

ORIGINAL

In the
SUPREME COURT OF OHIO

DOUG BERGMAN, et al.,	:	Case No. 2009-0558
	:	Certified Conflict Case No. 2009-0649
Plaintiffs-Appellants,	:	
	:	On Appeal from the
v.	:	Butler County
	:	Court of Appeals,
MONARCH CONSTRUCTION CO.,	:	Twelfth Appellate District
	:	
Defendant-Appellee.	:	Court of Appeals Case
	:	No. CA2008-02-0044

MERITS BRIEF OF APPELLEE MONARCH CONSTRUCTION COMPANY

GREGORY PARKER ROGERS* (0042323)
**Counsel of Record*

MATTHEW R. BYRNE (0082228)
Taft Steffinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
513-357-9349
513-381-0205 fax
rogers@taftlaw.com
byrne@taftlaw.com

Counsel for Defendant-Appellee
Monarch Construction Co.

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 43604-1608
419-224-8989
419-244-8990 fax
jdangelo@cdslaw.net

Counsel for Plaintiffs-Appellants
Doug Bergman, et al.

RICHARD CORDRAY (0038034)
Attorney General of Ohio

BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*

ALEXANDRA T. SCHIMMER (0075732)

Chief Deputy Solicitor General
SUSAN M. SULLIVAN (0012081)

DAN E. BELVILLE (0040250)

LINDSAY M. SESTILE (0075618)

Assistant Attorneys General

30 East Broad Street, 17th Floor

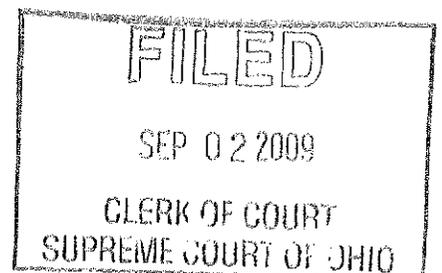
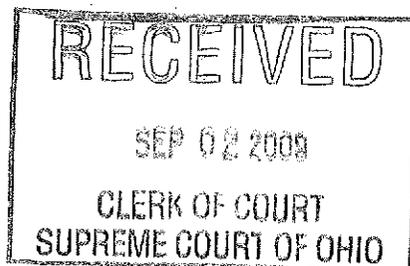
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
State of Ohio



N. VICTOR GOODMAN* (0004912)

**Counsel of Record*

MARK D. TUCKER

Benesch, Friedlander, Coplan & Aronoff, LPP

41 South High Street, 26th Floor

Columbus, Ohio 43215

(614) 223-9300

(614) 223-9330 fax

vgoodman@bfca.com

mtucker@bfca.com

Counsel for *Amicus Curiae* Ohio State
Building and Construction Trades Council

ROGER L. SABO*

**Counsel of Record*

Schottenstein, Zox & Dunn Co., LPA

250 West Street

Columbus, Ohio 43215

(614) 462-5030

(614) 222-3488 (fax)

rsabo@szd.com

Counsel for *Amicus Curiae* Associated General
Contractors of Ohio, Inc. and Allied
Construction Industries

ALAN ROSS*

NICK A. NYKULAK

**Counsel of Record*

Ross, Brittain & Schonberg Co., LPA

6480 Rockside Woods Blvd., Suite 350

Cleveland, Ohio 44131

(216) 447-1551

(216) 447-1554 (fax)

alanr@rbslaw.com

nickn@rbslaw.com

Counsel for *Amicus Curiae* Northern Ohio
Chapter of Associated Builders and
Contractors and Associated Builders and
Contractors of Ohio

TABLE OF CONTENTS

	Page
Introduction.....	1
Statement of Facts.....	3
Appellee’s Propositions of Law and Arguments	5
I. <u>Appellee’s Proposition of Law No. 1: R.C. 4115.05 makes the public authority liable for any back wages, fines, damages, court costs and attorney fees where it fails to notify a contractor or subcontractor of a change in the prevailing wage rates</u>	5
II. <u>Appellee’s Proposition of Law No. 2: The 25% penalty described in R.C. 4115.10(A) is discretionary</u>	10
A. The Penal Nature of R.C. 4115.10(A) Requires That The 25% Penalty Is Discretionary.....	10
B. The Use Of "May" In R.C. 4115.10(A) Means The 25% Penalty Is Discretionary	11
C. The Proper Use of "May" And "Shall" In Other Sections of The Prevailing Wage Statute Show That The Drafters Knew How To Use These Words To Achieve Their Desired Goals.....	12
D. R.C. 4115.16(B) Places The Courts In The Same Position As The Director, Who May Decide Not To Require Penalties Per R.C. 4115.13(C)	12
E. No Purpose Is Served By Penalizing Monarch, The Innocent Contractor	12
III. <u>Appellee’s Proposition Of Law No. 3: Only the State has standing to require payment of the 75% penalty to Commerce described in R.C. 4115.10(A).</u>	13
Conclusion	15
Certificate Of Service	15

Appendix.....	<u>Appx. Page</u>
Cited Pages of Transcript of Bench Trial	1
29 C.F.R. § 5.5(a)(6).....	13
Ohio Civil Rule 17(A)	21
R.C. 4115.99	23

TABLE OF CASES

	Page
<i>Bergman v. Monarch Constr. Co.</i> (Ohio App. 12 Dist.), 2009-Ohio-551, 2009 WL 295396.....	6
<i>City of North Canton v. City of Canton</i> , 114 Ohio St. 3d 253, 2007-Ohio-4005.....	13
<i>Dean v. Seco Elec. Co.</i> (1988), 35 Ohio St. 3d 203.....	10
<i>Dorrian v. Scioto Conservancy Dist.</i> (1971), 27 Ohio St. 2d 102.....	11
<i>Int'l Bh'd. of Elec. Workers Local Union No. 8 v. Stollsteimer Elec., Inc.</i> (Ohio App. 6 Dist), 2006-Ohio-3865.....	10, 12
<i>Lyons v. Chapman</i> (1931), 40 Ohio App. 1.....	13
<i>Nuco Plastics, Inc. v. Universal Plastics, Inc.</i> (Ohio App. 11 Dist.) 76 Ohio App. 3d 137.....	13
<i>Ohio Asphalt Paving, Inc. v. Dep't of Indus. Relations</i> (1992), 63 Ohio St. 3d 512.....	2, 6, 7
<i>State ex rel. Nat'l. Elec. Contractors Ass'n v. Ohio Bur. Of Emp. Svcs.</i> (1998), 83 Ohio St. 3d 173.....	8
<i>Young v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> (Ohio App. 8 Dist. 1993), 88 Ohio App. 3d 12.....	13

Other Authorities

29 C.F.R. § 5.5(a)(6).....	5
Ohio Civil Rule 17(A).....	13
R.C. 4115.....	<i>passim</i>
R.C. 4115.05.....	<i>passim</i>
R.C. 4115.10(A).....	<i>passim</i>
R.C. 4115.13(C).....	1, 12

R.C. 4115.16.....	9
R.C. 4115.16(B).....	<i>passim</i>
R.C. 4115.16(D).....	12
R.C. 4115.99.....	12
<i>Through The Looking Glass (And What Alice Found There) (1871)</i>	10

Introduction

Defendant-Appellee Monarch Construction Company ("Monarch" or "the Company") was the general contractor on a public construction project. One of its subcontractors, Don Salyers Masonry ("Salyers"), failed to pay \$171,812.03 in prevailing wages to Salyers's employees, unbeknownst to Monarch. Salyers went out of business, leaving Monarch in the lurch for Salyers's unpaid wages. The State, and the original 34 plaintiffs, sought from Monarch \$368,266.34 in unpaid wages and \$368,266.34 in penalties, as a result of their faulty interpretation of the prevailing wage laws. In other words, the State and plaintiffs sought \$736,532.68 from Monarch where only \$171,812.03 was unpaid by its subcontractor.

Upon being provided notice, Monarch proved to the State that \$171,812.03 was left owing to the Salyers employees, which was less than half the original calculation of \$368,266.34 left unpaid. Thirty-four employees filed this lawsuit, and 52 assigned their claim to the Department of Commerce. Monarch paid the 52 employees, and the claims of the remaining 34 went to trial. Monarch now has paid the claims of all but four of the plaintiffs who pursue the claim in this court. Only about \$10,000 remains at issue.

Plaintiffs and their *amici* are wrong when they claim that the 25% penalty on unpaid prevailing wages under R.C. 4115.10(A) is mandatory.¹ The statute says that plaintiffs "may" recover a penalty. This is a penal statute that requires strict construction. The General Assembly knew how to make a penalty mandatory, but it chose not to do so. Moreover, Plaintiffs admit that the Director of Commerce can decide not to penalize a contractor under the provisions of R.C. 4115.13(C). The provisions of R.C. 4115.16(B) are that a court stands in the shoes of the

¹ The participation of the State as *amicus curiae* on the penalty issue is puzzling. The State received payment on behalf of the 52 employees without any penalty. The State's position now that penalties are mandatory is inconsistent with its earlier position in this litigation.

Director to make this determination where an interested party sues. The courts below made the necessary findings that absolve Monarch from this penalty.

For this same reason, Monarch cannot be held liable for the 75% penalty payable to the State, as Monarch did nothing wrong. Further, Plaintiffs have no standing to try to collect the 75% mandatory penalty that would go to the State and not to them, as the courts below properly found. Plaintiffs sue to try to collect on behalf of another, and they have no financial interest or constitutionally cognizable claim in payment by Monarch or receipt by the State of these monies.

