

# **PREVAILING WAGE ADVISORY COMMITTEE**

## Meeting Minutes

Wednesday, November 14, 2007

Portland State Office Building  
Room 1A  
800 NE Oregon Street  
Portland, OR

### **Members Present**

Jessica Adamson  
Daniel Bonham  
John Killin  
Norm Malbin  
Shawn Miller  
John Mohlis  
Patrick O'Brien  
Pete Savage  
Bob Shiprack

### **Members Absent**

Mark Holliday

### **Staff Present**

Dan Gardner  
Christie Hammond  
Lois Banahene  
Mike Kern  
Susan Wooley

Commissioner Dan Gardner called the meeting to order at 1:30 PM. He announced that Sonny Chickering had resigned from the committee and he would be naming a replacement.

### **Minutes of Last Meeting of September 13, 2007**

The committee unanimously approved the draft minutes of the September 13, 2007 meeting as written.

### **Quarterly Statistical Reports**

Staff presented several quarterly statistical reports, including a summary of PWR enforcement activity and a summary of the PWR education seminars conducted biennium-to-date. Staff noted that that the predetermination process now provides the opportunity to contest the agency's decision and request a hearing.

### **2007 Construction Industry Survey Data**

Denise Voll from the Oregon Employment Department informed the committee that the 2007 Construction Industry Survey had gone very well, and that there had been an 88% return rate for this survey. She explained to committee members how some of the raw survey data provided to the committee members was suppressed for confidentiality in those trades and regions where limited data was collected.

Committee member Bob Shiprack asked whether both heavy/highway and building construction had been surveyed.

Commissioner Gardner responded that BOLI has been surveying both heavy/highway and building for years and that the information in the wage rate data reflected a combination of both the heavy/highway and building survey data.

Committee members Norm Malbin and John Killin questioned the number of workers reported in the Limited Energy Electricians A and B classifications in the survey data, indicating that they believed the actual number of workers reported should be a much higher number than reflected in the data.

Ms. Voll responded that companies that perform routine maintenance and governmental agencies are not surveyed, however, she agreed to compare this year's data to last year's.

### **Proposed Administrative Rules**

Ms. Hammond presented a proposed rule addressing circumstances and conditions under which the commissioner may authorize the use of multiple wage determinations on projects comprised of more than one type of construction (mixed commercial and residential projects for example).

Ms. Hammond also presented proposed rules implementing the provisions of HB 2140 (effective July 1, 2007), and reminded the committee that BOLI had already adopted temporary rules implementing this legislation. She stated that the proposed rules would make permanent the temporary rules, with only some non-substantive changes to the language. She noted that the rules also implemented the provisions of HB 2021, which goes into effect on January 1, 2008.

Ms. Hammond briefly explained some of the provisions of HB 2021, including the provision that requires BOLI to enforce certain federal Davis-Bacon Act guidelines on projects subject to both state and federal law. She pointed out that the legislation shifted responsibility for the payment of prevailing wage rate fees from contractors to public agencies.

Committee member Jessica Adamson said that she saw a problem with the new rule requiring the agency to pay the prevailing wage fee on public works projects; specifically noting the section of the rule which requires public agencies to pay the fee at the time the agency enters into the *public works contract*.

Ms. Hammond agreed that some of the existing provisions of the PWR law were difficult to apply to projects newly-covered under the law, and pointed out that the "*Special Circumstances*" section of the rules attempts to address the fee issue in those situations in which an agency does not enter into a public works contract.

Ms. Hammond gave two specific examples of public/private projects where no public agency awards a contract. She first gave the example where the required fee must be paid by the agency or agencies that will occupy or use the completed project at the time the agency or agencies

enter(s) into an agreement to occupy or use the completed project. The second example given was a situation in which the required fee is to be paid by the public agency or agencies providing \$750,000 or more of public funds for the project at the time the public agency or agencies commit(s) to the provision of funds for the project. In these types of cases there will be no public contract per se, but the agency is still required to notify BOLI of the public works project and pay a fee.

Committee member Daniel Bonham asked what was meant by the term “adequate controls” in the context that all workers are paid in accordance with the applicable wage rates on those projects with multiple wage rate determinations. He also asked what he should be looking for as compliance with this particular provision, as far as presenting violations to BOLI.

