration. We would welcome the opportunity to discuss this issue further, or to address any particular questions or concerns you might have. Feel free to contact me at 206-257-6011 if you would like to discuss anything raised herein further.

Sincerely,

A handwritten signature in black ink, appearing to read "Danielle Franco-Malone". The signature is fluid and cursive, with a long horizontal flourish at the end.

Danielle Franco-Malone
*Counsel for the Washington and Northern Idaho District Council
of Laborers*

cc: Jermaine Smiley
Bob Abbott