

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT LABOR & INDUSTRY

In the Matter of the Proposed Rules of  
the Department of Labor & Industry  
Relating to Prevailing Wage Category  
Descriptions in Primary Classes of  
Labor for Laborers and Special Crafts,  
Minnesota Rules Parts 5200.1000 to  
5200.1120

**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge (ALJ) Richard C. Luis conducted a hearing concerning the above Rules on the morning of September 30, 2010, at the Minnesota Department of Labor & Industry (Department or Agency), 443 Lafayette Road North, Saint Paul, Minnesota. The hearing was continued until all interested persons, groups, and associations had an opportunity to be heard concerning the proposed rules.

The Hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.<sup>1</sup> The legislature has designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications that the agency may have made after the proposed rules were initially published are not impermissible substantial changes.

The rulemaking process includes a hearing when a sufficient number of persons request that a hearing be held. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings, an agency independent of the Department.

William A. Bierman, Jr., Esq., Staff Attorney for the Department, appeared at the Rule Hearing on behalf of the Department. The members of the Agency's hearing panel were William A. Bierman, Jr., Attorney for the Department, Roslyn Wade, Director of Labor Standards and Apprenticeship, Laura Zajac, staff attorney with the Department, and Labor Standards Investigators Karen Bugar, Jim Brown and Kristin Reyes.

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<sup>1</sup> Minn. Stat. §§ 14.131 through 14.20 (2010).

Approximately 49 people signed the hearing register and 15 interested persons spoke at the hearing. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

The Department received many written comments on the proposed rules before the hearing. After the hearing ended, the record remained open until October 20, 2010, to allow interested persons and the Department an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five working days to allow interested persons and the Department the opportunity to file a written response to the comments submitted. The OAH hearing record closed for all purposes on October 27, 2010. All of the comments received were read and considered.

### **SUMMARY OF CONCLUSIONS**

The Agency has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are necessary and reasonable.

Based on the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

#### **Nature of the Proposed Rules**

1. The Minnesota Prevailing Wage Act is a minimum wage law modeled after the Federal Davis Bacon Act that applies to construction projects financed in whole or in part by state funds. Its purpose is to ensure that those who work on such projects are paid wages comparable to wages paid for similar work in the community.<sup>2</sup> The Minnesota Prevailing Wage Act is codified at Minn. Stat. §§ 177.41-.44. The accompanying administrative rules are set forth at Minn. R. 5200.1000-.1120. Together, the statutes and rules govern the determination, certification, and payment of prevailing wages to laborers, workers and mechanics working on state-funded construction projects.<sup>3</sup>

2. Under the Minnesota Prevailing Wage Act, the Department establishes the labor classifications for workers and determines the prevailing wage rate for the classifications.<sup>4</sup> The classes of labor are listed under the Master Job Classifications at Minnesota Rules 5200.1100. Prevailing wage rates are determined by an annual survey of wages paid to construction workers on commercial and highway/heavy construction projects conducted by the Department. The Department compiles the wage information for each of ten areas of the state. The prevailing wage rate paid is the surveyed rate paid to the largest number of workers engaged in the same class of labor

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<sup>2</sup> Minn. Stat. § 177.41.

<sup>3</sup> Minn. Stat. § 177.41.

<sup>4</sup> Minn. Stat. § 177.44, subds. 3 and 4.

within a specified area. The Minnesota Department of Transportation (MnDOT) is responsible for awarding and enforcing state construction contracts and for including the minimum rates determined by the Department in bid specifications for public contracts.

3. In 2008, the Department conducted a rulemaking proceeding to amend and update the master job classifications to reflect changes in construction techniques, practices, and equipment. The master job classifications had last been revised and amended in 1997. The Department's 2008 proposed amendments applied to highway and heavy construction, and also had application to commercial construction because of new classifications created. In the main, the 2008 amendments concerned power equipment operators, truck drivers and special types of equipment. During that rulemaking process, many commentators discussed the need to define the job responsibilities of common and skilled laborers in relation to those of skilled trades people. In his report recommending adoption of the 2008 proposed rule amendments, Administrative Law Judge Eric Lipman noted that "Additional detail on the boundaries between and among Major Job Classifications would benefit all concerned."<sup>5</sup>

4. This rulemaking proceeding concerns proposed amendments to the rules governing the master job classifications for Laborers and Special Crafts. The proposed rule amendments provide descriptions of work performed by each classification of labor on public construction sites.

5. The proposed rules clarify the existing master job classifications for Laborers (Codes 101-112) and Special Crafts (Codes 701-730) by providing descriptions of the nature of the work, typical duties, and typical tools used for the already existing job classifications in these two areas. The proposed rule amendments apply to highway and heavy construction, as well as commercial construction.<sup>6</sup>

6. The purpose and goal of the proposed amendments is to add definitions to the master job classifications for Laborers and Special Crafts to reduce the level of misclassification of laborers and special craft workers on prevailing wage projects.<sup>7</sup> More specifically, the proposed rules are intended to clarify the classifications contained in Minnesota Rules 5200.1100 and provide contractors with easily accessible definitions to assist contractors and contracting agencies to determine the appropriate classification of a prevailing wage project.<sup>8</sup>

7. This rulemaking proceeding was instituted by a Request for Comments published in the State Register on August 18, 2008. In the Request for Comments the Department announced the creation of a prevailing wage work group to work on definitions for the classes of Labor for Laborers and Special Crafts. The Department

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<sup>5</sup> Report of the Administrative Law Judge in *In the Matter of the Proposed Amendments to Rules of the Department of Labor and Industry, Labor Standards Unit, Relating to Prevailing Wage Determinations, Master Job Classifications, Minnesota Rules Parts 5200.1030 to 5200.1100*; OAH Docket No. 8-1900-19710-1 at p. 33.

<sup>6</sup> SONAR at 4-5.

<sup>7</sup> SONAR at 9.

<sup>8</sup> SONAR at 17.

scheduled two prevailing wage work group meetings, which took place on November 5 and December 2, 2008. The work group included representatives of the Minnesota Building Trades, The International Brotherhood of Electrical Workers, the Associated General Contractors, the Minnesota Associated Builders and Contractors, the Joseph Company, Northfield Construction Company, and the Laborers District Council of Minnesota. The formation of the work group and the meeting dates, times and location were included in the Request for Comments.<sup>9</sup>

8. The proposed rule amendments were also developed in cooperation with MnDOT, and MnDOT staff attended the prevailing wage work group meetings. The prevailing wage work group meetings were also open to the public and comment sheets were passed out to all meeting attendants. The Department received a great deal of input on the proposed rule amendments from the work group members, the work group meetings, the comments submitted in response to the Request for Comments, and the testimony at the hearing.<sup>10</sup>

9. The overwhelming consensus expressed in the comments and at the hearing was that the lack of clarity in the current prevailing wage rules has been a source of confusion, worker misclassification, and uncertainty in bidding for all contractors who work on projects to which the law applies. In order to alleviate this confusion and avoid penalties and litigation, contractors have requested the Department promulgate rules defining the job responsibilities of the various job classifications. Additionally, both the Minnesota Court of Appeals and the Office of the Legislative Auditor have suggested that this is an area in which rules are needed.<sup>11</sup>

### **Rulemaking Legal Standards**

10. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely upon legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely upon interpretation of a statute, or stated policy preferences.<sup>12</sup> The Department prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rule. The SONAR was supplemented by comments made by Department representatives at the public hearing and in written post-hearing submissions.

