

**IN THE SUPREME COURT OF OHIO**

GENE'S REFRIGERATION, HEATING &  
AIR CONDITIONING, INC.

Appellant,

v.

SHEET METAL WORKERS'  
INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 33,

Appellee.

Case No. 2008-0780

On Appeal from the Medina County Court  
of Appeals, Ninth Appellate District  
Case No. 06CA0104-M

---

**MERIT BRIEF OF APPELLANT  
GENE'S REFRIGERATION, HEATING & AIR CONDITIONING, INC.**

---

Alan G. Ross (0011478), (COUNSEL OF RECORD)  
Nick A. Nykulak (0075961)  
Ross, Brittain & Schonberg Co., L.P.A.  
6480 Rockside Woods Blvd. South, Suite 350  
Cleveland, Ohio 44131  
Tel: 216-447-1551 / Fax: (216) 447-1554  
E-mail: alanr@rbslaw.com

COUNSEL FOR APPELLANT  
GENE'S REFRIGERATION, HEATING & AIR CONDITIONING, INC.

Joseph M. D'Angelo (0063348), (COUNSEL OF RECORD)  
Cosme, D'Angelo & Szollosi Co., L.P.A.  
The CDS Building  
202 North Erie Street  
Toledo, Ohio 43624  
Tel: 419-244-8989 / Fax: 419-244-8990  
Email: jdangelo@cdslaw.net

COUNSEL FOR APPELLEE  
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33



**TABLE OF CONTENTS**

	Page
<u>TABLE OF AUTHORITIES</u> .....	ii
<u>STATEMENT OF FACTS</u> .....	1
A.    Procedural History .....	1
B.    Relevant Facts .....	4
<u>ARGUMENT</u> .....	8
A.    Preliminary Statement .....	8
1.    Off-Site Manufacturing is Not Subject to Prevailing Wage Law .....	8
2.    Interested party Labor Union Representation is Limited .....	12
B.    Propositions of Law .....	14
<u>Proposition of Law No. 1: The Off-Site Manufacturing of Materials to be Used in or in Connection with a Public Improvement Project is Not Subject to Ohio’s Prevailing Wage Law Because the Requirements of Ohio’s Prevailing Wage Law Only Applies to Work Performed at and Upon the Jobsite of the Public Improvement Project</u> .....	14
1.    Statutory Interpretation Mandates that Ohio’s Prevailing Wage Law Applies Only Work Performed at the Jobsite. ....	17
2. <i>Clymer v. Zane</i> is Well Reasoned, Valid and Still the Law in Ohio .....	23
3. <i>Clymer</i> was Not Overruled, Prevailing Wage Laws Inherently Applies to Work Performed at the Jobsite of the Public Improvement .....	29
4.    Prevailing Wages Applying to Off-Site Manufacturing is Completely Unfeasible, Unworkable and Unenforceable .....	31
<u>Proposition of Law No. 2: A Labor Organization that Obtains Written a Authorization from an Employee Who has Worked on a Project Subject to the Requirements of Ohio’s Prevailing Wage Law Only has Standing as an Interested Party to Pursue Claims Only on Behalf of the Employee who Expressly Authorized the Representation</u> .....	34
<u>CONCLUSION</u> .....	42
<u>APPENDIX</u>	

**TABLE OF AUTHORITIES**

	Page
<u>Cases</u>	
<i>Allen v. Eden</i> (1954), 267 S.W.2d 714, 1954 Ky. LEXIS 848 .....	17, 29
<i>Bohnen v. Metz, 1<sup>st</sup> Dept.</i> (1908), 126 App. Div. 807, 111 N.Y.S. 196, <i>affirmed memorandum</i> 193 N.Y. 676, 87 N.E. 1115 .....	29, 30
<i>Callaway v. NDB Downing Co.</i> (1961), 172 A.2d 260, 1961 Del. Super. LEXIS 100.....	17, 30
<i>Clymer v. Zane</i> (1934), 128 Ohio St. 359, 191 N.E.123 .....	<i>passim</i>
<i>Crawford Cty. Bd. of Commrs. v. Gibson</i> (1924), 110 Ohio St. 290, 2 Ohio Law Abs. 341, 144 N.E. 117.....	22
<i>Dean v. Seco Electric Co.</i> (1988), 35 Ohio St. 3d 203, 519 N.E.2d 837 .....	17, 23
<i>Ewen v. Thompson –Starrett Co.</i> (1913), 208 N.Y. 245, 101 N.E. 894.....	30
<i>Harris v. Van Hoose</i> (1990), 49 Ohio St.3d 24, 550 N.E.2d 461 .....	41
<i>International Asso. of Bridge, etc. Local Union 290 v. Ohio Bridge Corp.</i> (1987), 32 Ohio App. 3d 18, 513 N.E.2d 358.....	36, 37
<i>International Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Industries</i> 6 <sup>th</sup> Dist. App. No. WD-07-026, 2008-Ohio-2992 .....	21
<i>International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.,</i> (1988), 36 Ohio St. 3d 74; 521 N.E.2d 809, 812.....	41
<i>Lovsey v. Morris Sheet Metal, Inc.</i> (Jul. 24, 1985), 4 <sup>th</sup> Dist. App. No. 1242, 1985 Ohio App. Lexis 6903.....	35
<i>Ohio State Ass’n or the United Ass’n of Journeyman &amp; Apprentices of the Plumbing &amp; Pipefitting Indus. v. Johnson Controls, Inc.</i> (1997), 123 Ohio App.3d 190, 703 N.E.2d 861.....	39
<i>Robbins Sound, Inc. v. Ohio University</i> 70 Ohio App. 3d 212, 590 N.E.2d 877, 1990 Ohio App. LEXIS 4910 (1990) .....	21

<i>Sheet Metal Workers' Intl. Assn., Local Union No. 33 v. Gene's Refrigeration, Heating &amp; Air Conditioning, Inc.,</i> 11 <sup>th</sup> Dist. No. 06CA0104-M, 2008-Ohio-1015.....	3
<i>Sheet Metal Workers Local Union 33 v. Mohawk Mechanical,</i> 86 Ohio St.3d 611, 1999-Ohio-209, 716 N.E.2d 198 .....	<i>passim</i>
<i>State ex rel. Asti v. Ohio Dept. of Youth Servs.</i> 107 Ohio St. 3d 262, 2005 Ohio 6432, 838 N.E.2d 658 .....	22
<i>State ex. rel. Corrigan v. Barnes</i> (1982), 3 Ohio App. 3d 40, 443 N.E.2d 1034 .....	17
<i>State ex rel. Evans v. Moore</i> 69 Ohio St. 2d 88, 92 (Ohio 1982).....	12, 38
<i>State v. Moaning</i> (1996) 76 Ohio St.3d 126, 128; .....	22
<i>State ex rel. Solomon v. Police &amp; Firemen's Disability &amp; Pension Fund Bd. of Trustees</i> (1995), 72 Ohio St.3d 62.....	22
<i>State ex rel. Watkins v. Eighth Dist. Court of Appeals</i> (1998), 82 Ohio St.3d 532, 1998 Ohio 190, 696 N.E.2d 1079 .....	22
<i>United Brotherhood of Carpenters &amp; Joiners of America, Local Union No. 1581 v. Edgerton Hardware Co., Inc.</i> 2007-Ohio-3958, 2007 Ohio App. LEXIS 3602.....	39
<i>Vaughn Industries, LLC v. DiMech Servs.</i> 167 Ohio App.3d 634, 2006-Ohio-3381, 856 N.E.2d 312 .....	21, 30
<i>Wadsworth v. Dambach</i> (1954), 99 Ohio App. 269, 133 N.E.2d 158.....	17
<u>Statutes</u>	
29 U.S.C. § 157.....	36
O.A.C. 4101:9-4-02 .....	5, 16, 20
O.A.C. 4101:9-4-09 .....	16
O.A.C. 4101:9-4-10 .....	14
O.A.C. 4101:9-4-13 .....	21

O.A.C. 4101:9-4-16 .....	21, 31
O.A.C. 4101:9-4-21 .....	16
O.A.C. 4101:9-4-23 .....	16
O.A.C. Ann. 4101:9-4-02 .....	20
O. R.C. 4115.032 .....	19
O.R.C. 4115.03 .....	<i>passim</i>
O.R.C. 4115.05 .....	<i>passim</i>
O.R.C. 4115.07 .....	20
O.R.C. 4115.10 .....	18, 27, 40
O.R.C. 4115.12 .....	15
O.R.C. 4115.16 .....	<i>passim</i>
O.R.C. 4115.99 .....	15
29 CFR § 5.2 .....	25

Other

<i>Taylor v. Douglass Co.: Applying Ohio’s Prevailing-Wage Law to Institutions Supported in Whole or in Part by Public Funds</i> , 37 U. Tol. L. Rev. 497 (2006) .....	14
--	----

## STATEMENT OF FACTS

### A. **Procedural History**

On September 16, 2005, the Plaintiff-Appellee Sheet Metal Workers' International Association, Local Union 33, (hereinafter referred to as "Local 33"), filed an interested party prevailing wage complaint pursuant to R.C. 4115.16 (B) against Defendant-Appellant Gene's Refrigeration, Heating & Air Conditioning, Inc., (hereinafter referred to as "Gene's"), alleging Gene's violated Ohio's Prevailing Wage Law, R.C. 4115.03 *et seq.*, while performing work on the Granger Fire Station Project located in Medina County, Ohio (hereafter referred to as the "Project").

On October 6, 2005, Gene's filed its Answer and affirmative defenses. On December 9, 2005, Gene's filed a Motion for Summary Judgment on the basis that (1) Local 33 lacked standing as an "interested party" to bring this prevailing wage lawsuit because the only individual who signed Local 33's union authorization card pursuant to R.C. 4115.03(F)(3) had never performed work on the public improvement Project at issue; and (2) that the off-site fabrication of metal duct work, i.e. "materials," is not, and has never been, subject to the provisions and requirements of Ohio's Prevailing Wage Law, even if such metal duct work was eventually installed on a public improvement project. (See Supp. pp. 1-88.)

On December 27, 2005, Local 33 filed a Partial Motion for Summary Judgment claiming it had standing as an "interested party" to bring a prevailing wage complaint on behalf of all of Gene's employees because one employee who never worked on the Project at issue signed a union authorization form, and that off-site fabrication work of materials was subject to the provisions and requirements of Ohio's Prevailing Wage Law, including the payment of prevailing wages. On March 7, 2006, the Magistrate denied both Motions for Summary

Judgment because the parties to this litigation failed to stipulate to undisputed facts. (App. No. 9) On March 27, 2006, the parties filed a Joint Motion for Reconsideration and stipulated to the facts presented below. (See Supp. pp. 93-98.) Following the Joint Motion for Reconsideration and oral argument on the issues presented, on April 27, 2006, the Magistrate granted Gene's Motion for Summary Judgment and held Local 33 only had standing as an "interested party" to sue on behalf of the one Gene's employee who signed the union authorization card, and that the off-site fabrication work performed by that one employee in Gene's sheet-metal fabrication shop was not subject to the provisions of Ohio's Prevailing Wage Law. The Magistrate denied Local 33's Motion for Partial Summary Judgment. (See App. No. 8.)

On May 9, 2006, both parties filed written objections to the Magistrate's conclusions of law with the trial court. On June 9, 2006, the trial court adopted the Magistrate's decision in total and overruled the parties' objections, but failed to specifically state in the Order that Summary Judgment had been granted in favor of Gene's. (See App. No. 7.) On June 13, 2006, Gene's filed a Motion for Attorneys' Fees and Costs as permitted by R.C. 4115.16 (D). On June 29, 2006, Local 33 filed a Notice of Appeal from the trial court's June 9, 2006 decision and filed a Brief in Opposition to Gene's Motion for Attorneys' Fees pending before the trial court.

On August 4, 2006, the Ninth District Court of Appeals dismissed Local 33's appeal for lack of a final appealable order. (See App. No. 6.) On August 9, 2006, Local 33 filed a Motion with the trial court requesting the court to enter a final appealable order. On November 22, 2006, the trial court denied Gene's Motion for Attorneys' Fees and Costs brought pursuant to R.C. 4115.16 (D), finding Local 33's action was not unreasonable or brought without foundation, even though not brought in subjective bad faith. (See App. No. 5.) On November 29, 2006, the trial court issued a final order summarizing the orders granted throughout the litigation and

specifically held that (1) Gene's Motion for Summary Judgment is granted; (2) Local 33's Motion for Partial Summary Judgment is denied; (3) Gene's Motion for Attorneys' Fees and Costs pursuant to R.C. 4115.16 (D) is denied; and (4) the parties' objections to the Magistrate's decision were overruled. (See App. No. 4.)

On December 13, 2006, Local 33 filed a Notice of Appeal with Ninth District Court of Appeals challenging the trial court's order granting summary judgment in favor of Gene's on both issues. On December 22, 2006, Gene's filed a Notice of Cross-Appeal from the trial court's order denying Gene's Motion for Attorneys' Fees and Costs pursuant to R.C. 4115.16 (D).

On March 10, 2008, the Court of Appeals reversed the decision of the trial court and held (1) Local 33 had standing to represent all employees on the "entire" Project, even though only one employee who never worked on the Project authorized the Union to represent only him, in contravention of this Court's holding in *Sheet Metal Workers Local Union 33 v. Mohawk Mechanical*, 86 Ohio St.3d 611, 1999-Ohio-209, 716 N.E.2d 198;<sup>1</sup> and (2) that the off-site fabrication/manufacturing of "all materials to be used in or in connection with" a public improvement project is subject to Ohio's prevailing wage law, surmising that this Court's long standing ruling in *Clymer v. Zane* (1934), 128 Ohio St. 359, 191 N.E.123, 125, must have been

---

<sup>1</sup> The Ninth District specifically held, "This Court finds, upon consideration of the Supreme Court's discussion in *Mohawk* and the statute's definition of 'interested party' within the context of 'a particular public improvement,' that Mr. Cherfan's written authorization to allow Local 33 to represent him in this prevailing wage action was sufficient to impute standing to Local 33 to file a prevailing wage complaint with respect to the entire project and any and all violations with respect to any and all of Gene's employees. The Supreme Court did not specify that Local 33 only had standing to pursue a complaint on behalf of those specific employees who signed the authorization forms. Rather, the high court expressly stated that the statute does not require that any specific percentage of employees must authorize representation before the union may file a prevailing wage complaint. In fact, it appears that it is merely the affirmative act of an employee's authorizing representation which substantiates jurisdiction and imputes interested party status to the union." *Sheet Metal Workers' Intl. Assn., Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.*, 11<sup>th</sup> Dist. No. 06CA0104-M, 2008-Ohio-1015 at ¶ 22 (Emphasis added.)

*legislatively superseded* by a one sentence amendment to R.C. 4115.05 in 1935. (See App. No. 3 and 4.)

On April 24, 2008, Gene's filed a Notice of Appeal (App. No. 1.) and a brief in support requesting the Ohio Supreme Court to accept this case for review based upon two propositions of law. On July 9, 2008, this Court accepted review on both propositions presented by Gene's and this argument follows.

**B. Relevant Facts**

The following facts are undisputed as they were stipulated to by the parties in the Joint Motion for Reconsideration filed with the Magistrate on March 27, 2006:

The Project at issue in this action is the Granger Fire Station Project located in Medina County, Ohio. (Supp. p. 95, ¶1.) The Project was for the construction of a public improvement for a public authority and is subject to the requirements of Ohio's Prevailing Wage Law. (Supp. p. 95, ¶2-4.)

Local 33 has at all times relevant hereto has been a bona fide organization of labor, with its jurisdiction including Medina County, Ohio. (Supp. p. 95, ¶5.) Local 33 exists in whole or in part for the purpose of negotiating with employers concerning wages, hours, or terms and conditions of employment of employees performing sheet metal, heating and cooling work. (Supp. p. 95, ¶6.)

Gene's is a construction contractor founded in 1959 that performs plumbing, heating, ventilation, and air conditioning work for both residential and commercial customers, including sheet metal fabrication of duct work. (Supp. p. 22 at ¶2.) Gene's business operations include both field construction work and in-shop sheet metal fabrication. (Supp. p. 96, ¶14.) Gene's was at all relevant times a corporation incorporated in and doing business within the State of Ohio

and is a contractor as defined by O.A.C. 4101:9-4-02(H). (Supp. p. 95, ¶7-8.) Gene's submitted a bid for the Project and was awarded the contract by the public authority. (Supp. p. 95, ¶9-10.)

Gene's has a fabrication shop on its premises where various work is performed, including fabrication of sheet-metal duct work. (Supp. p. 96, ¶11, ¶15.) At all relevant times Mr. Elie Cherfan was an employee of Gene's, and was employed in Gene's off-site sheet metal fabrication shop. (Supp. p. 96, ¶12, ¶15.) Mr. Cherfan worked exclusively in Gene's off-site fabrication shop and performed labor including the fabrication of duct work, some of which may have been installed on the Project at issue. (Supp. p. 96, ¶16-17.) At all time relevant hereto, Mr. Cherfan never performed any construction work on the jobsite of the Project at issue.<sup>2</sup> (Supp. p. 22, ¶3-4.)

Gene's fabrication shop, or "shop work," consists of fabricating duct work, reviewing job blueprints and specifications, speaking to clients on the telephone, driving to pick up materials for the fabrication shop, making deliveries, loading and unloading delivery trucks, cleaning up the fabrication shop, and any other job related duties specified by Gene's. (Supp. p. 22, ¶5.) Gene's does not fabricate all of the duct work that will be used on any construction project and frequently purchases prefabricated duct work from other manufacturing companies such as Pulliam & Associates, Ohio Air, and Famous Supply, especially on larger construction projects, like the Project at issue here. (Supp. p. 22, ¶6 and 7.) In this case, sheet metal duct work was also purchased from these enumerated manufacturers and was installed on the Project at issue in this litigation. (Supp. p. 22, ¶7.) In fact, certain forms of duct work such as round duct, snap-lock duct, and spiral duct are not fabricated by Gene's and are always purchased from other

---

<sup>2</sup> Mr. Cherfan was employed by Gene's almost exclusively in the sheet metal fabrication shop from August 3, 1998 until he quit on May 13, 2005. (Supp. p. 22, ¶3.)

manufacturing companies.<sup>3</sup> (Supp. p. 22, ¶7.) Furthermore, Gene's also manufactures, distributes and sells duct work made in its fabrication shop to other smaller construction contractors and the public, as opposed to simply fabricating duct work solely for installation by its employees on the jobsite of the Project. (Supp. p. 22, ¶ 9.)

On July 8, 2005, Mr. Cherfan signed an authorization card with Local 33 authorizing Local 33 to file a prevailing wage complaint on his behalf for the work he performed Gene's sheet metal fabrication shop.<sup>4</sup> (Supp. p. 96, ¶13.) With respect to the Project, Gene's paid all of

---

<sup>3</sup> Gene's also purchases air conditioning units which are completely wired and piped for direct installation on a public improvement project from manufacturers such as Carrier Corporation, Trane, York and AAON who operate throughout the United States. (Supp. p. 22, ¶8.) According to the Ninth District's decision, would these manufacturing companies be required to pay prevailing wages in effect in Medina County, Ohio because these air conditioning and heating units are considered "materials" to be used in or in connection with a public work? Would these manufacturers, because of the air conditioners various components, be required to pay their employees Sheet Metal Worker, Electrician and/or Pipefitter rates? How could this be implemented or enforced?

<sup>4</sup> The Magistrate Judge and the Trial Court improperly struck Exhibits from Gene's Motion for Summary Judgment which were properly authenticated as public records obtained from the Ohio Department of Commerce. See April 27, 2006 Magistrate Order. Although Gene's filed objections to the Magistrate's Order Striking these Exhibits with the trial court, which the trial court denied, the issue was not raised on appeal because Gene's Motion for Summary Judgment had been granted, making the trial court's error harmless. This Court should consider Gene's Exhibits E and H when deciding this appeal. The affidavit of Attorney David Farkas authenticates these documents as public records obtained from the Ohio Department of Commerce. See Gene's December 29, 2005 Motion and Affidavit authenticating Exhibits E and H. (Supp. p. 91, ¶3).

Exhibit E is the authorization form Mr. Cherfan signed with Local 33. This authorization form is the only basis for Local 33's R.C. 4115.03(F) standing in this case. The authorization form states: "Of my own free will, I hereby authorize Sheet Metal Workers Local 33, its agents and/or representatives to represent me in all matters pertaining to my claims regarding any and all prevailing wage issues, pursuant to any federal and/or state law. This authorization is granted pertaining to my previous employer as well as any future employer on any federal and/or state prevailing wage project at which I may be employed. This authorization is effective as of the date I signed it and will remain in effect until I revoke it in writing." (Emphasis Added.) It is clear from the express language on this form that Local 33 was only authorized to represent Mr. Cherfan interests in this prevailing wage lawsuit, hence if shop time is not compensable at

its off-site fabrication shop employees, including Elie Cherfan, at their regular non-prevailing wage rates, which are lower than the jobsite prevailing wage rate. (Supp. p. 96, ¶18.) No other Gene's employee signed a form authorizing Local 33 to represent them in this litigation, and no other contractor employing members of Local 33 submitted a bid, or otherwise worked on the Project.

On July 12, 2005, Plaintiff Local 33 filed an interested party administrative prevailing wage complaint pursuant to R.C. 4115.16 (A) with the Director of the Ohio Department of Commerce, Division of Labor and Workers' Safety, Bureau of Wage and Hour ("Director") asserting violations of the Prevailing Wage Law. (Supp. p. 96, ¶19.) More than sixty days elapsed from the date of the filing of the administrative prevailing wage complaint, and on September 16, 2006, Local 33 filed its interested party Complaint in the Medina County Court of Common Pleas. (Supp. p. 97, ¶20 and 22.) Pursuant to Ohio's Prevailing Wage Law, R.C. 4115.03 to R.C. 4115.16, and the applicable regulations, Defendant Gene's was obligated to comply with Ohio's Prevailing Wage Law. (Supp. p. 97, ¶21.)

---

prevailing wages, this lawsuit should been dismissed. Ironically, the Ninth District through its holding took away every other employee's right to "free will," but Mr. Cherfan's, to decide whether Local 33 could represent them in this litigation.

Exhibit F is a letter from Gordan Gaiten, the Superintendent of the Ohio Department of Commerce dated February 13, 2004, which infers that the Ohio Department of Commerce does not support the notion that Ohio's Prevailing Wage Law covers work performed off-site. The Department of Commerce rejected the Carpenter's Union attempt to have Ohio's Prevailing Wage Law cover work performed off-site. This letter is relevant to the arguments presented herein as it is the Ohio Department of Commerce's responsibility and duty to enforce and interpret Ohio's Prevailing Wage Law.