The courts below also properly found the public authority, Miami University, the responsible party for the period of time when it failed to provide notice to Monarch or Salyers of the proper prevailing wage rate.² Plaintiffs had Miami as a defendant in this suit but they failed to pursue their claim against it. This Court's decision in *Ohio Asphalt Paving, Inc. v. Dep't of Indus. Relations* (1992), 63 Ohio St. 3d 512 is relevant and on point. The courts below properly followed it to hold the public authority liable to Plaintiffs in this situation for its shortcomings. And again, Plaintiffs admit under R.C. 4115.05 that the Director can hold the public authority liable for its failure to notify of the change in the wage rate. Under R.C. 4115.16(B), this Court stands in the shoes of the Director where an interested party sues, and the courts below made the necessary findings that result in liability on the public authority for its error.

Monarch is the unwitting and innocent party here that already has paid more than \$160,000 in prevailing wages unpaid by the defunct subcontractor. None of the deterrent purposes of the penalty provisions of R.C. 4115 cited by Plaintiffs and their *amici* would be served by having a penalty enforced here; the statutory scheme was applied properly below by not enforcing penalties. Plaintiffs could have received the balance of their prevailing wage from

² The amount at issue is \$1,401.74 over the "Miami lack of notification" issue since the other 29 Plaintiffs owed money have not pursued this appeal.

Miami, which was a co-defendant below, but they chose not to pursue this claim. It is not the job of this Court to fix this litigation strategy mistake.

Monarch respectfully requests this Court to affirm the decision of the Twelfth District Court of Appeals in its entirety.

Statement Of Facts

Miami hired Monarch as the general contractor of a student housing project at Miami. (Tr. 58-59)³ Salyers was a Monarch subcontractor. (Tr. 59) Salyers went out of business toward the end of the project, and it failed to respond to repeated inquiries from the Wage-Hour Bureau of the Division of Labor and Workforce Safety of the Department of Commerce ("Commerce") for fringe benefit information related to prevailing wage compliance. (Tr. 33-35, 111) After repeated notices to Salyers that went unanswered by it, on December 12, 2005, Commerce issued a determination that Salyers owed \$368,266.34 in underpaid prevailing wages and it assessed an equal amount as a penalty. (Pl. Ex. 9) This determination notice also was sent to Monarch; this was the first notice Monarch received of any investigation by Commerce. (Tr. 62, 130)

Prior to receipt of this notice, Monarch had investigated Salyers's compliance with the prevailing wage statute and had been assured by both Miami and Salyers that Salyers was in compliance. (Tr. 70-72, 61, 134; Def. Ex. C) Miami incorrectly told Monarch that an outdated prevailing wage rate used by Salyers was still valid. (Def. Ex. C) Miami failed to inform Monarch or Salyers of the correct prevailing wage rate until March 28, 2005, over eight months after the rate changed on July 16, 2004. (Def. Ex. D; Tr. 134-35)

³ "Tr." refers to the transcript of the trial proceedings in the Butler County Court of Common Pleas, included within the record provided to this Court by the Twelfth District Court of Appeals and excerpts of which are attached in the Appendix.

After receipt of Commerce's determination, Monarch was able to provide information to Commerce from a review of Salyers's files indicating that a substantial amount of the alleged deficiency had in fact been paid by Salyers in the form of fringe benefits. (Pl. Ex. 12; Tr. 43, 112-13, 119, 120-21) Commerce redetermined that Salyers had failed to pay \$171,812.03 on behalf of 86 employees. (Def. Ex. E) Monarch paid 52 of these employees through Commerce without any suit being filed. (Tr. 45-46) No penalty was assessed by Commerce for these employees. Thirty-four of the 86 employees brought this suit against Monarch and Miami. (Amended Complaint) The 34 had been underpaid about \$100,000, but they sought from Monarch \$225,518.26 in back wages. (*Id.*) They also sought a 25% penalty of about \$56,000 on their own behalf and a 75% penalty on behalf of the State of about \$170,000. (*Id.*) Miami succeeded on its motion to dismiss which Plaintiffs did not oppose. At trial (and before trial through motion practice), Plaintiffs lost every material contested issue. The Court awarded Plaintiffs \$88,013.53. (10/17/07 Decision 6) This represented the unpaid prevailing wages Monarch had always agreed the Plaintiffs were owed by Salyers, less about \$10,000 that was the responsibility of Miami for the period when it is undisputed Miami failed to provide timely notice to Salyers or Monarch of a change in the prevailing wage rate.

Most Plaintiffs accepted the Court's award, leaving but seven to prosecute an appeal. The Twelfth District affirmed the trial court in its entirety. Only five of the Plaintiffs (one of whom is owed nothing) prosecute this appeal, seeking approximately \$3,400 more on their own behalf (\$1401.74 due to the Miami issue and the balance in penalty) and about \$6,000 in penalty on behalf of the State.

Appellee's Propositions of Law and Arguments

I. Appellee's Proposition of Law No. 1: R.C. 4115.05 makes the public authority liable for any back wages, fines, damages, court costs and attorney fees where it fails to notify a contractor or subcontractor of a change in prevailing wage rates.

The courts below properly reduced the amount of underpaid prevailing wages owed by Monarch under R.C. 4115.10(A) by the amount for which Miami was liable, under R.C. 4115.05, due to Miami's failure to notify Monarch and Salyers of the change in the prevailing wage rate. Plaintiffs were not denied their full prevailing wage. They could have sought it from Miami, but instead they sought it from Monarch, which is the wrong entity.⁴

R.C. 4115.05 provides that "the public authority is liable" for the amount of underpayment caused by the public authority's failure to notify the contractor of a change in the prevailing wage rate. Specifically, it states in pertinent part that:

Upon receipt from the Director of Commerce of a notice of 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 a 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 attorneys 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.

⁴ Monarch notes that there is nothing in R.C. 4115 or its regulations that hold contractors liable for a subcontractor's failure to pay prevailing wages. Plaintiffs were employed by Salyers, not Monarch. R.C. 4115 is in contrast to the Federal Davis-Bacon Act regulations that do explicitly make contractors liable for their subcontractors. 29 C.F.R. § 5.5(a)(6). There is no statutory basis to hold Monarch liable for any of the claims at issue.

It is undisputed Miami failed to provide notice of the change in rates as it was obligated to do by statute. Miami's failure to notify Monarch or Salyers of the correct prevailing wage rate was properly taken into account by the trial court when assessing Monarch's liability and was properly affirmed by the Twelfth District in *Bergman v. Monarch Constr. Co.* (Ohio App. 12 Dist.), 2009-Ohio-551, at ¶ 68, 2009 WL 295396 ("Having found that R.C. 4115.05 placed liability on Miami for not providing the change in prevailing wage rates, the trial court did not err in discounting the amount Monarch owed Plaintiffs.").

The arguments of Appellants, the Trade Council, and the State with regard to Miami's liability are without merit. In *Ohio Asphalt Paving, Inc. v. Dep't of Indus. Rel.* (1992), 63 Ohio St. 3d 512, 517, this Court held that contractors are liable for the full amount of underpaid prevailing wages owed to an employee "except as provided in R.C. 4115.05." *Id.* at 517 (emphasis added). This Court explained that R.C. 4115.05 "places liability upon the public authority **whenever** it fails to notify the contractor of any changes in the prevailing rate of wages during the life of the contract." *Id.* at 517 n.2 (emphasis added).

Plaintiffs wrongly claim that they will be denied their prevailing wage if the decisions below stand. R.C. 4115.05 plainly states that "the public authority is liable" due to its failure to provide the required notice. Plaintiffs named the public authority as a defendant in this action but they failed to pursue their R.C. 4115.05 rights against it. R.C. 4115 is not clear about how to enforce this R.C. 4115.05 right. This Court filled the gap in *Ohio Asphalt Paving* allowing a contribution right for the contractor under the facts in that case. The courts below properly applied *Ohio Asphalt Paving* to require Plaintiffs to proceed directly against the public authority here.

Plaintiffs and *amici* Trades Council argue that Monarch should be required to pay the full amount of underpaid prevailing wages owed to Appellants and permitted separately to bring a contribution action against Miami. (Appellants' Brief 6; Trades Council Brief 14) But while this Court's decision in *Ohio Asphalt* showed that courts may exercise their equitable powers in the prevailing wage context, it does not require that the equitable remedy always be only a contribution action. *See Ohio Asphalt*, 63 Ohio St. 3d at 517. In fact, a contribution action would be an inappropriate remedy in this case. It would be inequitable to hold Monarch liable for the full amount of underpaid prevailing wages when Monarch's and Miami's separate liabilities are specific in amount and precisely attributable to each and where both were defendants in this lawsuit. By contrast, in *Ohio Asphalt* the trial court could not precisely divide the liability between the contractor and the public authority—the public authority's failure to notify the contractor of its duty under the prevailing wage statute affected the entire underpayment amount, as did the contractor's negligence in failing to inform itself of its statutory obligations. *See id.* at 516 (" . . . both the public authority and the contractor are charged with ensuring compliance with the prevailing wage provisions when entering into a public improvement contract.") (emphasis added). Thus, contribution was necessary to apportion liability; this is not the case here.

In this case, the amount of underpaid prevailing wages for which Miami was liable under R.C. 4115.05 was precisely known at the time of the trial court's decision. It was equitable to reduce Monarch's liability, as the trial court did. It also serves judicial efficiency and avoids unnecessary costly litigation, as Appellants' proposed contribution remedy would require an entirely new lawsuit. On this basis the decision of the Twelfth District should be affirmed.