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<sup>9</sup> SONAR at 5 and 23.

<sup>10</sup> SONAR at 5.

<sup>11</sup> See, *AAA Striping Serv. Co., v. Minn. Dept. of Transp. & Minn. Dept. of Labor & Indus.*, 681 N.W.2d 706, 718 (Minn. App. 2004); Office of the Legislative Auditor, Evaluation Report, Prevailing Wages, February 2007, p. 63.

<sup>12</sup> *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984).

11. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.<sup>13</sup> Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.<sup>14</sup> A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.<sup>15</sup>

12. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."<sup>16</sup> An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.<sup>17</sup>

13. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.<sup>18</sup>

14. In this matter, the Department has proposed some revisions to the proposed rule language after the proposed rules were published in the State Register. Thus, the Administrative Law Judge must also determine if the new language is substantially different from that which was originally proposed.<sup>19</sup>

15. Minnesota Statutes § 14.05, subd. 2, instructs that a later modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In reaching a determination regarding whether modifications are substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that

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<sup>13</sup> *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

<sup>14</sup> *Greenhill v. Bailey*, 519 F.2d 5, 19 (8<sup>th</sup> Cir. 1975).

<sup>15</sup> *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

<sup>16</sup> *Manufactured Housing Institute*, 347 N.W.2d at 244.

<sup>17</sup> *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

<sup>18</sup> Minn. R. 1400.2100.

<sup>19</sup> Minn. Stat. § 14.15, subd. 3.

the rulemaking proceeding . . . could affect their interests,” whether “the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing,” and whether “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”<sup>20</sup>

#### **Procedural Requirements of Chapter 14**

16. On August 18, 2008, the Agency published a Request for Comments on the proposed rules. The Request for Comments was published at 33 S.R. 335.<sup>21</sup>

17. By letter dated July 27, 2010, the Department asked the Commissioner of Minnesota Management and Budget (MMB) to evaluate the fiscal impact and benefit of the proposed rules on local units of government.<sup>22</sup>

18. In a memo dated August 10, 2010, MMB reviewed the Department’s proposed rule amendments and found that they will not impose a significant cost on local governments.<sup>23</sup>

19. By letter dated August 10, 2010, the Agency requested that the Office of Administrative Hearings schedule a hearing on the proposed rules and assign an Administrative Law Judge. Along with the letter, the Agency filed a proposed Notice of Hearing, a copy of the proposed rules, and a draft of the Statement of Need and Reasonableness (SONAR). The Agency also requested that the Office of Administrative Hearings give prior approval of its Additional Notice Plan.<sup>24</sup>

20. Administrative Law Judge Richard C. Luis was assigned to the rule hearing.

21. In a letter dated August 17, 2010, Administrative Law Judge Richard Luis approved the Agency’s Notice of Hearing and Additional Notice Plan.<sup>25</sup>

22. On August 26, 2010, the Department electronically mailed a copy of the SONAR to the Legislative Reference Library as required by law<sup>26</sup> and mailed copies of the Notice of Hearing and SONAR to the Chairs and Ranking Minority Members of the Economic Development and Housing Budget Division, the Business Industry and Jobs Committee, the Higher Education and Workforce Development Finance and Policy Division, and the Commerce and Labor Committee.<sup>27</sup>

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<sup>20</sup> Minn. Stat. § 14.05, subd. 2.

<sup>21</sup> Ex. 1.

<sup>22</sup> Ex. 12A; Minn. Stat. § 14.131.

<sup>23</sup> Ex. 12B.

<sup>24</sup> Ex. 14.

<sup>25</sup> Ex. 13.

<sup>26</sup> Ex. 5.

<sup>27</sup> Ex. 11. See Minn. Stat. § 14.116.

23. On August 26, 2010, the Department mailed a copy of the Notice of Hearing to all interested parties on its rulemaking mailing list for Labor Standards/Prevailing Wage.<sup>28</sup>

24. On August 26, 2010, the Department electronically mailed a copy of the Notice of Hearing to all persons and associations on the Department's rulemaking mailing list pertaining specifically to Labor Standards/Prevailing Wage rulemakings and to all persons identified in the Additional Notice Plan.<sup>29</sup>

25. On August 26, 2010, the Department mailed a copy of the Notice of Hearing to all persons and organizations identified in the Additional Notice Plan.<sup>30</sup>

26. On August 30, 2010, a copy of the Notice of Hearing was published in the *State Register* at 35 S.R. 297.<sup>31</sup>

27. On the day of the hearing the Department placed the following documents in the record:

- The Request for Comments on Possible Amendment to Rules Governing Primary Classes of Labor, published August 18, 2010, at 33 SR 340. (Ex. 1);
- A copy of the proposed rules with Revisor's approval dated August 5, 2010 (Ex. 3);
- A copy of the SONAR (Ex. 4);
- Certificate of Mailing the SONAR to the Legislative Reference Library August 26, 2010 (Ex. 5);
- A copy of the Notice of Hearing as published in 35 S.R. 301 (Ex. 6);
- Certificate of Mailing the Notice of Hearing to the Agency Rulemaking Mailing List and to those who requested a hearing on August 26, 2010, and Certificate of Accuracy of the Mailing List (Ex. 7A-D);
- Certificate of Mailing the Notice of Hearing to individuals and organizations pursuant to the Additional Notice Plan on August 26, 2010 (Ex. 8A-I);
- Written public comments received during the public comment period (Ex. 9);
- Certificate of Mailing the Notice of Hearing and the SONAR to Legislators on August 26, 2010 (Ex. 11);
- Copies of correspondence between the Department and the Minnesota Management and Budget regarding the fiscal impact of the proposed rule amendments. (Ex. 12).

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<sup>28</sup> Ex. 7A.

<sup>29</sup> Ex. 7C.

<sup>30</sup> Ex. 8A –I.

<sup>31</sup> Ex. 6B.

- Copy of letter from Administrative Law Judge Richard Luis approving Notice of Hearing and Additional Notice Plan. (Ex. 13).
- Department's letter to Chief Administrative Law Judge Ray Krause requesting hearing. (Ex. 14).
- Class 205 Exhibits (Ex. 15).
- Department's Amendment Withdrawing Proposed Rule Amendments to the Definitions of "Commercial Construction" and "Highway Construction." (Ex. 16).

28. Written public comments received during the hearing (Exs. 17-27), the Agency's responses (Exs. 28 and 29), and written comments received after the hearing (Exs. 30-103) were also marked and placed in the record.

