Prevailing Wage Program Opinion Letter February 22, 2012

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The Department of Labor Standards ("DLS") writes in response to your request for guidance under the Massachusetts' Prevailing Wage Law, G.L. c. 149, §§ 26 and 27, as directed by the Court, in its "Order on the Motion for Summary Judgment of the Plaintiff," in Kuehl, et. al. v. D & R Paving, LLC,Superior Court No. 2009-0602-A ("Kuehl").

In Kuehl, a group of employees brought a class action against an employer for violations of the Prevailing Wage Law and the Fair Labor Standards Act and the parties filed cross motions for summary judgment. The gravamen of the state law claims are that the driver/employees were not paid the prevailing wage rate for time spent hauling "gravel" and "fill" or for time during which the drivers waited, in holding areas on or near the physical limits of the project, for instructions to deliver the contents of the trucks. The Court granted the plaintiff's motion for summary judgment as to liability for failure to pay the prevailing wage for all time spent at the work site, including waiting time inside or outside the project limits.[1] In reaching its decision, the Court interpreted the terms "site", "gravel" and "fill" as the terms are used in the Prevailing Wage Law.[2] The Court suggested that the parties obtain the view of DLS regarding the definition of the term "site" as it is used in the Prevailing Wage Law. The Court also directed the parties to seek the views of DLS regarding the definition of "gravel" and "fill" "particularly as applied to the facts of this case." These issues are discussed below.

I. Definition of the term "site"[3]

The parties dispute whether time spent waiting in designated holding areas on a public works project is compensable at the prevailing wage rate. The employer contends that the waiting time is not compensable at the prevailing wage rate because the activity occurs while the trucks and drivers are in holding areas on or near the physical limits of the projects and not actually "on" the site, as required by the Prevailing Wage Law. The plaintiffs contend that the time is compensable because, in their view, the definition of "site" is to be construed broadly. The answer to the question turns on whether the designated holding area constitutes part of the "site" as the term is used in the Prevailing Wage Law.

The Court relied on the Supreme Judicial Court's decisions in Construction Industries of Massachusetts v. Commissioner or Labor and Industries, 406 Mass. 162, 168 (1989) ("CIM") and, the companion case, Teamsters Joint Council No. 10 v. Director of the Dept. of Labor and Workforce Development, 447 Mass. 100, (2006) ("Teamsters") to support its holding that the word "site", as used in the Prevailing Wage Law, includes a location designated by a contractor as a "holding" or a "waiting" area, which may or may not be within the physical limits of the project. Kuehlat page 5. In reaching its conclusion, the Court reasoned that the statute speaks "not of work within the physical limits of the job site, but rather in the construction of public work or on said works. Rather than location, these phrases describe the purpose of the work performed by the teamsters [drivers]." Id. at page 5. The Court continued:

The plain meaning of the statutory language is best captured by the notion of work having a significant "nexus" and "connection" with the public works project. A statute limited to work within the physical limits of work would create an artificial distinction having little or nothing to do with the statutory purpose and would be subject to easy evasion by careful description of project limits or selection of designated waiting areas.

The Court's interpretation of the term "site" is consistent with the SJC's CIM decision, which provides, in relevant part, that "[T]he commissioner is empowered to set wages for teamsters when there is a significant

nexus between the work these teamsters perform and the site of the construction project.… When the performance of a statutorily specified job has a significant connection with the construction project, then that job falls within the domain of the posted wage law statute." CIM at 371. In short, DLS agrees with the Court's interpretation of the term "site" for the narrow purpose of determining whether drivers of vehicles, i.e. "teamsters", must be paid the prevailing wage rate for work, as described above, performed on a construction project. Accordingly, time spent by truck drivers in designated waiting or "holding" areas on a construction project is compensable at the applicable prevailing wage rate for the classification of work.This interpretation is consistent with earlier guidance issued by this agency. See Letter to Montenegro, dated May 17, 2000; MW-2002-007 and Notice to Drivers of Bituminous Concrete,dated September 1, 2006.

II. Definition of the terms "gravel" and "fill"

The Court next considered the question of whether the employee/drivers, as part of their work on the project(s), hauled "gravel" or "fill" to and from the project site. If the material hauled was either gravel or fill, the employee/drivers were entitled to be paid the prevailing wage rate for such work under the express language of the Prevailing Wage Law.

