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Washington Supreme Court Applies Prevailing Wage Laws to Dump Truck Drivers

by Judd H. Lees

In a recent decision involving the Washington Public Works Act, which requires payment of prevailing wages for construction of public works, the Washington Supreme Court continued its trend of interpreting state wage and hour laws expansively to protect Washington employees. In a close 5-4 ruling in Silver Streak et al. v. Washington State Department of Labor and Industries, the Court affirmed a ruling by the Department of Labor and Industries that the state Public Works Act applied to end-dump truck drivers who delivered dirt to the third runway project at SeaTac Airport. They did so despite the employers' reliance on a 1992 department policy memorandum which stated in part that "Delivery of materials using a method in which the truck does not roll while the material is placed, or rolls only enough distance to allow the materials to exit the truck, does not include incorporation of the materials into the jobsite."

The truck drivers in question merely delivered and dumped their fill loads by stopping their trucks and raising the truck bed hydraulically which allowed the fill to exit by force of gravity into a pile below the bed. The drivers remained in their vehicles while they were dumping and were on site for approximately five to fifteen minutes per delivery. This contrasts with the belly-dump truck drivers who, as the name suggests, spread fill materials by opening a gate in the bottom or the "belly" of the trucks as they driver over the project and incorporate the materials into the project.

WAC 296-127-018(a) states that workers who "deliver . . . materials to a public works project site and perform any spreading, leveling, or otherwise participate in any incorporation of materials into the project," are subject to the Washington Public Works Act. Despite the absence of "spreading or leveling" by the dump truck drivers in question as well as receipt of the 1992 department policy memorandum apparently exempting the work, the Department of Labor and Industries issued a complaint and sought $500,000 in back pay for the drivers. This began a see-saw battle up through the Washington Supreme Court. The employers initially prevailed before an administrative law judge based on the determination that their method of delivery did not amount to "incorporation" as required by WAC 296-127-018. According to the judge, the employees were engaged in "nothing more than a method of delivery."

The Department then appealed to the Department Director who reversed and held that the end-dump truck drivers did "participate in incorporation" of the fill materials since they deposited the material directly onto the project site and not at a stockpile. The Director also determined that the drivers "incorporated" fill materials by driving across the project site and compacting the fill materials. The suppliers appealed to Superior Court and the Court sustained the Director's ruling on "incorporation" although it disagreed with the Director's ruling on compaction.

Suppliers appealed again and this time were successful before the Court of Appeals. The Court determined that the terms in the administrative regulation requiring "spreading, leveling or rolling" suggested that more than just dumping was required. The Court of Appeals determined that dumping the materials was not similar to the three activities listed in the WAC.

The Department then appealed and the matter went before the Washington Supreme Court. The Court first noted that the Public Works Act was to be construed liberally to protect

employees not suppliers. Second, the Court determined that the lower court's ruling was based on its failure to consider the regulatory language "otherwise participate in any incorporation of the materials into the project." The majority determined that merely dumping the materials on the project (especially since the dumping occurred where the materials would ultimately be incorporated) was sufficient to constitute "participation in the incorporation" of the materials into the project and thus the Public Works Act applied.

However, the Court agreed with the suppliers that they had reasonably relied on the 1992 memorandum in determining that their drivers were not covered by the Public Works Act. As a result, the Court ruled that the Department was stopped from obtaining any back pay based on the difference in wage rates. Remarkably, two of the justices (Fairhurst and Owens) who joined in the majority dissented on this point and stated that the suppliers' reliance on the 1992 memorandum was not reasonable and that, as a result, the suppliers should have been liable for the difference.

The lessons learned from the Silver Streak decision are three-fold. First, this decision joins the Drinkwitz and Bostain decisions which deal with the Washington Minimum Wage Act, as a clear message that Washington courts will construe wage and hour and prevailing wage laws in favor of Washington employees. Second, the definition of "incorporation" as it pertains to material suppliers will be broadly construed. Finally, the Department cannot retroactively apply a change in its interpretation of regulations after contractors have already bid on work.