### **Additional Notice**

29. Minnesota Statutes §§ 14.131 and 14.23, require that the SONAR contain a description of the Agency's efforts to provide additional notice to persons who may be affected by the proposed rules. The Agency submitted an additional notice plan to the Office of Administrative Hearings, which reviewed and approved it by letter dated August 17, 2010. In addition to notifying those persons on the Agency's rulemaking mailing list for these proposed rules, the Agency represented that it would mail or electronically mail the Notice of Hearing to:

- Members of the Prevailing Wage Work Group;
- Associated Builders and Contractors;
- Minnesota Building and Construction Trades Council;
- Association of General Contractors;
- Minnesota Electrical Association;
- Office of Labor Compliance, Minnesota Department of Transportation;
- Council of Construction & General Laborers;
- International Brotherhood of Teamsters;
- Christian Labor Association;
- Chairperson, Construction Law Section, Minnesota State Bar Assoc.;
- National Electrical Contractors Association;
- Joseph Vespa, Chair, Board of Electricity;
- Hennepin County Attorney's Office, Prevailing Wage Compliance;

List containing 1208 names of contractors and individuals who have contacted the Department of Transportation's Labor Compliance Office concerning prevailing wage issues;

The Agency's email list of persons interested in changes to prevailing wage rates;

Chairs of both the House and Senate transportation policy and transportation budget committees;

Association of Minnesota Counties; and

League of Minnesota Cities.

30. A copy of the proposed rules, SONAR, and the Notice of Hearing was also posted on the Department's rulemaking webpage.

31. The Minnesota Department of Transportation posted an announcement of the proposed rules and a link to the Notice of Hearing, SONAR and proposed rules on its website.

32. The Administrative Law Judge finds that the Department fulfilled its additional notice requirement.

### **Statutory Authorization**

33. Minn. Stat. § 175.171 gives the Department general authority to adopt rules relative to the exercise of its powers and duties.

34. In addition to its general rulemaking authority, the Department has specific statutory authority under Minn. Stat. §§ 177.21 to 177.44 to determine prevailing wage rates for all trades and occupations on state projects, and to investigate and define the classes of labor and prevailing wage rates for highway construction projects.<sup>32</sup> The proposed rule amendments concern both highway and heavy construction and commercial construction.<sup>33</sup>

35. Effective July 1, 2007, Minn. Stat. § 177.28 granted the Department general rulemaking authority to promulgate these rules. Minn. Stat. § 177.28, subd. 1, states:

The Commissioner may adopt rules, including definitions to terms, to carry out the purposes of sections 177.21 to 177.44, to prevent the circumvention or evasion of those sections, and to safeguard the minimum wage and overtime rates established by sections 177.24 and 177.25.

36. The Administrative Law Judge finds that the Department has the statutory authority to adopt the proposed rules. The issue whether the proposed rules are consistent with the governing statutes is addressed in the part by part analysis below.

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<sup>32</sup> See, Minn. Stat. §§ 177.43, subd. 4, and 177.44, subd. 3 and 4.

<sup>33</sup> SONAR at 5.

## Regulatory Analysis in the SONAR

37. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. The first factor requires:

**(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

The proposed rule amendments will affect contracting agencies, contractors, subcontractors and employees of contractors working on prevailing wage projects. According to the Department, all of the affected individuals will benefit from the proposed rule because it will give all affected classes a clearer picture of what types of work fall within the Labor classifications and the Special Crafts skilled trades listed in Minnesota Rule 5200.1100, subparts 2 and 5. The Department states that costs for all affected classes should be reduced because the clarification of work performed in these two classifications should reduce the number of complaints, investigations, and contested case hearings. The Department states that currently contractors may mistakenly underbid projects by using incorrect labor codes to classify employees. This rule will assist contractors in correctly classifying their workers, so that their initial bids are more accurate, reducing the chance of increased costs after the project is well underway or completed.<sup>34</sup>

According to the Department, its costs relating to implementation and enforcement of the rule amendments should be limited to publishing the rule and notifying stakeholders. The benefit of the rule is an expected drop in prevailing wage violations and contested case hearings. The Department states that there should be no increased costs to it or the Department of Transportation (the contracting and enforcing agencies) because contractors and subcontractors should be better able to assign the correct classifications and hours for workers in advance of the bids.

The Department states that those that may bear some costs with the adoption of the proposed rule amendments in a low bid competitive bidding system include some construction contractors and subcontractors who are currently not paying construction workers the correct prevailing wage, such as contractors or subcontractors who misclassify workers as Laborers when they are performing the work of one of the Special Crafts, such as carpentry. It is possible that these contractors and subcontractors will absorb some of the costs of the rule amendments. However, the Department notes that most workers are correctly classified under the current rules. As a result, the Department maintains any increased labor costs should be minimal. The Department states that the state, counties and cities may pay more for projects if increased labor costs are passed on. However, the Department asserts that any increase in labor costs should be minimal as none of the work described in the affected classifications is new or uncovered work. In addition, the Department states that any

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<sup>34</sup> SONAR at 7.

increase in labor costs is speculative because the annual prevailing wage survey process may either increase or decrease the certified prevailing wage rate for the type of work being performed.<sup>35</sup>

**(2) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.**

The Department states that its costs related to the implementation and enforcement of this rule should be minimal and limited to publishing the rule and notifying stakeholders. The Department anticipates little cost increase associated with data collection and some negligible increased mailing and staff costs. The Department does not anticipate increased costs for data entry. In addition, the Department expects to experience overall future cost savings in enforcement actions because of the clarification of master job classification issues by these rules.<sup>36</sup>

According to the Department, there should be only minimal additional administrative costs to the Department of Transportation since the rules do not increase the number of classifications available on projects. The Department maintains that the Department of Transportation should experience an overall cost savings in enforcement because the rules will clarify master job classification issues that otherwise would require case-by-case enforcement. Case-by-case enforcement can be very costly because of the staff time and costs associated with the administrative hearings, including costs for an Assistant Attorney General's services and the Administrative Law Judge's time.<sup>37</sup>

Finally, the Department states that the proposed rule amendments will not increase or decrease collection of revenue by the state in a way that can be estimated. The Department points out, however, that payment of prevailing wages is reflected in tax revenues collected from contractors and construction workers, and also affects state sales tax revenue.<sup>38</sup>

**(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

The Department states that there are no less costly or less intrusive methods for achieving the purpose of the prevailing wage law. The purpose of the rule amendments is to describe the master job classifications for Laborers and Special Crafts to reduce the level of misclassification of workers on prevailing wage projects. The Department states that the proposed amendments are necessary to enforce the prevailing wage law as the legislature intended. The Department asserts that the changes are not intrusive because the major stakeholders, contractors or others who participate in the prevailing

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<sup>35</sup> SONAR at 7.

<sup>36</sup> SONAR at 8.

<sup>37</sup> SONAR at 8.

<sup>38</sup> SONAR at 8.

wage survey will still need to determine under which master job classification to report each worker. The Department maintains that these proposed amendments should make that task easier by clarifying the classifications. The Department notes further that the prevailing wage rates for all the classes, including the descriptions of work performed, are available on the internet and can be downloaded easily at no cost.

**(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.**

The Department and MnDOT have the authority to enforce the prevailing wage statute by existing rules on a case-by-case basis. This method is not preferred because it is a more costly method of implementation for both the contracting agencies and the industry, and it does not affect all members of the industry uniformly. Also, case-by-case enforcement without clear descriptions of the nature of work, typical duties, and typical tools used for labor and special crafts classifications has proven to be difficult and confusing for contractors, employees and agencies.