Commissioner Gardner replied that he would have to look at this issue on a case by case basis. He suggested to the committee that along with the request to use multiple wage determinations on a project, he would like to have in writing the estimated number of hours a specific craft will spend on each of the residential and commercial parts of the project.

Ms. Hammond suggested that instructions be given to workers and supervisors that they should be monitoring the hours spent on each separate part of the project. She noted that some of the language used in the rule was taken from the federal guidelines.

Committee member Jessica Adamson questioned the ability to accurately estimate numbers of hours by craft early in the process. She provided an example of where the hours submitted to the bureau could be submitted even before the design phase is completed, and noted that in that case, there would be no way for an accurate measurement of either the residential or commercial hours. Ms. Adamson said she would like to see some leniency on how the bureau handles the reporting of the number of hours, yet she also thought it was important to keep a close eye on this so it is not abused.

Commissioner Gardner suggested that possibly guidelines could be developed requiring agencies to provide the bureau with specific information at certain phases of the project, and that the failure to do so could result in the bureau reversing its approval for multiple wage determinations to be used.

Christie Hammond pointed out that certified payroll records are already required to be submitted on a monthly basis and these records reflect the number hours worked at each applicable wage classification.

### **Draft Revised Occupational Definitions**

Ms. Hammond stated that she had not received comments from committee members regarding the proposed draft occupational definitions.

Committee member Shawn Miller responded that he believed he had submitted comments relating to the proposed Electrical Material Handler classification. Christie Hammond said she thought the issue relating to the Electrical Material Handler classification had been resolved.

Committee member John Killin explained that he disagreed with the bureau's position regarding the Electrical Material Handler definition, but that he understood he had been overruled. Mr. Killin explained that it was his understanding that although it was not within the classification for Electrical Material Handlers to assemble products on worksites, it is a common practice for these workers to distribute products to the journeymen. He expressed concern with language in the definition that precludes Electrical Material Handlers from performing a variety of tasks, including operating equipment. He went on to say that he found some of the language in the Electrical Material Handler definition strange in comparison to other definitions, in that it listed four or five specific duties that Electrical Material Handlers could not perform. Mr. Killin said he agreed that Electrical Material Handlers could not perform certain duties such as laying out equipment, but thought that the definition dwelt more on what the workers could not do than did the definitions for other trades.

Norman Malbin asked Mr. Killin if he agreed that Electrical Material Handlers were precluded from performing specific duties, then to what in the definition was he specifically objecting. Mr. Malbin said he believed the reason for having the language precluding the Electrical Material Handlers from performing specific tasks in the definition was to prevent the abuse of the classification.

Commissioner Gardner stated his opinion that allowing Electrical Material Handlers to distribute products on a project would be taking work away from apprentices who should be performing that work.

John Killin said he thought that on larger projects, it was more efficient to use a Material Handler in place of a low term apprentice. He also said that his contractors believed that low term apprentices should be learning how to pull wire, not distributing products. He also commented that because the workforce is so tight, until more journeymen are available, he wouldn't be able to get more apprentices on projects due to ratio restrictions.

Committee member Patrick O'Brien stated that he sees that contractors are trying to be more efficient with their journeymen hours.

Committee member Pete Savage said he believed the Electrical Material Handler classification infringed on apprentice-grade work, and that the duties of the classification should not be expanded.

Also discussed was the inclusion of HVAC testing, adjusting and balancing (TAB) within the proposed Sheet Metal Worker definition. Committee member Shawn Miller said he would like to see TAB duties removed from the revised definition, stating that there should be some form of resolution in the TAB committee before making the decision on whether or not to add the language.

Commissioner Gardner explained that the proposed definition clarified BOLI's current position regarding the classification of this type of work, and noted that he had charged the TAB subcommittee with coming to some sort of resolution for *future* work.

Shawn Miller stated his opinion that adding the TAB language to the Sheet Metal Worker definition at this time could circumvent the work of the TAB committee. Jessica Adamson said she shared Mr. Miller's opinion, adding that the inclusion of TAB work in the Sheet Metal definition appears to presuppose an outcome that could send mixed signals to the committee charged with coming to some type of resolution on the TAB issue.