## ARGUMENT

### A. Preliminary Statement

This cause presents two critical issues regarding the construction of public improvement projects subject to Ohio's Prevailing Wage Law, R.C. 4115.03 to R.C. 4115.16: (1) whether the labor performed in the off-site manufacturing<sup>5</sup> of all materials to be "used in or in connection with" a public improvement project are to be paid at prevailing wage rates pursuant to R.C. 4115.05; and (2) whether a labor organization, that only represents employees performing sheet metal, heating and cooling work, has standing as an "interested party" to represent all employees in every trade or craft who worked on a public improvement project when only one employee, who never even performed work on jobsite of the project, had authorized that labor organization to represent him pursuant to R.C. 4115.03(F)(3).

The Ninth District Court of Appeals decision is contrary to two well established Ohio Supreme Court decisions,<sup>6</sup> undermines the apparent intent of the Legislature, ignores the precise language of the prevailing wage statute, as well as 74 years of statutory interpretation, enforcement and industry practice.

#### 1. Off-Site Manufacturing is Not Subject to Prevailing Wage Law

The erroneous holding of the Ninth District affects all manufacturing business and construction contractors doing work in Ohio. Because of this holding the following "materials" manufactured in different industries for public projects are all now subject to prevailing wages which were never subject prior to this decision, including but not limited to:

---

<sup>5</sup> When the term "manufacturing" is used in this brief, it is intended to include all types of fabricating or preparing of materials "used in or in connection" with a public works project.

<sup>6</sup> See *Clymer v. Zane* (1934), 128 Ohio St. 359, 191 N.E.123, 125 and *Sheet Metal Workers Local Union 33 v. Mohawk Mechanical*, 86 Ohio St.3d 611, 1999-Ohio-209, 716 N.E. 2d 198.

- (1) Steel: All formation and fabrication of steel used in buildings, including cutting and welding of structural steel to size and specifications that is used to frame buildings. This would also include pre manufactured steel buildings, storage sheds, or other modular units.
- (2) Wood: All millwork performed for the moldings or trim used in public projects which will also include manufacturing of pre-hung doors, pre-hung windows and the fabrication of cabinetry and wood countertops to be installed on the project. The law would also cover the cutting and sizing of wood studs used to frame interior and exterior walls and floors, as well as roof trusses. The manufacturing of all modular buildings, pre manufactured walls and floors.
- (3) Concrete: All batch plants, gravel pits, quarries and all ready mix suppliers which supply materials to make concrete or asphalt will all be subject to prevailing wages for all road work projects, parking lots, sidewalks, foundations and the like. (*Chymer* specifically excluded gravel pits from coverage).
- (4) Sheet Metal: All sheet metal duct work manufactured for a public improvement project including parts of heating, ventilation and cooling units manufactured by companies such as General Electric, Lennox, Carrier and Trane. The law would also cover the manufacturing of architectural sheet metal used as capping on building as well as gutters and metal roofing systems.
- (5) Plumbing and Fire Protection: The formation of pipe, the cutting and threading of pipe, the manufacturing of plumbing fixtures and sprinkler heads.
- (6) Electrical: The preassembly of breaker boxes and other electrical equipment to be installed on a project, the cutting or fabrication of stock materials such as wire and conduit.
- (7) Masonry: The cutting and manufacturing of block, brick and stone, including prefabrication of stone countertops and other decorative stone products.
- (8) Glass: The manufacturing and cutting of glass for windows or doors.
- (9) Elevators: The construction of elevator cars and other pre assembled parts.
- (10) Painting: The painting, staining and preparation of any paintable materials or the mixing of paint at a local hardware store.
- (11) Landscaping: Nurseries and tree farms who supply plants for installation.

- (12) Roofing: The manufacturing of all roofing materials including shingles, roof liners and compounds.

The decision of the Ninth District would also require the payment of prevailing wages for persons delivering such materials to the public project as the delivery would be considered “upon any material to be used in or in connection with a public work.” Requiring prevailing wages to be paid for the manufacturing of off-site materials would make the cost of public improvement projects skyrocket in Ohio, placing a further strain on Ohio’s dwindling economy and tax base.<sup>7</sup>

Moreover, since many of the “materials” are currently manufactured in unionized plants, the imposition of building and construction wages (and other requirements) upon other manufacturing industries will wreak havoc on existing collective bargaining agreements and employer/labor relationships.<sup>8</sup>

---

<sup>7</sup> The cost of road construction alone would dramatically increase, for example, if employees working in guardrail fabrication shops, gravel pits, batch plants and the drivers who deliver such materials are now required to be paid prevailing wages. Governmental entities currently struggling to complete public projects would either have to raise taxes to fund the projects or indefinitely postpone road repairs and other needed construction projects because they would not be able to afford the increased costs of construction.

<sup>8</sup> For example, a steel service center, whose employees are represented by the United Steel Workers of America (USW), may be contracted to fabricate steel beams that will be installed on a project covered by Ohio’s prevailing wage law. These employees already work under a collective bargaining agreement with wage rates and work duties established for their industry that resulted from years of negotiations by the USW and employers. The work performed by the steel service center employees will include the receiving of the steel, the handling/movement of the steel through the fabrication process, and the shipping of the finished cut steel to the project. However, according to the Ninth District’s decision, now building and construction industry prevailing wage rates will apply. How will all of these manufacturer/supplier job functions now be covered by construction and building trades unions who do not do this type of work? Does the prevailing wage for construction Laborers apply to the receiving, handling and shipping of the steel? If heavy steel is moved by overhead cranes do construction Operating Engineer’s (crane operators) rates apply? Do construction Ironworker’s rates apply to the cutting of the steel, or because of a technologically advanced cutting process (i.e. a computer aided cutting machine) are no building trade unions rates applied at certain steel service centers or will the Ironworkers Union claim that the computer operator is performing work subject to Ironworkers prevailing wages? If any welding or hand cutting is required, do construction Ironworkers rates apply?

It is incontrovertible that separate collective bargaining agreements exist that govern the wages, hours and other terms of conditions of employment for employees performing manufacturing/fabrication work in the manufacturing industry, which completely differ from the terms and rates negotiated and paid to building and construction industry employees that form the basis for the wages payable under Ohio's Prevailing Wage Law. In fact, the wages, hours and other terms and conditions of employment in the manufacturing/fabricating industries are negotiated by different labor unions altogether, although the work performed is some of the same as work that could be claimed by various construction industry labor unions on the jobsite of the project.

The Ninth District's interpretation of Ohio's prevailing wage law would conflict with the terms and conditions of employment negotiated for employees working in the manufacturing/fabricating industries, would undermine the bargaining power of these labor unions, and would lead to inherent and irresolvable conflicts between construction and manufacturing industry labor organizations when establishing the "prevailing wage" for a particular locality. When determining the prevailing wage rates for a particular trades, the Ohio

---

The USW has spent years developing the terms and conditions for their collective bargaining agreements setting forth manufacturing job classifications, manufacturing wage rates, and other job duties which are now jeopardized by the imposition of building and construction trade collective bargaining agreements. Simply stated, construction site specific pay practices and qualifications cannot be matched with those job practices in the manufacturing or industrialized setting because construction industry unions do not, and cannot, claim USW work. The imposition of these foreign building and construction trade practices on only the prevailing wage portion of the steel service centers production will surely create inefficiencies and undermine the USW's current collective bargaining agreement.

The list of unanswered questions is as enormous as the number of off-site activities within the reach of the Ninth District's decision. Based on the short list of questions for just one type of off-site manufacturing, it is clear that the Ninth District's decision will change the face of collective bargaining in Ohio while simultaneously driving business out of Ohio.

Department of Commerce simply adopts the wages established by collective bargaining agreements then in force in particular localities. See R.C. 4115.04.

In *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 92 (Ohio 1982), this Court held that above all else, the primary purpose of the prevailing wage law was to “support the integrity of the collective bargaining process by preventing the undercutting of wages in the private construction sector.” (Emphasis Added.) Through the Ninth District’s interpretation of R.C. 4115.05, and the application of construction industry prevailing wage law to off-site manufacturing work, the Ninth District is now acting to disrupt the wages paid in other industries and to undercut or otherwise undermine the collective bargaining agreements now in place in manufacturing industries. As this Court has made clear, Chapter 4115 applies to the “construction sector,” not off-site fabrication and manufacturing facilities.

## **2. Interested Party Labor Union Representation is Limited**

In the second proposition presented to this Court for review, the Ninth District improperly held that a labor organization has the right to represent every employee in every trade and craft who performed work in connection with a public improvement project (and now all persons who manufacture “materials” for the project) when just one employee authorizes the union to represent that employee’s own interest. This decision is directly contrary to this Court’s decision in *Mohawk Mechanical*. As Chief Justice Moyer stated in his dissent in *Mohawk Mechanical*, “the execution of authorization forms such as those used in the case is analogous to the creation of an ‘attorney-in-fact relationship,’ and sufficient to satisfy subsection (F)(3), if the forms are executed before the union takes an action on behalf of the employees.” (*Id.* at 616.) This creation of an “attorney-in-fact” relationship should only apply to the individual employee(s) who authorized the labor organization to represent them.

Moreover, it is submitted that interested party status, if obtained, was not intended to create an unlimited license for a single labor union, limited to representing employees who perform work in one particular trade or craft, to bring a class action on behalf of every employee in every trade or craft. There are inherent conflicts of interest in having one labor union represent an unwilling group of employees who choose to be non-union, or having that same labor union represent members of a different labor union that has jurisdictional claims over work performed on the project that may well conflict with the claims of the “interested party” union. It is simply inappropriate to have a single labor union even venture to represent a class of workers consisting of all trade or craft employees, union and non-union. Simply put, a single labor union, by definition cannot fairly and adequately represent a class consisting of all employees. Thus, it is submitted that Chief Justice Moyer’s analysis that there must be actual authorization by each employee assures that an “attorney-in-fact” relationship is established, as exists in every other attorney-client relationship. Such an arrangement allows each individual employee the control to revoke the union’s representation at any time for any reason, including the failure to fairly and adequately represent that employee’s interests in the litigation.

The Ninth District’s decision impinges upon the rights of all Ohio workers performing work on public improvement projects by forcing this “attorney-in-fact” union representation upon them. In effect, the Ninth District’s holding creates a new form of class action without any of the attendant safeguards available in other proceedings. The Ninth District’s holding will effectively allow unions to undermine the statutory scheme by inserting themselves into the “employee’s shoes” so that there is a grave potential that the union may proceed with litigation or resolve it on terms that are in the union’s best interests and not the affected employees. The holding of *Mohawk Mechanical* and the clear statutory language of R.C. 4115.03 (F) do not

impose representation by a union upon employees who neither requested such representation, and/or who prefer to represent themselves or select their own attorney.

## B. Propositions of Law

**Proposition of Law No. 1:** The Off-Site Manufacturing of Materials to be Used in or in Connection with a Public Improvement Project is Not Subject to Ohio's Prevailing Wage Law Because the Requirements of Ohio's Prevailing Wage Law Only Apply to Work Performed at and Upon the Jobsite of the Public Improvement Project.

In 74 years since this Court's decision in *Clymer v. Zane*, research reveals that not a single Ohio Court or Administrative Agency<sup>9</sup> has held that manufacturers or contractors are required to pay their employees prevailing wages for off-site manufacturing work performed pursuant to R.C. 4115.05.<sup>10</sup> The Ninth District simply ignored the fact that for 74 years no court or administrative body has ever imposed this law on off-site work and ignored the practice firmly embedded in and relied upon by the construction industry that such off-site work is not covered. Instead the Ninth District held that this Court's 1934 holding *Clymer v. Zane* was *legislatively*

---

<sup>9</sup> O.A.C. 4101:9-4-10 (A), "Procedure for requesting wage rate schedules," provides, "Every public authority authorized to contract for or construct with its own forces a public improvement, before advertising for bids or undertaking such construction with its own forces, shall have commerce determine the prevailing rate of wages to be paid to laborers, workmen, and mechanics for the class or classes of work called for in the construction of the public improvement." To date, the Department of Commerce has never issued a wage rate schedule covering off-site manufacturing or fabrication work. Hence, how could a contractor be required to make payment of prevailing wages as required by O.A.C. 4101:9-4-20(A) (An employer shall not pay or permit any worker to accept wages less than the prevailing rate of wages as determined by the director and evidenced by the prevailing wage rate schedule) if such off-site wages were never included in the schedule of wages issued by the Department of Commerce?

<sup>10</sup> In the Court below, Local 33 did not present any evidence that *Clymer v Zane* had been "legislatively overruled" except for a citation to a law review article written by its former legal counsel in this litigation, Ryan Hymore. See *Taylor v. Douglass Co.:Applying Ohio's Prevailing-Wage Law to Institutions Supported in Whole or in Part by Public Funds*, 37 U. Tol. L. Rev. 497 (2006). In seventy-four years, Mr. Hymore, a law student at the time he published the article, is the only "authority" to ever make the argument that off-site fabrication work is compensable under Ohio's Prevailing Wage Law or to even suggest that the holding of *Clymer* has been overruled.

*superseded* in 1935 by Am.S.B. No. 294 with the addition of the following sentence to the Section 17-4a of the General Code:

The wages to be paid for a legal day's work, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with such labor is performed in its final or completed form is to be situated, erected or used and shall be paid in cash. (See App. No. 27.)

There is no legislative history available to explain the Legislature's amendment in 1935, only 74 years of non-enforcement of this provision upon off-site work. All the while the Legislature has continued to make amendments to the prevailing wage statute which has grown from just four paragraphs to over fourteen statutory sections, with a full complimentary Administrative Code. See R.C. 4115.03 to 4115.16, and 4115.99; O.A.C. 4101: 9-4-01 to O.A.C. 4101: 9-4-28. No provision contained in the Administrative Code, which is supposed to interpret and supplement the language of the statute, including R.C. 4115.05, even hints that the off-site manufacturing of materials for a public improvement project is subject to prevailing wages.

Moreover, when the Administrative Code was adopted by the Director pursuant to R.C. 4115.12, which allows the Department of Commerce to adopt reasonable rules not inconsistent with the statutory sections regarding the application and administration of Ohio's prevailing wage law, the issue of off-site manufacturing of materials to be used in or in connection with a public works project was never raised or addressed. Before the Administrative Code was enacted, extensive hearings were held and testimony was taken from members of organized labor, construction industry employer groups and other stakeholders regarding the meaning, extent and interpretation of these statutory sections. If *Clymer* was really overruled by the one sentence added in 1935, one would think that at least one of the building trades unions (or the Department itself) would have raised the point that off-site manufacturing/fabrication was within the reach and scope of Ohio's

prevailing wage law, and subsequently the Administrative Code would have been drafted to reflect coverage to extend to off-site work. Such was not the case.

To the contrary, the Administrative Code implemented by the Department of Commerce specifically states in various sections that Ohio's Prevailing Wage Law applies only to the jobsite of the public improvement.

O.A.C. 4101:9-4-02 (GG) defines " 'subcontractor' to mean any business association hired by a contractor to perform construction on a public improvement or any business association hired by such subcontractor, or any subcontractor whose subcontract derives from the chain of contracts from the original subcontractor.

O.A.C. 4101:9-4-09 (A), Determination of wage rate schedule, explicitly states the director shall determine the prevailing rate of wages to be paid for a legal day's work to employees upon public works.

O.A.C. 4101:9-4-21 (A), Maintenance, preservation, and inspection of payroll records, provides "Each contractor and subcontractor performing work on a public improvement shall keep, maintain for inspection, and preserve accurate payroll records in accordance with these rules. If an employer performs both prevailing wage work and non-prevailing wage work, the records must be capable of being segregated. The employer may segregate such records on an hourly, daily, weekly, work shift, or project basis.

O.A.C. 4101:9-4-21 (C) continues, any records maintained by contractors and subcontractors concerning wages paid each employee or the number of hours worked by each employee on a public improvement shall be made available for inspection by any authorized representative of the contracting public authority, including the project prevailing wage coordinator and commerce, during normal working hours of business days.

O.A.C. 4101:9-4-23, Investigation states, a complaint may be filed with commerce by any employee upon a public improvement or any interested party.

(Emphasis added.)

Furthermore, the Ohio Supreme Court's decision in *Clymer v. Zane* was not *legislatively superseded* as the Ninth District held. To the contrary, various Ohio Courts including this Court, as well as other State Courts have continued to cite *Clymer*, and none have ever indicated this case has

been *legislatively superseded*.<sup>11</sup> In fact, the decision in *Clymer* became a focal point for other state courts that took notice of the decision and adopted the same reasoning for excluding employees who prepare materials off-site for use on public improvement projects from being paid prevailing wages.<sup>12</sup>

**1. Statutory Interpretation Mandates that Ohio's Prevailing Wage Law Applies Only to Work Performed at the Jobsite**

In holding that one sentence added by the legislature in 1935 by Am.S.B. No. 294 had *legislatively superseded* the holding of *Clymer v. Zane*, the Ninth District made a simple “proximity in time” argument concluding that *Clymer v. Zane* was decided in 1934 and the Legislature subsequently amended the statute in 1935 in response to that decision. However, there is no legislative history available to explain why this sentence was added, or to explain what the Legislature intended the addition of this sentence to mean.<sup>13</sup>

The only intent the Legislature has provided this Court with is the fact that in 74 years, this one sentence has never been interpreted by any administrative agency or court to require the

---

<sup>11</sup> See *Dean v. Seco Electric Co.* (1988), 35 Ohio St. 3d 203, 519 N.E.2d 837; *Wadsworth v. Dambach* (1954), 99 Ohio App. 269, 133 N.E.2d 158; *State ex. rel. Corrigan v. Barnes* (1982), 3 Ohio App. 3d 40, 443 N.E.2d 1034; *Allen v. Eden* (1954), 267 S.W.2d 714, 1954 Ky. LEXIS 848; *Callaway v. NDB Downing Co.* (1961), 172 A.2d 260, at 264-266, 1961 Del. Super. LEXIS 100. Moreover, until the Ninth District's decision, Shepard's Citation Service on Lexis-Nexis is unaware of any negative feedback regarding the holding of *Clymer*.

<sup>12</sup> See *Allen v. Eden* (1954), 267 S.W.2d 714, 1954 Ky. LEXIS 848 (the Kentucky Court of Appeals specifically adopted the reasoning of the Ohio Supreme Court in *Clymer v. Zane* and held that work performed in the production of materials used in the construction of a public project is not work on the project itself).

<sup>13</sup> Although never stated by any court or administrative agency, following the Ninth District's approach, the best argument is, perhaps, that this sentence was added to address only the specific facts of *Clymer*; in other words, wages of employees working in gravel and batch plants preparing “materials” for road construction work, but was not intended to apply to manufacturing or fabrication of sheet metal work, windows, doors, steel etc. . . . For the reasons stated in this Brief, this argument would also fail.

off-site manufacturing of materials to be subject to Ohio's Prevailing Wage Law. R.C. 4115.05 has been amended at least eight times since 1935, and if it was truly the Legislature's intent to require that the off-site manufacturing work was to be paid at prevailing wages, then the Ohio Legislature has had ample opportunity to revisit and clarify its intent on the issue.<sup>14</sup> The failure of the Legislature to take steps to require that off-site manufacturing work to be paid at prevailing wages, or to have the Ohio Department of Commerce or its multiple predecessor agencies enforce R.C. 4115.05 as the Ninth District has interpreted it, make the present day intent of the Legislature absolutely clear.

Contrary to the Ninth District's decision and in 74 years of enforcement of prevailing wage laws, various administrative agencies, Ohio Courts and industry practice has made clear that the manufacturing of off-site "materials used in or in connection with" a public improvement project is not subject to the requirements of Ohio's Prevailing Wage Law. This is because prevailing wages are paid only for time spent performing work on the jobsite of the public project. The intent that prevailing wage law applies only to the jobsite of the public improvement project is clearly demonstrated through various provisions contained in the statutory sections of Ohio's Prevailing Wage Law.

R.C. 4115.10 (A) states, that "[a]ny employee upon any public improvement who is paid less than the . . . [prevailing wage] may recover . . . the difference between the fixed rate of wages and the amount paid to him and in addition thereto a sum equal in amount to such difference." (Emphasis added.) Similarly 4115.10 (B) continues, "Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable thereto may

---

<sup>14</sup> GC § 17-4a; 116 v 206; 118 v 587; Bureau of Code Revision, 10-1-53; 128 v 935 (Eff 11-9-59); 131 v 992 (Eff 11-3-65); 135 v H 1171 (Eff 9-26-74); 137 v H 1129 (Eff 9-25-78); 141 v H 238 (Eff 7-1-85); 146 v S 162 (Eff 10-29-95); 148 v H 471. Eff 7-1-2000.

file a complaint in writing with the director upon a form furnished by the director. R.C. 4115.032, "Construction projects to which prevailing wage provisions apply" states, "Construction on any project, facility, or project facility to which section 122.452 [122.45.2], 122.80, 165.031 [165.03.1], 166.02, 1551.13, 1728.07, or 3706.042 [3706.04.2] of the Revised Code applies is hereby deemed to be construction of a public improvement within section 4115.03. . . All contractors and subcontractors working on such projects, facilities, or project facilities shall be subject to and comply with sections 4115.03 to 4115.16 of the Revised Code. . . ." Even R.C. 4115.05, which the Ninth District relied upon in rendering its decision begins with, "[e]very contract for a public work shall contain a provision that each laborer, workman, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work, shall be paid the prevailing rate of wages provided in this section." (Emphasis added.)

These sections clearly state that prevailing wages must be paid for construction work performed on the jobsite of the public improvement project and is fully supported by the definition of "construction" contained in R.C. 4115.03(B):

"Construction" means:

(1) Any new construction of any public improvement, the total overall project cost of which is fairly estimated to be more than fifty thousand dollars ("threshold") adjusted biennially by the administrator and performed by other than full-time employees who have completed their probationary period in the classified service of a public authority.

(2) Any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating of any public improvement the total overall project cost of which is fairly estimated to be more than fifteen thousand dollars ("threshold") adjusted biennially by the administrator and performed by other than full-time employees who have completed their probationary period in the classified service of a public authority. Construction includes, but is not limited to, dredging, shoring, demolition, drilling, blasting, excavating, clearing, clean up, landscaping, scaffolding, installation and any other change to the physical

structure of a public improvement.

(Emphasis Added.); see also, O.A.C. Ann. 4101:9-4-02 (G).