The State, on the other hand, argues that Monarch is not able to recover from Miami at all – not even by a contribution action – because the Director did not issue a determination finding Miami partially liable. (State of Ohio Brief 13-16) This argument ignores the force of R.C. 4115.16(B) that courts take the place of the Director where an interested party⁵ files suit.

Plaintiffs and their *amici* seize upon the fact that the "Director" did not make the determination here that Miami failed to provide the statutory notice. This is irrelevant.

R.C. 4115.16(B), in pertinent part, is that:

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 the injured persons the relief specified under Section 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.*** (emphasis added)

This Court recognized in *State ex rel. Nat'l. Elec. Contractors Ass'n v. Ohio Bur. Of Emp. Svcs.* (1998), 83 Ohio St. 3d 179, 183-84, what is apparent from the statute, that courts sit in the place of the Director when interested persons file suit. All parties agree that the Director may find the public authority failed to give notice of a rate change by virtue of R.C. 4115.05; R.C. 4115.16(B) gives the courts this same ability.

Moreover, the interpretation of R.C. 4115.05 advanced by *amici* Trades Council and the State would eliminate any opportunity for judicial review of the Director's lack of determination save for mandamus actions. (See State of Ohio Brief 12 ("a contractor's liability can be partially reduced, and a public entity can be held partially liable, ***only where the Director of Commerce issues a determination . . .***") (italics in original) (other emphasis added)). Their interpretation of

⁵ "Interested party" must include these Plaintiffs. Had the union filed suit on their behalf, the union would be an "interested party" and R.C. 4115.16(B) would apply. Where these union employees nominally file their own suit, the provisions of R.C. 4115.16(B) that courts sit in place of the Director, cannot disappear. This would make the Director's decision here unreviewable by courts except by mandamus, which makes a mockery of the statutory scheme.

R.C. 4115 is wrong and it would deny due process to Monarch. It is not plausible to suggest that the General Assembly, in passing R.C. 4115.05, intended for the Department to be able to issue or withhold determinations regarding the liability of public authorities for any reason whatsoever without these determinations being reviewable by the courts.

If this Court adopts the interpretation of R.C. 4115.05 advocated by the State, the State would be able to ignore its legal obligations with impunity. The State, through its public authorities, could fail to notify contractors of changes in the prevailing wage rate (which they are required to do by R.C. 4115.05), and then the State, through Commerce, could fail to recognize the public authority's resulting liability under that same section in the Director's written determination, and the courts could do nothing to correct the situation. (*See* State of Ohio Brief 12) In this way the State could ensure that *all* liability for underpaid prevailing wages would be placed on contractors, even though R.C. 4115.05 places at least partial liability on public authorities when they fail to provide required notices. Such a system does not provide Monarch the constitutionally required due process.

The State argues that the trial court's holding with regard to Miami's liability is wrong because it leaves room for contractors to drag the State into every prevailing wage case. This reasoning is flawed for three reasons. First, the State can already be brought into prevailing wage cases, as R.C. 4115.05 and R.C. 4115.16 make clear. Second, the State's plan would permit it to completely shirk its duties and liabilities, violating due process. (The trial court below properly used its equitable power to avoid that outcome). Third, contractors would still be able to bring mandamus actions to require the Director to issue a determination regarding a public authority's liability under R.C. 4115.05 each time the Director failed to do so; this would

be a waste of resources for litigants, the State, and the courts. Principles of judicial efficiency therefore favor the approach taken by the courts below.

II. Appellee's Proposition of Law No. 2: The 25% penalty described in R.C. 4115.10(A) is discretionary.

***Certified Conflict:* Is the 25% penalty set forth in R.C. 4115.10(A) a mandatory penalty that must be enforced against a party that violates prevailing wage statutes if the violation is not the result of statutory misinterpretation or payroll error?**

A. *The Penal Nature Of R.C. 4115.10(A) Requires That The 25% Penalty Is Discretionary.*

This Court has held that the prevailing wage statute's penalty provision, R.C. 4115.10(A) which says that the 25% penalty of unpaid prevailing wages "may" be awarded to employees, is "penal in nature, and it must therefore be strictly construed." *Dean v. Seco Elec. Co.* (1988), 35 Ohio St. 3d 203, 205. The use of "may" in the statute must be construed as intentional, and the 25% penalty viewed as discretionary. In this regard the decision below was correct and the decision by the Sixth District in *Int'l Bh'd. of Elec. Workers Local Union No. 8 v. Stollsteimer Elec., Inc.*, 2006-Ohio-3865 was incorrect.

Plaintiffs' position that "may" means "shall" recalls a discussion from a Lewis Carroll novel.

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty, "which is to be master – that's all."

Carroll, *Through The Looking Glass (And What Alice Found There)*, Chapter 6 (1871). Given that this is a penalty provision, contractors cannot be put in the position of having "words mean

so many different things." The alleged ambiguity in the meaning of "may" must be resolved in favor of Monarch. None of the other statutes cited by Plaintiffs and their *amici* for the proposition that "may" can mean "shall" were penal provisions. This alone distinguishes R.C. 4115.10(A) from the others.

B. The Use Of "May" In R.C. 4115.10(A) Means The 25% Penalty Is Discretionary.

The "**may** recover" language used in R.C. 4115.10(A) (emphasis added) means that the 25% penalty is discretionary. *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St. 2d 102, 107 ("The statutory use of the word 'may' is generally construed to make the provision in which it is contained optional, permissive, or discretionary.")

Appellants and *amici* Trades Council and State of Ohio argue that "may" refers both to the 25% penalty and to the "calculation of underpayments," and that because the damages remedy resulting from the calculation of underpayments is central to R.C. 4115.10(A), the 25% penalty payable to the plaintiff employee(s) must also be mandatory when a violation is found. In other words, they argue that in the context of R.C. 4115.10(A) "may" actually means "must" or "shall." This rewrites the statute, which this Court may not do.

Notwithstanding this objection, this argument fails. An award of the full amount of underpayments calculated under R.C. 4115.10(A) is a discretionary remedy; the prevailing wage statute itself permits reductions in this amount by a court in certain limited situations – even in one situation expressly acknowledged by *amicus* State of Ohio. For example, even under the State's view of the prevailing wage statute, the statute permits a court to reduce the amount of unpaid prevailing wages owed by a contractor when the public authority is liable for all or part of the unpaid wages because the public authority failed to notify the contractor of the correct prevailing wage as determined by the Director of Commerce. *See* R.C. 4115.05. (State of Ohio

Brief 12-13) The use of "may" in R.C. 4115.10(A) means exactly what it says---the 25% penalty is not mandatory.

C. The Proper Use of "May" And "Shall" In Other Sections of The Prevailing Wage Statute Show That The Drafters Knew How To Use These Words To Achieve Their Desired Goals.

"May" and "shall" are deliberately used according to their normal meanings in multiple places in the prevailing wage statute. *See* R.C. 4115.99; R.C. 4115.16(D). Had the General Assembly wished to make the 25% penalty mandatory it could have used such language. It did not. The General Assembly's decision to use "may" rather than "shall" is made especially clear in light of the fact that it used "shall" in the following sentence after it used "may" in R.C. 4115.10(A). This is the wrong forum for Plaintiffs to seek a rewrite of the statute. This complaint belongs with the General Assembly.

D. R.C. 4115.16(B) Places The Courts In The Same Position As The Director, Who May Decide Not To Require Penalties Per R.C. 4115.13(C).

As demonstrated earlier, when a lawsuit is filed by an interested party, the word "courts" may be substituted for "Director" by virtue of R.C. 4115.16(B). Plaintiffs and their *amici* admit that the Director may decide not to issue penalties under the conditions set forth in R.C. 4115.13(C). Courts have this same discretion by virtue of R.C. 4115.16(B). For this additional reason, the Sixth District in *Int'l Bh'd. of Elec. Workers Local Union No. 8 v. Stollsteimer Elec., Inc.*, 2006-Ohio-3865 erred when it found that only the Director may decide not to require a penalty. Courts have this same ability by virtue of R.C. 4115.16(B) in a suit by an interested party.

E. No Purpose Is Served By Penalizing Monarch, The Innocent Contractor.

The lower courts properly determined not to issue the 25% disciplinary penalty. Monarch did nothing wrong and R.C. 4115 *does not* make a general contractor liable for the

penalties arguably owed by its subcontractors. Monarch paid the unpaid prevailing wages owed by Salyers, and it cooperated with Commerce in its investigation. No purpose would be served by penalizing Monarch under these facts.

III. Appellee's Proposition of Law No. 3: Only the State has standing to require payment of the 75% penalty to Commerce described in R.C. 4115.10(A).

Plaintiffs seek to "establish" as mandatory a statutory penalty that has been enforced only once in 17 years. (Tr. 46) Commerce did not obtain this penalty against Monarch with respect to the 52 employees paid by Monarch through Commerce outside this lawsuit.