Historically, MnDOT has attempted to provide contract guidelines through the bidding procedure. Due to the general applicability and future effect of these guidelines, the courts have in some cases ruled that these guidelines constituted unpromulgated rulemaking. While the guidelines may have been considered less intrusive, they were not considered a viable alternative because the Department is not a contracting agency (unlike MnDOT) and the resulting litigation and injunctions proved to be costly to all segments of the construction industry.<sup>39</sup>

**(5) The probable costs of complying with the proposed rules, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

The Department states that adding descriptions to the job classifications for Laborers and Special Crafts is not expected to have any significant impact on construction costs covered by the prevailing wage laws. The rule amendments do nothing to expand the coverage of the prevailing wage. The prevailing wage rates are based on the modal wages collected by the annual prevailing wage survey. The proposed new language is designed to clarify the existing master job classifications for Laborers and Special Crafts and to reduce classification disputes and confusion in bidding prevailing wage jobs.<sup>40</sup>

The Department states that it is possible that adding descriptions to the job classifications will result in some workers being paid slightly more money, while others are paid slightly less due to reclassifications of workers by various contractors. The Department notes further that it is unknown how much of the work in the affected

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<sup>39</sup> SONAR at 10.

<sup>40</sup> SONAR at 11.

classes is being performed by union workers and whether union wage rates are already being used for the work. In any event, the Department points out that if labor costs account for 30 percent of contract costs and if five percent of all labor hours are increased by five percent as a result of the rule amendments, contract costs would only increase by 0.08 percent. This would result in only a \$750 cost increase in a \$1 million dollar contract.<sup>41</sup> Moreover, construction wages, due to economic conditions and changes in union contracts, have been level or decreasing slightly in the past few years. For all of these reasons, the Department contends that the proposed rule amendments will have little or no impact on the overall costs to the parties.

**(6) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

According to the Department, if the rule amendments are not adopted, there will be more misclassification disputes, which will result in misclassified employees, increased investigation and litigation costs, and increased costs to contracting agencies in administration and enforcement of prevailing wages.

**(7) An assessment of any differences between the proposed rules and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.**

The Department identifies several differences between Minnesota's prevailing wage law and the federal Davis Bacon Act. First, Minnesota's prevailing wage rates are set by the arithmetic mode and the federal prevail wage rates are set by a weighted average method. Minnesota's process requires that at least two projects in an area report a class of labor to certify a prevailing wage rate and the federal process does not. The federal process allows for job specific wage surveys, which Minnesota does not. The federal process also allows for the creation of new prevailing wage classifications outside of the federal rulemaking process, where Minnesota requires the Department to create classifications by rulemaking. Finally, the federal process has thousands of job classifications and Minnesota has only a few hundred separate classifications. The Department contends that by keeping the number of job classifications down to a manageable number it can better avoid "missing" rates – those job classifications that lack up-to-date wage survey information.

The Administrative Law Judge finds that the Agency has adequately considered the cost of its proposed amendments and it has adequately considered the other factors in the regulatory analysis required by Minn. Stat. § 14.131.

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<sup>41</sup> SONAR at 12.

## **Performance Based Rules**

38. The Administrative Procedure Act<sup>42</sup> also requires an agency to describe in its SONAR how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.<sup>43</sup>

39. The Department states that the proposed rule amendments clarify the scope of the existing Laborer and Special Crafts classifications and allow an easily accessible list of definitions for laborers and skilled trades. Current reference documents are not easily accessible to the general public. The Department contends that the accessible and well-written definitions will assist both contractors and contracting agencies in the administration and enforcement of prevailing wage.<sup>44</sup>

40. The Department states that, in comparison to case by case enforcement, the proposed rule amendments promote superior achievement in meeting the prevailing wage law's regulatory objective of paying prevailing wages.<sup>45</sup>

41. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

## **Consultation with the Commissioner of Finance**

42. Under Minn. Stat. § 14.131, the Agency is also required to "consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

43. The Department consulted with MMB, and in a response dated August 10, 2010, MMB's Executive Budget Officer Ryan Baumtrog concluded that the proposed rules "will not impose a significant cost on local governments."<sup>46</sup>

44. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131.

## **Compliance Costs to Small Businesses and Cities**

45. Under Minn. Stat. § 14.127, state agencies must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any

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<sup>42</sup> Minn. Stat. § 14.131.

<sup>43</sup> Minn. Stat. § 14.002.

<sup>44</sup> SONAR at 13.

<sup>45</sup> SONAR at 13.

<sup>46</sup> Ex. 12B; SONAR at 15.

one statutory or home rule charter city that has less than ten full-time employees.”<sup>47</sup> Although this determination is not required to be included in the SONAR, the agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.<sup>48</sup>

46. In the SONAR, the Department states that it has determined that the cost of complying with the proposed rule amendments in the first year after the rules take effect will not exceed \$25,000 for any one small business or small city. The Department’s determination is based upon its assessment in the SONAR of the probable costs of complying with the proposed rules.<sup>49</sup> The Department asserts that the proposed rule is simply a clarification of the current rules and not an expansion of coverage. According to the Department, small businesses will simply use the new clarified classification rules to determine their labor costs when developing a bid for a project subject to the prevailing wage statute. The Department further states that small cities with less than 10 full-time employees are not generally part of state-aid highway programs and would not receive state funding for public works construction projects. However, if a small city were to receive state funding for a project, the cost of administering the application of the state prevailing wage statute on the project would be no different than is required under the current statutes and rules.<sup>50</sup>

47. The Administrative Law Judge concludes that the Department has met the requirements set forth in Minn. Stat. § 14.127 for determining whether the cost of complying with the proposed rules in the first year after the rules take effect, will exceed \$25,000 for any small business or small city.

## **Analysis of the Proposed Rules**

### **General**

48. This Report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise required close examination. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not address each comment or rule part. When rules are adequately supported by the SONAR or the agency’s oral or written comments, a detailed discussion of the proposed rules is unnecessary.

49. The Administrative Law Judge finds that the Agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. Further, the Administrative Law Judge finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

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<sup>47</sup> Minn. Stat. § 14.127, subd. 1.

<sup>48</sup> Minn. Stat. § 14.127, subd. 2.

<sup>49</sup> See SONAR at 9-11.

<sup>50</sup> SONAR at 16.

## Discussion of Proposed Rule

### Part by Part Analysis

#### 5200.1010 Definitions

50. The Department initially proposed amending the definition of “Commercial construction” in subpart 2 and “Highway and heavy construction” in subpart 3 as follows:

##### **Subp. 2. Commercial construction.**

“Commercial construction” means all building construction projects exclusive of residential construction. Commercial construction includes all site work, paving, sidewalks, parking ramps, landscaping, and covered work incidental to the commercial building contract. Demolition or site work preparatory to building construction is considered a part of commercial construction.

##### **Subp. 3. Highway and heavy construction.**

“Highway and heavy construction” means all construction projects which are similar in nature to those projects based upon bids as provided under Minnesota Statutes, section 161.32 for the construction or maintenance of highways or other public works and includes roads, highways, streets, airport runways, bridges, ~~power plants, dams, and utilities~~ rails, and railroads. Highway and heavy construction also includes: athletic fields, playgrounds, park shelters and trails, communication towers, power plants, filtration, water and solid waste treatment plants, dam, dikes, flood control projects, utilities, wind farms, solar collection farms, and landfills. Highway and heavy construction includes all work incidental to the construction of a power, water, or waste plant when the primary scope of work is the utility and the building is an enclosed shelter.