Nowhere in the definition of “construction” is off-site “manufacturing” or “fabrication” of “materials” mentioned or included, but the statute specifically mentions demolition, installation, clean up, etc... In fact, all of the activities in the definition of “construction” refer to activities performed at the jobsite of the public improvement. If the off-site manufacturing or fabrication is not mentioned in the definition of “construction” then it must be the intent of the Legislature to exclude this type of work from coverage of Ohio’s prevailing wage law. “Construction” of a “public improvement” are the quintessential elements of any project which triggers coverage of Ohio’s prevailing wage law. The fact that manufacturing and fabrication are excluded from the definition of “construction,” coupled with the fact that various sections of the statute refer to “on” or “upon” a public improvement establishes that prevailing wages are to be paid for construction work performed at the jobsite of the project.<sup>15</sup>

The fact that prevailing wages only apply to the jobsite of the public improvement project is supported by two other sections of the Revised and Administrative Codes.<sup>16</sup> R.C. 4115.07 and

---

<sup>15</sup> Furthermore, O.A.C. 4101:9-4-13 defines the “Duties of contractors,” however nowhere contained in the “duty of contractors” is the obligation to pay workers prevailing wages for off-site manufacturing or fabrication work.

<sup>16</sup> O.A.C. 4101:9-4-13 (3) provides that a contractor shall: “Post in a prominent and accessible place on the site of the work a legible statement of the schedule of wage rates specified in the contract for the various occupations of laborers, workmen, and mechanics employed. The notice must remain posted during the life of the contract and must be supplemented in its entirety whenever new wage rate schedules are issued by the department. The schedule must also state the name, address, and phone number of the prevailing wage coordinator.”

R.C. 4115.07, which O.A.C. 4101:9-4-13(3) is derived from similarly states: “There shall be posted in a prominent and accessible place on the site of the work a legible statement of the schedule of wage rates specified in the contract to the various classifications of laborers,

O.A.C. 4101:9-4-13(3) specifically refers to a posting of the schedule of wages, which must be placed at the “site of the work.”<sup>17</sup> The “site of the work” has been interpreted by two Sixth District decisions to be the jobsite. See *Vaughn Industries, LLC v. DiMech Servs., et al.*, 167 Ohio App.3d 634, 643, 2006-Ohio-3381, 856 N.E.2d 312 (“The prevailing rate of wages for a specific jobsite is then set forth in a prevailing wage rate schedule which is posted at the jobsite. That schedule is to include the ratio of apprentices to skilled workers allowed on the jobsite. Ohio Adm.Code 4101:9-4-16(H).”) (Emphasis added); *International Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Industries*, 6<sup>th</sup> Dist. App. No. WD-07-026, 2008-Ohio-2992, ¶41 (the Defendant properly posted the name of the prevailing wage coordinator on the “job box” located at the site of the construction project giving proper written notice of the coordinator’s identity to its employees.); See also, *Robbins Sound, Inc. v. Ohio University*, 70 Ohio App. 3d 212, 590 N.E.2d 877, 1990 Ohio App. LEXIS 4910 (1990) (Every subcontractor performing work on a public project in this state has an independent duty to ascertain the prevailing wage for such project.)

How could Ohio’s prevailing wage law cover off-site employees who perform work in fabrication or manufacturing shops when the law requires that the schedule of wages, which informs employees of the prevailing wage rate, must be posted at the jobsite where such employees will never work? Simply put, prevailing wages apply only to the jobsite of the public improvement.

Appellees may argue that R.C. 4115.05 as written is ambiguous and can be interpreted in  

---

workers, and mechanics employed, said statement to remain posted during the life of each contract.”

<sup>17</sup> No court has ever interpreted “site of the work” to mean a fabrication shop or manufacturing facility. Site of the work, like with Davis Bacon provisions has been defined to mean the jobsite of the public improvement project.

different ways. However, in construing the terms of a particular statute, words must be given their usual, normal, and/or customary meanings.<sup>18</sup> The language used in the prevailing wage statute “upon” or “about” simply means “on,” referring to the jobsite of the project, not some off-site location. “It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law.”<sup>19</sup>

This Court has held that courts must avoid statutory interpretations that create absurd or unreasonable results.<sup>20</sup> When possible, courts should also avoid interpretations that create confusion or uncertainty.<sup>21</sup> There is no doubt given the history and seventy-four years of enforcement of this statute that the Ninth District’s interpretation of R.C. 4115.05 will cause confusion, uncertainty and absurd results for all business who manufacture, supply or fabricate “materials” for public works projects.

Utilizing these statutory interpretation principles, it is clear that even 74 years later, the Ohio Supreme Court’s holding in *Clymer v. Zane* remains sound and carefully reasoned. This Court held in *Clymer* that the words “upon a public improvement” did not cover work performed off-site, and the words “on” or “upon” particularly referred to the jobsite of the project. This Court reasoned to hold otherwise would surely lead to conflicts with regulations and codes

---

<sup>18</sup> See *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees* (1995), 72 Ohio St.3d 62, 65.

<sup>19</sup> *State v. Moaning* (1996), 76 Ohio St.3d 126, 128; *State ex rel. Watkins v. Eighth Dist. Court of Appeals* (1998), 82 Ohio St.3d 532, 535, 1998 Ohio 190, 696 N.E.2d 1079 (statutes pertaining to the same general subject matter must be construed *in pari materia*).

<sup>20</sup> See *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St. 3d 262, 2005 Ohio 6432, 838 N.E.2d 658.

<sup>21</sup> See *Crawford Cty. Bd. of Commrs. v. Gibson* (1924), 110 Ohio St. 290, 298-299, 2 Ohio Law Abs. 341, 144 N.E. 117.

governing wages of other industries.<sup>22</sup> Most significantly, the Ohio Supreme Court in *Clymer* noted that since the statute provided for sanctions and was penal in nature, it should be narrowly construed.<sup>23</sup>

The Ninth District did not “narrowly construe” the one sentence contained in R.C. 4115.05 when the Court read this sentence in isolation from the rest of the statute and held that all materials used in a public project are subject to Ohio’s Prevailing Wage Law. When reading R.C. 4115.05 *in pari materia* with the rest of the provisions of Ohio’s prevailing wage statute (and the Administrative Code), it is clear that prevailing wages apply to the work performed upon a public improvement, i.e. the jobsite, and the Ninth District clearly misinterpreted the language contained in R.C. 4115.05 by reading this one sentence in isolation and concluding that *Clymer* had been *legislatively superseded*.

## **2. *Clymer v. Zane* is Well Reasoned, Valid and Still the Law in Ohio**

The holding and reasoning of *Clymer* remains valid today. In *Clymer v. Zane* (1934), 128 Ohio St. 359, 191 N.E.123, a defendant-contractor was awarded a highway public improvement contract subject to Ohio’s Prevailing Wage Law. The defendant-contractor also owned a gravel pit where the plaintiffs were employed in the removal of gravel for use on the highway improvement project. The plaintiff-employees of the gravel pit contended they were employees “upon a public improvement” and thus were entitled to the benefits of the minimum wage law [prevailing wage law]. The Supreme Court of Ohio held against this contention and

---

<sup>22</sup> This is especially true were here, wherein the Ninth District’s decision seeks to impose construction industry prevailing wage rates upon companies in the manufacturing industry. This imposition will surely lead to conflicts with the wages, hours and other terms of conditions of employment which were collectively bargaining for between labor and management, or are otherwise the standard or “prevailing wage rate” in the manufacturing industry.

<sup>23</sup> See *Dean v. Seco Electric Co.* (1988), 35 Ohio St.3d 203.

stated:

To extend the provisions of the statute to all employees who prepare material for a public improvement would be to include within the provisions of the law the employees of a cement factory which makes cement for a public improvement, and the employees of a brick plant which makes paving brick for a public highway, if such cement plant or brick factory is owned or operated by the contractor in charge of the public improvement. Such a construction would likely lead to conflicts with regulations and codes governing wages of other industries. Clearly it was not the intention of the Legislature to extend the provisions [of the prevailing wage law] so far.

*Id.* at 125.

The Ohio Supreme Court, pointing out that the workers in their testimony had referred to the work at the improvement site as being “out on the road” or at “the job,” stressed that the workers did not consider themselves to be employed “upon” the highway improvements, in that they distinguished between their work and the work performed at the site of the improvement. Moreover, the Court held that the statute, in providing for sanctions against employers, was a penal statute that was required to be construed narrowly. *Id.*

Furthermore, the Court noted other considerations showing that the work at the gravel pit was separate from the operations required under the highway improvement contract. The Court pointed out that the contractor acquired the gravel pit prior to the commencement of work on the improvement, and that the contractor sold more than 8000 tons of material to other construction contractors separate and distinct of the public improvement project at issue. The gravel pit was equipped to produce materials above and beyond that needed for the improvement, and that the contractor maintained ownership of the pit long after the completion of the improvement.

The decision of *Clymer* is so well reasoned that the Federal prevailing wage law, known as the Davis Bacon Act, mimics its reasoning and logic when defining the “site of the work.” Most of Ohio’s original prevailing wage law was simply copied from the provisions of the Davis

Bacon Act which was enacted in 1931. As such, one provision of the Davis Bacon Act sheds light on the issue presented herein and should be deemed interpretive of the ambiguous language contained in R.C. 4115.05. 29 CFR § 5.2(i) provides comprehensive definitions and states that manufacturing, furnishing of materials, or servicing and maintenance work is distinguishable from “construction activities” providing that these activities are excluded from coverage under the Act unless performed in connection with the Project and performed at the site of the work. See also 29 CFR 5.2(j)(1) and (l). The Davis Bacon Act specifically provides:

(l) The term “site of the work” is defined as follows:

(1) The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (1)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (1)(1) of this section;

(3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (1)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

(Emphasis Added.)

Under the Davis Bacon Act, the “site of the work” determines whether employees must be paid prevailing wages. Three things are clear from the Davis Bacon Act. First, that construction industry prevailing wages and regulations are simply not applicable for employees

working in the manufacturing, supply or servicing and maintenance industries. R.C. 4115.05 which was drafted in 1935, and when read in isolation, fails to distinguish any of these other industries from the construction industry unless the statute is read *in para materia* with other statutory sections cited herein that define prevailing wage to apply to the work performed at the jobsite. Davis Bacon provides clear guidance that prevailing wage laws simply cannot apply and are entirely inapplicable to any other industry but construction.

Second, Federal prevailing wages apply only to the “site of the work” unless the job headquarters, tool yards, batch plants, borrow pits, etc... are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work. Moreover, if these enterprises existed before the federal project began and are owned by contractors or subcontractors then they are specifically excluded from the site of the work. This statutory language is completely in line with the reasoning and holding of *Clymer* where the Court noted that the gravel pit was a separate enterprise owned by the contractor that operated before and after the public works project began.

Third, Davis Bacon establishes a comprehensive definitional statute pertaining to “off-site” work that this Court can use to interpret the language of R.C. 4115.05 that Appellees may argue is ambiguous. Because Ohio’s statute lacks definitions defining “materials,” “off-site” or what “off-site” work can be covered by construction industry prevailing wage laws, this Court can derive guidance and instruction from the Davis Bacon Act defining the “site of the work,” which is undoubtedly the most analogous statute to R.C. 4115.05. It is simply unfeasible to include manufactures, suppliers and fabricators under a statute designed to cover and regulate construction industry employers and the prevailing wages they must pay.

Furthermore, the single sentence at issue, contained in R.C. 4115.05, as read by the Ninth

District should result in an “all or nothing approach” to off-site manufacturing. Rather than paint with such a broad brush, the Ninth District attempted to write its own version of what the Legislature could have intended in order to legislate from the bench a coverage for scope of R.C. 4115.05 that it deemed appropriate, imposing obligations only upon contractors, subcontractors, or suppliers of materials who “specifically fabricate material for the project” and further dispensed its own formulation of legislative intent for R.C. 4115.05, the requirement of an “intimate connection” with the Project. In other words, the Ninth District would legislate to exclude pre-manufactured “materials” pulled from stock or inventory.

However, this interpretation of R.C. 4115.05 is unfounded considering R.C. 4115.05, if believed to address or apply to off-site manufacturing, specifically states that R.C. 4115.05 applies to “any material to be used upon or in connection therewith...” Thus, the statute was not logically or strictly construed by the Ninth District (or read as a whole with the rest of R.C. 4115.05 and R.C. 4115.10.). The only conclusion which could be derived from reading this sentence in isolation from the rest of the prevailing wage statute is that it applies to all materials which would be used in or in connection with the construction of public works project.

Gene’s submits that since this cannot be the law, the only logical interpretation, as determined from the Davis Bacon Act, Ohio case law (discussed below), and from various statutory and administrative code sections is that the ambiguous sentence contained in R.C. 4115.05 must be read to apply only to “materials” manufactured/fabricated at the jobsite of the Project.

More so, R.C. 4115.05 cannot be interpreted arbitrarily, capriciously or discriminatorily to apply only to construction contractors who employ persons performing construction work at the jobsite of the public improvement, but who also happen to own fabrication or manufacturing

shops.<sup>24</sup> There is simply no logical distinction between a construction contractor who owns a manufacturing shop and a manufacturer that does not perform construction work. The manufacturing of materials to be used on a public works project is manufacturing work nonetheless. Hence, if this statute applies to offsite manufacturing it would apply to all manufacturers, suppliers and fabricators or delivery persons who provide materials for a public works project. An arbitrary ruling will only lead to the closing of contractors' fabrication shops, the loss of jobs and the purchase of materials from outside the State of Ohio where Ohio's prevailing wage law would not apply.

Last, it is also important to note that the off-site manufacturing of sheet metal duct work at issue herein could not have been performed on the jobsite of the project. Gene's fabrication shop is a separate and distinct enterprise which was not formed to supply material simply for this Project, but existed before and after the Project was complete. Gene's manufacturing shop is filled with heavy machinery, benders, presses and cutters used to form duct work. This machinery is fixed and cannot be transported to the jobsite. This type of manufacturing work has always been performed off-site. Construction employees then take the pre-fabricated duct work to the jobsite where it is assembled, trimmed to fit and installed.

---

<sup>24</sup> R.C. 4115.05 as interpreted by the Ninth District cannot be limited to just those "contractors" who happen to own fabrication or manufacturing business. R.C. 4115.03 (H) defines "Contractor" to mean any business association that is involved in construction of a public improvement. Contractor includes an owner, developer, recipients of publicly issued funds, and any person to the extent he participates in whole or in part in the construction of a public improvement by himself, through the use of employees, or by awarding subcontracts to subcontractors as defined in paragraph (GG) of this rule." (Emphasis added.) As such, if R.C. 4115.05, is read to include off-site manufacturing work, the law would apply equally to contractors, subcontractors, material men, manufacturers, deliverymen and suppliers as all are "involved in the construction of a public improvement." Because this interpretation is nonsensical and simply unworkable, it must be interpreted to apply to work performed on "materials" situated, erected and used only at the jobsite of the public improvement project as is consistent with the rest of the statute.

3. ***Clymer* was not Overruled, Prevailing Wage Law Inherently Applies to Work Performed at the Jobsite of the Public Improvement**

As touched upon previously, the *Clymer* decision's reasoning and continued validity has been supported by case law from Ohio and other states.

In *Allen v. Eden* (1954), 267 S.W.2d 714, 1954 Ky. LEXIS 848, the Kentucky Court of Appeals specifically adopted the reasoning of the Ohio Supreme Court in *Clymer v. Zane* (1934), 128 Ohio St. 359, 191 N.E.123, 125 and held that work performed in the production of materials used in the construction of a public project is not work on the project itself, though being carried on by the owner of the producing plant, where the materials are produced in a separate enterprise. The Kentucky Court of Appeals found that the employee was not covered by the state prevailing wage statute, K.R.S. 337.510 to 337.520, when the employee worked at the employer's asphalt mix plant and spent some of his work time preparing mix used on road resurfacing and construction projects for which the employer was awarded contracts subject to the prevailing wage statute. Stating that the employee's work at the plant was an enterprise distinct from the employer's highway resurfacing and construction contracts, the court held that work performed in producing materials used in the construction of a public works project is not work on the project itself, even though the same entity both prepares the materials and performs the construction, where the materials are produced in a separate enterprise.

Likewise, in *Bohnen v. Metz, 1<sup>st</sup> Dept.* (1908), 126 App. Div. 807, 111 N.Y.S. 196, *affirmed memorandum* 193 N.Y. 676, 87 N.E. 1115, a defendant-contractor contracted to erect a municipal building and subcontracted with a manufacturer who was to furnish doors, windows, and other woodwork for the special purpose of being used in the building. The court held that employees of the manufacturers were not covered by the minimum wage [prevailing wage] law. The court stated:

The persons employed in the manufacture of the doors, windows, and woodwork ultimately used in the building were not employed ‘on, about, or upon such public work’ within the meaning of the statute; and hence it was unimportant whether they were employed more than eight hours a day or were paid the prevailing rate of wages.

*Id.* at 199.

The *Bohnen* case was followed by another New York case, *Ewen v. Thompson –Starrett Co.* (1913), 208 N.Y. 245, 101 N.E. 894. Here the defendant-contractor on a municipal building sublet granite fabrication work to a subcontractor. The subcontractor performed the quarrying, cutting, dressing and trimming of the granite to specification on a site other than the construction site of the building. The court held that employees of the subcontractor were not covered by the minimum wage law [prevailing wage law] since they were not employed “‘on, about or upon’ the public work of constructing the municipal building in the city of New York within the intent of the act...” *Id.* at 896. See also, *Callaway v. NDB Downing Co.* (1961), 172 A.2d 260, at 264-266, 1961 Del. Super. LEXIS 100 (A Delaware court held that the minimum wage law [prevailing wage] was not intended to cover an employee who merely worked on a subcontract as a carpenter to furnish a finished product for use in a public school building, when such work is done almost completely away from the construction site).

These cases evidence the fact that the fabrication of materials used “in connection” with a public improvement project is not subject to the requirements of prevailing wage laws. It is fundamental the prevailing wages must be paid and the regulations followed for time spent performing work on the jobsite of the public improvement.

Compliance with the provisions of Ohio’s Prevailing Wage Law with regard to the work performed on the jobsite of a public improvement project is further evidenced by the Sixth District Court of Appeals decision rendered in *Vaughn Industries, LLC v. DiMech Servs., et al.*,

167 Ohio App.3d 634, 2006-Ohio-3381, 856 N.E.2d 312. In *DiMech*, several defendant-contractors attempted to argue that apprentice to journeyman ratios on a public improvement project could be calculated on a “company wide” rather than a “jobsite” basis under Ohio’s prevailing wage law. The Sixth District Court of Appeals disagreed, and held by its nature; Ohio’s prevailing wage law exists to determine the prevailing rate of wages in a particular industry at a specific location, i.e. the jobsite. R.C. 4115.04(A). *Id.* at 642-643. The prevailing rate of wages for a specific jobsite is then set forth in a prevailing wage rate schedule which is posted at the jobsite. *Id.* That schedule is to include the ratio of apprentices to skilled workers [journeyman] allowed on the jobsite. See O.A.C. 4101:9-4-16(H) and R.C. 4115.05. *Id.*

Hence, the Sixth District rejected an argument that would have allowed a “company wide” ratio for determining journeyman to apprentices on the jobsite. Thus, a ratio that takes into account employees who worked in an off-site fabrication shop, parts department, office, etc... under *DiMech* cannot be counted toward meeting the on the jobsite prevailing wage ratio requirement. The law in Ohio is well settled, prevailing wage laws and regulations only apply to those employees who perform work on the jobsite of the public improvement project.

**4. Prevailing Wages Applying to Off-Site Manufacturing is Completely Unfeasible, Unworkable and Unenforceable**

The complete unfeasibility of the Ninth District’s off-site manufacturing holding becomes apparent when attempting to apply it to Ohio’s Prevailing Wage Law. As Judge Slaby noted in this dissent:

The majority attempts to limit the practical effects of its holding, but one might fairly ask at what point that fabrication process achieves the ‘intimate connection’ the majority envisions. Must the fabricator of materials that are incorporated in machines used in job assembly pay the prevailing wage because the machine is ultimately used in connection with the public work? When certain off-site employees are paid for fabrication of materials, how is the fraction of their time spent on those items that become part of a public improvement to be determined and

compensated out of an entire working day? Must a contractor now record those fractions of working time spent by off-site employees whose work bears a tangential relationship to material used in public improvements? Simply put, the rule is unworkable.

*Genes Refrigeration*, at ¶50. As Judge Slaby observes, the majority's holding will surely lead to confusion in the application of Ohio's Prevailing Wage Law, lead to absurd results and cause more unneeded litigation in this area.

If an employer, whether it be a manufacturer, supplier, or contractor, must pay prevailing wages to its employees for any material that is assembled, manufactured, fabricated, or otherwise constructed "in connection" with a public work, the extent of the law under the Ninth District's holding would be endless. Any business dealing with sheet metal products, like the corrugated sheet metal on the exterior of a building or the flashing on roofing systems, would have to pay Sheet Metal Workers prevailing wages; window manufacturers, cabinet makers, or door manufacturers would have to pay their employees "Carpenters prevailing wages;" any manufacturer of material used on the project that was painted or stained would have to pay its employees "Painters prevailing wages;" glass makers for windows or mirrors would pay Glazier's prevailing wages; manufacturers of air conditioning units, boilers or heaters would pay Millwright, Electrician, Pipe Fitter, and Sheet Metal workers prevailing wages; the list is virtually endless. This effect would lead to conflicts with collective bargaining agreements negotiated in the other industries beside construction, and would lead to conflicts with federal labor laws. Furthermore, it would undermine the industrialized system of collective bargaining agreements, job classifications and other duties negotiated by industrial/manufacturing labor unions for decades.

In addition, what labor "in connection" with the public project must be compensated at prevailing wages. Mr. Nortz, Gene's Project Manager, stated in his affidavit that Gene's

fabrication shop, or “shop work,” consists mainly of reviewing job blueprints and specifications, speaking to clients on the telephone, fabricating duct work, driving to pick up materials for the fabrication shop, making deliveries, loading and unloading delivery trucks, cleaning up the fabrication shop, and any other job related duties specified by the supervisor. (Supp. p. 22 at ¶5.) Fabricating duct work is not a job exclusively performed by any employee working in Gene’s fabrication shop. Where does the reach of Ohio’s Prevailing Wage Law end? Should Mr. Cherfan be paid prevailing wages for picking up the metal that will become the duct work, unloading the metal from delivery trucks, cleaning up the shop after the ducts were fabricated etc. . . . because this work was done “in connection” with a public work? What if the sheet metal that is picked up or loaded in trucks is mixed with other sheet metal not destined for a prevailing wage jobsite? Is Mr. Cherfan paid prevailing wages for all his loading, delivery and unloading activities because it is impossible to separate prevailing wage time from non-prevailing work activities, let alone apportion his wages between the prevailing wage rate and his regular rate? Given the many duties assigned to Mr. Cherfan, who works exclusively in Gene’s fabrication shop, it would be overly burdensome and nearly impossible for Gene’s, as well as other contractor or manufacturer, to keep track of the amount of time spent actually fabricating materials that MAY be used on a public project, versus performing some other task in the shop. The enforcement of Ohio’s Prevailing Wage Law for off-site work would be practically speaking, impossible.