Plaintiffs have no standing to raise this argument, for this claim belongs to the State, not to Plaintiffs. They wrongly argue that their effort to enforce the 75% penalty payable to the State is in their own interests, rather than in the interests of the State, and that they therefore have standing. (Appellants' Brief 11) This Court has stated that: "Generally, a litigant must assert its own rights, not the claims of third parties." *City of North Canton v. City of Canton*, 114 Ohio St. 3d 253, 256, 2007-Ohio-4005, at ¶ 14. Only a "real party in interest" has standing. Ohio Civ. R. 17(A). The proper test for whether a party is the "real party in interest" is "Who would be entitled to damages?" *See Young v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (Ohio App. 8 Dist. 1993), 88 Ohio App. 3d 12, 16; *Nuco Plastics, Inc. v. Universal Plastics, Inc.* (Ohio App. 11 Dist. 1991), 76 Ohio App. 3d 137, 143; *Lyons v. Chapman* (Ohio App. 5 Dist. 1931), 40 Ohio App. 1, 6. Plaintiffs are not entitled to the 75% penalty, which is payable to the Bureau's enforcement fund. In fact, Plaintiffs are in the exact same financial position they would have been in if the trial court had held that the 75% penalty was mandatory and awarded it to the State. Plaintiffs have no interest in the 75% penalty and therefore do not have standing.

The following hypothetical example illustrates why there is no standing. Assume both the 25% (to the employee) and 75% (to the State) penalties were indeed mandatory as Plaintiffs

claim. If an employee were underpaid prevailing wages by his employer, the employee could enter into settlement negotiations with the employer. By statute, the employee would be entitled to receive up to 125% of the underpayment amount, and the State would receive 75% of the underpayment amount if this case went to trial. *See* R.C. 4115.10(A). Thus the employer would be obliged to pay 200% of the underpayment amount if the employee pursued litigation. But if the employee had standing – as Plaintiffs assert – with regard to the 75% penalty, then the employee could settle his claims short of trial for 150% of the underpayment and pay none of this to the State. This would allow the employee to receive more money through settlement than he could receive through litigation, and it would also allow the employer to pay less than it would be required to pay by a court under R.C. 4115.10(A). This example illustrates why these Plaintiffs lack the standing to pursue this penalty.

Furthermore, the 75% penalty is not mandatory where the "underpayment by a contractor or subcontractor was the result of a misinterpretation of the statute or an erroneous preparation of the payroll documents" as determined by the Director. R.C. 4115.13(C). The courts take the place of the Director where an interested party files suit. R.C. 4115.16(B). The courts below properly exercised their discretion to award no penalty, as, again, Monarch did nothing wrong. R.C. 4115.10(A) does *not* penalize a contractor for the sins of the subcontractor.

The decision below should be affirmed.

Conclusion

For each, and all, of the foregoing reasons, Monarch respectfully requests this Court affirm the decision of the Twelfth District Court of Appeals with regard to each of Appellants' propositions of law.

Respectfully submitted,



Gregory Parker Rogers (0042323)
Matthew R. Byrne (0082228)
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
513-357-9349
513-381-0205 fax
rogers@taftlaw.com

Counsel for Defendant-Appellee
Monarch Construction Co.

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon the following via regular United States mail, this 1st day of September, 2009.

JOSEPH M. D'ANGELO* (0063348)
Cosme, D'Angelo & Szollosi Co., L.P.A.
**Counsel of Record*
The CDS Building
202 North Eric Street
Toledo, Ohio 43604-1608
419-224-8989
419-244-8990 fax
jdangelo@cdslaw.net

Counsel for Plaintiff-Appellants
Doug Bergman, et al.

RICHARD CORDRAY (0038034)

N. VICTOR GOODMAN* (0004912)
**Counsel of Record*
vgoodman@bfca.com
MARK D. TUCKER
mtucker@bfca.com
Benesch, Friedlander, Coplan & Aronoff, LLP
41 South High Street, 26th Floor
Columbus, Ohio 43215
(614) 223-9300
(614) 223-9330 fax

Counsel for *Amicus Curiae* Ohio State
Building and Construction Trades Council

Attorney General of Ohio

BENJAMIN C. MIZER* (0083089)

Solicitor General

**Counsel of Record*

ALEXANDRA T. SCHIMMER (0075732)

Chief Deputy Solicitor General

SUSAN M. SULLIVAN (0012081)

DAN E. BELVILLE (0040250)

LINDSAY M. SESTILE (0075618)

Assistant Attorneys General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*

State of Ohio

ROGER L. SABO*

**Counsel of Record*

Schottenstein, Zox & Dunn Co., LPA

250 West Street

Columbus, Ohio 43215

(614) 462-5030

(614) 222-3488 (fax)

rsabo@szd.com

Counsel for *Amicus Curiae* Associated General
Contractors of Ohio, Inc. and Allied
Construction Industries

ALAN ROSS*

NICK A. NYKULAK

**Counsel of Record*

Ross, Brittain & Schonberg Co., LPA

6480 Rockside Woods Blvd., Suite 350

Cleveland, Ohio 44131

(216) 447-1551

(216) 447-1554 (fax)

alanr@rbslaw.com

nickn@rbslaw.com

Counsel for *Amicus Curiae* Northern Ohio
Chapter of Associated Builders and
Contractors and Associated Builders and
Contractors of Ohio



1

1

2 COURT OF COMMON PLEAS

3 BUTLER COUNTY OHIO

4 HARRY KRUER, et al.

5 Plaintiffs

6 vs. Case No: CV2006-02-0605

7 MONARCH CONSTRUCTION COMPANY, et al.

8 Defendants JUDGE: MICHAEL SAGE

9

10

11 ---

12 BENCH TRIAL

13 JANUARY 16, 2007

14 ---

15

16 VOLUME I OF II

17

18

19

20

21

22

23

24

25

3

1 I N D E X

2 WITNESSES

3 For Plaintiffs: page

4 Robert Kennedy 17:11

5 Direct Examination by MR. ANGELO 43:20

6 Cross-Examination by MR. ROGERS 47:20

7 Redirect Examination by MR. D'ANGELO 50:6

8 Recross-Examination by MR. ROGERS 56:7

9 Further Examination by MR. D'ANGELO

10 For Defendant, Monarch Construction: page

11 Jerome Corbett 59:2

12 Direct Examination by MR. ROGERS 69:16

13 Cross-Examination by MR. D'ANGELO

14

15

16

17

18

19

20

21

22

23

24

25

2

1

2 APPEARANCES

3

4 On Behalf of the Plaintiffs:

5 JOSEPH M. D'ANGELO, ESQ.

6 The CDS Building

7 202 North Eric Street

8 Toledo, OH 43624

9

10 On Behalf of the Defendants:

11 GREGORY ROGERS, ESQ.

12 RACHEL ZANHISER, ESQ.

13 425 Walnut Street

14 Suite 1800

15 Cincinnati, OH 45202

16

17

18

19

20

21

22

23

24

25

4

1 T-R-A-N-S-C-R-I-P-T OF P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: Okay. This is Case No.

3 CV06-02-0605, which is captioned Stephen Bergman and

4 others vs. Monarch Construction Company and others.

5 It is before the Court for trial. Are both sides

6 read to proceed?

7 MR. ROGERS: Monarch is read your Honor.

8 MR. D'ANGELO: Your Honor just continue

9 D'Angelo on behalf of the plaintiffs we're read as

10 well.

11 THE COURT: Okay. Well, let's proceed to

12 opening statements.

13 MR. D'ANGELO: Your Honor before we begin, do

14 you have a preference with respect to the podium or

15 whether we should stand or be seated when we address

16 the --

17 THE COURT: Well, here's -- the only issue I

18 have is that please understand that your record is a

19 recording, okay. So if you venture too far from any

20 one microphone, the possibility exists that we may

21 not pick you up. Typically if you speak in a loud

22 normal tone, you will have a record made, okay. So

23 I don't want to discouraged you from -- from

24 whatever is easiest for everybody. Chris typically

25 will be listening and if something goes -- if your

33

1 cover letter and then there is an attachment which asks --
2 goes through and asks for different various information to
3 be sent to us.
4 Q And I believe you were able to review the
5 investigative file in this case at some point in time?
6 A Yes.
7 Q Okay. And is this Plaintiff's -- Plaintiff's
8 Exhibit 2, an item that was actually a part of the
9 administrative investigative file?
10 A Yes, it was.
11 Q Now, did the employer supply anything to the
12 investigator in response to Plaintiff's Exhibit 2?
13 A No. She never received any records.
14 Q Okay. Plaintiff's Exhibit 3 is wage and hour
15 document pages 1141 through 1144. Mr. Kennedy, can you tell
16 the Court what Plaintiff's Exhibit 3 is?
17 A Yes. That's our subpoena duces tecum that we
18 sent to Don Salyers Masonry, requesting again the records
19 that were not provided pursuant to the March 24th letter.
20 And this was sent out on April 25th, 2005.
21 Q And did your investigator receive any records
22 in response to Plaintiff's Exhibit 3?
23 A No, she's -- no, she did not.
24 Q Plaintiff's Exhibit 4 is page 1173. Now, the
25 complaint was filed in March of '05; is that true?