Commissioner Gardner responded by saying if the committee is able to come to a consensus regarding the issue, he would be glad to adopt it. He expressed his concern that not including TAB work in a published definition would be a great disservice to contractors who would not know how to classify the work, especially considering the bureau's current position. Commissioner Gardner also commented that failing to classify TAB work in the published definitions could weaken any future litigation on this particular issue.

Committee member John Mohlis asked about the TAB subcommittee's projected timeline. Norman Malbin responded that the subcommittee had met twice, and he anticipated there would be at least one more meeting and a fieldtrip scheduled. He said that the subcommittee would like to finalize its findings by the end of January, 2008. Jessica Adamson said she believed that the committee would be able to have a relatively fair assessment of whether or not it would be able to come to some type of agreement by the end of its next meeting.

Patrick O'Brien apologized for missing the previous PWR Advisory Committee meeting where the TAB issue was originally discussed in detail and asked how TAB became a PWR issue.

Commissioner Gardner explained that the TAB issue came out of a PWR investigation. He stated that the issue basically came down to whether the duties of HVAC testing, adjusting and balancing were technical or manual in nature, and if manual, what the correct classification for the work should be. Commissioner Gardner stated that he had appointed a subcommittee headed by Norm Malbin to review the issue.

Mr. O'Brien asked whether BOLI would draw the line with testing and balancing of these systems, or would the agency also be considering other technical/professional testers. Mr. O'Brien said he did not understand how BOLI could have a classification for this type of tester without looking at other types of testers/balancers.

Commissioner Gardner again explained that the TAB issue arose from a complaint received and that he was not interested in looking at other testing professions, unless a complaint was received that required BOLI to look at the issue. He also mentioned that one of the suggestions that may come out of the TAB committee may be to independently survey testing and balancing contractors; giving testing and balancing its own classification.

Prevailing Wage Advisory Committee Meeting Minutes  
November 14, 2007

Norman Malbin reported that the committee was discussing to what extent the activities being performed on the job were manual and physical in nature. In fact, he pointed out, the language in the PWR rule that defines a “worker” reflects this language. He also noted that the committee had asked the question whether engineers would be covered under the PWR law and that what it boils down is how manual or physical labor is defined.

Patrick O’Brien stated that he could identify three or four other testing procedures that would probably meet the definition of manual or physical in nature. He provided examples of work, including concrete core sample testing, which he believed would meet the definition of “worker” under the law.

Pete Savage said that he believed the difference was that there are no general contractors performing their own concrete testing.

Norman Malbin stated that the question came up at a committee meeting as to what exactly they were charged with and that he believed it was to look at whether TAB work was covered under the PWR law.

Commissioner Gardner clarified that the purpose of the committee was not to review or consider the current TAB case, but to look at the issue prospectively.

On another note concerning the proposed definitions, Jessica Adamson asked whether the issue concerning the erection of scaffolding between the Carpenters and Laborers had been resolved. She expressed concern that the changes to the classification of scaffolding erection would likely result in more confusion and possibly more claims.

Patrick O’Brien stated that it was his experience that each craft erected its own scaffolding.

Commissioner Gardner responded that to the best of his knowledge, the multi-trade scaffolding issue had been worked out between the Carpenters and the Laborers. He also pointed out that the purpose of revising the definitions was to make them more descriptive, which he hoped would result in fewer misclassifications.

Jessica stated that her only concern relating to the erection of scaffolding was that each of the crafts involved had signed off on the changes.

Commissioner Gardner replied that the only definition that was not yet resolved was the Bridge Carpenter and that a resolution regarding this definition would be coming soon.

Commissioner Gardner noted that he was participating in a work group that was looking at legislation designed to help reduce the misclassification of workers/employees as independent contractors; possibly requiring the licensing of independent contractors. He pointed out that he was only bringing this issue to light in order to start the discussion and that he would like to see less misclassification in construction work.

Prevailing Wage Advisory Committee Meeting Minutes  
November 14, 2007

It was noted that Bruce Warner, Director of the Portland Development Commission, was on the meeting agenda to discuss below-market loan interest rates, but because Mr. Warner was not present, Commissioner Gardner said this topic would be brought up at a future meeting.

The meeting was adjourned at approximately 3:00 PM.