Given the sound reasoning in *Clymer* and reading R.C. 4115.05 *in pari materia* with the rest of the provisions of Ohio’s prevailing wage statute, including the administrative code, the Ninth District clearly misinterpreted the language contained in R.C. 4115.05 by reading this one sentence in isolation and concluding that *Clymer* had been *legislatively superseded*. Based upon

the explicit language of the statute when read as a whole, the guidance provided by the Davis Bacon Act, industry practice and enforcement of this law in 74 years, and the sound and affirmed reasoning of *Clymer*, the language “upon any material to be used in or in connection with a public work” must apply only to materials prepared on the jobsite of the public improvement project in question. The statute simply does not state or make any reference to the fact that materials prepared, manufactured or fabricated off-site would be subject to the requirements of Ohio’s Prevailing Wage Law.

The Ninth District’s holding regarding prevailing wages to be paid for off-site preparation, fabrication and manufacturing of “material used in or in connection with a public improvement” project is unreasonable, unworkable, and without statutory foundation. Reversing the Ninth District’s decision does not change the status of the law in Ohio it simply returns the law to the status quo as it has been interpreted and enforced for the last 74 years.<sup>25</sup> Gene’s Proposition of Law No. 1 should be adopted by the Court.

**Proposition of Law No. 2:** A Labor Organization that Obtains Written a Authorization from an Employee Who has Worked on a Project Subject to the Requirements of Ohio’s Prevailing Wage Law Only has Standing as an Interested Party to Pursue Claims Only on Behalf of the Employee who Expressly Authorized the Representation.

Ohio’s Prevailing Wage Law, pursuant to R.C. 4115.03(F) and R.C. 4115.16, grants standing to an “interested party” to file a complaint on behalf of an employee to enforce his

---

<sup>25</sup> If the decision of the Ninth District is upheld, every public authority could be responsible for underpayments owed to manufacturing and fabrication employees who performed work off-site and where not paid prevailing wages. R.C. 4115.05 states “If the director determines that a contractor or subcontractor has violated sections 4115.03 to 4115.16 of the Revised Code because the public authority has not notified the contractor or subcontractor as required by this section, the public authority is liable for any back wages, fines, damages, court costs, and attorney’s fees associated with the enforcement of said sections by the director for the period of time running until the public authority gives the required notice to the contractor or subcontractor.” No public authority has notified any contractors that wages have to be paid for off-site manufacturing or fabrication work.

rights.<sup>26</sup> However, contrary to Ninth District holding, Ohio's Prevailing Wage Law does not allow an interested party to pursue claims on behalf of any employee who has not "authorized" such action or representation. To allow an "interested party" to pursue and enforce claims on behalf of other Gene's employees who did not authorize the lawsuit violates this Court's holding in *Mohawk Mechanical*, the Legislature's intent, and the right of every employee to select his/her own "attorney-in-fact."

In *Mohawk*, three employees of Mohawk Mechanical, a non-union contractor, signed "authorization forms" that expressly granted authority to Local 33 pursuant to R.C. 4115.03(F) to file a prevailing wage complaint "on their behalf" with regard to alleged underpayments for work they performed on a public improvement project. *Id.* at 613. After the lawsuit was filed, three other Mohawk employees who also worked "on the public project" signed Local 33's authorization forms. *Id.* After sixty days elapsed without a ruling from the Ohio Bureau of Employment Services, Local 33 filed its prevailing wage complaint on behalf of these three employees in the trial court. *Id.* at 613.

Shortly thereafter, Mohawk Mechanical filed a motion for summary judgment

---

<sup>26</sup> A labor organization acting as an interested party may also sue to enforce provisions of Ohio's Prevailing Wage Law if the labor organization "has as members" employees of a contractor who submitted a losing bid on a public improvement project awarded to another contractor. R.C. 4115.03(F)(3). See *Lovsey v. Morris Sheet Metal, Inc.* (Jul. 24, 1985), 4<sup>th</sup> Dist. App. No. 1242, 1985 Ohio App. Lexis 6903, (R.C. 4115.03 to 4115.16 provides a scheme to establish wage rates for public construction projects in keeping with those in the private sector. To ensure no discrimination between union and non-union contractors in the bidding process, all contractors are required to pay the same hourly rates as those paid to union workers under collective bargaining agreements). This is done to protect the competitive bidding process with regards to other contractors who are signatory with the union and who are bidding on public projects. However, when a contractor's employee brings an action, the action is exclusively brought in relation to the rights of that particular employee, i.e. to collect underpayments in wages. See R.C. 4115.10; and *Mohawk*, discussed supra. In the instant matter, no union contractor submitted a bid on the Project at issue. There is no competitive bidding claim at issue in this litigation. Local 33's entire standing argument is precariously perched on Mr. Cherfan's authorization form, a Gene's employee who never set foot of the jobsite of the Project.

challenging Local 33's "interested party" standing pursuant to R.C. 4115.03 (F), alleging Local 33 "was not authorized to represent" Mohawk employees because Mohawk was not signatory to a collective bargaining agreement with Local 33. *Id.* at 614. The Ohio Supreme Court disagreed and held that certain employees of Mohawk "took affirmative acts to authorize Local 33 to file a complaint on their behalf . . . within sixty days of the filing of the complaint, three Mohawk employees had given **written authorization** to Local 33 to represent them in the prevailing wage action." *Id.* at 614 (Emphasis added.) In reading *Mohawk*, it is clear that the Ohio Supreme Court permitted Local 33 to file a complaint on behalf of only those Mohawk employees who signed authorization cards, not on behalf of all employees who worked on the public project at issue.

This Court's reasoning in *Mohawk* for limiting Local 33's representation to only those employees who authorized the union to file suit on their behalf is sound. Allowing a labor organization to bring a prevailing wage complaint on behalf of employees who did not authorize the union to represent them would violate their inherent right to select their own legal counsel, and would further violate their rights under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157.<sup>27</sup> The National Labor Relations Act specifically grants every employee the right to accept or reject union representation; any law which would conflict with this right would be preempted. *Id.*

The Third District Court of Appeals in *International Asso. of Bridge, etc. Local Union*

---

<sup>27</sup> 29 U.S.C. § 157 states, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]."

290 v. *Ohio Bridge Corp.* (1987), 32 Ohio App. 3d 18, 20, 513 N.E.2d 358, reasoned like this Court in *Mohawk*, that labor organizations under Ohio's Prevailing Wage Law are only "authorized" to represent employees who have specifically authorized the representation:

We find no legislative intent that the union's own bylaws or constitution can be asserted to "authorize" the Union's representation of non-union employees working on a construction site which itself has no relation to the union, statutory or otherwise. The term "authorize" is not defined in the statute. Therefore, the common meaning associated with the term must be employed. The term "authorize" requires some sort of active delegation of rights. Black's Law Dictionary (5 Ed. 1979) 122 defines "authorize" as "To empower; to give a right or authority to act. To endow with authority or effective legal power, warrant, or right . . . Thus, based on common meaning, the Union's own constitution cannot be used to "authorize" the Union's representation of individuals who have not sought such representation. To hold otherwise would permit any union to "bootstrap" itself into the position of an "interested party."

(Emphasis added.)

Following the same logic and reasoning employed in *Mohawk* and *Ohio Bridge Corp.*, Local 33 only has standing as an "interested party" in the instant matter to file a prevailing wage complaint on behalf of the single Gene's employee who signed an authorization form. It is undisputed that Local 33 only obtained one authorization form from Mr. Cherfan, a Gene's employee who worked exclusively in Gene's off-site fabrication shop. Mr. Cherfan never worked on the jobsite of the public improvement Project at issue. To allow the Ninth District's interpretation of R.C. 4115.03(F) to stand, would allow an authorization from a single employee, in a single construction company to effectively authorize the representation of hundreds of employees from numerous companies working on a project, and make a single labor union their unwitting and unsolicited "attorney-in-fact."<sup>28</sup> Based upon the holding in *Mohawk*, and the

---

<sup>28</sup> A union acting as an attorney-in-fact has unlimited and unrestricted power to settle lawsuits for whatever is in the best interests of the union. A union may settle a prevailing wage case for attorney's fees or in return for the employer signing a collective bargaining agreement, and never the collect or ensure that back pay is paid for any affected employees. These employees under

language used in the statute, Ohio Law is clear that a labor organization only has standing as an interested party to pursue a prevailing wage complaint on behalf of the employee who specifically authorized the action, not every employee, and not from every trade or craft employed at the project.

Furthermore, if the Ninth District's interpretation of *Mohawk* and the statute are correct, why would this Court even bother mentioning the three Mohawk Mechanical employees who authorized Local 33's representation after the lawsuit was filed? Why did the Court continuously use the terms "on their behalf" and "to represent them," when describing the prevailing wage complaint authorized by six Mohawk employees? Given the content of the dissent in *Mohawk Mechanical* by Chief Justice Moyer, with Justices Cook and Lundberg Stratton concurring, most assuredly that dissent would have included a dissent to the majority opinion if that majority opinion had also held that a single employee authorization grants a single union standing and authority to represent all other union and non-union employees from all other trades or crafts. The holding by the Ohio Supreme Court purposefully articulates that a union only has standing to represent employee(s) who affirmatively authorize such representation in their particular trade or craft.

---

Ohio law have absolutely no recourse against the union, and would be effectively precluded from filing a prevailing wage complaint under the doctrine of res judicata simply because the law was read to allow the union to represent these unwilling employees' interests in lawsuits. Having litigated prevailing wage cases, it is the experience of the undersigned that the true interests of the Union in filing prevailing wage lawsuits are not in line with the interests of non-union employees who performed work on a project covered by prevailing wage.

In *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 92 (Ohio 1982), this Court held that above all else, the primary purpose of the prevailing wage law was to "support the integrity of the collective bargaining process by preventing the undercutting of wages in the private construction sector." However, non-union employees who choose not to be in any union have little or no concern for collective bargaining or its integrity. On the other hand, Union's have as their primary goal, the representation of the interests of their members – not the interests of non-union employees or union members from other trades or crafts who have never authorized a union they mindfully chose not to join. The opportunity for disservice to these non-union employees by the unions through the Ninth District's decision is at once apparent and substantial.

The Legislature did not intend to allow an “interested party” labor organization to pursue or enforce provisions of the law that are not specific to the employee who “authorized” the action. To allow an “interested party” to pursue and enforce the claims on behalf of other Gene’s employees and all other union or non-union employees “. . . with respect to the entire project . . .” who did not authorize the action would violate this Court’s holding in *Mohawk Mechanical*, the Legislature’s intent, and ethical requirements in the practice of law. The Ohio Supreme Court’s reasoning in *Mohawk* for limiting Local 33’s representation to only those employees who authorize the union to file suit on their behalf is sound considering the “attorney-in-fact” relationship created. The ethical and related questions discussed above raise serious ethical questions as to whether representation of employees by a Union and its attorney in a lawsuit is appropriate without each employee’s timely authorization.<sup>29</sup>

---

<sup>29</sup> The Ninth District’s decision and a recent Sixth District’s decision in *United Brotherhood of Carpenters & Joiners of America, Local Union No. 1581 v. Edgerton Hardware Co., Inc.* 2007-Ohio-3958, 2007 Ohio App. LEXIS 3602 have effectively expanded the definition of “interested party” to allow any labor organization of any trade jurisdiction to file a complaint against any contractor performing work on a project. See also *Ohio State Ass’n or the United Ass’n of Journeyman & Apprentices of the Plumbing & Pipefitting Indus. v. Johnson Controls, Inc.* (1997), 123 Ohio App.3d 190, 703 N.E.2d 861, 864 where the Eighth District Court of Appeals stated a labor organization is given standing to bring a complaint on behalf of any person who is not paid the prevailing wage.

Hence, a labor organization representing plumbers could sue a contractor performing carpentry work on a prevailing wage project for prevailing wage violations. This Plumbers Union will be effectively representing employees performing carpentry work. This cannot be what the Legislature or the *Mohawk Mechanical* Court intended as the labor union bringing the complaint should be required to possess some expertise regarding the particular trade or craft work being performed. For example, plumbers and carpenters have different wage rates, perform completely different work and have different work rules. How could one union call itself an “expert” and be given the legal authority to represent employees performing work in a completely different trade when the labor organization knows little about the specific trade work being performed or the collective bargaining agreement involved? Moreover, what if the Carpenters Union obtains an authorization as well? Will the Carpenters Union, at odds with the Plumbers, also claim to represent all the employees of the Project, including persons performing plumbers work?

In effect, the Ninth District's decision permits a single union based upon a single employee's authorization to bring a class action lawsuit. As mentioned above, a single union has inherent conflicts of interest with the interests of employees who have chosen to be non-union, as well as with employees who choose to be members of different labor unions. In either case, the union that takes on this class representation can hardly, fairly and adequately represent the interests of this broad and diversified multi-trade group of union and non-union employees. The ethical issues for the union and its attorney are substantial, particularly when this new class action is rooted in Chapter 4115, which was not designed to accommodate the substantive and procedural complexities now inextricably intertwined with this type of litigation. Thus, the simple, but necessary obtaining of employee authorizations to establish an attorney/client relationship envisioned by the *Mohawk* Court is readily apparent. It is submitted that the statutory creation of an "interested party" by the Legislature, as interpreted by the *Mohawk* Court, was not with the intent to create a new form of unregulated class action litigation.

The status of the law before the Ninth District's expansive holding sufficiently protects any employee's interest that elects union representation. In essence any labor organization, acting as an "interested party" would be allowed pursuant to R.C. 4115.03 (F) and 4115.16 after receiving a signed authorization card, to "step into the shoes" of the employee and bring a complaint on his/her behalf. R.C. 4115.10 provides the remedy for employees under Ohio's Prevailing Wage Law to receive back pay resulting from underpayments of the prevailing wage. R.C 4115.10(A)

---

Interested parties should be limited to (1) representing only those employees performing work in that union's trade or craft and who specifically authorize the union's representation; or (2) when standing is achieved through having members of a contractor who submitted a bid on the project, only to enforce the prevailing wage law with respect to the labor organizations specific trade jurisdiction, i.e. the plumber's union filing complaints against contractors doing plumbing work on the project, the electrician union files against contractors doing electrical work on the project, etc...

states that “[a]ny employee upon any public improvement who is paid less than the . . . [prevailing wage] may recover . . . the difference between the fixed rate of wages and the amount paid to him and in addition thereto a sum equal in amount to such difference.” The employee may file suit for recovery . . .” (Emphasis added.) See generally, *International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.*, (1988), 36 Ohio St. 3d 74; 521 N.E.2d 809, 812. Union representation should not be forced upon other union or non-union employees who do not request it. More so, without unsolicited union representation, any employee may file a confidential complaint with the Ohio Department of Commerce who will enforce their rights under the law.<sup>30</sup>

There is no need to read Ohio’s Prevailing Wage Law more broadly. In fact, reading the statute more broadly will lead to conflicts and confusion in the law. For instance what happens if two different employees working for the same company were to authorize two separate unions to represent them? According the Ninth District both unions would have the unlimited right to sue the same employer or all employers on the “entire project” claiming to represent all employees performing work on the “entire project.” How could a case like this be resolved or litigated? Which union would have the authority to settle claims? The Ninth District’s holding regarding interested party standing is simply unworkable.

The Ninth District’s decision regarding the union’s interested party standing is unduly expansive, in dereliction of the Legislature’s intent and is clearly erroneous in light of this Court’s holding in *Mohawk*. As such, “interested party” standing by labor organizations should

---

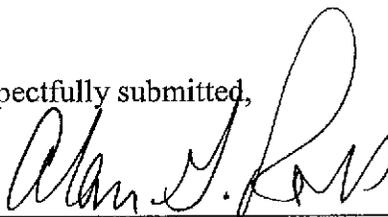
<sup>30</sup> The Director of the Ohio Department of Commerce may bring a claim against a contractor for any violation of Ohio’s Prevailing Wage Law at anytime. See R.C. 4115.13; see also *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 550 N.E.2d 461. Contrary to Local 33’s assertions, the Department of Commerce, not an interested party, is charged with the enforcement of Ohio’s Prevailing Wage Law and the collection of underpayment for all affected employees.

be limited to representing only those employees who specifically authorize the representation. Gene's Proposition of Law No. 2 should be adopted by the Court, resulting in Local 33 being limited to representing Mr. Cherfan's interests only. Since Mr. Cherfan has no interests in the project involved because he only performed off-site work, then the Union's complaint should be dismissed because it is unreasonable and without foundation.

### CONCLUSION

The decision of the Ninth District Court of Appeals is fundamentally wrong and has turned 74 years of prevailing wage law interpretation and application on its head. The Ninth District's decision has introduced confusion and absurdity into what was otherwise well established principles of law. As such, the Ninth District opinion should be reversed in total and Gene's Propositions of Law adopted.

Respectfully submitted,



---

Alan G. Ross (0011478), COUNSEL OF RECORD  
Nick A. Nykulak (0075961)  
Ross, Brittain & Schonberg Co., L.P.A.  
6480 Rockside Woods Blvd. South, Suite 350  
Cleveland, OH 44131-2547  
Tel: 216-447-1551 / Fax: 216-447-1554  
E-mail: alanr@rbslaw.com

COUNSEL FOR APPELLANT

Dated: August 25, 2008

**CERTIFICATE OF SERVICE**

This is to certify that one copy of the foregoing Merit Brief of Appellant was served this 25<sup>th</sup> day of August 2008 via U.S. Mail, postage prepaid, upon the following:

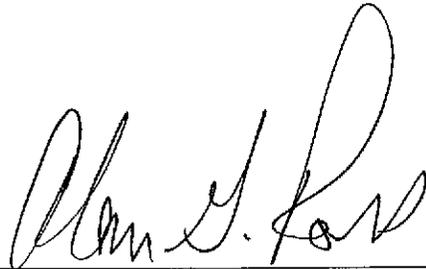
Joseph M. D'Angelo, Esq.  
Cosme, D'Angelo & Szollosi Co., L.P.A.  
The CDS Building  
202 North Erie Street  
Toledo, Ohio 43624

Anthonio C. Fiore, Esq.  
230 East Town Street  
Columbus, Ohio 43215

Keith McNamara  
McNamara & McNamara  
88 East Broad Street, Suite 1250  
Columbus, Ohio 43215

Roger L. Sabo, Esq.  
Schottenstein Zox & Dunn  
Arena District  
250 West Street  
Columbus, Ohio 43215

Luther LeRoy Liggett  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215



---

Alan G. Ross

## Appendix

<u>No.</u>	<u>Page No.</u>	<u>Document</u>
1	1	Date-stamped Notice of Appeal filed April 24, 2008 with the Ohio Supreme Court.
2	3	March 10, 2008 Notice of Decision/Order of Judgment of the Ninth Judicial District.
3	4	March 10, 2008 Decision and Journal Entry of the Ninth Judicial District.
4	27	The Trial Court's November 29, 2006 Final Appealable Order Granting Defendant's Motion for Summary Judgment, Denying Plaintiff's Partial Motion for Summary Judgment, Denying Defendant's Motion for Attorneys' Fees and Costs, and Overruling the Parties Objections to the Magistrate's April 27, 2006 Decision.
5	29	The Trial Court's November 22, 2006 Order and Opinion Denying Defendant's Motion for Attorneys' Fees and Costs.
6	30	The Ninth District Court of Appeals' Decision of August 4, 2006 Dismissing Plaintiff's June 29, 2006 Notice of Appeal for Lack of a Final Appealable Order.
7	32	The Trial Court's June 09, 2006 Order and Opinion Adopting the Magistrate's April 27, 2006 Decision in Full, Granting Defendant's Motion for Summary Judgment, and Denying Plaintiff's Partial Motion for Summary Judgment.
8	33	The Magistrate's April 27, 2006 Decision Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Partial Motion for Summary Judgment.
9	35	The Trial Court's March 7, 2006 Order Denying Defendant's Motion for Summary Judgment and Plaintiff's Partial Motion for Summary Judgment.
10	37	29 U.S.C. § 157
11	38	O.A.C. 4101:9-4-09
12	40	O.A.C. 4101:9-4-10
13	42	O.A.C. 4101:9-4-13
14	44	O.A.C. 4101:9-4-16

<u>No.</u>	<u>Page No.</u>	<u>Document</u>
15	46	O.A.C. 4101:9-4-21
16	47	O.A.C. 4101:9-4-23
17	48	O.A.C. Ann. 4101:9-4-02
18	54	O.R.C. 4115.032
19	55	O.R.C. 4115.03
20	58	O.R.C. 4115.05
21	60	O.R.C. 4115.07
22	61	O.R.C. 4115.10
23	63	O.R.C. 4115.12
24	64	O.R.C. 4115.16
25	65	O.R.C. 4115.99
26	66	29 CFR § 5.2
27	70	206 (Amended Senate Bill No. 294): <u>The State of Ohio Legislative Acts Passed and Joint Resolutions Adopted, Ninety-First General Assembly of Ohio</u> . Volume CXVI. The F.J. Heer Printing Co. Columbus, Ohio 1935.

IN THE SUPREME COURT OF OHIO

SHEET METAL WORKERS' : On Appeal From the Medina County Court  
INTERNATIONAL ASSOCIATION, : of Appeals, Ninth Appellate District  
LOCAL UNION NO. 33, :  
: Court of Appeals  
Appellee, : Case No. 06CA0104-M  
: v. : Medina County Court of Common Pleas,  
: Case No. 05-CIV-1249  
GENE'S REFRIGERATION, HEATING :  
& AIR CONDITIONING, INC. : 08-0780  
: Appellant. :

---

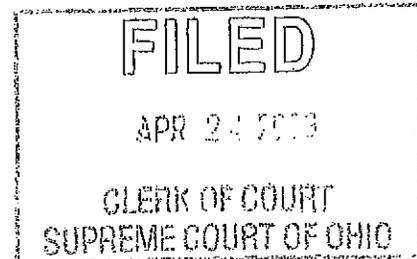
NOTICE OF APPEAL OF APPELLANT GENE'S REFRIGERATION,  
HEATING & AIR CONDITIONING, INC.

---

Alan G. Ross (0011478), (COUNSEL OF RECORD)  
Nick A. Nykulak (0075961)  
Ross, Brittain & Schonberg Co., L.P.A.  
6480 Rockside Woods Blvd. South, Suite 350  
Cleveland, OH 44131-2547  
Telephone: (216) 447-1551 Facsimile: (216) 447-1554  
E-mail: [alanr@rbslaw.com](mailto:alanr@rbslaw.com)  
[nickn@rbslaw.com](mailto:nickn@rbslaw.com)

COUNSEL FOR APPELLANT, GENE'S REFRIGERATION,  
HEATING & AIR CONDITIONING, INC.