34

1 A Yes. Yes, it was filed March of '05.
2 Q Can you tell the Court what Plaintiff's
3 Exhibit 4 is, please?
4 A This was a letter that the investigator Shari
5 Hetteshimer faxed to Don Salyers Masonry prior to issuing
6 the predetermination she had received information from the
7 public authority and had done the audit based on those
8 certain payrolls and any information from the public
9 authority. And again she was asking for fringe benefit
10 information and wanted to see if Don Salyers Masonry would
11 send her any information based on that, knowing that this is
12 all she needed now to really complete the audit. And so she
13 faxed it to them asking for the information by October 14th,
14 2005.
15 Q And did the contractor supply any of the
16 fringe benefit records that was requested?
17 A No, he did not.
18 Q Plaintiff's Exhibit 5 is page 1174. Mr.
19 Kennedy, could you please identify Plaintiff's Exhibit 5 for
20 the Court?
21 A Yes. This is a letter from investigator
22 Shari Hetteshimer sent on October 31st, 2005 to Don Salyers
23 Masonry. It's a cover letter to the preliminary audit which
24 had a finding again, based on the certain payroll saying no
25 fringe information given by Don Salyers. And it would have

35

1 been the \$368,000 and some change determination, is what was
2 mailed there with this.
3 Q Okay. And based on Plaintiff's Exhibit 5 --
4 well, first of all, did your office or your investigator
5 receive any documentation from the contractor after it was
6 sent Plaintiff's Exhibit 5?
7 A No, we did not.
8 Q Let me ask you, had the contractor received
9 this October 31 determination and sent you some records by
10 which you could calculate fringe benefit credit, what would
11 have been the disposition at that point?
12 A Shari would have reviewed the records and
13 tried to determine if they were accurate and truthful. And
14 if she believed they were, there is back up to the payments
15 made. We would have given them credit in the fringe area
16 and most likely would have reduced the determination.
17 Q Now, that document gives until November 11th
18 to respond; is that true?
19 A Yes.
20 Q But did -- did your office issue a final
21 determination on November of '05?
22 A I don't believe so. I think it was December
23 something.
24 Q I'm going to give you what we've marked as
25 Plaintiff's Exhibit 6. And that is wage and hour 0001

36

1 through 0115. Mr. Kennedy, can you tell the Court what
2 Plaintiff's Exhibit 6 is?
3 A Plaintiff's Exhibit 6 is a copy of all the --
4 what the front page is, is a tally of our determination
5 against Don Salyers for back wages. This is all the
6 employees and the amounts owed and the -- and their
7 classification of work. Page 0004 and 0005 and 0006 are all
8 just a list of employees and their name and address and
9 amounts due.
10 Q And then starting with -- I'm sorry. Go
11 ahead.
12 A And then 0007 has (inaudible) would be all
13 the individuals what we would call PW1s, a calculation for
14 that individual weeks worked, days worked classification,
15 the hours worked those days, what he or she was paid and
16 then what he or she should have been paid as opposed to
17 prevailing wage rate, what the difference was and then total
18 those up.
19 Q So from page 7 to the end, is PW1s. Those
20 are per employee expected analyses of the determination?
21 A Yes, that's correct.
22 Q And page one is the actual overall picture?
23 A Correct. That is just a tally, if you would,
24 of all these behind it.
25 Q So for example, the first employee there is

41

1 are or if I can just have this, that would be fine.

2 THE COURT: Take a second -- Chris can you

3 make Mr. Rogers a copy?

4 MR. D'ANGELO: Thank you.

5 THE COURT: We'll just take a break while we

6 get copies.

7 MR. D'ANGELO: Thank you.

8 Q. (By Mr. D'Angelo) Okay. We've given you

9 Plaintiff's Exhibit 10 which has no Bate stamp numbers, but

10 thanks to the Court, we've solved that problem. Mr.

11 Kennedy, can you tell us what Plaintiff's Exhibit 10 is?

12 A. They're the letters that go to the individual

13 employees who worked on the project who had a determination

14 in their benefit and it tells them that a determination is

15 made and it gives them their rights under 4115.10(A) to file

16 their own lawsuit within 90 days. And then if they don't,

17 what will happen is we would retain jurisdiction and go

18 forward with the case.

19 Q. And was -- were Plaintiff's Exhibits 10 sent

20 to the persons addressed in the various letters?

21 A. Yes, they were sent to the various

22 individuals at those addresses which came from the certified

23 payrolls.

24 Q. And you said that upon receipt of Plaintiff's

25 Exhibit 10, the individual workers had 90 days to either

42

1 retain counsel and bring suit or they would be barred?

2 A. They would be time barred and it would revert

3 to us, the Department of Commerce, to proceed.

4 Q. Now, did either Monarch or Salyers Masonry

5 make any payments upon receipt of Plaintiff's 9, the

6 determination, in this case?

7 A. No.

8 Q. Plaintiff's Exhibit 11 is page 1299

9 MR. ROGERS: Page what?

10 MR. D'ANGELO: 1299.

11 A. Okay.

12 Q. Mr. Kennedy, could you please tell the Court

13 what Exhibit 11 is?

14 A. Yes. It's a letter -- cover letter we sent

15 to the Attorney General's office, Labor Relation Section

16 with a file, in this particular case Don Salyers Masonry,

17 stating that 60 days lapsed since a determination and for

18 them to proceed with collection enforcement.

19 Q. So as of February 6th, 2006, this matter was

20 official turned over for collection; is that true?

21 A. Yes, to the Attorney General's Office.

22 MR. D'ANGELO: Your Honor, I would move for

23 the admission of Plaintiff's Exhibits 1 through 11.

24 MR. ROGERS: No objection, your Honor.

25 THE COURT: Okay. They will be received

43

1 without objection.

2 MR. D'ANGELO: And with that, subject to

3 rebuttal case, I'm -- I have no further questions

4 for Mr. Kennedy.

5 THE COURT: Okay. Cross-examination?

6 CROSS-EXAMINATION

7 BY MR. ROGERS:

8 Q. Mr. Kennedy, eventually information was

9 supplied from the files of Don Salyers concerning what

10 fringe benefit contributions had been made by Salyers on

11 behalf of the employees; is that correct?

12 A. Yes, that's correct.

13 Q. Now, I've handed you Defendant's Exhibit A.

14 Is this a redetermination that was made by your office upon

15 receipt of that information?

16 MR. D'ANGELO: Objection, your Honor. I

17 understand that this Defendant's Exhibit A will

18 eventually find its way into the case, but it really

19 goes to I think the defendant's case in chief. It

20 certainly doesn't touch on anything that was

21 addressed through the completion of the testimony on

22 direct.

23 And I would prefer to address it in that

24 fashion where it would be presented as its case in

25 chief, where I would be able to cross-examine,

44

1 rather than take the role of direct examiner with

2 respect to the matters he intends to get into.

3 THE COURT: Mr. Rogers?

4 MR. ROGERS: We have a state employee that

5 I'm happy to send him back to Columbus as soon as we

6 got there information in. It's a bench trial. It

7 seems to me --

8 THE COURT: It's a bench trial. If I think

9 it needs -- this document needs to be cross-examined

10 upon, I would be happy to give you some leeway to

11 ask leading questions, okay. But I think that you

12 know Mr. Kennedy has been patient and obviously the

13 Court is running late because of having to seat a

14 grand jury this morning. So, let's try to get

15 through Mr. Kennedy and I'll give you some latitude

16 as far as cross-examining him on documents which

17 would normally come in under the defendant's case in

18 chief, okay?

19 MR. D'ANGELO: Thank you, your Honor.

20 THE COURT: Okay. Let's proceed.

21 Q. (By Mr. Rodgers) Is Defendant's Exhibit A --

22 was this made by somebody in your office, Mr. Kennedy?

23 A. Yes, it was.

24 Q. And is this a redetermination upon having

25 received benefit information concerning Mr. Salyers'

45

1 employees?

2 MR. D'ANGELO: Objection to the

3 characterization of Defendant's A as a

4 redetermination.

5 THE COURT: Well, let's let the witness

6 identify what it is.

7 MR. ROGERS: Okay.

8 Q. (By Mr. Rogers) What is Defendant's A?

9 A. Probably fair to say that it's a

10 recalculation since we never issued a redetermination based

11 upon this. It's probably fair to characterize it as a

12 recalculation.

13 Q. The very first line on the top of this spread

14 sheet, does that in fact say redetermination?

15 A. It does say redetermination. That's because

16 we're on our computer system, so we were differentiating

17 between the two.

18 Q. And whether there is also -- this is a

19 redetermination or recalculation, the amount now is

20 \$169,529.53?

21 A. Yes, it is.

22 Q. And that would be applicable to each of the

23 employees on this spread sheet, Defendant's Exhibit A?

24 A. Correct.

25 Q. The employees who are not plaintiff's -- in

46

1 this lawsuit, has the department reached a resolution with

2 Monarch concerning those employees?

3 MR. D'ANGELO: Objection; calls for

4 settlement negotiations.

5 THE COURT: Overruled.

6 A. Yeah. Well, partial. I guess a partial

7 settlement. We received our determination for the

8 non-plaintiff's of 71,000 and something. And we received a

9 check for 63,000 and something. There is still a \$7,000

10 issue at hand, but --

11 Q. And what is that \$7,000 issue still at hand?

12 A. It's a whether Miami University gave the up

13 -- wage rate update to Monarch, who thus would have given it

14 to Salyers and that is what that difference is from that one

15 wage rate increase. So we still have some further

16 negotiations, if you will, between Miami, us and Monarch.

17 Q. Does the department have a view as to whether

18 or not a 25 percent penalty and 75 percent penalty --

19 whether or not that is mandatory or whether that is

20 discretionary?

21 A. The statute says shall on the 75 percent.

22 So, -- but I can't think of one we actually have a case on

23 here. We actually negotiate those prior to going to trial.

24 So, we've only had one go to trial since I've been here.

25 Q. Which one was that?

47

1 A. It was a the OU case. It was a student

2 housing case. I can't remember the name up there, an

3 electric company out of Florida and that -- there was about

4 40 different subs involved in that. Most of all of them

5 settled except for the one that went to trial.