51. In a letter to the Administrative Law Judge dated September 29, 2010, Mr. Bierman announced that the Department was withdrawing its proposed amendments to the definitions of Commercial construction and Highway and heavy construction. Mr. Bierman explained that the Department added the proposed amendments to the definitions after its cost estimates were completed and reviewed by MMB. The Department subsequently concluded that the proposed amendments to the definitions may increase costs on state funded commercial construction projects. While the Department believes the terms need to be better defined, it decided to withdraw the proposed amendments until it could obtain more input from stakeholders.<sup>51</sup>

52. The Administrative Law Judge finds that the withdrawal of the proposed amendments is within the discretion of the Department and does not render the rules substantially different from what was proposed.

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<sup>51</sup> Ex. 16.

## 5200.1040 Classes of Labor

53. This rule part identifies the five general classes of labor into which fall all of the prevailing wage master job classifications: Laborers, Power equipment operators, Truck drivers, Special equipment, and Special crafts.

54. The Minnesota Department of Transportation (MnDOT) suggested in a written comment that the title of this rule part be amended to read: Classes of Labor For Survey Purposes to clarify that this rule part is used only for purposes of the wage survey responses. MnDOT states that it needs to be absolutely clear to readers of this rule that classifying workers by the job in which they have worked the greatest number of hours applies only to survey responses and not to determining the prevailing wage.<sup>52</sup>

55. In its response comments, the Department states only that it will consider MnDOT's suggestions regarding distinguishing the rules between those intended for survey purposes and those intended for use in determining job classifications at a future rulemaking.<sup>53</sup>

56. The Administrative Law Judge finds MnDOT's suggestion to be reasonable and recommends that the Department consider amending the title for clarity as suggested. However, it is within the Department's discretion to wait until a future rulemaking and its response to MnDOT's comment was not unreasonable.

57. Clause F of 5200.1040 lists the various sources the Department must consider in determining particular classes of labor. One of the sources the Department is required to consider is the United States Department of Labor Dictionary of Occupational Titles. The Dictionary of Occupational Titles, however, was last published in 1991 and is outdated. The United States Department of Labor has replaced the printed Dictionary with an online version called the "O\*NET Online" website.<sup>54</sup>

58. In light of this change, the Department has proposed amending clause F of 5200.1040 by deleting the reference to the Dictionary of Occupational Titles and replacing it with "O\*NET Online" Web site. As amended, clause F would read as follows:

F. In determining particular classes of labor, the department shall consider work classifications contained in collective bargaining agreements, apprenticeship agreements on file with the department, the ~~"United States Department of Labor Dictionary of Occupational Titles,"~~ "O\*NET OnLine" Web site, and customs and usage applicable to the construction industry.

59. The Department states that the change is reasonable and necessary because the Dictionary of Occupational Titles is outdated, out of print, and has been

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<sup>52</sup> Ex. 30 (Letter from Deputy Commissioner/Chief Engineer Khani Sahebjam dated September 28, 2010).

<sup>53</sup> Ex. 28 at 10.

<sup>54</sup> SONAR at 20.

replaced by the online website, which is updated more frequently and available to anyone with access to the internet.<sup>55</sup>

60. The Administrative Law Judge finds the Department's proposed amendment to be needed and reasonable.

61. MnDOT suggested in a written comment that the Department amend clause F to include a reference to the Master Job Classifications Definitions to ensure that they are the primary source for determining a job classification.<sup>56</sup> MnDOT recommends that clause F be amended to read as follows:

F. In determining particular classes of labor, the department shall first consider the work classifications contained in 5200.1100 Master Job Classification and 5200.1101 Job Classification Descriptions (Definition rules) and if no determination is rendered the department shall then consider the work classification information contained in collective bargaining agreements, apprenticeship agreements on file with the department, the "United States Department of Labor Dictionary of Occupational Titles," "O\*NET OnLine" Web site, and customs and usage applicable to the construction industry.

62. The Administrative Law Judge suggests that the Department consider adding a reference to 5200.1100 and 5200.1101 as sources to be considered when determining particular classes of labor. MnDOT's proposed language that these rule parts be the primary sources and that the other sources be considered by the Department only by default, if no determination results from applying Parts 5200.1100 and 5200.1101, is found to be unreasonable and not necessary.

### **5200.1100 Master Job Classifications**

63. The Department has proposed adding a Clause B to inform contractors that descriptions of the nature of work, typical duties, and typical tools used for the laborer codes and classifications of Part 5200.1100, subp. 2, and 5200.1100, subp. 5, are located at Part 5200.1101 and 5200.1102, respectively.<sup>57</sup>

64. The Department has proposed adding one new master job classification to the 308 existing prevailing wage master job classifications. The new job classification at subpart 2a will read as follows:

#### **Subp. 2a. Special equipment.**

Code No. 205 Pavement marking or removal equipment (one or two person operators); self-propelled, truck or trailer mounted units. The nature of the work performed by the operator of this equipment is the application of and removal of pavement marking. Normally paint is

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<sup>55</sup> SONAR at 20.

<sup>56</sup> Ex. 30.

<sup>57</sup> SONAR at 20.

applied, but tape is also used to mark these lines. The systems included on this equipment include skip line controllers, paint and bead monitoring, air pressure regulators, paint agitators and heaters, marking tape, water jet cutting, line marking grinders, vacuum collection, footage counters, mounted video camera, and laser alignment guiding tools.

65. Pavement marking equipment is used to place road striping such as lane dividers, no passing lines, and lane/shoulder boundary lines. Generally, this equipment has two operators, one to drive the equipment and monitor video of skip line distances, and a second person to operate the other systems mounted on the equipment for marking the pavement and removing pavement marking. Some units are driven by the same person operating the spray equipment.<sup>58</sup>

66. The bulk of this work is performed on highway and heavy projects, but the equipment is used in commercial construction too. Historically this work has been performed by MnDOT workers on state highways and city or county workers on local roads, not as part of the scope of work under the general contract for road construction. Over the years, however, the work has increasingly come to be performed, as part of the work under the construction contract, by the contractor's employees or, more typically, the employees of a subcontractor.<sup>59</sup>

67. In its SONAR, the Department states that it is necessary to create a separate classification for "pavement marking or removal equipment" because the bulk of the work is now done by employees of contractors or subcontractors as part of the construction contract. In addition, because this work is so unique and specialized it does not fall into an existing classification. According to the Department, a new classification is needed to cover the work and to provide certainty in bidding.<sup>60</sup>

68. Gregg Cavanagh submitted written comments on behalf of AAA Striping Service Co., a pavement marking contractor, regarding the new classification for pavement marking as well as the proposed language for painters and painters' typical duties. Mr. Cavanagh pointed out overlapping language that he thought would lead to confusion between operators of pavement marking equipment and painters who generally perform application of pavement markings by hand. Mr. Cavanagh recommended some changes to clarify the proposed language and the Department has proposed to amend the rules based on his suggestions.<sup>61</sup>

69. Based on Mr. Cavanagh's comments the Department has proposed amending Minn. Rule 5200.1100, Subp. 5, Code 715 Painters (line 12.24) as follows:

Code 715 Painters (including hand brushed, hand sprayed, and the hand taping of pavement markings).

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<sup>58</sup> SONAR at 21.

<sup>59</sup> SONAR at 21.