Joseph M. D'Angelo (0063348), (COUNSEL OF RECORD)  
Cosme, D'Angelo & Szollosi Co., L.P.A.  
The CDS Building  
202 North Erie Street  
Toledo, OH 43624-1608  
Telephone: (419) 244-8989 / Facsimile: (419) 244-8990  
Email: [jdangelo@cDSLAW.net](mailto:jdangelo@cDSLAW.net)



COUNSEL FOR APPELLEE, SHEET METAL WORKERS'  
INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33,

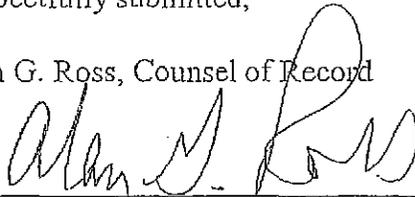
NOTICE OF APPEAL OF APPELLANT GENE'S REFRIGERATION,  
HEATING & AIR CONDITIONING, INC.

Appellant Gene's Refrigeration, Heating & Air Conditioning, Inc., hereby gives Notice of Appeal to the Supreme Court of Ohio from the March 10, 2008 Decision and Journal Entry of the Medina County Court of Appeals, Ninth Judicial District, Case No. 06CA0104-M.

This case raises issues of great general interest and public concern in the State of Ohio.

Respectfully submitted,

Alan G. Ross, Counsel of Record



Dated: April 23, 2008

Alan G. Ross (0011478)

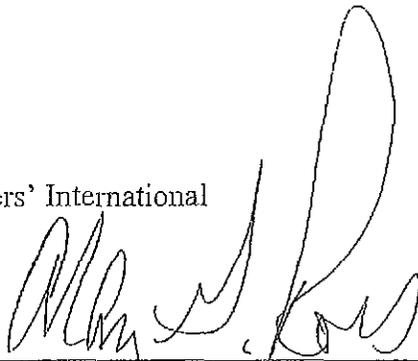
COUNSEL FOR APPELLANT,  
GENE'S REFRIGERATION, HEATING & AIR  
CONDITIONING, INC.

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail on April 23, 2008, postage prepaid, to Counsel for the Appellees:

Joseph M. D'Angelo, Esq.  
Cosme, D'Angelo & Szollosi Co., L.P.A.  
The CDS Building  
202 North Erie Street  
Toledo, OH 43624-1608

Counsel for Appellee, SheetMetal Workers' International  
Association, Local Union No. 33



Alan G. Ross  
COUNSEL FOR APPELLANT

Court of Appeals  
Ninth Judicial District  
Medina County

Telephone (330) 725-9722

Office of  
Kathy Fortney  
Clerk  
Medina County Court of Appeals  
Legal Division  
93 Public Square  
Medina, OH 44256

Case #06CA0104-M

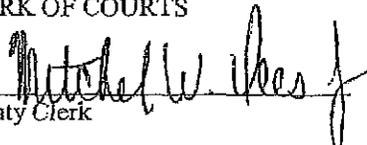
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL  
UNION NO. 33  
PLTF./APPELLANT/CROSS-APPELLEE

VS

GENE'S REFRIGERATION HEATING & AIR CONDITIONING INC.  
DEFT./APPELLEE/CROSS-APPELLANT

Please be advised that a Decision/Order of Judgment was filed in the above entitled case on  
MARCH 10, 2008.

KATHY FORTNEY  
CLERK OF COURTS

By:   
Deputy Clerk

Notice was sent to Counsel of Record and/or Parties not represented by Counsel on March 11,  
2008.

Cc: RYAN K. HYMORE; ALAN G. ROSS; JOSEPH M. D'ANGELO; JOSEPH J.  
GUARINO III; NICK A NYKULAK; KARL E STRAUSS



which denied its motion for attorney fees. This Court reverses the judgment of the trial court, which granted summary judgment in favor of Gene's.

I.

{¶2} Gene's is a contractor which submitted a bid for a public improvement, the Granger Fire Station Project, located in Medina County, Ohio. The parties agree that this project was construction within the meaning of the Ohio Prevailing Wage Law and governed by R.C. 4115.03 to 4115.16. Gene's was awarded a contract for the project. Gene's participated in both site construction work and off-site fabrication of duct work. Some of the duct work fabricated by Gene's in its off-site workshop was installed in the project. Elie Cherfan was an employee of Gene's. Mr. Cherfan worked exclusively in the off-site workshop. Gene's paid Mr. Cherfan, and all other off-site workshop employees, at their regular non-prevailing wage rates, which were lower than the prevailing wage rates.

{¶3} Local 33 is a bona fide organization of labor, which exists in whole or in part for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees. On July 12, 2005, Local 33 filed an interested party administrative prevailing wage complaint pursuant to R.C. 4115.16(A) with the Director of the Ohio Department of Commerce, Division of Labor and Workers' Safety, Bureau of Wage and Hour, asserting violations of the Prevailing Wage Law. The director did not rule on the

merits of the administrative complaint within sixty days. On September 16, 2005, Local 33 filed an interested party prevailing wage enforcement action in the Medina County Court of Common Pleas, pursuant to R.C. 4115.16(B). Local 33 alleged project-wide underpayment and other violations, exceeding the claims regarding only Mr. Cherfan. Gene's timely answered.

{¶4} Gene's filed a motion for summary judgment, arguing that (1) Local 33 lacks standing to sue on behalf of anyone other than Mr. Cherfan, (2) off-site workshop employees are not subject to Ohio's Prevailing Wage Law, and (3) Gene's is entitled to attorney fees.

{¶5} Local 33 filed a cross-motion for partial summary judgment, arguing that (1) the union has standing to sue to enforce the prevailing wage law on the entire project, and (2) workshop employees who work on materials to be used in or in connection with the project are entitled to receive the prevailing wage rates. Local 33 also filed a motion to strike exhibits B, C, D, E, F, H and I, attached to Gene's motion for summary judgment. The parties then filed a series of responses and replies.

{¶6} On March 7, 2006, the trial court denied the motion to strike and both motions for summary judgment. On March 27, 2006, the parties filed a joint motion to reconsider, appending joint stipulations of fact. The matter was referred to the magistrate, who issued a decision on April 27, 2006, granting Local 33's motion to strike the exhibits; denying Local 33's motion for partial summary

judgment; and granting Gene's motion for summary judgment, thereby dismissing the union's complaint. The magistrate did not address the issue of attorney fees.

{¶7} Local 33 timely filed objections to the magistrate's decision, objecting to the magistrate's findings that (1) Local 33 has standing to pursue the action only on behalf of Mr. Cherfan, (2) the off-site shop work performed by Mr. Cherfan is not subject to the prevailing wage law, and (3) Gene's is entitled to summary judgment in its favor. Gene's also timely objected to the magistrate's decision, objecting to the magistrate's striking of exhibits B, C, D, E, F, H and I, attached to Gene's motion for summary judgment.

{¶8} On June 9, 2006, the trial court affirmed the magistrate's decision, ordering that Local 33's motion to strike Gene's exhibits is well taken, that the union has standing to pursue this action only on behalf of Mr. Cherfan, and that the off-site shop work performed by Mr. Cherfan is not subject to the prevailing wage law.

{¶9} On June 14, 2006, Gene's filed a motion for attorney fees. On June 29, 2006, Local 33 filed a notice of appeal. The next day, Local 33 filed a motion to vacate the hearing regarding attorney fees, and alternatively, its opposition to an award of attorney fees to Gene's.

{¶10} On August 4, 2006, this Court dismissed the appeal for lack of a final, appealable order, because the trial court failed to independently enter judgment as to the parties' motions for summary judgment. *Sheet Metal Workers'*

*Internatl. Assn., Local Union 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.*, 9th Dist. No. 06CA0053-M.

{¶11} On November 22, 2006, the trial court issued a journal entry in which it denied Gene's motion for an award of attorney fees. On November 29, 2006, the trial court issued a judgment entry in which it overruled all objections to the magistrate's decision; granted Gene's motion for summary judgment, but denied its motion for attorney fees; and denied Local 33's cross-motion for summary judgment. Local 33 timely appealed, raising two assignments of error for review. Gene's cross-appealed, raising one assignment of error for review.

## II.

### LOCAL 33'S FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED WHEN IT ADOPTED THE MAGISTRATE'S LEGAL CONCLUSION THAT LOCAL 33 WAS NOT AN 'INTERESTED PARTY' WITH RESPECT TO A PARTICULAR PUBLIC IMPROVEMENT WHERE LOCAL 33 WAS 'AUTHORIZED TO REPRESENT EMPLOYEES OF A PERSON' WHO SUBMITTED A BID ON THE PUBLIC IMPROVEMENT."

{¶12} Local 33 argues that the trial court erred by adopting the magistrate's decision, which granted summary judgment in favor of Gene's by finding that Local 33 has standing to pursue its prevailing wage law complaint only on behalf of Elie Cherfan. Local 33 argues that, as an interested party, it has standing to file suit on behalf of more than Mr. Cherfan and to pursue more than underpayment violations of Ohio's Prevailing Wage Law. This Court agrees.

{¶13} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶14} Pursuant to Civ.R. 56(C), summary judgment is proper if:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶15} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party’s pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a “genuine triable issue” exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶16} Both Gene's and Local 33 relied on the Ohio Supreme Court case *Sheet Metal Workers' Internat. Assn., Local Union No. 33 v. Mohawk Mechanical, Inc.* (1999), 86 Ohio St.3d 611, in support of their respective motions for summary judgment. Gene's argued in its motion for summary judgment that *Mohawk* stands for the proposition that a labor union may represent only those employees in a prevailing wage action who have signed an authorization for representation form. Gene's asserted that a union has no standing as an interested party to represent any other employee who has not expressly authorized such representation. Local 33, on the other hand, argued in its motion for summary judgment that the *Mohawk* court held that a union attains standing, i.e., interested party status, to sue regarding any violation of the prevailing wage law arising out of an entire public improvement project so long as any employee working on the project has authorized representation.

{¶17} Ohio's Prevailing Wage Law is set out in R.C. 4115.03 through 4115.16. R.C. 4115.16 authorizes an "interested party" to file a complaint alleging a violation of the prevailing wage law with the director of commerce, or in the court of common pleas, if the director has not ruled on the merits of the complaint within sixty days. R.C. 4115.16(A) and (B).

{¶18} R.C. 4115.03(F) defines "interested party," with respect to a particular public improvement," as

“(1) Any person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement;

“(2) Any person acting as a subcontractor of a person mentioned in division (F)(1) of this section;

“(3) Any bona fide organization of labor which has as members or is authorized to represent employees of a person mentioned in division (F)(1) or (2) of this section and which exists, in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees;

“(4) Any association having as members any of the persons mentioned in division (F)(1) or (2) of this section.”

{¶19} The parties stipulated that Gene’s submitted a bid and was awarded a contract for construction of the public improvement. The parties further stipulated that Local 33 in a bona fide organization of labor which exists, in whole or in part, for the purpose of negotiating with employers concerning wages, hours, or terms and conditions of employment of employees. In addition, the parties stipulated that Elie Cherfan, an employee of Gene’s during the relevant time, authorized Local 33 to represent him.

{¶20} In the *Mohawk* case, Mohawk was a subcontractor whose employees worked on a public improvement project. The project was exempt from the competitive bidding requirements normally associated with public works pursuant to R.C. 3313.372. Mohawk did not pay its employees the prevailing wages under the belief that the prevailing wage laws did not apply to this project. At the time, Mohawk’s employees were not members of Local 33; rather, Local 33 was involved in a labor organization and representation drive with those employees.

After finding that the prevailing wage law applies in non-competitive bid situations, the Supreme Court considered whether Local 33, which was not a party to a collective bargaining agreement with the employer, could still be an “interested party” pursuant to R.C. 4115.03(F). The Supreme Court found that it is enough that the union “in its normal course concerns itself with the stuff of the prevailing wage statute.” *Mohawk*, 86 Ohio St.3d at 614.

{¶21} The Supreme Court further held that “[t]he statute does not require that a majority of employees authorize the representation.” *Id.* The *Mohawk* court continued:

“Employees of Mohawk took affirmative acts to authorize Local 33 to file a complaint on their behalf. Local 33 claims that the union received oral authorization from Mohawk employees to represent them in the prevailing wage complaint. While verbal authorization may be enough under the terms of the statute to allow a union to file a complaint, the record is devoid of any evidence of such authorization. However, within sixty days of the filing of the complaint, three Mohawk employees had given written authorization to Local 33 to represent them in the prevailing wage action. That action cured any jurisdictional defect that may have been present.”<sup>1</sup> *Id.*

{¶22} This Court finds, upon consideration of the Supreme Court’s discussion in *Mohawk* and the statute’s definition of “interested party” within the

---

<sup>1</sup> Chief Justice Moyer, joined by Justices Cook and Lundberg Stratton, dissented, finding that the union did not have standing as an interested party, because the subcontractors’ employees had not executed authorization forms until after Local 33 filed its complaint. The dissent did not address the issue of whether the execution of authorization forms only authorizes a union to file suit on behalf of those employees who affirmatively authorized representation.

context of “a particular public improvement,” that Mr. Cherfan’s written authorization to allow Local 33 to represent him in this prevailing wage action was sufficient to impute standing to Local 33 to file a prevailing wage complaint with respect to the entire project and any and all violations with respect to any and all of Gene’s employees. The Supreme Court did not specify that Local 33 only had standing to pursue a complaint on behalf of those specific employees who signed the authorization forms. Rather, the high court expressly stated that the statute does not require that any specific percentage of employees must authorize representation before the union may file a prevailing wage complaint. In fact, it appears that it is merely the affirmative act of an employee’s authorizing representation which substantiates jurisdiction and imputes interested party status to the union.

{¶23} Neither party cites any other case law which has addressed this issue, and, in fact, this Court has found none. This Court has found three law review articles which cite the *Mohawk* case, including one authored by Chief Justice Moyer who dissented in *Mohawk*; however, none illuminates the issue before us.

{¶24} Based on the above discussion, this Court finds that Gene’s failed to meet its initial burden under *Dresher* to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law on the issue of Local 33’s standing as an interested party to file a prevailing wage claim on behalf of

any or all of Gene's employees and in regard to any or all violations of the prevailing wage law. Accordingly, the trial court erred by granting summary judgment in favor of Gene's on this issue. Local 33's first assignment of error is sustained.

LOCAL 33'S SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED WHEN IT ADOPTED THE MAGISTRATE'S LEGAL CONCLUSION THAT TIME SPENT BY GENE'S EMPLOYEES WORKING ON MATERIALS USED IN OR IN CONNECTION WITH A PARTICULAR PUBLIC IMPROVEMENT, I.E., SHOP TIME, WAS NOT COMPENSABLE AT THE PREVAILING WAGE RATES APPLICABLE IN THE JOB SITE'S LOCALITY."

{¶25} Local 33 argues that the trial court erred by adopting the magistrate's decision, which granted summary judgment in favor of Gene's upon finding that shop work performed by an employee off-site from the public improvement project is not subject to Ohio's Prevailing Wage Law. This Court agrees.

{¶26} This Court has set out our standard of review of summary judgments above.

{¶27} In its motion for summary judgment, Gene's relied on a 1934 decision of the Ohio Supreme Court, *Clymer v. Zane* (1934), 128 Ohio St. 359. The *Clymer* case involved a contractor's employees who worked in an off-site gravel pit to provide sand and gravel for concrete to be used in a public improvement project. The applicable prevailing wage law at the time was codified in Section 17 of the General Code. Section 17-4, General Code, provided for the

payment of “a fair rate of wages to be paid by the successful bidder to the employees in the various branches or classes of the work.” Section 17-6, General Code, provided for fines and penalties for any contractor/subcontractor who violated the wage provisions of the contract. In addition, that section provided for the recovery by “[a]ny employee upon any public improvement” of a penalty sum from the contractor/subcontractor.

{¶28} The issue before the Supreme Court was whether “the men who worked in the gravel pit [were] employees *upon a public improvement?*” (Emphasis in original.) *Id.* at 362. The *Clymer* court held:

“A private enterprise, separate in time and in space, is not necessarily a part of a public improvement because owned and operated by the contractor in charge of the public improvement, and workmen employed in such private enterprise cannot be held to be employees upon a public improvement solely because material prepared in such enterprise is used in the public improvement.” *Id.* at paragraph three of the syllabus.

The Supreme Court reasoned:

“To extend the provisions of the statute to all employees who prepare material for a public improvement would be to include within the provisions of the law the employees of a cement factory which makes cement for a public improvement, and the employees of a brick plant which makes paving brick for a public highway, if such cement plant or brick factory is owned or operated by the contractor in charge of the public improvement. Such a construction would likely lead to conflicts with regulations and ‘codes’ governing wages of other industries. Clearly it was not the intention of the Legislature to extend the provisions of section 17-6 so far. It can be safely assumed that the intention of the Legislature is accurately stated in the section of the law which imposes the penalty. From its position in the series of sections and from its very nature we must conclude that it determines the legislative intent. And because it is a

penal section it must be construed in favor of the person against whom it assesses the penalty.” *Id.* at 363-64.

{¶29} Local 33 argues that the holding in *Clymer* was superseded when the legislature enacted legislation the next year in 1935 to “amend sections 17-3, 17-4 and 17-5 of the General Code and to enact supplementary sections 17-4a and 17-5a pertaining to prevailing rate of wages on public improvements.” Am.S.B. No. 294. Section 17-4a, General Code, was supplemented to provide in relevant part:

“The wages to be paid for a legal day’s work, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day’s work in the same trade or occupation in the locality within the state where such public work on, about or in connection with such labor is performed in its final or completed form is to be situated, erected or used and shall be paid in cash.”

{¶30} The Ohio Supreme Court has stated that “a legislative body in enacting amendments is presumed to have in mind prior judicial constructions of the section[.]” *State ex rel. Cty. Bd. of Edn. of Huron Cty. v. Howard* (1957), 167 Ohio St. 93, 96 (holding that prior Supreme Court case law interpreting a statutory provision was still authoritative law even though the legislature had amended the statute many times since, because the legislature never changed the particular phraseology at issue). The Supreme Court has further held that “legislative inaction in the face of longstanding judicial interpretations of [a] section [of a statute] evidences legislative intent to retain existing law.” *State v. Cichon* (1980), 61 Ohio St.2d 181, 183-84.

{¶31} It has been said:

“The intention of the legislature should control absolutely the action of the judiciary. Where that intention is clearly ascertained, the courts have no other duty to perform than to execute the legislature’s will, without any regard to their own views as to the wisdom or justice of the particular enactment. \*\*\* It is dangerous to attempt to be wiser than the law, and when its requirements are plain and positive, the courts are not called upon to give reasons why it was enacted. And courts should adhere to the cardinal rule that the judicial functions are always best discharged by an honest and earnest desire to ascertain and carry into effect the intention of the law-making body.” *Beck v. Commrs. Of Medina Cty.* (1883), 9 Ohio Dec.Reprint 108.

{¶32} The Ohio Supreme Court has recognized the legislature’s authority to modify the law:

“The law itself, as a rule of conduct, may be changed at the will \*\*\* of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.” *Leis v. Cleveland Ry. Co.* (1920), 101 Ohio St. 162, 165.

{¶33} In this case, this Court finds that the legislature, presumed to have been aware of the holding in the *Chlymer* case, took swift and affirmative actions to supplement the prevailing wage law to require the payment of the prevailing rate to “laborers, workmen or mechanics upon any material to be used upon or in connection [with public works].” Am.S.B. No. 294. The amended statute expressly addressed the issue of an off-site employee’s right to be paid at the prevailing rate. The current version of the statute mirrors the same intent of the legislature to include off-site employees within the purview of the prevailing wage

law. R.C. 4115.05 provides for the prevailing rate of wages to be paid to laborers, workers, or mechanics upon public works. That section further expressly provides:

“The prevailing rate of wages to be paid for a legal day’s work, to laborers, workers, or mechanics, upon any material to be used in or in connection with a public work, shall be not less than the prevailing rate of wages payable for a day’s work in the same trade or occupation in the locality within the state where such public work is being performed and where the material in its final or completed form is to be situated, erected, or used.”

{¶34} R.C. 4115.10(A) mandates that no entity that constructs a public improvement with its own forces shall violate Ohio’s Prevailing Wage Law, R.C. 4115.03 to 4115.16. That section further prescribes a penalty for any such entity “who fails to pay the rate of wages so fixed[.]” R.C. 4115.10(A). Although this section provides an express recovery for “[a]ny employee upon any public improvement” who has not been paid the fixed rate, a reading of this provision in its entirety indicates that the penalty provision is applicable for any violation of the wage provisions, necessarily including R.C. 4115.05 regarding workers upon materials to be used in or in connection with the public work.

{¶35} Our view also comports with the purposes behind the prevailing wage law, enunciated by the Ohio Supreme Court:

“The prevailing wage law evidences a legislative intent to provide a comprehensive, uniform framework for, inter alia, worker rights and remedies vis-à-vis private contractors, subcontractors and materialmen engaged in the construction of public improvements in this state. \*\*\* Above all else, the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining

process by preventing the undercutting of employee wages in the private construction sector.” *Internatl. Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.* (1988), 36 Ohio St.3d 74, 78.

{¶36} In addition, this Court finds support for our position in Judge Zimmerman’s dissent in *Clymer*. The dissent opined that the “intimate connection between the gravel pit and the road construction work, geographically and otherwise,” entitled the gravel pit workers to receive the prevailing rate of wages in that case. *Clymer*, 128 Ohio St. at 365. This idea is mirrored in the legislature’s 1935 amendment to the prevailing wage law, which required the payment of the prevailing wage to workers upon materials to be used in or in connection with a public improvement. The legislature has maintained that same requirement within the current version of the statute.

{¶37} The requirement that the work be done “upon any material to be used in or in connection with a public work,” mandates such an “intimate connection,” thereby foreclosing Gene’s argument that a break from the holding in *Clymer* would create unwieldy results. Gene’s speculated that it would be a logistical nightmare to track all materials used in a public improvement to ensure that those off-site fabricators were paid the correct wage. The statute, however, includes a presupposition that the materials at issue must be fabricated specifically “to be used” in regard to the project, rather than pre-fabricated materials made in the ordinary course of business by suppliers. This Court surmises that it would not be difficult to trace materials made specifically for a particular public

improvement to determine which off-site workers would be subject to the prevailing wage law.

{¶38} R.C. 4115.05 is also clear in its mandate of which prevailing rate must be paid to off-site workers. The statute expressly states that the rate of wages shall be that in the location “where such public work is being performed and where the material in its final or completed form is to be situated, erected, or used.” Accordingly, Gene’s argument that it would be too cumbersome to determine which prevailing wage is applicable is unfounded.

{¶39} Based on the above reasoning, this Court finds that the Ohio Supreme Court’s holding in *Clymer*, that off-site workers are not entitled to receive the prevailing wage, has been superseded by the legislature in its amendment and express supplementing of the prevailing wage law. The statute now expressly provides for the payment of the prevailing rate of wages to employees who fabricate materials to be used in or in connection with a public work. Accordingly, this Court finds that Gene’s failed to meet its initial burden under *Dresher* to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law on the issue of whether an off-site shop worker who fabricates materials to be used in or in connection with a public improvement is subject to the prevailing wage law. Accordingly, the trial court erred by granting summary judgment in favor of Gene’s on this issue. Local 33’s second assignment of error is sustained.