6 MR. ROGERS: Nothing further, your Honor.

7 THE COURT: Okay. Any redirect?

8 REDIRECT EXAMINATION

9 BY MR. D'ANGELO:

10 Q. Mr. Kennedy, this Defendant's Exhibit A, can

11 you recall or does it actually tell you when this

12 recalculation was generated, sir?

13 A. It doesn't state on there. I can't really

14 recall. I mean, I believe it was some time in the spring of

15 last year or April, June. I really don't know.

16 Q. Spring of '06?

17 A. '06, yes. I'm sorry.

18 Q. And would you agree that this was not

19 generated prior to February 6th when you turned over this

20 case to the Attorney General for collection; is that true?

21 A. That's true. It was after that.

22 Q. And it was also after the filing of this

23 lawsuit on February 21st; would you agree with that?

24 A. Yes.

25 Q. Are you aware of the information that was

48

1 utilized in generating this recalculations?

2 A. Yes. Generally speaking I was -- it was

3 primarily fringe information, pension being the biggest

4 part. I think there might have been some health insurance.

5 Q. And how does your office come into possession

6 of these records?

7 A. Through Monarch Construction. They were able

8 to track down through their subs, they could get their

9 records from Salyers or Don Salyers Masonry. I don't know

10 if they went directly to the building, but they were able to

11 get the records that they did make some payments to the

12 various fringe providers and we were able to deduct a

13 calculation from that.

14 Q. Do you recall seeing any checks?

15 A. Not off the top of my head, I believe there

16 were.

17 Q. Do you have a basis on which you can advise

18 us if there were any checks presented, who paid those

19 amounts?

20 A. Without looking, I'm not sure. But I would

21 believe it's Don Salyers Masonry paid those amounts.

22 Q. But you don't have any specific recollection

23 of any checks?

24 A. I can't say that right at this moment, no.

25 Q. Is it possible that if you were presented

57

1 okay?

2 MR. D'ANGELO: Yes, your Honor. Thank you.

3 THE COURT: Let's proceed.

4 MR. D'ANGELO: I have nothing further your

5 Honor subject to rebuttal I would rest at this time.

6 THE COURT: Okay. Mr. Rogers, do you need to

7 take a restroom break?

8 MR. ROGERS: Maybe just a short break.

9 THE COURT: Okay. Let's take a brief recess

10 and we will come back.

11 (Recess taken 11:53 a.m. to 12:10 a.m.)

12 THE COURT: Okay.

13 MR. ROGERS: Monarch calls Jerry Corbett.

14 THE COURT: Okay.

15 (Witness sworn.)

16 THE COURT: Mr. Rogers, I know that this is

17 superfluous, but he's being called on behalf of

18 Monarch construction.

19 MR. ROGERS: Correct.

20 THE COURT: And Salyers --

21 MR. ROGERS: I don't represent Mr. Salyers.

22 THE COURT: And that's -- I understand that.

23 I just want to make sure that the record is clear

24 that Salyers is in default and is not present.

25 MR. ROGERS: That's my understanding.

58

1 THE COURT: Okay. So if there is every a

2 transcription, I want to make sure that the record

3 is clear that Mr. Corbett is here on behalf of

4 Monarch and not Don Salyers Masonry. Okay, I didn't

5 mean to interrupt you. I just wanted to make sure

6 that the record is clear.

7 MR. ROGERS: Thank you.

8 JEROME CORBETT

9 being first duly sworn, was examined and testified as

10 follows:

11 DIRECT EXAMINATION

12 BY MR. ROGERS:

13 Q. State your name, please?

14 A. Jerome J. Corbett, Jr.

15 Q. And how are you employed?

16 A. I'm chief financial officer for Monarch

17 Construction Company.

18 Q. How long have you been employed by Monarch

19 Construction?

20 A. Almost 11 years.

21 Q. What is the business of Monarch Construction

22 Company?

23 A. We're general contractors.

24 Q. And were you the general contractor of the

25 Miami University project that is at issue here?

59

1 A. Yes, we were.

2 Q. Were you the direct employer of any of the

3 plaintiffs?

4 A. No, we were not.

5 Q. And you have sub contracted Don Salyers

6 Masonry?

7 A. That's correct.

8 Q. Tell the Judge what happened as far as

9 Monarch is concerned with this whole situation.

10 A. Approximately early March 2005, our payroll

11 account received a phone call. I can't tell you for sure

12 who it was from indicating that potentially Don Salyers was

13 underpaying prevailing wages on the Miami Student Apartment

14 Housing Project. He made the initial contact with Salyers

15 employees at that point in time. I believe it was Willie

16 Salyers who was responsible for prevailing wage issues with

17 Salyers Masonry. Mr. Salyers indicated that they were

18 paying the correct rate that based on the information that

19 they had, that they were paying the correct rate.

20 MR. D'ANGELO: Objection. I believe there is

21 a lot here that I am not being afforded a chance to

22 object. For example, that last statement was

23 clearly hearsay.

24 THE COURT: I agree.

25 MR. ROGERS: Obviously, Salyers wasn't paying

60

1 prevailing wages I'm just trying to lay a

2 background, your Honor.

3 THE COURT: Okay. Well, again it's a bench

4 trial. The Court will not accept it for the truth

5 of the matter. What I will do is I will accept it

6 for the state of mind of this witness. Say as a

7 result of this information what he did or did not

8 do, okay. I will not accept it for the truth of the

9 matter, okay.

10 MR. D'ANGELO: Thank you. But he's also

11 testifying about someone else having a conversation

12 with someone else.

13 THE COURT: I know.

14 MR. D'ANGELO: Okay.

15 THE COURT: I know. I was waiting for the

16 objection.

17 MR. D'ANGELO: Well, I was trying to see if

18 he would stop. Okay, thank you.

19 THE COURT: It's clearly hearsay and it

20 clearly cannot be offered for the truth of the

21 matter.

22 MR. ROGERS: Okay.

23 Q. (By Mr. Rogers) Let's pack up a second,

24 Jerry. When did you find out there was a problem with

25 Salyers with wages on this project and what did you do in

61

1 response?
2 A. In March of 2005 I was informed by our
3 payroll account and that he received a phone call and that
4 there may be an issue he had some conversations by the
5 middle of March 2005. I called Willie Salyers to ask him
6 specifically whether they were paying the correct rates. He
7 told me that they had been through this several times before
8 and that they were paying the correct rates and that it was
9 probably related to a union issue is why they were being
10 singled out.
11 Q. Did you get from Miami a statement about what
12 the appropriate prevailing wage rate was for brick layers
13 for that March 2005 time frame?
14 A. Yes, we did. We requested one from Miami.
15 Q. I've handed you Defendant's Exhibit C, as in
16 Charlie. What is it?
17 A. It is a fax to our payroll accountant Mark
18 Imhoff from Mike Krieger, assistant facility contract
19 administrator for Miami University in response to our request
20 for the current prevailing wage rate in effect for that
21 project.
22 Q. And what did you do upon receipt of
23 Defendant's Exhibit C?
24 A. We sent this exhibit to Salyers Masonry.
25 Q. And did you have any understanding as to

62

1 whether or not this was in fact, the correct rates as of
2 March of 2005?
3 A. Our payroll accountant, based on conversation
4 with someone from the union, I believe, felt that this may
5 be an old determination and that there was a more current
6 determination out there.
7 Q. Mr. Corbett, I've handed you Defendant's
8 Exhibit D as in David. What is that?
9 A. This is a letter that we received from Mike
10 Krieger on March 28th, 2005 with the corrected prevailing
11 wage rate determination for the project.
12 Q. What is the next issue that you had with
13 Salyers in term of whether or not they were paying the
14 correct prevailing wage rate?
15 A. We did not hear anything more until December
16 of 2005 on this project.
17 Q. Okay. And what did you hear in December of
18 2005?
19 A. That is when we received the letter from Mr.
20 Kennedy.
21 Q. That was earlier marked during his testimony?
22 A. Correct.
23 Q. And what did you do in response to that?
24 A. We spoke to Salyers, Nathan Salyers, who was
25 the president of the masonry company at that point in time.

63

1 He informed us that they had paid the correct rates; that
2 they had fringe information that they had provided it to the
3 State previously. We told him that we felt that they needed
4 to provide another copy based on that determination letter
5 that we had seen.
6 Q. Okay.
7 A. And based on our determination, and we also
8 called Mr. Kennedy within a day or two of receiving that
9 letter.
10 Q. Okay. There comes a point in time where the
11 company took it upon itself to supply the fringe information
12 to the State?
13 A. Yes.
14 MR. D'ANGELO: Objection.
15 THE COURT: Overruled. Well, state your
16 basis.
17 MR. D'ANGELO: I mean, it's starting to be
18 very leading at this point and what he is eliciting
19 are yes no answers on things. That is basically
20 testimony.
21 THE COURT: Okay. Overrule the objection.
22 Let's proceed.
23 Q. (By Mr. Rogers) Did there come a time when
24 Monarch took it upon itself to provide fringe information to
25 the State on a matter of (inaudible)?