The Court first looked to the DLS Topical Index, which instructs that "crushed stone" will be considered "gravel" in the absence of evidence to the contrary. See Letter to Richard Wayne, dated February 3, 1998. The Court noted that DLS acknowledged, in a later opinion letter that it had been asked to take a more detailed position on what constitutes "gravel" or "fill" under the Prevailing Wage Law, but that it had not done so to date. Kuehl at page 7. The Court directed the parties to request the views of DLS and to report those views to the Court "if and when" DLS articulates a definition of "gravel" and "fill." Id. By this letter, DLS articulates such a definition.

A. Background

In 1998, a Special Commission was created to study the issue of the addition of the terms "gravel" and "fill" to the Prevailing Wage Law. The Special Commission was comprised of five members: The House and Senate Chairman of the Joint Committee on Commerce and Labor, the Secretary of Transportation and Construction, a representative of the Teamsters and a representative of the Construction Industries of Massachusetts. The Special Commission was dissolved without resolving the question.

In 2002, DOS conducted at least two public hearings on the subject of the definition of the terms "gravel" and "fill". The DLS took testimony from members of the public, the Massachusetts Department of Highways, the Department of Environmental Protection, the Construction Industries of Massachusetts, the Teamsters and others regarding this subject. The issue was not resolved at that time. DLS has reviewed testimony provided during those hearings in conjunction with the issuance of this letter.

B. Discussion

DLS must give plain meaning to the terms "gravel" and "fill" in interpreting the Prevailing Wage Law. See, generally, CIM, 406 Mass. at 167-168. Accordingly, DLS looks to the ordinary meaning of those words as defined in a standard dictionary. The Concise Oxford American Dictionary p. 392 defines the term "gravel" as follows: "a loose aggregation of small, rounded stones/ a mixture of such stones with coarse sand, used for paths and roads and as aggregate."[4] Accordingly, the term "gravel" under the Prevailing Wage Law includes materials which consist of small, rounded stones, with coarse sand. In addition, the DLS will continue to consider crushed stone as "gravel" for the purpose of the Prevailing Wage Law. See Letter to Richard Wayne, cited above.

The term "fill", is admittedly a less technical term and does not lend itself to a standard interpretation. The term "fill" should be viewed in light of the purpose of the Prevailing Wage Law, to ensure that workers

receive the prevailing wage rate for all work performed in the construction of public work. Further, such rates "shall apply to all persons engaged in the transportation of gravel or fill from such [construction] site." c. 149, §27. The Court, quoting from the Concise Oxford American Dictionary, reasoned that "the ordinary meaning of "fill" is fairly general: 'material, loose or compacted, that fills a space, esp. building or engineering work." Kuehl at page 7. In an attempt to provide additional guidance to awarding authorities and contractors involved in public works projects, DLS has looked to bid specifications and similar materials used by government entities and awarding authorities to refine the dictionary definition of "fill" as it is used in the construction industry for the purposes of the Prevailing Wage Law.

DLS has also examined files and testimony received during the 2002 public hearings in reaching the following definition of the term "fill":

Uncontaminated, naturally occurring inorganic mineral soils imported to or exported from a site for the purposes of bringing the site to rough grade. "Fill" specifically excludes any organic soil or any processed manufactured materials such as bituminous concrete or mix.

We hope that this information is helpful.

Sincerely,

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1 The Court rendered other rulings not relevant to this opinion.

2 G.L. c. 149, § 27, provides, in pertinent part; "The commissioner shall prepare, for the use of such public officials or public bodies whose duty it shall be to cause public works to be constructed, a list of the several jobs usually performed on various types of public works upon which mechanics and apprentices, teamsters, chauffeurs and laborers are employed, including the transportation of gravel or fill to the site of said public works or the removal of surplus gravel or fill from such site." Section 27 continues as follows: "Such rates shall apply to all persons engaged in transportation of gravel or fill to the site of said public works or removing gravel and fill from such site, regardless of whether such persons are employed by a contractor or subcontractor or are independent contractors or owner-operators."

3 The Court and the parties seek guidance on the term "job site". However, the relevant portion of the statute contains only the term "site". *See footnote2, supra*. Accordingly, this agency confines its inquiry to the interpretation of the term "site" for the purposes of the Prevailing Wage Law.

4 See also, the Commonwealth of Massachusetts Highway Department Standard Specifications for Highways and Bridges, Metric Addition, 1995, which similarly defines gravel as follows: "gravel shall consist of inert material that is hard, durable stone and coarse sand, free from loam and clay, surface coatings and deleterious materials."