<sup>60</sup> SONAR at 21.

<sup>61</sup> Ex. 93.

70. The Department agrees with Mr. Cavanagh that the insertion is necessary to clarify that the painter classification includes the “hand” taping of paint pavement marking. Taping by pavement marking equipment is already covered by classification 205.<sup>62</sup>

71. Similarly, the Department has proposed amending Minn. Rule 5200.1102, Subp. 15B (Code 715 Painters Typical duties), by inserting the word “hand” before the word “taping” and deleting the phrase “striping via trucks.” The amended provision would read as follows:

**Subp. 15. Code No. 715, Painters.**

...

**B. Typical duties:**

...

(9) Pavement marking including hand-brushed, hand-sprayed, and the hand taping of pavement markings, ~~striping via trucks~~, and the operation of compressors for purposes of marking pavement hand spraying for pavement marking.

72. The Department further proposed amending item 2 of the typical tools used by painters (line 65.8) by deleting the phrase “striping machines and trucks.”

73. The Department states that the above amendments will clarify that the Painter classification includes “hand” taping of paint pavement marking. The Department states also that deleting the reference to applying or removing paint via striping machines or trucks is necessary to avoid conflicting with the newly created Class 205, Pavement marking or removal equipment.<sup>63</sup>

74. The Administrative Law Judge finds that the Department’s proposed amendments are needed and reasonable to reduce confusion regarding the typical duties and tools of painters and pavement marking or removal equipment. The proposed amendments do not render the rule substantially different from what was originally proposed.

75. The Administrative Law Judge recommends that the Department consider inserting the word “marking” before the phrase “removal equipment” in the position title for Code 205 at line 5.2. Otherwise, the position title implies it governs equipment that removes pavement, not markings. The Administrative Law Judge also recommends that the Department delete the word “included” after the word “systems” in the fourth sentence because it is redundant. When “included” is deleted, the sentence would read: “The systems on this equipment include skip line controllers, ...”

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<sup>62</sup> Ex. 29 at 4 (Department’s October 27, 2010 response).

<sup>63</sup> Ex. 29 at 4-5 (Department’s October 27, 2010, response to comments).

### **5200.1101 Job Classification Descriptions; Laborers**

76. This rule part provides job descriptions of the laborer classifications. Each laborer classification appears in a separate subpart with three primary clauses. Clause A describes the nature of the work. Clause B describes the typical duties involved and Clause C describes the typical tools used in performing the work tasks.<sup>64</sup>

77. When drafting the classifications, the Department considered the sources required by rule, input from its prevailing wage work group, and the Laborers Agreement between the Laborers District Council of Minnesota and North Dakota and signatory contractors. The Laborers Agreement includes special provisions for: Laborers Local 132 and Southwestern Minnesota Building Contractors, Laborers Local 405 and Southeastern Building Contractors, Laborers Local 563 and St. Cloud Area Building Contractors, Laborers Local 1091 and Twin Ports Contractors Association, Laborers Local 1097 and Northern Minnesota Contractors Association, and the Laborers Agreement between the Metropolitan Builders Division of the Associated General Contractors of Minnesota and Minnesota Concrete and Masonry Contractors Association and Laborers District Council of Minnesota and North Dakota on behalf of its affiliated local unions.<sup>65</sup>

78. The Department states in its SONAR that the descriptions are necessary to reduce the misclassification of workers on prevailing wage projects. According to the Department, the proposed classifications are reasonable because they clarify the general tasks and work duties of the various laborers.<sup>66</sup>

79. The Department has proposed adding twelve laborer classifications: Laborer, common (general labor work); Laborer, skilled (assisting skilled craft journeyman); Laborer, landscaping (gardener, sod layer, and nursery); Flag person; Watch person; Blaster; Pipelayer (water, sewer, and gas); Tunnel miner; Underground and open ditch laborer (eight feet below starting grade level); Survey field technician; Traffic control person (temporary signage); and Quality control tester.<sup>67</sup>

### **5200.1102 Job Classification Descriptions; Special Crafts**

80. This rule part provides job descriptions of the special crafts classifications. Each classification includes a description of the nature of the work, the typical duties, and the typical tools used for each of the thirty special crafts classifications. The Department reviewed several sources of information to develop descriptions for the special craft classifications including, O\*Net's Summary Reports; Wisconsin's Dictionary of Occupational Classifications and Work Descriptions; Kentucky's Definitions and Descriptions of Construction Trades and Related Workers; Missouri's Department of

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<sup>64</sup> SONAR at 23-25.

<sup>65</sup> SONAR at 24.

<sup>66</sup> SONAR at 24.

<sup>67</sup> SONAR at 23-28.

Labor and Industrial Relations, Labor Standards Division, Prevailing Wage Law Rules; and Minnesota's Apprenticeship Standards.<sup>68</sup>

81. The Department has proposed adding thirty special craft classifications: Heating and frost insulators; Boilermakers; Bricklayers; Carpenters; Carpet layers (linoleum); Cement masons; Electricians; Elevator constructors; Glaziers; Lathers; Ground person; Ironworkers; Lineman; Millwright; Painters; Piledriver; Pipefitters – steamfitters; Plasterers; Plumbers; Roofer/waterproofer; Sheet metal workers; Sprinkler fitters; Terrazzo workers; Tile setters; Tile finishers; Drywall taper; Wiring system technician - communications system technician; Wiring system installer - communication system installer; Asbestos abatement or environmental remediation worker; and sign erector.

82. The Department states in its SONAR that the descriptions are necessary to reduce the misclassification of workers on prevailing wage projects. According to the Department, the proposed classifications are reasonable because they clarify the general tasks and work duties of these special crafts.<sup>69</sup>

83. The majority of the commentators expressed support for the proposed rules and praised the Department's efforts to define and clarify the job duties for the various classifications.<sup>70</sup> These commentators stated that the proposed rules reflect how work is performed in the Minnesota construction industry and provide much needed clarification to contractors, workers and agencies regarding Prevailing Wage requirements.<sup>71</sup>

84. There were, however, some general criticisms regarding the proposed Common Laborer and Skilled Laborer definitions, as well as some specific criticisms regarding the Special Crafts definitions. These criticisms will be addressed below.

### **Material Handling by Common and Skilled Laborers**

85. Several commentators complained that the Department's proposed descriptions for common laborer (Code 101) and skilled laborer (Code 102) are too narrow.<sup>72</sup> These commentators criticized the fact that the proposed definitions focus on the types of materials used to classify work.<sup>73</sup> Specifically, Minn. Rule 5200.1101, Subp. 1B(1) provides that Common Laborers may load, unload, stockpile, and stage construction materials *unless* the materials are included in a skilled trade definition. These commentators assert that common or skilled laborers should be permitted to load, unload, or handle all types of material regardless of whether it is wood, iron, electrical or any other material used by a craftsman. According to these comments, a

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<sup>68</sup> SONAR at 28-39.

<sup>69</sup> SONAR at 28-39.

<sup>70</sup> Exs. 3, 39 – 42, 44, 45, 47, 49, 51-53, 55, 56, 58-62, 64, 66, 67, 75, 80-82, 84, 89, 94, 95, 97, 98 and 100.

<sup>71</sup> Id.

<sup>72</sup> Exs. 31, 33, 34, 37, 54, 57, 68, 71, 72, 85, 92 and 103.