GENE'S CROSS-ASSIGNMENT OF ERROR

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING GENE’S REFRIGERATION, HEATING & AIR CONDITIONING, INC.’S MOTION FOR ATTORNEYS’ FEES AND COSTS PURSUANT TO R.C. 4115.16(D), AND FINDING THAT PLAINTIFF’S ACTION WAS NOT UNREASONABLE OR BROUGHT WITHOUT FOUNDATION.”

{¶40} Gene’s argues that the trial court abused its discretion by denying its motion for attorney fees and costs pursuant to R.C. 4115.16(D).

{¶41} R.C. 4115.16(D) provides:

“Where, pursuant to this section, a court finds a violation of sections 4115.03 to 4115.16 of the Revised Code, the court shall award attorney fees and courts costs to the prevailing party. In the event that court finds that no violation has occurred, the court may award court costs and attorney fees to the prevailing party, other than to the director or the public authority, where the court finds that action brought was unreasonable or without foundation, even though not brought in subjective bad faith.”

{¶42} Based on our disposition of Local 33’s two assignments of error, Gene’s is no longer “the prevailing party.” Accordingly, this Court need not reach the merits of Gene’s cross-assignment of error as it is now rendered moot. App.R. 12(A)(1)(c).

III.

{¶43} Local 33’s two assignments of error are sustained. We decline to address Gene’s cross-assignment of error. The judgment of the Medina County Court of Common Pleas is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed,  
and cause remanded.

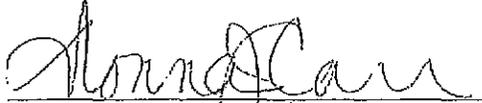
---

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee/cross-appellant.

  
DONNA J. CARR  
FOR THE COURT

MOORE, J.  
CONCURS

SLABY, P. J.  
DISSENTS, SAYING:

{¶44} I would affirm the decision of the trial court in its entirety and respectfully dissent from the majority's resolution of both assignments of error.

{¶45} With respect to the Union's first assignment of error, I conclude that R.C. 4115.03(F)(3) does not contemplate that an employee organization may file a complaint on behalf of all employees as an "interested party" based solely on a written authorization of representation granted by one. As the majority notes, R.C. 4115.03(F)(3) defines an interested party, in part, as "[a]ny bona fide organization of labor which has as members or is authorized to represent employees" of a person referenced in R.C. 4115.03(F)(1) or (F)(2). To conclude that one employee – let alone one employee whose work is offsite and whose involvement in the public improvement is speculative, at best – to effect an authorization of legal representation goes far beyond what the legislature intended.

{¶46} In *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Mohawk Mechanical, Inc.* (1999), 86 Ohio St.3d 611, the Supreme Court of Ohio addressed the representation requirements of R.C. 4115.03(F)(3) and concluded that, on the facts of that case, the written authorizations of several employees were effective. In that case, the Union had engaged in an organizational drive with the employer's employees, but did not yet represent the employees for purposes of collective bargaining. At issue in that case was whether R.C. 4115.03(F)(3)

required the Union to be the employee representative for purposes of collective bargaining in order to be an interested person under that subsection, which also provides that an employee organization must “exist[], in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees[.]” *Mohawk*, 86 Ohio St.3d at 613. Six employees signed written authorizations at one point or another during the dispute, and the Union filed a complaint alleging violations of the prevailing wage statute. The Court concluded that it was sufficient for purposes of R.C. 4115.03(F)(3) “that the labor organization in its normal course concerns itself with the stuff of the prevailing wage statute [because] [b]argaining about wages and hours just has to be something that the labor organization normally does.” *Id.* at 614. Accordingly, the Court determined that R.C. 4115.03(F)(3) did not require the existence of a collective bargaining agreement or an affirmative vote by a majority of employees in order for the Union to qualify as an interested party.

{¶47} Significantly, the *Mohawk* decision was limited to these threshold issues. It does not address the scope of the Union’s representation. Indeed, there is nothing in the opinion that would indicate that the Union’s participation as an interested party related to any employees other than those who provided written authorizations of representation. Justice Moyer’s dissent is illustrative on this point. While agreeing with the majority’s statement of the law, the dissent parted ways with the majority on the issue of the timing of the authorizations, concluding

that an authorization must be signed before a complaint under the prevailing wage statute is filed by the purportedly interested party. As the dissent explained:

“In my view, the execution of authorization forms may be used to authorize a union to stand in the place of non-member employees in regard to alleged prevailing wage claims. *Execution of authorization forms such as those used in the case is analogous to the creation of an attorney-in-fact relationship, and sufficient to satisfy subsection (F)(3), if the forms are executed before the union takes an action on behalf of the employees. \*\*\** In order to demonstrate its standing as an interested party pursuant to R.C. 4115.03(F)(3) based on the execution of authorization forms by non-union members, a labor union should be required to demonstrate that the persons it represents are, in fact, employees of the company accused of violating prevailing wage laws.” (Emphasis added.) *Mohawk* at 616-17, Moyer, C.J., dissenting.

{¶48} It appears more than likely that the representation at issue in *Mohawk* related to the employees whose authorizations were at issue – not to employees at large, whether or not they had authorized it.

{¶49} *Mohawk* does not stand for the proposition that once a single employee authorizes representation under R.C. 4115.03(F)(3), a labor organization has carte blanche authority to represent the interests of all. The majority’s inference to the contrary is unwarranted, and I would overrule the Union’s first assignment of error on this basis.

{¶50} I also disagree with the majority’s resolution of the Union’s second assignment of error and would affirm the judgment of the trial court granting summary judgment to Gene’s because the language of R.C. Chapter 4115 and, in particular, R.C. 4115.05, when considered in its totality, is consistent with the

Supreme Court of Ohio's decision in *Clymer v. Zane* (1934), 128 Ohio St. 359. The majority attempts to limit the practical effects of its holding, but one might fairly ask at what point the fabrication process achieves the "intimate connection" that the majority envisions. When a contractor produces duct work in the normal course of its business for its own use in construction activities, is the connection established when some of its materials are used in relation to a public improvement? Must the fabricator of materials that are incorporated in machines used in job assembly pay the prevailing wage because the machine is ultimately used "in connection with a public work"? When certain off-site employees are paid for fabrication of materials, how is the fraction of their time spent on those items that become part of a public improvement to be determined and compensated out of an entire working day? Must a contractor now record those fractions of working time spent by off-site employees whose work bears a tangential relationship to material used in public improvements? Simply put, the rule is unworkable.

{¶51} I respectfully dissent.

APPEARANCES:

RYAN K. HYMORE and JOSEPH M. D'ANGELO, Attorneys at Law, for appellant/cross appellee.

ALAN G. ROSS and NICK A. NYKULAK, Attorneys at Law, for appellee/cross-appellant.

06 NOV 29 PM 2:01

FILED  
KATHY FORTNEY  
MEDINA COUNTY  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
MEDINA COUNTY, OHIO

SHEET METAL WORKERS'  
INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 33

*Plaintiff*

\* Case No. 05-CIV-1249

\*

Judge Collier

\*

v.

\* JUDGMENT ENTRY

GENE'S REFRIGERATION,  
HEATING & AIR CONDITIONING,  
INC.

*Defendant*

\*

\*

\*

\*

Plaintiff filed an unopposed motion for a final and appealable order. On June 9, 2006, the court intended to grant defendant's summary-judgment motion and deny plaintiff's cross-motion for summary judgment. Defendant then moved for an award of attorney fees under R.C. 4115.16(D), which the court denied on November 22, 2006. The court hereby enters final judgment for defendant and against plaintiff because, based on the parties' cross-motions for summary judgment, defendant is entitled to judgment as a matter of law. Further, no genuine issues of material fact remain and it appears from the record evidence and stipulation of facts that reasonable minds can come to but one conclusion and that conclusion is adverse to the plaintiff, even construing the evidence most strongly in plaintiff's favor.

**ORDER**

IT IS THEREFORE ORDERED that plaintiff's motion for a final and appealable order is GRANTED; and it is further

ORDERED that defendant's summary-judgment motion is GRANTED; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is DENIED; and it is further

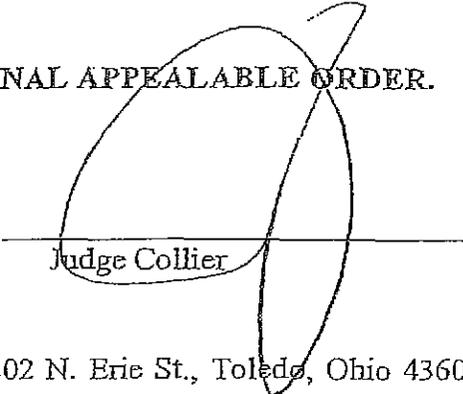
ORDERED that the objections to the magistrate's decision are overruled; and it is further

ORDERED that defendant's motion for attorney fees is DENIED.

*Costs to defendant.*

**THIS IS A FINAL APPEALABLE ORDER.**

\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Judge Collier

cc: Joseph M. D'Angelo & Ryan K. Hymore, 202 N. Erie St., Toledo, Ohio 43604,  
counsel for plaintiff

Alan G. Ross & David S Farkas, 6000 Freedom Sq. Dr., Suite 540, Cleveland,  
Ohio 44131, counsel for defendant



STATE OF OHIO )  
COUNTY OF MEDINA )

SS: COURT OF APPEALS  
06 AUG -4 PM 12:08

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

SHEET METAL WORKERS'  
INTERNATIONAL ASSOCIATION  
LOCAL UNION NO. 33

FILED  
KATHY J. JIMENEZ  
CLERK OF COURTS

C.A. No. 06CA0053-M

Appellant

v.

GENE'S REFRIGERATION, HEATING  
& AIR CONDITIONING, INC.

JOURNAL ENTRY

Appellee

On July 17, 2006, this Court ordered appellant to demonstrate that the order from which it appealed is a final, appealable order. Appellant responded, but has failed to persuade us of our jurisdiction.

In order for a decision to be final, a judge must "separately enter his or her own judgment setting forth the outcome of the dispute and the remedy provided." *Harkai v. Scherba Industries, Inc.* (2000), 136 Ohio App.3d 211, 218.

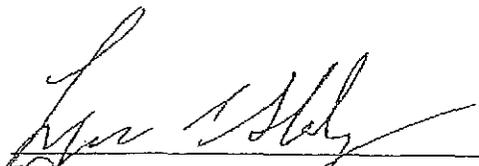
"The matters should be disposed of 'such that the parties need not resort to any other document to ascertain the extent to which their rights and obligations have been determined.' *Daly v. Martin* (May 14, 1997), 9th Dist. No. 2599-M, quoting *Lavelle v. Cox* (Mar. 15, 1991), 11th Dist. No. 90-T-4396 (Ford, J, concurring). See, also, *In re Zakov* (1995), 107 Ohio App.3d 716, 717 (stating that the trial court 'must sufficiently address [the] issues so that the parties may know of their rights and obligations by referring only to that document known as the judgment entry[.]')." *Bergin v. Berezansky*, 9th Dist. No. 21451, 2003-Ohio-4266, at ¶5.

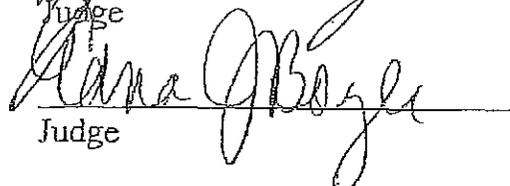
Here, the trial court's June 9, 2006 order affirms the magistrate's decision, but fails to independently enter judgment as to the parties' motions for summary judgment. The order sufficiently determines only the plaintiff's motion to strike. Accordingly, the June 9,

2006 order is not final and appealable and this Court is without jurisdiction to hear the appeal.

The appeal is dismissed. Costs are taxed to the appellant. All outstanding motions are denied as moot.

The clerk of courts is ordered to mail a notice of entry of this judgment to the parties and make a notation of the mailing in the docket, pursuant to App.R. 30, and to provide a certified copy of the order to the clerk of the trial court. The clerk of the trial court is ordered to provide a copy of this order to the judge who presided over the trial court action.

  
\_\_\_\_\_  
Judge

  
\_\_\_\_\_  
Judge

IN THE COURT OF COMMON PLEAS  
MEDINA COUNTY, OHIO

COMMON PLEAS COURT

06 JUN -9. AM 8:56

FILED  
KATHY FORTNEY  
MEDINA COUNTY  
CLERK OF COURTS

SHEET METAL WORKER'S  
INTERNATIONAL ASSOCIATION, LOCAL )  
UNION NO. 33 )

CASE NO. 05CIV1249

Plaintiff )

JUDGE CHRISTOPHER J. COLLIER

vs. )

JUDGMENT ENTRY

GENE'S REFRIGERATION, HEATING & )  
AIR CONDITIONING, INC. )

Defendant )

This matter came before the Court on the objections of both parties to the Magistrate's Decision of April 27, 2006. No transcript of the proceedings is necessary as the Magistrate's Decision was a ruling on motions pursuant to the stipulations of fact submitted by the parties.

After careful independent review of the file, the Magistrate's Decision, and upon considering the briefs of the parties, the Court finds the Magistrate's Decision contains no error of law or other defect. The Magistrate's Decision is affirmed in full. Accordingly, the Plaintiff's motion to strike exhibits B,C,D,E,F,H & I to the Defendant's summary judgment motion is well taken. The Plaintiff has standing to pursue this matter only on behalf of Elie Cherfan. The shop work performed by Cherfan off site from the Granger Township fire station project was not subject to the prevailing wage law.

IT IS SO ORDERED.

CHRISTOPHER J. COLLIER  
JUDGE

"FINAL APPEALABLE ORDER"

IN THE COURT OF COMMON PLEAS  
MEDINA COUNTY, OHIO  
06 APR 27 PM 12:00

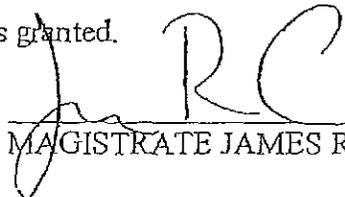
SHEET METAL WORKERS' )  
INTERNATIONAL ASSOCIATION LOCAL ) CASE NO. 05 CIV 1249  
UNION NO. 33 )  
Plaintiff )  
vs. )  
GENE'S REFRIGERATION, HEATING & )  
AIR CONDITIONING, INC. )  
Defendant )

This Cause comes up for hearing on the Defendant's motion for summary judgment; the Plaintiff's motion to strike; the Plaintiff's cross-motion for partial summary judgment and response to the Defendant's motion for summary judgment; the Defendant's sur-reply; the Defendant's response to the Plaintiff's motion to strike; the Plaintiff's reply to the Defendant's response; the Defendant's supplemental brief; and the Plaintiff's supplemental brief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Plaintiff's motion to strike Defendant's exhibits B,C,D,E,F,H & I to the Defendant's motion for summary judgment is granted.
2. Summary judgment is appropriate when (1) there is no genuine issue of material fact to be litigated; (2) whether in viewing the evidence in a light most favorable to the non-moving party it appears that reasonable minds could come to but one conclusion; and (3) whether the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St. 3d 280 and *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317.

3. The parties have submitted written stipulations of fact, attached hereto, which the Court hereby adopts and incorporates herein. Additionally, the parties stipulated on the record that Elie Cherfan was the only employee of the Defendant to expressly authorize the Plaintiff to represent him in this action.
4. Upon consideration of the parties stipulations of fact and the arguments of counsel, the Court finds no material issue of fact exists which would preclude summary judgment on the issues presented.
5. The Court finds the Plaintiff has standing to pursue this action only on behalf on Elie Cherfan.
6. The Court further finds the shop work performed by Cherfan off site from the public improvement project known herein as the Granger Fire Station Project is not subject to the prevailing wage law.
7. Accordingly, the Defendant's motion for summary judgment in its favor on the Plaintiff's complaint is granted.

  
MAGISTRATE JAMES R. LEAVER

Pursuant to Civ. R. 53, any party may file written objections to a Magistrate's Decision within fourteen (14) days of the filing of this decision. A party shall not Assign as error on appeal the court's adoption of any finding of fact or Conclusion of law in that decision unless the party timely and specifically objects to that finding or conclusion as required by Civ. R. 53(E)(3).

#### CERTIFICATE OF SERVICE

A copy of the foregoing was sent to all counsel of record/pro-se parties on this 27th day of April, 2006.

IN THE COURT OF COMMON PLEAS  
MEDINA COUNTY, OHIO  
COMMON PLEAS COURT

06 MAR -7 PM 2: 29

SHEET METAL WORKERS'  
INTERNATIONAL ASSOCIATION LOCAL  
UNION NO. 33

KATHY FORTNEY  
MEDINA COUNTY  
CLERK OF COURTS

CASE NO. 05CIV1249

Plaintiff

JUDGE CHRISTOPHER J. COLLIER

Vs.

GENE'S REFRIGERATION, HEATING &  
AIR CONDITIONING, INC.

JOURNAL ENTRY

Defendant

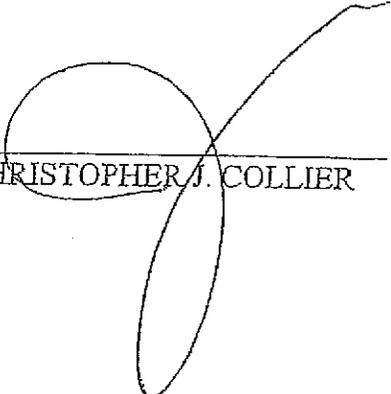
---

This cause comes up for hearing on the summary judgment motion of the Defendant; the Plaintiff's motion to strike; the Plaintiff's cross-motion for summary judgment and response to Defendant's motion for summary judgment; the Defendant's sur-reply in support of summary judgment; the Defendant's response to the Plaintiff's motion to strike; the Plaintiff's short reply to the Defendant's response to Plaintiff's motion to strike; the Defendant's supplemental brief in support of its motion for summary judgment; and the Plaintiff's supplemental brief in support of its cross motion for summary judgment.

Summary judgment is appropriate when (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence in favor of the non-moving party, that conclusion favors the moving party. *Dresher v. Burt* (1996), 75 Ohio St. 3d 280 and *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

The Plaintiff's motion to strike is Denied. Upon consideration of the evidence presented pursuant to Civ. R. 56 (C) and the pleadings, the Court finds the parties' motions for summary judgment are DENIED.

IT IS SO ORDERED.



JUDGE CHRISTOPHER J. COLLIER

**29 USC § 157****Right of employees as to  
organization, collective bargaining, etc.**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section **158(a)(3)** of this title.

§ 158 (a)(1) • (b)(1) 433 593

## **4101:9-4-09 Determination of wage rate schedule.**

(A) The director shall determine the prevailing rate of wages to be paid for a legal day's work to employees upon public works as not less than the collective bargaining rates in the applicable locality under collective bargaining agreements or understandings between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the trade or occupation, was made and collective bargaining agreements or understandings successor thereto. For certain bond projects where a statute so provides, a nonpublic user beneficiary may pay regular bargaining unit employees covered under a collective bargaining agreement the rate under a collective bargaining agreement in existence prior to the date of the commitment instrument undertaking to issue bonds. The wage rate schedule, including all modifications, corrections, escalations, or reductions, shall be the "fixed rate of wages" as used in section 4115.03 to 4115.16 of the Revised Code.

(B) To determine the prevailing rate of wages, the director shall consider the following information:

(1) Signed collective bargaining agreements or understandings between employers and bona fide organizations of labor, in force at the date of the contract for the public improvement;

(2) Signed collective bargaining agreements or understandings which are successor to those mentioned in paragraph (B)(1) of this rule. For purposes of this rule, successor collective bargaining agreements or understandings include collective bargaining agreements or understandings previously in existence but subsequently brought to the attention of the department, and collective bargaining agreements or understandings which come into existence subsequent to an initial request by a public authority for a fixing of the prevailing wage schedule.

(C) When determining the prevailing rate of wages, the director will not recognize special project rates or percentage of scale agreements.

(D) The director shall make a wage rate schedule in accordance with the criteria set forth in division (E) of section 4115.03 and section 4115.04 and 4115.05 of the Revised Code and division-level 4101:9 rules of the Administrative Code.

(E) Ratios of apprentices, helpers, serving laborers, trainees and assistants shall be issued by the director as part of the prevailing wage rate schedule where such classifications exist in the collective bargaining agreement or understanding in force at the date and in the locality of the public improvement. Such ratio shall not be greater than the ratio allowed the contractor or subcontractor in said collective bargaining agreement or understanding.

(F) The wage rate schedules shall be disseminated to the public authorities. Each public authority shall disseminate any changes in the wage rate schedules in their entirety to employers under its jurisdiction within seven working days from receipt and require such employers to make the necessary adjustments in the prevailing wage rates.

(G) No employer shall classify or pay any employee as an apprentice, helper, serving laborer, trainee or assistant unless the director, as part of the prevailing wage rate schedule, designates such classifications as being applicable to the locality.

(H) No employer shall classify or pay any employee as an apprentice, helper, serving laborer, trainee or assistant in excess of the ratio of apprentices, helpers, serving laborers, trainees or assistants to journeymen or skilled workers as indicated in the prevailing wage rate schedule issued by the director for the locality.

HISTORY: Eff 2-15-90; 6-23-97; 6-3-04

Rule promulgated under: RC 119.03

Rule authorized by: RC 4115.12

Rule amplifies: RC 4115.03, 4115.04, 4115.05, 4115.08

R.C. 119.032 review dates: 03/03/2004 and 06/03/2009

## **4101:9-4-10 Procedure for requesting wage rate schedules.**

(A) Every public authority authorized to contract for or construct with its own forces a public improvement, before advertising for bids or undertaking such construction with its own forces, shall have commerce determine the prevailing rate of wages to be paid to laborers, workmen, and mechanics for the class or classes of work called for in the construction of the public improvement. The public authority shall initially request a wage rate schedule under sections 4115.03 to 4115.16 of the Revised Code by submitting the standard forms, supplied by the division of prevailing wage, minimum wage and minors, to the following address: "Division of Labor and Worker Safety, Bureau of Wage and Hour, Ohio Department of Commerce 50 West Broad Street, Suite 2800 Columbus, Ohio 43215"

(B) The public authority shall supply the following information to the division on the applicable forms:

(1) A sufficiently detailed description of the work to indicate the type of construction involved, prepared by the designing architect and/or engineer, unless there is no designing architect or engineer in which case the identity of the person providing the description shall be provided.

(2) A sufficiently detailed, itemized breakdown of all expected costs, prepared by the designing architect and/or engineer, unless there is no designing architect or engineer in which case the identity of the person providing the description shall be provided.