64

1 A. Yes, we did. Tom Butler, president of
2 Monarch Construction Company visited the Salyers office and
3 with their help, pulled together records related to the
4 fringe benefit payments.
5 Q. And was -- what (inaudible)?
6 A. Mr. Butler sent that information on to the
7 State.
8 MR. D'ANGELO: Objection.
9 THE COURT: I'm assuming you know this of
10 your own personal knowledge?
11 THE WITNESS: Yes.
12 THE COURT: Okay. Overruled the objection
13 then.
14 Q. (By Mr. Rogers) I want to turn your
15 attention to Defendant's Exhibit B, the cover page of
16 Defendant's Exhibit B. Who prepared that?
17 A. That's a spread sheet that I prepared last
18 week based on information we received from the State.
19 Q. And the information that you received from
20 the State, do you recognize that within this exhibit?
21 A. Yes. Those are the State's calculations of
22 the amounts due subsequent to Mr. Butler providing with the
23 additional fringe information.
24 Q. The -- you have the name listed obviously and
25 then it says current per State. What does that column

69

1 Q. Okay. Thank you. Monarch Construction is
2 not new to the prevailing wage field, is it?
3 A. No.
4 Q. It's true that Monarch performs a multitude
5 of prevailing wage projects in a given year, don't they?
6 A. That's correct.
7 Q. And you are familiar with generally speaking
8 at least the responsibilities that you undertake when you
9 take a prevailing wage job as a contractor?
10 A. Yes.
11 Q. You for example, as a general contractor on a
12 prevailing wage job, by law you are required to answer for
13 any underpayments of your subcontractors; isn't that true?
14 A. I understand that we may be responsible to
15 pay the correct rate if the subcontractor does not.
16 Q. Right. In fact, it's in the contract that
17 you execute with the public authority, is the not?
18 A. Yes. And it's in our contract with our subs
19 that they must pay it.
20 Q. That's right. Now, you've testified that in
21 March of 2005, you first learned that there may be an issue
22 with respect to your subcontractors prevailing wage
23 compliance; is that true?
24 A. Yes.
25 Q. And that is roughly about the same time that

70

1 the prevailing wage complaint was filed. Were you aware
2 that a complaint had been filed?
3 A. I don't know that today. I did not before
4 today see the actual complaint.
5 Q. Okay.
6 A. Did I know that there was a complaint filed
7 by December of 2005? I had to assume that a complaint had
8 been filed because we received a determination from the
9 State. Prior to that, I don't believe that I knew that an
10 actual complaint had been filed.
11 Q. Now, you testified that when you learned that
12 there was an issue, you had a telephone conversation with a
13 person from Salyers?
14 A. Correct.
15 Q. And I believe you testified that in that
16 conversation you were assured that Salyers was paying the
17 correct rate?
18 A. That's correct.
19 Q. Did you do anything else at that point in
20 time to assure for yourself that that was in fact,
21 occurring?
22 A. I had our payroll account take a look at the
23 prevailing wage reports. The certified payroll reports that
24 we had from Salyers and those generally speaking, those
25 certified payroll reports indicated that they were paying

71

1 the correct rates. We also did follow-up to get the correct
2 determination.
3 Q. For the record, your Honor, the certified
4 payroll reports that the witness has just testified to are
5 in Exhibit O. 178 through o-597.
6 THE COURT: So there is a record of it? Can
7 we make sure what that would be. Your Plaintiff's
8 Exhibit 12? I want to make sure we have a record or
9 are you just asking --
10 MR. D'ANGELO: I'm going to ask a question.
11 I don't anticipate introducing it as evidence.
12 THE COURT: Okay. Just as long as there is
13 -- okay, that is fine. I'm not trying to be
14 difficult. I just want to make sure we put it on
15 the record and I want to make sure particularly in
16 cases like this, where somebody goes back and tries
17 to recollect or reconstruct what exactly Mr. Corbett
18 was looking at. I want to make sure. Why don't you
19 just proffer what it is in more detail so the record
20 is clear.
21 MR. D'ANGELO: Okay.
22 Q. (By Mr. D'Angelo) Mr. Corbett, what I've
23 handed you is a very large pile of papers that have been
24 marked and I indicated the page range and {IHES} {R-TD}
25 certified payroll reports from Salyers Masonry. If you

72

1 would like to take a look at that and comfort yourself that
2 I'm representing that correctly. Do you agree that that is
3 what those are?
4 A. Yes.
5 Q. Okay. Now, you testified having looked at
6 the certified payroll reports. You could confirm that
7 Salyers was paying the correct rate?
8 A. What I said was I had our payroll accountant
9 review them to see if they were paying the right rates.
10 Q. And were you given any indication from your
11 payroll person that the correct rates that were being paid,
12 were not?
13 A. Based on the notices that we received at the
14 time, my understanding was that they were paying the correct
15 rates.
16 Q. Okay. So are you testifying today that by
17 looking at the certified payroll reports, you could confirm
18 payment in fact, of the proper rates?
19 A. Just by looking at these without some
20 additional detail, no, I can't say they were. I can't
21 testify that they were paying the correct rates.
22 Q. Was there anything else that you did back in
23 March of 2005 to give -- get a handle as to whether in fact,
24 you had a problem with this subcontractors payment of
25 prevailing wage?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

HARRY KRUEER, et al.,

Plaintiffs,

Case No. CV-2006-02-0605

vs.

MONARCH CONSTRUCTION
COMPANY, et al.,

HONORABLE MICHAEL SAGE

Defendants.

TRIAL TO THE COURT
APRIL 16, 2007
TRANSCRIPT OF PROCEEDINGS

VOLUME II OF II

111

1 A. They are spreadsheets of the audit that I did.
 2 The first page is a list of all the names, their social
 3 security, addresses. I didn't have telephone numbers. The
 4 total hours according to the certified payroll reports, and
 5 the amount due, and the classification that was on the
 6 certified payroll reports. The others are the individual
 7 spreadsheets.
 8 Q. Now, did you prepare these documents?
 9 A. Yes, I did.
 10 Q. And were these documents prepared pursuant to your
 11 duties as an investigator for wage and hour?
 12 A. Yes.
 13 Q. Now, if you could tell the Judge what you did to
 14 prepare these documents. What was your process?
 15 A. I first off sent a letter requesting records from
 16 Don Salyers. It is our policy that if we don't get the
 17 records that whatever information that we have, we do a
 18 determination from that. And the only information that I had
 19 at that time was the certified payroll reports which were
 20 provided to me by the public authority.
 21 And from there, as I said before, I made the
 22 spreadsheets from the certified payroll reports putting down
 23 each individual, the hours that they worked according to the
 24 certified payroll reports, the rate of pay according to the
 25 certified payroll reports. And then once I got all that

112

1 information there, I put in what should have been paid. And
 2 that gave us the difference. And I made another spreadsheet
 3 which was the total sum of what was due.
 4 Q. Now, these reports that you prepared identified as
 5 Plaintiff's Exhibit 6, did you give any credit for fringe
 6 benefits?
 7 A. No, I didn't.
 8 Q. Why not?
 9 A. Because I had no documentation at that time.
 10 Q. Now, at that time, had you talked to anyone from
 11 Monarch Construction Company?
 12 A. No, I hadn't.
 13 Q. Now, after you prepared the documents in
 14 Plaintiff's Exhibit 6, did you do any further investigation?
 15 A. No. I sent them to the Columbus office, and a
 16 determination was sent out.
 17 Q. Did you revisit your determination --
 18 A. Yes, I did.
 19 Q. What happened then?
 20 A. I received a call, asked if I would do a
 21 redetermination if I had more information provided to me such
 22 as the fringe benefits. And I said yes, I would.
 23 Q. Who did you --
 24 A. Mr. Butler. Mr. Butler from Monarch called. And
 25 he said that he would go to Don Salyer's office and see what

113

1 he could find.
 2 Q. And did he give you additional information?
 3 A. Yes, he did.
 4 Q. What types of information did he give you?
 5 A. He gave me health and welfare information,
 6 long-term disability, short-term disability, 401(k), vacation.
 7 If I had my spreadsheet, I could tell you more direct --
 8 Q. I'll help you out.
 9 MS. ZANHISER: Can I approach?
 10 THE COURT: Please.
 11 A. This is not the fringe benefit. This is the
 12 redetermination amount.
 13 Q. Would you please take a look at Defendant's
 14 Exhibit E?
 15 A. Okay.
 16 Q. And what is that document?
 17 A. This is the redetermination total page. Again, a
 18 list of all the employees according to the certified payroll
 19 reports, their social security numbers, addresses, their total
 20 hours according to the certified payroll reports, and the
 21 amount due of back wages. But it's -- this amount was taking
 22 into consideration the fringe benefits.
 23 Q. Did you prepare Exhibit E?
 24 A. Yes, I did.
 25 Q. And did you prepare this document pursuant to your

114

1 duties as an investigator with wage and hour?
 2 A. Yes, I did.
 3 Q. If you could take a look at Exhibit F. Ignoring
 4 the first page, if you would look at the documents that
 5 follow. I know these are very, very poor copies.
 6 A. Faint.
 7 Q. But could you identify this document?
 8 A. Yes. These are the spreadsheets for the
 9 individuals. Again, taking the information from the certified
 10 payroll reports and the fringe documents.
 11 Q. And you prepared --
 12 A. Yes, I did.
 13 Q. -- these documents as well? And did you prepare
 14 these documents pursuant to your duties as an investigator for
 15 wage and hour?
 16 A. Yes.
 17 MR. D'ANGELO: Objection.
 18 THE COURT: What is the basis of the objection?
 19 MR. D'ANGELO: Well, I can clean that up in
 20 cross-examination. Thank you. I'll withdraw it.
 21 THE COURT: Okay, that is fine.
 22 Q. (BY MS. ZANHISER) I believe you've already
 23 answered this, but why is Defendant's Exhibit F different from
 24 Plaintiff's Exhibit 6?
 25 A. The difference is the fringe benefit information.