<sup>73</sup> Id.

contractor should not, for example, have to classify a worker as a journeyman plumber simply to have that worker stockpile PVC pipe at a work site.<sup>74</sup>

86. The Department states that the exception, “unless included in a skilled trade,” reflects the customs of the construction industry that general laborers do not typically move or handle specialized equipment.<sup>75</sup> According to the Department, it is customary for master tradesmen to haul their own sensitive, specialized equipment. The Department states, for example, that electricians typically carry their own solar panels; not general laborers. The Department asserts that these electricians should not be transformed into general laborers (and paid less than the prevailing wage for electricians) simply because they are carrying equipment.<sup>76</sup>

87. At the hearing, Phil Raines, on behalf of the Minnesota Chapter of Associated Builders and Contractors (MN-ABC), stated that general laborers typically lug, tote and move all sorts of materials around a job site - regardless of the type of material involved. Mr. Raines asserts that if a laborer moves wood or electrical equipment, he should not be deemed to be a carpenter or electrician for prevailing wage purposes.<sup>77</sup>

88. In a written comment also submitted on behalf of MN-ABC, Michael McCain, of the Seaton, Beck & Peters law firm, objected to the clause “unless included in a skilled trade.” Mr. McCain stated that the proposed common laborer definition should be expanded so that common laborers are able to handle, move and transport any type of material (i.e., wood, iron, wall panels, equipment, tools, etc.). According to Mr. McCain, common laborers on non-union job sites load, unload, handle and transport material for skilled craftsmen regardless of the type of material. Mr. McCain notes that handling or transporting material involves no skill – just heavy lifting and an ability to follow directions. Mr. McCain objected specifically to the Ironworker classification (Code 712), which classifies the unloading and carrying of rebar, wire mesh, and expanded metal as Ironworker duties thus excluding the handling of these materials from general laborer duties. Likewise, Mr. McCain objected to the Carpenter classification (Code 704), which classifies the handling of door frames, wood and hollow metal doors as Carpenter and not general laborer work. Mr. McCain asserts that if the proposed definition of common laborer is not modified to permit the handling of any materials, the proposed rules will ignore common practices in the construction industry on non-union job sites.<sup>78</sup>

89. In a similar vein, Susan Bowman of Comstock Construction, Inc., recommended that the Department amend the rules to specifically provide for assistants or helpers to special craft persons so that the common and skilled laborers may handle all material up to the point of installation.<sup>79</sup> Ms. Bowman echoed Mr. McCain’s comment

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<sup>74</sup> Ex. 103.

<sup>75</sup> Ex. 28 at 9.

<sup>76</sup> Ex. 28 at 9.

<sup>77</sup> Tr. at 115-117; Ex. 71. See also, Ex. 36 (Frederick Plass of Plass Inc.)

<sup>78</sup> Ex. 68 at 5-6. See also, Exs. 72 and 103.

<sup>79</sup> Ex. 78.

that carrying rebar takes no special skills and should not transform a general laborer into an individual who would receive Ironworker wages.<sup>80</sup>

90. Other commentators, however, asserted that the call to expand the definition for common laborer to allow handling of any material would cause confusion and significant enforcement problems, and was simply a veiled attempt to reduce prevailing wage rates for skilled craftsmen.<sup>81</sup>

91. Harry Melander, President of the Minnesota State Building and Construction Trades Council (Council), submitted a written comment on behalf of the Council's affiliated unions. The Council contends that broadening the definition of skilled laborer so that they may generally "assist" all craft workers would result in substituting clearly defined classifications for vague language and would cause confusion and hinder enforcement. In addition, the Council maintains that expanding the definition of common and skilled laborer to permit the handling of all types of material raises safety concerns. According to the Council, electrical and other sensitive or fragile equipment should only be handled by persons knowledgeable of the hazards associated with the material. The Council believes that as written the proposed descriptions for common laborer and skilled laborer encompass the typical duties that have historically been performed by construction craft laborers as codified by Minnesota collective bargaining agreements, apprenticeship programs, and industry practice.<sup>82</sup>

92. The Department maintains that limiting general laborers to handling only material not included in skilled trade definitions reflects industry practices regarding which materials are generally handled by special craftsmen. The Department notes, for example, that certain electrical components are handled by electricians because of their delicacy, the cost of their replacement, and the risk of shock that they can pose. The Department states that the proposed rules are reasonable because they reflect the practice that general/common laborers handle a wide variety of material except for specific material handled by special craftsmen. In addition, the Department asserts that broadening the definition for Laborer to permit more expansive material handling duties would cause overlap with the Special Crafts classifications and make it difficult for contractors and the Department to determine the worker's proper classification.<sup>83</sup>

93. The Administrative Law Judge finds the proposed classification descriptions to be needed and reasonable and the limitation placed on common laborers to handle only material not included in a skilled trade to be a rational choice by the Department.

### **Conflict with Electrical Code**

94. James Freichels, on behalf of Communication, Control, Alarm, Remote, Signaling Association (CCARSA), and Russ Ernst, on behalf of the Minnesota

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<sup>80</sup> Id. at 4.

<sup>81</sup> Exs. 82 and 83.

<sup>82</sup> Ex. 75.

<sup>83</sup> Ex. 29 at 1-2.

Electronic Security & Technology Association, testified at the hearing regarding the proposed definitions for Code 727 (Wiring system technician; communications system technician) and Code 728 (Wiring system installer; communications system installer). Mr. Freichels and Mr. Ernst asserted that the proposed definitions are inconsistent with the Electrical Act,<sup>84</sup> which defines the scope of work permitted for licensed electricians and registered unlicensed persons working under the direct supervision of licensed electricians. These commentators believe the proposed classification definitions for wiring system installer and technician are narrower than the work parameters statutorily established for electrical licensing.<sup>85</sup> They maintain that the statutory language regulating the duties of power limited technicians and registered unlicensed individuals should be used in the proposed rules, or the rules will conflict with the statute.<sup>86</sup>

95. In response to these comments, the Department states that there is no requirement that the prevailing wage rules track state licensing provisions. The Department points out that the Prevailing Wage law is meant to ensure that workers are paid at least the prevailing wage for the same or most similar occupation. Licensing statutes, on the other hand, are meant to define an occupation's scope of work and to protect public safety. Contractors are required to comply with both licensing statutes and the prevailing wage law.<sup>87</sup>

96. The Department does propose, however, to amend the two classifications in response to some of the concerns raised by the commentators. The proposed amendments change the titles of the two classifications by replacing the phrase "communications system" with "technology circuits or systems." Mr. Ernst was concerned that the phrase "communications system" might imply that the two classes were limited to only communications, which is not the case.<sup>88</sup>

97. The Department also proposes to add the phrase "copper tester, fiber testers," after "Typical tools used:" for Code 727.<sup>89</sup> And, in the list of "Typical duties" for Code 728, the Department proposes to delete the phrase "Work done by installers does not require licensing" and insert: "Pulling, splicing, and terminating cable connecting to the dead end."<sup>90</sup>

98. The Department maintains that these proposed amendments will clarify and more accurately reflect the nature of the work for these two classes.

