

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENTS OF LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF OCCUPATIONAL SAFETY
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August 18, 2004

Karla E. Zarbo
Office of the Attorney General
Fair Labor and Business Practices Division
One Ashburton Place
Boston, MA 02108-1598

Re: Prevailing Wage Applicability; Waterproofing Work

Dear Ms. Zarbo:

Thank you for your letter dated June 29, 2004 asking for further clarification of the proper occupational classifications to be used by workers who install waterproofing materials.

Before I respond to the specific questions posed, it should be noted that your request for assistance in determining the proper occupational classification in connection with a potential enforcement action is a fine example of the cooperation between the Division of Occupational Safety (DOS) and the Attorney General's Office (AGO). It has been obvious for a long time that the structural separation of the administrative and enforcement functions of the prevailing wage law sometimes makes our respective duties more difficult. With DOS's responsibilities limited to the pre-bid functions of rate setting, applicability determinations, and appeals, your office could chose not to confer with us on matters that arise during enforcement (post-bid). That you seek our counsel during this stage, as we similarly seek the counsel of your Office when making pre-bid applicability decisions, is important to the seamless administration and enforcement of

this law. In my opinion, the regulated community benefits greatly from this cooperation.

The conundrum in answering your question is that the specifics you provide go far beyond the description of waterproofing work and laborer's work contained in the building trade collective bargaining agreements that cover these aspects of construction. As you know, the prevailing wage law instructs DOS to look to collective bargaining agreements when setting occupational classifications and rates of wages. The most obvious and logical way to supplement the descriptions of work given in the collective bargaining agreements is to make observations in the field, as you have done and conveyed in your letter. However, DOS does not typically rely on this approach for two reasons: 1) the statute does not contemplate this or any other supplement to the language in the collective bargaining agreements in its instructions for the establishment of occupational classifications; and, 2) DOS does not typically have the opportunity to observe work in the field because it must make its applicability determinations during the bidding stage, before any work begins.

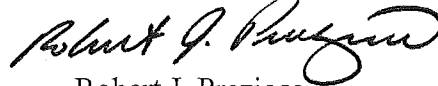
In the conduct of your enforcement responsibilities, it is understandable that disputes sometimes arise over the proper occupational classifications to be used for particular tasks, and that you will derive relevant information about those disputes from observations made in the field. DOS publishes prevailing wage rates for the three occupational classifications in question - "Brick/Stone/Artificial Masonry (Incl. Masonry Waterproofing)," "Roofer (Incl. Roofer Waterproofing & Roofer Damproofg)," and "Laborer" - because they are established by their respective collective bargaining agreements. Based on the language contained therein, an unambiguous distinction exists between the installers (whether a "Bricklayer/Mason" or a "Roofer") and the "Laborers." As stated in my previous letter, workers who install waterproofing materials must be classified as either "Bricklayers" or "Roofers" but not as "Laborers."

To help inform your decision for enforcement purposes, I would suggest that the following tasks are included under the definition of installation: the application of waterproofing materials to other building components; the measuring, cutting, mixing, and preparing of all waterproofing materials; and the connecting, positioning, sealing, and finishing, of all waterproofing materials. (See copies of the collective bargaining agreements already provided to your Office.)

The question about whether to use the "Bricklayer/Mason" rate or the "Roofer" rate is, in my opinion, more difficult on unique structures such as ventilation buildings where the masonry and roofing components may not be clearly distinguished from one another. In the event that such a structure has a roof, installation of waterproofing materials on the roof should be paid the "Roofer" rate. Waterproofing work performed on other building components, such as walls, should be paid at the "Bricklayer/Mason" rate. When waterproofing work is performed in areas located between the walls and a roof, either rate could reasonably apply. In that event, DOS reiterates its position that we will not choose between the higher and lower rate in classifying workers engaged in activities that fall under the jurisdictional ambit of two different unions.

I hope this letter helps with your case. Feel free to contact Lisa Price or me if you have any additional questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert J. Prezioso". The signature is fluid and cursive, with a large, stylized initial "R".

Robert J. Prezioso
Commissioner

cc: Kathryn B. Palmer, General Counsel
Lisa Price, Legal Counsel