(3) The county in which the project is to be constructed.

(4) The estimated time of completion of the project.

(5) The estimated total cost of the project.

(6) The type of funding involved.

(C) The time required to process requests for a wage rate schedule is dependent upon the facts and circumstances of each project. Commerce shall process each request within thirty days.

(D) The schedule of wage rates, as formulated by commerce, shall be attached to and made a part of the specifications for all work to be performed on every public improvement project subject to sections 4115.03 to 4115.16 of the Revised Code.

(E) Where any work is to be performed pursuant to a contract, the schedule of wage rates shall also be printed on the bidding blanks.

(F) True and accurate copies of the bidding blanks shall be filed with commerce by the public authority prior to the award of the general contract.

(G) Any person may be placed on a county-by-county mailing list for changes in the wage rate schedules by either accessing the wage rate schedules via electronic means through the department of commerce, division of labor and worker safety website, or paying an annual fee of fifteen dollars per

county and providing a sufficient supply of self-addressed envelopes. Each wage rate schedule will be charged at twenty-five cents a page.

(H) In the event that it is unclear which occupation to categorize an employee because the work to be performed on a public improvement by said employee fits the description of more than one occupation, the proper occupation shall be determined by looking to past industry practices in the locality concerning which occupation has traditionally done said work.

HISTORY: Eff 2-15-90; 6-23-97; 6-3-04

Rule promulgated under: RC 119.03

Rule authorized by: RC 4115.12

Rule amplifies: RC 4115.03, 4115.04, 4115.05, 4115.08

R.C. 119.032 review dates: 03/03/2004 and 06/03/2009

## **4101:9-4-13 Duties of contractors.**

(A) Every contractor and subcontractor on a public improvement project shall:

(1) Under its contract with any public authority or contractor of a public authority, supply the prevailing wage coordinator with all documentation required pursuant to sections 4115.03 to 4115.16 of the Revised Code and division-level 4101:9 rules of the Administrative Code. Said contractor shall obtain from either commerce or the public authority sufficient copies of all forms required to assure accurate and timely submission of all reports required by sections 4115.03 to 4115.16 of the Revised Code and division-level 4101:9 rules of the Administrative Code.

(2) As soon as it begins performance under its contract with any contracting public authority, supply the prevailing wage coordinator of the contracting public authority with a schedule of the dates during the life of its contract with the public authority on which it is required to pay wages to employees. The schedule of pay dates must not be greater than the time periods required for reporting of payrolls as set forth paragraph (B) of this rule.

(3) Post in a prominent and accessible place on the site of the work a legible statement of the schedule of wage rates specified in the contract for the various occupations of laborers, workmen, and mechanics employed. The notice must remain posted during the life of the contract and must be supplemented in its entirety whenever new wage rate schedules are issued by the department. The schedule must also state the name, address, and phone number of the prevailing wage coordinator.

(4) On the occasion of the first pay date under a contract, issue to each employee not covered by a collective bargaining agreement or understanding between employees and bona fide organizations of labor an individual written notification stating the identity of the prevailing wage coordinator and when the prevailing wage coordinator is appointed. In the event that the contractor is unable to identify the prevailing wage coordinator he shall contact the Ohio department of commerce.

(5) Failure to provide any information, reports, documents or other evidence required by this rule or rules 4101:9-4-06 and 4101:9-4-07 of the Administrative Code is a violation of sections 4115.05 and 4115.071 of the Revised Code.

(B) For the purposes of paragraph (A)(2) of this rule, the initial and all supplemental payroll reports shall contain the information required in section 4115.071 of the Revised Code and an accurate description of the nature of the deductions withheld from each employee's wages.

(C) Falsification of any information addressed within this rule is a violation of section 4115.071 of the Revised Code and a criminal violation pursuant to section 2921.13 of the Revised Code.

HISTORY: Eff 2-15-90; 6-23-97; 6-3-04

Rule promulgated under: RC 119.03

Rule authorized by: RC 4115.12

Rule amplifies: RC 4115.05, 4115.07, 4115.071

R.C. 119.032 review dates: 03/03/2004 and 06/03/2009

## **4101:9-4-16 Apprentices, serving laborers, assistants, helpers, and trainees.**

(A) Apprentices, serving laborers, assistants, helpers, and trainees, shall not be categorized as common labor.

(B) Apprentices may be categorized in their particular trades, and paid less than the prevailing rates of wages for qualified laborers, workmen, or mechanics in such particular trades, only if there is in force at the time work is being performed under a contract for the public improvement project, in the locality of such project, a collective bargaining agreement or understanding between employers and bona fide organizations of labor which authorizes the employment of apprentices.

(C) Where the foregoing condition is not fulfilled, with respect to any individual apprentice or group of apprentices, such apprentice or group of apprentices shall be categorized according to the type of work performed and shall be paid the full prevailing rates of wages applicable to qualified laborers, workmen, or mechanics who performed that type of work.

(D) Serving laborers, assistants, and helpers may be categorized as such in their particular trades, and paid less than the prevailing rates of wages for qualified laborers, workmen, or mechanics in such particular trades, only if there is in force at the time work is being performed under a contract for the public improvement project, in the locality of such project, a collective bargaining agreement or understanding between employers and bona fide organizations of labor which authorizes the employment of serving laborers, assistants, and helpers.

(E) Where the foregoing condition applicable to serving laborers, assistants, and helpers is not fulfilled, with respect to individual serving laborers, assistants, and helpers, or groups of serving laborers, assistants, and helpers, such individuals or groups shall be classified according to the work performed, and shall be paid the full prevailing rate of wages as stated in the wage rate schedule issued by commerce, applicable to qualified laborers, workmen, or mechanics who perform that type of work.

(F) Trainees may be categorized in their particular trades, and paid less than the prevailing rate of wages for qualified laborers, workmen, or mechanics in such particular trade, only if there is in force at the time work is being performed under a contract for the public improvement project, in the locality of such project, a collective bargaining agreement or understanding between employees and bona fide organizations of labor which authorizes the employment of trainees.

(G) Where the foregoing condition is not fulfilled with respect to an individual trainee or group of trainees, such trainee or group of trainees shall be categorized according to the type of work performed and shall be paid the full prevailing rate of wages applicable to qualified laborers, workmen, or mechanics who perform that type of work.

(H) Ratios of apprentices to skilled workers may not exceed the allowable ratio contained in the prevailing wage schedule. The allowable ratio of apprentices to skilled workers set forth in the prevailing wage schedule shall be the ratio of apprentices to skilled workers in the collective bargaining agreement applicable to the locality of the project. If a contractor or subcontractor has employed apprentices in excess of the allowable ratio contained in the prevailing wage schedule, all such

apprentices are considered to have been improperly classified and will be entitled to an equitable share of the total of the wages which would have been paid had such employees been properly classified. For purposes of ratios, a working foreman, supervisor, or owner may be counted as a laborer, workman, or mechanic; however, if an employer has miscategorized any employee, including a working foreman, supervisor or owner, or utilized an excessive number of apprentices, such employees cannot be counted as laborers, workmen, or mechanics for ratio purposes.

(I) Ratios of serving laborers, assistants, and helpers to skilled workers may not exceed the allowable ratio contained in the prevailing wage schedule. The allowable ratio of serving laborers, assistants, and helpers to skilled workers set forth in the prevailing wage schedule shall be the ratio of serving laborers, assistants, and helpers to skilled workers in the collective bargaining agreement applicable to the locality of the project. If a contractor or subcontractor has employed serving laborers, assistants, or helpers in excess of the allowable ratio contained in the prevailing wage schedule, all such serving laborers, assistants, and helpers are considered to have been improperly classified and will be entitled to an equitable share of the total of wages due if such employees had been properly classified. For purposes of ratios, a working foreman, supervisor, or owner may be counted as a laborer, workman, or mechanic; however, if an employer has miscategorized any employee, including a working foreman, supervisor or owner, or utilized an excessive number of serving laborers, assistants, or helpers, such employees cannot be counted as laborers, workmen, or mechanics for ratio purposes.

(J) Ratios of trainees to skilled workers may not exceed the allowable ratio contained in the prevailing wage schedule. The allowable ratio of trainees to skilled workers set forth in the prevailing wage schedule shall be the ratio of trainees to skilled workers in the collective bargaining agreement applicable to the locality of the project. If a contractor or subcontractor has employed trainees in excess of the allowable ratio contained in the prevailing wage schedule, all such trainees are considered to have been improperly classified and will be entitled to an equitable share of the total of wages due if such employees had been properly classified. For purposes of ratios, a working foreman, supervisor, or owner may be counted as a laborer, workman, or mechanic; however, if an employer has miscategorized any employee, including a working foreman, supervisor or owner, or utilized an excessive number of trainees, such employees cannot be counted as laborers, workmen, or mechanics for ratio purposes.

HISTORY: Eff 2-15-90; 6-23-97; 6-3-04

Rule promulgated under: RC 119.03

Rule authorized by: RC 4115.12

Rule amplifies: RC 4115.05

R.C. 119.032 review dates: 03/03/2004 and 06/03/2009

## **4101:9-4-21 Maintenance, preservation, and inspection of payroll records.**

(A) Each contractor and subcontractor performing work on a public improvement shall keep, maintain for inspection, and preserve accurate payroll records in accordance with these rules. If an employer performs both prevailing wage work and non-prevailing wage work, the records must be capable of being segregated. The employer may segregate such records on an hourly, daily, weekly, work shift, or project basis.

(B) The payroll records required to be kept by this rule shall contain all of the information contained in division (C) of section 4115.071 of the Revised Code and a chronological listing of all hours worked on all projects by each employee employed on the public improvement throughout the term of the public improvement.

(C) Any records maintained by contractors and subcontractors concerning wages paid each employee or the number of hours worked by each employee on a public improvement shall be made available for inspection by any authorized representative of the contracting public authority, including the project prevailing wage coordinator and commerce, during normal working hours of business days.

(D) Such payroll records shall be preserved by the affected contractors and subcontractors for a period of at least one year following the completion of the public improvement for which the records were made.

(E) For the purpose of this rule, the word "preserved" means not destroyed and kept within the state of Ohio for one full year following the completion of the public improvement. The one-year time period is tolled upon any request by commerce to inspect such records or proceed with an investigation or litigation.

(F) The contractor or subcontractor shall make available to the public authority, prevailing wage coordinator, commerce, or any other person with right of inspection, the address where the records are kept and the name and address of the person responsible for keeping and maintaining them. The contractor or subcontractor shall notify the above parties of any change and the records shall not be relocated without notification to the parties listed above.

(G) Any right of inspection of records required by this rule is in addition to any other rights commerce may have to inspect records.

HISTORY: Eff 2-15-90; 6-23-97; 6-3-04

Rule promulgated under: RC 119.03

Rule authorized by: RC 4115.12

Rule amplifies: RC 4115.07, 4115.071

R.C. 119.032 review dates: 03/03/2004 and 06/03/2009

## **4101:9-4-23 Investigation.**

A complaint may be filed with commerce by any employee upon a public improvement or any interested party. The complaints shall be in writing. Commerce will rule on all complaints as expeditiously as possible. Upon receipt of a complaint or upon the director's own motion the director shall initiate an investigation. Such investigation may include an audit of the records of any employer on the affected project. Audits shall be done at reasonable times during business hours. Prior notice is not required though usually will be given. No employer shall refuse an authorized agent of commerce admission to its premises for purposes of inspection. Inspection may cover any duplicate books, cancelled checks, and any records pertaining to nonpublic improvement projects to the extent necessary to determine whether prevailing rates of wages have been paid on public improvement projects. The final decision regarding any audit will be made by the central staff of commerce and not by field auditors.

HISTORY: Eff 2-15-90; 6-23-97; 6-3-04

Rule promulgated under: RC 119.03

Rule authorized by: RC 4115.12

Rule amplifies: RC 4115.10, 4115.13, 4115.16

R.C. 119.032 review dates: 03/03/2004 and 06/03/2009

## 4101:9-4-02 Definitions.

The following definitions are provided for the purposes of clarifying the meaning of certain terms as they appear in sections 4115.03 to 4115.16 of the Revised Code and division-level 4101:9 rules of the Administrative Code.

(A) "Apprentice" means any employee who is enrolled or indentured per trade occupation as a member of a bona fide apprenticeship program, or a person in the first ninety days of probationary employment as an apprentice in such an apprenticeship program who has been certified by the Ohio apprenticeship council or registered with the Ohio apprenticeship council through those states with which Ohio holds reciprocal apprenticeship agreements to be eligible for probationary employment as an apprentice.

(B) "Basic hourly rate of pay" means that portion of the prevailing wage, excluding fringe benefits, paid directly to the employee before deductions.

(C) "Bona fide apprenticeship program" means a comprehensive training program registered with the Ohio apprenticeship council, or certified by those with which Ohio holds reciprocal apprenticeship agreements.

(D) "Business association" means a business in any form including, but not limited to, a sole proprietorship, partnership or corporation.

(E) "Classification" means the level of experience within an occupation, trade or craft.

(F) "Common labor" means the classification for unskilled employees.

(G) "Construction" means:

(1) Any new construction of any public improvement, the total overall project cost of which is fairly estimated to be more than fifty thousand dollars ("threshold") adjusted biennially by the administrator and performed by other than full-time employees who have completed their probationary period in the classified service of a public authority.

(2) Any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating of any public improvement the total overall project cost of which is fairly estimated to be more than fifteen thousand dollars ("threshold") adjusted biennially by the administrator and performed by other than full-time employees who have completed their probationary period in the classified service of a public authority. Construction includes, but is not limited to, dredging, shoring, demolition, drilling, blasting, excavating, clearing, clean up, landscaping, scaffolding, installation and any other change to the physical structure of a public improvement.

(H) "Contractor" means any business association that is involved in construction of a public improvement. Contractor includes an owner, developer, recipients of publicly issued funds, and any person to the extent he participates in whole or in part in the construction of a public improvement by himself, through the use of employees, or by awarding subcontracts to subcontractors as defined in paragraph (GG) of this rule. Contractor also includes any business association that administers, conducts, and oversees construction of a public improvement by directing contractors and

subcontractors on a specific project, but is not physically performing work on the project.

(I) "Commerce" means the Ohio department of commerce.

(J) "Director" means the director of the Ohio department of commerce.

(K) "Employee" means any person in the employment of an employer who performs labor or work of the type performed by a laborer, workman, or mechanic in the construction, prosecution, completion or repair of a public improvement and includes owners, partners, supervisors, and working foremen who devote more than twenty per cent of their time during a work week to such labor or work for the time so spent. Employee does not include an individual who is a sole proprietor. Employee also does not include full-time employees of a public authority who have completed their probationary periods in the classified civil service of the public authority, except such persons are employees if performing work outside the classification specifications of the civil service position for which the probationary period has been served. Employee does not include any person in a program administered by a public authority approved at the discretion of the director in writing prior to work on any project or program, including, but not limited to, local workfare or community action programs.

(L) "Employer" means any public authority, contractor, or subcontractor.

(M) "Enforceable commitment" means a legally binding contractual obligation of an employer.

(N) "Fringe benefits" means:

(1) Medical or hospital care or insurance to provide such;

(2) Pensions on retirement or death or insurance to provide such;

(3) Compensation for injuries or illnesses resulting from occupational activities if it is in addition to that coverage required by Chapter 4121. and 4123. of the Revised Code;

(4) Supplemental unemployment benefits that are in addition to those required by Chapter 4141. of the Revised Code;

(5) Life insurance;

(6) Disability and sickness insurance;

(7) Accident insurance;

(8) Vacation and holiday pay;

(9) Defraying of costs for apprenticeship or other similar training programs which are beneficial only to the employees affected;

(10) Other bona fide fringe benefits.

None of the benefits enumerated in this rule may be considered in the determination of prevailing wages if federal, state, or local law requires contractors or subcontractors to provide any such benefits.

(O) "Fringe benefits credit" means payment made by an employer on behalf of an employee for fringe benefits. The amount of a contribution made by the employee to a fringe benefit, as described in rule 4101:9-4-07 of the Administrative Code, shall not constitute a fringe benefits credit.

(P) "Institution" means any society or corporation of a for-profit, not-for-profit, public or private character established or organized for any charitable, educational or other beneficial purpose.

(Q) "Interested party," with respect to a particular public improvement, means:

(1) Pursuant to division (F)(1) of section 4115.03 of the Revised Code, any person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement;

(2) Any person acting as a subcontractor of a person mentioned in division (F)(1) of section 4115.03 of the Revised Code;

(3) Any bona fide organization of labor which has as members or is authorized to represent employees of a person mentioned in division (F)(1) or (F)(2) of section 4115.03 of the Revised Code and which exists in whole or in part for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees.

(4) Any association having as members any of the persons mentioned in division (F)(1) or (F)(2) of section 4115.03 of the Revised Code.

(R) "Laborer, workman, or mechanic" means a person who performs manual labor, or labor of a particular occupation, trade or craft, or who uses tools of a particular occupation, trade or craft, or who otherwise performs physical work in such occupation, trade or craft which has been approved in writing by the director through issuance of prevailing wage rate schedules for such occupations, trades or crafts.

(S) "Legal day's work" means that portion of any twenty-four-hour time period during which an employee may work consistent with all applicable state or federal laws.

(T) "Locality" means the county in Ohio wherein the physical work upon any public improvement is being performed.

(U) "Materialman" means any supplier or furnisher of materials to be used in the construction of any public improvement.

(V) "Nonpublic user beneficiary" means any nongovernmental person who is the recipient of funds generated by the issuance of public obligations for such person's construction, use, occupancy, or enjoyment of a public improvement.

(W) "Occupation," "trade" or "craft" means the functional nature of work performed by an individual. The director may use the U.S. department of labor's "Dictionary of Occupational Titles" as a guide in

determining an occupation, trade or craft.

(X) "Person" means any individual, institution, business association, or governmental agency.

(Y) "Prevailing wage" means the sum of the following:

(1) The basic hourly rate of pay;

(2) The rate of contribution irrevocably made by an employer to a trustee or to a third person pursuant to a fund, plan, or program which is communicated in writing to the employees affected prior to completion of any project to which sections 4115.03 to 4115.16 of the Revised Code apply;

(3) The rate of costs to the employer which may be reasonably anticipated in providing fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program which is communicated in writing to the employees affected prior to completion of any project to which sections 4115.03 to 4115.16 of the Revised Code apply.

(Z) "Prevailing wage rate schedule" means the determination of the department of the prevailing rates of wages to be paid to employees in applicable occupations and the ratios of helpers, apprentices, trainees, serving laborers, and assistants to skilled workers; it includes any subsequent modifications, corrections, escalations or reductions to any wage rates or ratios.

(AA) "Public authority" means any officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor, or any institution supported in whole or in part by public funds. Sections 4115.03 to 4115.16 of the Revised Code and division level 4101:9 rules of the Administrative Code apply to expenditures of such institutions made in whole or in part from public funds.

(BB) "Public improvement" means:

(1) All buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works which are:

(a) Constructed by a public authority of the state or any political subdivision, including, but not limited to, a municipality thereof;

(b) Constructed by any person for a public authority of the state or a political subdivision, including, but not limited to, a municipality thereof, pursuant to a contract with such public authority;

(c) Constructed pursuant to any statute of the Revised Code requiring payment of prevailing wage; or

(d) Constructed in whole or in part from public funds by an institution supported in whole or in part by public funds.

(2) All work performed on a newly constructed structure or work to suit it for occupancy by a public authority when a public authority rents or leases such a structure or work within six months after

completion of such construction.

(3) Any construction where the federal government or any of its agencies furnishes all or any part of the funds used in constructing such improvement except where the federal government or any of its agencies provides the funds by loan or grant and prescribes predetermined minimum wages to be paid to employees in the construction of such projects or where federal statute or regulation explicitly preempts the application of state prevailing wage law. Loan or grant does not include federal government insurance of state financing on the project nor a loan guarantee of private funds. To be predetermined the rates must be set according to the procedures of the U.S. department of labor, prior to the beginning of construction, and specifications of the project must reference the application of federal wage requirements.

(CC) "Rate of contribution" means the hourly credit of the amount irrevocably made by an employer to a fund, plan or program pursuant to division (E)(2) of section 4115.03 of the Revised Code.

(DD) "Rate of costs" means the hourly credit of the amount reasonably anticipated to be paid by an employer in providing fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program pursuant to division (E)(3) of section 4115.03 of the Revised Code.

(EE) "State" means the state of Ohio or any of its instrumentalities or political subdivisions, and the departments, agencies, boards, or commissions thereof.

(FF) "Structures and works" means, to the extent not specifically stated in the definition of public improvement, all construction activity, including, but not limited to, improvements of all types, such as bridges, dams, plants, highways, parkways, streets, streetscapes, subways, tunnels, mains, power lines pumping stations, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals.

(GG) "Subcontractor" means any business association hired by a contractor to perform construction on a public improvement or any business association hired by such subcontractor, or any subcontractor whose subcontract derives from the chain of contracts from the original subcontractor.

(HH) "Supported in whole or in part by public funds" means any payment or partial payment directly or indirectly from funds provided by loans, grants, taxes, or any other type of payment from public funds of the federal government or of the state as defined in division level 4101:9 rules of the Administrative Code.

(II) "Third person" means a person responsible for safeguarding contributions to a fund, plan, or program pursuant to division (E)(2) of section 4115.03 of the Revised Code or fringe benefits provided pursuant to division (E)(3) of section 4115.03 of the Revised Code, or both. A third person must act in a fiduciary capacity and must assume the usual fiduciary responsibilities imposed upon trustees by applicable state or federal law.

(JJ) "Trainee" is one who is employed pursuant to and individually registered in a program which has received prior approval by the employment and training administration (ETA), U.S. department of labor. Each occupation in which trainees are to be trained must be one commonly recognized

throughout the construction industry.

(KK) "Trustee" means a person responsible for safeguarding contributions to a fund, plan, or program pursuant to division (E)(2) of section 4115.03 of the Revised Code or fringe benefits provided pursuant to division (E)(3) of section 4115.03 of the Revised Code, or both. A trustee must act in a fiduciary capacity and must assume the usual fiduciary responsibilities imposed upon trustees by applicable state or federal law. The terms used in these rules are to be construed according to the purposes of the prevailing wage law, general principles of Ohio law, custom and usage in the construction industry, the context of their usage, and the use of similar words therein.

HISTORY: Eff 2-15-90; 6-23-97; 6-3-04

Rule promulgated under: RC 119.03

Rule authorized by: RC 4115.12

Rule amplifies: RC 4115.03

R.C. 119.032 review dates: 03/03/2004 and 06/03/2009

## **4115.032 Application to construction projects.**

Construction on any project, facility, or project facility to which section 122.452 , 122.80, 165.031 , 166.02, 1551.13, 1728.07, or 3706.042 of the Revised Code applies is hereby deemed to be construction of a public improvement within section 4115.03 of the Revised Code. All contractors and subcontractors working on such projects, facilities, or project facilities shall be subject to and comply with sections 4115.03 to 4115.16 of the Revised Code, and the director of commerce shall, and any interested party may, bring proceedings under such sections to enforce compliance.