99. Phil Raines proposed that the requirement of a license be added to the definition of "Electrician" in Minnesota Rule 5200.1102, subp. 7 (Code 707). The Department rejected this suggestion because the Electrical Act itself allows for registered unlicensed electrical workers to perform all the work of an electrician when

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<sup>84</sup> Minn. Stat. § 326B.31 – 326B.399.

<sup>85</sup> Ex. 18.

<sup>86</sup> Ex. 38.

<sup>87</sup> Ex. 28.

<sup>88</sup> Ex. 50.

<sup>89</sup> 5200.1102, Subp. 27C.

<sup>90</sup> 5200.1102, Subp. 28B(3).

under direct supervision of a licensed electrician. The Department also rejected the suggestion that registered unlicensed electrical workers be added to the skilled laborer classification as assisting licensed electricians.<sup>91</sup> The Department emphasizes that the prevailing wage law focuses on compensating workers based on the tasks they perform – not on the licenses they hold. The Department maintains that it is not feasible for it to measure an individual worker’s level of skill or experience when determining prevailing wage rates if the job tasks meet the definitions of both special crafts worker and skilled laborer. The Department contends such an overlap in tasks would increase confusion, increase misclassifications, and make enforcement of prevailing wage law more difficult.<sup>92</sup>

100. The Administrative Law Judge finds the Department’s amendments to Codes 727 and 728 to be reasonable and needed. The amendments do not render the rule substantially different from what was originally proposed. In addition, the Administrative Law Judge finds the Department’s decision not to amend Code 707 to require licensure and not to add registered unlicensed electrical workers to the skilled laborer classification to be within its discretion and a rational regulatory choice. The overwhelming message from the commentators is that clarity is needed in classifying skilled laborers and their corresponding special crafts persons. The Department hopes its attempts to eliminate definitional overlap in job classifications will bring greater clarity to contractors, workers and agencies regarding prevailing wage determinations.

### **Sheet Metal Roofs**

101. Kent Schwickert requested that the description for Roofers (Code 720)<sup>93</sup> be amended to permit Roofers to install sheet metal roofs in addition to other roofing material.<sup>94</sup> According to Mr. Schwickert, it is customary in today’s marketplace for roofers, rather than sheet metal workers, to install metal roofs. Mr. Schwickert also suggested adding “vegetative materials” to the list of roofing materials installed by roofers.<sup>95</sup>

102. John Quarnstrom, representing SMARCA, a roofing and sheet metal contractor trade association, stated that the predominant practice in Minnesota was for contractors to use sheet metal workers to install metal roofing, flashing, curbs and other metal work associated with roof construction.<sup>96</sup> Mr. Quarnstrom pointed out that construction of sheet metal roofs is part of the work processes taught in sheet metal apprentice programs, and it was not taught as part of the work processes for roofing apprentices.

103. The Department declined to change the description of the “Roofer” classification to permit installation of sheet metal roofs. The Department has proposed,

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<sup>91</sup> Ex. 27.

<sup>92</sup> Ex. 28. See also Ex. 99 (MnDOT’s comments dated October 27, 2010.)

<sup>93</sup> Minn. R. 5200.1102, Subp. 20.

<sup>94</sup> Ex. 31.

<sup>95</sup> Id.

<sup>96</sup> Ex. 83.

however, to add “vegetative materials” to the list of roofing materials installed by roofers as suggested by Mr. Schwickert. The Department notes that green roof/garden roof systems are being installed on public projects and use of vegetative materials on roofs is being taught to apprentice roofers and included in Apprenticeship agreements filed with the Department.<sup>97</sup>

104. The Administrative Law Judge finds the proposed amendment adding “vegetative materials” to the list of roofing materials in Code 720 to be needed and reasonable and does not render the rule substantially different from what was originally proposed. The Administrative Law Judge also finds that the Department’s decision not to change the description of “Roofer” to permit installation of sheet metal roofs to be a rational choice and within the agency’s discretion.

### **Tuckpointer classification**

105. About five commentators requested that the Department amend the proposed rules to add a classification under Skilled Laborer for tuckpointers. Tammy Merth, Vice-President of Mercon Corporation, stated that her company employs tuckpointers to repair historical masonry buildings. She maintains that it is unreasonable and unfair for Mercon to have to use another classification, such as “bricklayer,” to describe the work of tuckpointers. According to Ms. Merth, and other commentators, tuckpointing is a distinct craft that involves restoring brick and stone masonry mortar joints on older buildings. Tuckpointers have a different scope of work from bricklaying and receive different wages.<sup>98</sup>

106. Harry Melander, of the Minnesota Building and Construction Trades Council, asserted that the addition of a tuckpointer classification was unnecessary and unreasonable. Mr. Melander maintains that the rule amendments as proposed accurately reflect practices found in the masonry industry in Minnesota and that the Bricklayers classification (Code 703) already includes the work described as tuckpointing. According to Mr. Melander, the repairing of mortar joints and brick is work that is historically performed by Bricklayers, and the work is encompassed under a single collective bargaining agreement and the typical tools are the same.<sup>99</sup>

107. In response to these comments, the Department states that, with the exception of the pavement marking classification, its purpose with this rulemaking was to describe the classes already present in the rules and not to undertake adding additional classifications.<sup>100</sup> The Department maintains further that because it has not proposed a classification for tuckpointers, the comments urging it to do so are outside of the scope of this rulemaking.

108. The Administrative Law Judge finds the Department’s decision not to develop a new classification for “Tuckpointers” is reasonable and within the

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<sup>97</sup> Ex. 29.

<sup>98</sup> Ex. 74. See also, Exs. 65, 70, 77 and 86.

<sup>99</sup> Ex. 75.

<sup>100</sup> Ex. 29.

Department's discretion. Because the Department did not propose a new classification for tuckpointing, the comments urging it to do so are outside the scope of review of the Administrative Law Judge.

### **Overtime after 8 hours in a day**

109. The Department received two comments objecting to the requirement that employers pay workers overtime after 8 hours of work in any day rather than the more common industry practice of paying overtime only after 40 hours of work in a week.<sup>101</sup> The commentators requested that the Department amend the rules to require overtime on prevailing wage projects only for hours worked in excess of 40 per week.

110. As the Department pointed out in its response, Minn. Stat. § 177.43 provides that "prevailing hours of labor may not be more than eight hours per day or more than 40 hours per week." Because the eight hour day requirement is in statute, it cannot be changed by amending the rules.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Department gave proper notice of the hearing in this matter.
2. The Department has fulfilled the procedural requirements of Minnesota Statutes § 14.14 and all other procedural requirements of law or rule.
3. The Department has demonstrated its statutory authority to adopt the proposed rule and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii).
4. The Department has documented the need for and reasonableness of its proposed rule with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii).
5. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

Based on the Conclusions, the Administrative Law Judge makes the following:

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<sup>101</sup> Exs. 87 and 88.

## RECOMMENDATION

**IT IS RECOMMENDED** that the proposed rules be adopted, as finally proposed.

Dated: November 24, 2010

/s/ Richard C. Luis  
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RICHARD C. LUIS  
Administrative Law Judge

Transcript Prepared.

## NOTICE

The Agency must make this Report available for review by anyone who wishes to review it for at least five working days before the Agency takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Agency makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

When the rule is filed with the Secretary of State by the Office of Administrative Hearings, the Agency must give notice to all persons who requested that they be informed of the filing.