The director shall make the determination of wages as required under sections 122.452 , 122.80, 165.031 , 166.02, 1551.13, 1728.07, and 3706.042 of the Revised Code and shall designate one of the director's employees to act as the prevailing wage coordinator under section 4115.071 for any project, facility, or project facility for which a coordinator has not been designated by any public authority.

Effective Date: 07-01-2000

## **4115.03 Wages and hours on public works definitions.**

As used in sections 4115.03 to 4115.16 of the Revised Code:

(A) "Public authority" means any officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor, or any institution supported in whole or in part by public funds and said sections apply to expenditures of such institutions made in whole or in part from public funds.

(B) "Construction" means either of the following:

(1) Any new construction of any public improvement, the total overall project cost of which is fairly estimated to be more than fifty thousand dollars adjusted biennially by the director of commerce pursuant to section 4115.034 of the Revised Code and performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority;

(2) Any reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting of any public improvement, the total overall project cost of which is fairly estimated to be more than fifteen thousand dollars adjusted biennially by the administrator pursuant to section 4115.034 of the Revised Code and performed by other than full-time employees who have completed their probationary period in the classified civil service of a public authority.

(C) "Public improvement" includes all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by a public authority of the state or any political subdivision thereof or by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof. When a public authority rents or leases a newly constructed structure within six months after completion of such construction, all work performed on such structure to suit it for occupancy by a public authority is a "public improvement." "Public improvement" does not include an improvement authorized by section 1515.08 of the Revised Code that is constructed pursuant to a contract with a soil and water conservation district, as defined in section 1515.01 of the Revised Code, or performed as a result of a petition filed pursuant to Chapter 6131., 6133., or 6135. of the Revised Code, wherein no less than seventy-five per cent of the project is located on private land and no less than seventy-five per cent of the cost of the improvement is paid for by private property owners pursuant to Chapter 1515., 6131., 6133., or 6135. of the Revised Code.

(D) "Locality" means the county wherein the physical work upon any public improvement is being performed.

(E) "Prevailing wages" means the sum of the following:

(1) The basic hourly rate of pay;

(2) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program;

(3) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing the following fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected:

(a) Medical or hospital care or insurance to provide such;

(b) Pensions on retirement or death or insurance to provide such;

(c) Compensation for injuries or illnesses resulting from occupational activities if it is in addition to that coverage required by Chapters 4121. and 4123. of the Revised Code;

(d) Supplemental unemployment benefits that are in addition to those required by Chapter 4141. of the Revised Code;

(e) Life insurance;

(f) Disability and sickness insurance;

(g) Accident insurance;

(h) Vacation and holiday pay;

(i) Defraying of costs for apprenticeship or other similar training programs which are beneficial only to the laborers and mechanics affected;

(j) Other bona fide fringe benefits.

None of the benefits enumerated in division (E)(3) of this section may be considered in the determination of prevailing wages if federal, state, or local law requires contractors or subcontractors to provide any of such benefits.

(F) "Interested party," with respect to a particular public improvement, means:

(1) Any person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement;

(2) Any person acting as a subcontractor of a person mentioned in division (F)(1) of this section;

(3) Any bona fide organization of labor which has as members or is authorized to represent employees of a person mentioned in division (F)(1) or (2) of this section and which exists, in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees;

(4) Any association having as members any of the persons mentioned in division (F)(1) or (2) of this section.

(G) Except as used in division (A) of this section, "officer" means an individual who has an ownership interest or holds an office of trust, command, or authority in a corporation, business trust, partnership, or association.

Effective Date: 07-01-2000

## **4115.05 Prevailing rate of wage in locality to control contract wage.**

The prevailing rate of wages to be paid for a legal day's work, as prescribed in section 4115.04 of the Revised Code, to laborers, workers, or mechanics upon public works shall not be less at any time during the life of a contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining agreements or understandings, between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the trade or occupation, was made, and collective bargaining agreements or understandings successor thereto.

Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less at any time during the life of a contract for the public work than the prevailing rate of wages then payable for such labor in the locality where the public work is being performed, under or as a result of collective bargaining agreements or understandings between employers and bona fide organizations of labor in force at the date the contract for the public work, requiring the employment of serving laborers, helpers, assistants, or apprentices, was made, and collective bargaining agreements or understandings successor thereto.

Apprentices will be permitted to work only under a bona fide apprenticeship program if such program exists and is registered with the Ohio apprenticeship council.

The allowable ratio of apprentices to skilled workers permitted to work shall not be greater than the ratio allowed the contractor or subcontractor in the collective bargaining agreement or understanding referred to in this section under which the work is being performed.

In the event there is no such collective bargaining agreement or understanding in the immediate locality, then the prevailing rates of wages in the nearest locality in which such collective bargaining agreements or understandings are in effect shall be the prevailing rate of wages, in such locality, for the various occupations covered by sections 4115.03 to 4115.16 of the Revised Code.

The prevailing rate of wages to be paid for a legal day's work, to laborers, workers, or mechanics, upon any material to be used in or in connection with a public work, shall be not less than the prevailing rate of wages payable for a day's work in the same trade or occupation in the locality within the state where such public work is being performed and where the material in its final or completed form is to be situated, erected, or used.

Every contract for a public work shall contain a provision that each laborer, worker, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work, shall be paid the prevailing rate of wages provided in this section.

No contractor or subcontractor under a contract for a public work shall sublet any of the work covered by such contract unless specifically authorized to do so by the contract.

Where contracts are not awarded or construction undertaken within ninety days from the date of the establishment of the prevailing rate of wages, there shall be a redetermination of the prevailing rate of

wages before the contract is awarded. Upon receipt from the director of commerce of a notice of a change in prevailing wage rates, a public authority shall, within seven working days after receipt thereof, notify all affected contractors and subcontractors with whom the public authority has contracts for a public improvement of the changes and require the contractors to make the necessary adjustments in the prevailing wage rates.

If the director determines that a contractor or subcontractor has violated sections 4115.03 to 4115.16 of the Revised Code because the public authority has not notified the contractor or subcontractor as required by this section, the public authority is liable for any back wages, fines, damages, court costs, and attorney's fees associated with the enforcement of said sections by the director for the period of time running until the public authority gives the required notice to the contractor or subcontractor.

On the occasion of the first pay date under a contract, the contractor or subcontractor shall furnish each employee not covered by a collective bargaining agreement or understanding between employers and bona fide organizations of labor with individual written notification of the job classification to which the employee is assigned, the prevailing wage determined to be applicable to that classification, separated into the hourly rate of pay and the fringe payments, and the identity of the prevailing wage coordinator appointed by the public authority. The contractor or subcontractor shall furnish the same notification to each affected employee every time the job classification of the employee is changed.

Effective Date: 07-01-2000

## **4115.07 Full payment of wages - records.**

All contractors and subcontractors required by sections 4115.03 to 4115.16 of the Revised Code, and the action of any public authority to pay not less than the prevailing rate of wages shall make full payment of such wages in legal tender, without any deduction for food, sleeping accommodations, transportation, use of small tools, or any other thing of any kind or description. This section does not apply where the employer and employee enter into an agreement in writing at the beginning of any term of employment covering deductions for food, sleeping accommodations, or other similar item, provided such agreement is submitted by the employer to the public authority fixing the rate of wages and is approved by such public authority as fair and reasonable.

All contractors or subcontractors falling within or affected by sections 4115.03 to 4115.16 of the Revised Code, shall keep full and accurate payroll records with respect to wages paid each employee and the number of hours worked by each employee, covering all disbursements of wages to their employees to whom they are required to pay not less than the prevailing rate of wages. Such payroll records shall be open to inspection by any authorized representative of the contracting public authority, including the prevailing wage coordinator or the director of commerce at any reasonable time and as often as may be necessary, and such records shall not be destroyed or removed from the state for the period of one year following the completion of the public improvement in connection with which the records are made. There shall be posted in a prominent and accessible place on the site of the work a legible statement of the schedule of wage rates specified in the contract to the various classifications of laborers, workers, and mechanics employed, said statement to remain posted during the life of each contract.

Each contractor or subcontractor shall file with the contracting public authority upon completion of the public improvement and prior to final payment therefor an affidavit stating that the contractor or subcontractor has fully complied with sections 4115.03 to 4115.16 of the Revised Code.

Effective Date: 07-01-2000

## 4115.10 Prohibitions.

(A) No person, firm, corporation, or public authority that constructs a public improvement with its own forces, the total overall project cost of which is fairly estimated to be more than the amounts set forth in division (B)(1) or (2) of section 4115.03 of the Revised Code, adjusted biennially by the director of commerce pursuant to section 4115.034 of the Revised Code, shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code. Any employee upon any public improvement, except an employee to whom or on behalf of whom restitution is made pursuant to division (C) of section 4115.13 of the Revised Code, who is paid less than the fixed rate of wages applicable thereto may recover from such person, firm, corporation, or public authority that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to the employee and in addition thereto a sum equal to twenty-five per cent of that difference. The person, firm, corporation, or public authority who fails to pay the rate of wages so fixed also shall pay a penalty to the director of seventy-five per cent of the difference between the fixed rate of wages and the amount paid to the employees on the public improvement. The director shall deposit all moneys received from penalties paid to the director pursuant to this section into the penalty enforcement fund, which is hereby created in the state treasury. The director shall use the fund for the enforcement of sections 4115.03 to 4115.16 of the Revised Code. The employee may file suit for recovery within ninety days of the director's determination of a violation of sections 4115.03 to 4115.16 of the Revised Code or is barred from further action under this division. Where the employee prevails in a suit, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(B) Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable thereto may file a complaint in writing with the director upon a form furnished by the director. The complaint shall include documented evidence to demonstrate that the employee was paid less than the prevailing wage in violation of this chapter. Upon receipt of a properly completed written complaint of any employee paid less than the prevailing rate of wages applicable, the director shall take an assignment of a claim in trust for the assigning employee and bring any legal action necessary to collect the claim. The employer shall pay the costs and reasonable attorney's fees allowed by the court if the employer is found in violation of sections 4115.03 to 4115.16 of the Revised Code.

(C) If after investigation pursuant to section 4115.13 of the Revised Code, the director determines there is a violation of sections 4115.03 to 4115.16 of the Revised Code and a period of sixty days has elapsed from the date of the determination, and if:

(1) No employee has brought suit pursuant to division (A) of this section;

(2) No employee has requested that the director take an assignment of a wage claim pursuant to division (B) of this section;

The director shall bring any legal action necessary to collect any amounts owed to employees and the director. The director shall pay over to the affected employees the amounts collected to which the affected employees are entitled under division (A) of this section. In any action in which the director prevails, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(D) Where persons are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for self or any other person, shall request, demand, or receive, either before or after the person is engaged, that the person so engaged pay back, return, donate, contribute, or give any part or all of the person's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent the procuring or retaining of employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

(E) The director shall enforce sections 4115.03 to 4115.16 of the Revised Code.

(F) For the purpose of supplementing existing resources and to assist in enforcing division (E) of this section, the director may contract with a person registered as a public accountant under Chapter 4701. of the Revised Code to conduct an audit of a person, firm, corporation, or public authority.

Effective Date: 09-26-2003

## **4115.12 Administrative rules for contractors and subcontractors.**

In order to facilitate the administration of sections 4115.03 to 4115.16 of the Revised Code, and to achieve the purposes of those sections, the director of commerce may adopt reasonable rules, not inconsistent with those sections, for contractors and subcontractors engaged in the construction, prosecution, completion, or repair of a public improvement financed in whole or in part by any public authority.

Effective Date: 07-01-2000

## **4115.16 Filing complaint.**

(A) An interested party may file a complaint with the director of commerce alleging a violation of sections 4115.03 to 4115.16 of the Revised Code. The director, upon receipt of a complaint, shall investigate pursuant to section 4115.13 of the Revised Code. If the director determines that no violation has occurred or that the violation was not intentional, the interested party may appeal the decision to the court of common pleas of the county where the violation is alleged to have occurred.

(B) If the director has not ruled on the merits of the complaint within sixty days after its filing, the interested party may file a complaint in the court of common pleas of the county in which the violation is alleged to have occurred. The complaint may make the contracting public authority a party to the action, but not the director. Contemporaneous with service of the complaint, the interested party shall deliver a copy of the complaint to the director. Upon receipt thereof, the director shall cease investigating or otherwise acting upon the complaint filed pursuant to division (A) of this section. The court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code. The court's finding that a violation has occurred shall have the same consequences as a like determination by the director. The court may order the director to take such action as will prevent further violation and afford to injured persons the remedies specified under sections 4115.03 to 4115.16 of the Revised Code. Upon receipt of any order of the court pursuant to this section, the director shall undertake enforcement action without further investigation or hearings.

(C) The director shall make available to the parties to any appeal or action pursuant to this section all files, documents, affidavits, or other information in the director's possession that pertain to the matter. The rules generally applicable to civil actions in the courts of this state shall govern all appeals or actions under this section. Any determination of a court under this section is subject to appellate review.

(D) Where, pursuant to this section, a court finds a violation of sections 4115.03 to 4115.16 of the Revised Code, the court shall award attorney fees and court costs to the prevailing party. In the event the court finds that no violation has occurred, the court may award court costs and attorney fees to the prevailing party, other than to the director or the public authority, where the court finds the action brought was unreasonable or without foundation, even though not brought in subjective bad faith.

Effective Date: 07-01-2000

## **4115.99 Penalty.**

(A) Whoever violates section 4115.08 or 4115.09 of the Revised Code shall be fined not less than twenty-five nor more than five hundred dollars.

(B) Whoever violates division (C) of section 4115.071 , section 4115.10, or 4115.11 of the Revised Code is guilty of a misdemeanor of the second degree for a first offense; for each subsequent offense such person is guilty of a misdemeanor of the first degree.

Effective Date: 08-25-1976

TITLE 29 - LABOR

SUBTITLE A - OFFICE OF THE SECRETARY OF LABOR  
PART 5 - LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS  
COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR  
STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS  
SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)  
subpart a - DAVIS - BACON AND RELATED ACTS PROVISIONS AND PROCEDURES

5.2 - Definitions.

(a) The term Secretary includes the Secretary of Labor, the Deputy Under Secretary for Employment Standards, and their authorized representatives.

(b) The term Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or authorized representative.

(c) The term Federal agency means the agency or instrumentality of the United States which enters into the contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to the project subject to a statute listed in 5.1.

(d) The term Agency Head means the principal official of the Federal agency and includes those persons duly authorized to act in the behalf of the Agency Head.

(e) The term Contracting Officer means the individual, a duly appointed successor, or authorized representative who is designated and authorized to enter into contracts on behalf of the Federal agency.

(f) The term labor standards as used in this part means the requirements of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other statutes listed in 5.1, and the regulations in parts 1 and 3 of this subtitle and this part.

(g) The term United States or the District of Columbia means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including corporations, all or substantially all of the stock of which is beneficially owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including nonappropriated fund instrumentalities.

(h) The term contract means any prime contract which is subject wholly or in part to the labor standards provisions of any of the acts listed in 5.1 and any subcontract of any tier thereunder, let under the prime contract. A State or local Government is not regarded as a contractor under statutes providing loans, grants, or other Federal assistance in situations where construction is performed by its own employees.

However, under statutes requiring payment of prevailing wages to all laborers and mechanics employed on the assisted project, such as the U.S. Housing Act of 1937, State and local recipients of Federal-aid must pay these employees according to Davis-Bacon labor standards.

(i) The terms building or work generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types, such as bridges, dams,

plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The manufacture or furnishing of materials, articles, supplies or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not a building or work within the meaning of the regulations in this part unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.

(j) The terms construction, prosecution, completion, or repair mean the following: (1) All types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work within the meaning of (paragraph (l)) of this section by laborers and mechanics employed by a construction contractor or construction subcontractor (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, all work done in the construction or development of the project), including without limitation (i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site; (ii) Painting and decorating; (iii) Manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996 in the construction or development of the project); (iv)(A) Transportation between the site of the work within the meaning of paragraph (l)(1) of this section and a facility which is dedicated to the construction of the building or work and deemed a part of the site of the work within the meaning of paragraph (l)(2) of this section; and (B) Transportation of portion(s) of the building or work between a site where a significant portion of such building or work is constructed, which is a part of the site of the work within the meaning of paragraph (l)(1) of this section, and the physical place or places where the building or work will remain.

(2) Except for laborers and mechanics employed in the construction or development of the project under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, and except as provided in paragraph (j)(1)(iv)(A) of this section, the transportation of materials or supplies to or from the site of the work by employees of the construction contractor or a construction subcontractor is not construction, prosecution, completion, or repair (see *Building and Construction Trades Department, AFL-CIO v. United States Department of Labor Wage Appeals Board (Midway Excavators, Inc.)*, 932 F.2d 985 (D.C. Cir. 1991)).

(k) The term public building or public work includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

(l) The term site of the work is defined as follows: (1) The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project; (2) Except as provided in

paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (l)(1) of this section; (3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

(m) The term laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term laborer or mechanic includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics.

Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent.

(n) The terms apprentice, trainee, and helper are defined as follows: (1) Apprentice means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S.

Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Bureau, or (ii) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice; (2) Trainee means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that Administration.

(3) These provisions do not apply to apprentices and trainees employed on projects subject to 23 U.S.C. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c).

(4) A distinct classification of helper will be issued in wage determinations applicable to work performed on construction projects covered by the labor standards provisions of the Davis-Bacon and Related Acts only where: (i) The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination; (ii) The use of such helpers is an established prevailing practice in the area; and (iii) The helper is not employed as a trainee in an informal training program. A helper classification will be added to wage determinations pursuant

to 5.5(a)(1)(ii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

(o) Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by loans, grants, or guarantees from the United States is employed regardless of any contractual relationship alleged to exist between the contractor and such person.

(p) The term wages means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan of program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Davis-Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal, State, or local law.

(q) The term wage determination includes the original decision and any subsequent decisions modifying, superseding, correcting, or otherwise changing the provisions of the original decision. The application of the wage determination shall be in accordance with the provisions of 1.6 of this title.

[48 FR 19541, Apr. 29, 1983, as amended at 48 FR 50313, Nov. 1, 1983; 55 FR 50149, Dec. 4, 1990; 57 FR 19206, May 4, 1992; 65 FR 69693, Nov. 20, 2000; 65 FR 80278, Dec. 20, 2000]

THE STATE OF OHIO  
LEGISLATIVE ACTS

PASSED  
(EXCEPTING APPROPRIATION ACTS)

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

NINETY-FIRST GENERAL ASSEMBLY OF OHIO

At Its Regular Session

BEGUN AND HELD IN THE CITY OF COLUMBUS, OHIO,  
JANUARY 7, 1935 to MAY 23, 1935,  
(both inclusive)

Also the Times for Holding the Courts of Appeals,  
and Courts of Common Pleas in Ohio,  
A. D. 1934 and 1935.

---

VOLUME CXVI

---



Columbus, Ohio  
THE F. J. HEER PRINTING CO.  
1935  
Bound at State Bindery

(Amended Senate Bill No. 294)

## AN ACT

To amend sections 17-3, 17-4 and 17-5 of the General Code and to enact supplementary sections 17-4a and 17-5a pertaining to prevailing rate of wages on public improvements.

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION 1. That sections 17-3, 17-4 and 17-5 of the General Code be amended and that supplemental sections 17-4a and 17-5a be enacted to read as follows:

**Definitions of terms.**

Sec. 17-3. The term "public authority", as used in this act, shall mean any officer, board, or commission of the state of Ohio, or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor. The term "construction", as used in this act, shall mean any construction, reconstruction, improvement, enlargement, alteration or repair of any public improvement fairly estimated to cost more than three hundred dollars. The term "public improvement", as used in this act, shall include all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works and all other structures or works constructed by the state of Ohio or any political subdivision thereof. The term "locality", as used in this act, shall mean the county wherein the physical work upon any public improvement is being performed. The term "public authority" shall also mean any institution supported in whole or in part by public funds and this act shall apply to expenditures of such institutions made in whole or in part from public funds.

**Prevailing rate of wages, how determined.**

Sec. 17-4. It shall be the duty of every public authority authorized to contract for or construct with its own forces for a public improvement, before advertising for bids or undertaking such construction with its own forces, to have the department of industrial relations ascertain and determine the prevailing rates of wages of mechanics and laborers for the class of work called for by the public improvement, in the locality where the work is to be performed; and such schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the bidding blanks where the work is done by contract. But a minimum rate of wages for common laborers, on work coming under the jurisdiction of the state department of highways, shall be fixed in each county of the state by said department of highways, in accordance with the provisions of section 17-4a of this act. This act shall not apply to public improvements in any case where the federal government or any of its agencies furnishes by loan or grant all or any part of the funds used in constructing such improvements, provided the federal government or any of its agencies prescribes predetermined minimum wages to be paid to

*mechanics and laborers employed in the construction of such improvements.*

\*\*\*

**Prevailing rate of wages to control; redetermination, when.**

Sec. 17-4a. The wages to be paid for a legal day's work, as hereinbefore prescribed in section 17-4 of this act, to laborers, workmen or mechanics upon such public works shall not be less than the wages paid in the same trade or occupation in the locality where such public work is being performed, under collective agreements or understanding between bona fide organizations of labor and employers, at the date such contract is made, and in the event there be no such agreement or understanding, then not less than the prevailing rate of wages to be determined as provided in section 17-4 of this act. Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less than the wage in the locality as a result of collective agreement or understanding and if no such agreement or understanding exists, shall be paid not less than the prevailing rate of wages to be ascertained as provided in section 17-4 of this act. The wages to be paid for a legal day's work, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with such labor is performed in its final or completed form is to be situated, erected or used and shall be paid in cash. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, sub-contractor or other person about or upon such public work, shall be paid the wages herein provided.

Where contracts are not awarded or construction undertaken within ninety days from the date of the establishment of the prevailing rate of wages as provided in section 17-4 of this act, there shall be a redetermination of the prevailing rate of wages before the contract is awarded.

**Contract to contain provision relative to rate of wages to be paid; rate paid by public authority.**

Sec. 17-5. In all cases where any public authority shall fix a \*\*\* prevailing rate or rates of wages as herein provided, and the work is done by contract, the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his sub-contractors to pay a rate or rates of wages which shall not be less than the rate or rates of wages so fixed. It shall be the duty of the successful bidder and all his sub-contractors to strictly comply with such provisions of the contract.

*Where a public authority constructs a public improvement with its own forces it shall be the duty of such authority to pay a rate or rates of wages which shall not be less than the rate or rates of wages so fixed as herein provided. Any mechanic or laborer paid less than such rate*