1 Q. You can see it. It was issued in December of
 2 2005; isn't that true?
 3 A. It could be.
 4 Q. Okay. You are not certain?
 5 A. I'm not certain, no.
 6 Q. It is not on the exhibit you have? Isn't it true
 7 that Monarch contacted you several months after that
 8 determination was issued?
 9 A. That is possible. I don't remember. I just got a
 10 phone call, and they were requesting that I explain the
 11 determination and how I came about that amount. And after the
 12 explanation of basically what I've already said today, that
 13 they asked if they could provide fringe benefit documentation,
 14 would I take it and do a redetermination. And I said yes. We
 15 do that all the time.
 16 Q. And did you have any other contact with Monarch
 17 after that initial call? Did you have further telephone
 18 conversations with them?
 19 A. I don't really remember. I may have called and
 20 said if there is anything else that I needed, you know, I
 21 don't remember.
 22 Q. So would it be correct to say that after they
 23 contacted you, you explained the basis for your determination
 24 and then they requested you consider additional documents? I
 25 assume the next thing that happened is they sent you those

12:08PM

12:09PM

1 documents?
 2 A. Yes. I got a stack of documents.
 3 Q. And you received those documents from Monarch?
 4 A. Correct.
 5 Q. Okay. And do you recall if there was any other
 6 information provided you by Monarch or anyone else that you
 7 utilized when you made the redetermination?
 8 A. It was just the documentations that Monarch had
 9 provided after that first initial determination.
 10 Q. Did they send you more than one allotment of
 11 documents?
 12 A. I don't remember. I work on many audits at one
 13 time. I don't remember.
 14 Q. Okay. If you take a look at Defendant's
 15 Exhibit E.
 16 A. Okay.
 17 Q. This doesn't have the date on it, either, does it?
 18 A. No, it doesn't.
 19 Q. I thought it did.
 20 A. Has the project dates.
 21 Q. Yeah. As you sit here today, do you recall the
 22 specific contents of the box of documents you received in
 23 order to perform the recalculation?
 24 A. There were copies of invoices, spreadsheets
 25 showing vacation time taken, 401(k) information, canceled --

12:10PM

12:11PM

1 well, lists of checks that were photocopy of checks.
 2 MR. D'ANGELO: I think I'm on 12. Does that make
 3 sense that I'm on Plaintiff's 12?
 4 THE COURT: The last exhibit I have --
 5 THE BAILIFF: -- was 11, so this would be 12.
 6 MR. D'ANGELO: Thank you. I lack copies of this
 7 document.
 8 THE COURT: We can make copies for you.
 9 MR. D'ANGELO: That would be wonderful.
 10 THE COURT: Okay, that is fine. We are happy to
 11 help. Just give us a second. Probably need an
 12 original plus three or four.
 13 MR. D'ANGELO: Thank you.
 14 Q. (BY MR. D'ANGELO) While that is being done, after
 15 a determination is issued, how many days does wage and hour
 16 give a contractor to cut checks?
 17 A. They send out the letters. I'm not involved with
 18 that.
 19 Q. So you don't know?
 20 A. I'm not positive, I will say that. I'm not
 21 positive.
 22 Q. Is it your understanding that employees receive a
 23 determination such as what you rendered in Plaintiff's Exhibit
 24 6 would have 90 days under the present law to either bring
 25 suit or assign wage and hour the rights to collect for them?

12:13PM

12:14PM

1 A. I'm not involved with that.
 2 Q. So you don't know that that is the case?
 3 A. I assume that that is what our office does. I'm
 4 not involved with that.
 5 Q. I'm not asking about your involvement. I'm asking
 6 what level of familiarity you have with the procedural
 7 mechanisms of your office and how that interfaces with
 8 effectuating the rights of the parties whom you impact when
 9 you perform your responsibilities. Do you understand that
 10 there is a certain time limit within which an employee has to
 11 bring suit lest he be barred from doing so?
 12 A. Yes.
 13 Q. You do understand that. Do you understand what
 14 period of time that is?
 15 A. You said 90 days?
 16 Q. Does that sound correct to you?
 17 A. I assume so.
 18 Q. You don't know?
 19 A. Positively, I don't handle that.
 20 Q. Would you agree that after the time period lapses
 21 within which an employee may bring an action to collect on the
 22 determination, at that point in time, the only means of
 23 collecting a determination is through the Attorney General's
 24 Office?
 25 A. I don't get involved with that.

12:16PM

12:17PM

131

1 steps removed from a credible source of this is what it
 2 says it is. Its accuracy can't be impugned. There are
 3 people out there who likely could bring this
 4 information to light in a format that would satisfy the
 5 Court and certainly the plaintiffs that it should be
 6 rolled on. But I have not seen it in these
 7 proceedings. And for that reason, Your Honor, we
 8 object.

9 THE COURT: Okay.

12:35PM 10 MS. ZANHISER: Your Honor, Ms. Hettesheimer based
 11 her report on canceled checks, invoices. She reviewed
 12 these in accordance with her duties as a wage and hour
 13 investigator. She compared this report as part of
 14 those duties. And we believe it comes in.

15 MR. D'ANGELO: A brief response, sir?

16 THE COURT: Sure.

17 MR. D'ANGELO: As Plaintiff's Exhibit 12
 18 indicates, checks are not part of the materials that
 19 were submitted. And we certainly dispute the
 20 characterization that any redetermination that was
 21 performed some two or three months after this lawsuit
 22 was filed -- We believe the redetermination occurred
 23 sometime in the late spring of 2006. -- was well past
 24 the point in time where an investigator had any
 25 authority -- legal authority to act. Therefore, we do

132

1 not believe she was acting in accordance with legal
 2 duties.

3 And finally, there certainly is case authority for
 4 the proposition that in order for a summary to be
 5 admitted, not only must the underlying information also
 6 be admissible, but there is case authority for the
 7 proposition that it must be introduced and admitted.
 8 You can rely on the summary, but you have to present
 9 the source documentation. That hasn't occurred here.

12:37PM 10 MS. ZANHISER: The source documentation has been
 11 presented. It is the PW-1s which have been identified
 12 as Defendant's Exhibit F. The PW-1 is a government
 13 record. It is a spreadsheet identifying the hours
 14 worked by the employee and the other things that
 15 Ms. Hettesheimerer -- I'm going to just call you Shari,
 16 sorry. And the fringe benefit credits, all those
 17 things, prevailing wage rate. Just Exhibit E is a
 18 summary of that document. Also, Shari did not testify
 19 that her review of documents was limited to the
 20 documents identified in Plaintiff's Exhibit 12.

12:38PM 21 THE COURT: Well, the Court believes that it is an
 22 803.8 exception to the hearsay rule, which is public
 23 records and reports. Essentially, it talks about
 24 records, reports, statements, or data compilations in
 25 any form of public offices or agencies setting forth

133

1 (a) the activities of the office or agency, or matters
 2 observed pursuant to duty imposed by law as to which
 3 matters there was a duty to report. And it talks about
 4 exceptions which are criminal matters.

5 So the Court believes it comes in under any
 6 stretch of the imagination. If I ignore all the other
 7 issues, I still think it is an 803.8 exception to the
 8 hearsay rule. So I will admit Defendant's Exhibit E.
 9 Now, did you -- what about F?

12:40PM 10 MS. ZANHISER: Not at this time.

11 THE COURT: It is not being offered at this time,
 12 okay. Any further questions of Ms. -- Hettesheimerer?

13 THE WITNESS: Great, that is perfect.

14 THE COURT: -- Hettesheimer before we excuse her?

15 MS. ZANHISER: No, Your Honor.

16 MR. D'ANGELO: No, Your Honor.

17 THE COURT: Okay. So she is excused.

18 MR. D'ANGELO: Well, except that we are going to
 19 be admitting F, and my next witness is very short, so I
 20 would ask that she remain until we --

12:41PM 21 THE COURT: She remain out in the hallway?
 22 MR. D'ANGELO: In the hallway, I don't care.

23 THE COURT: Well, you can remain out in the
 24 hallway or you can remain in the courtroom. Thank you.

25 MR. ROGERS: The defendant would recall Jerry

134

1 Corbett.

2 THE COURT: Okay.

3 JEROME CORBETT,
 4 having been first duly sworn, was examined and testified under
 5 oath as follows:

6 DIRECT EXAMINATION

7 BY MR. ROGERS:

8 Q. Mr. Corbett, I've handed you Defendant's Exhibit
 9 C. Is this -- it is addressed to a Mark Wilmhoff. Who is
 10 Mark Wilmhoff?

11 A. Mark Wilmhoff is the payroll accountant for
 12 Monarch Construction Company. He works for me.

13 Q. Okay. And the project at issue was the public
 14 authority, Miami University?

15 A. Yes, it was.

16 Q. And what is Defendant's Exhibit C?

17 A. Exhibit C is a copy of a fax that we received from
 18 Mike Creager at Miami University in response to our request to
 19 verify the current prevailing wage rate in effect on this
 20 project.

12:45PM 21 Q. Okay. Then I have also handed you Defendant's
 22 Exhibit D as in David?

23 A. Yes.

24 Q. What is Defendant's Exhibit D?

25 A. Exhibit D is a letter from Mike Creager correcting

1 the information that he sent to us on the fax of March 15th
2 which shows the -- actually the correct prevailing wage rate
3 that should have been in effect in March of 2005.

4 Q. And are we talking about bricklayers being the
5 classification that we have been talking about in this
6 lawsuit?

7 A. Yes.

8 MR. ROGERS: I would move the admission of
9 Defendant's Exhibits C and D at this time.

12:48PM 10 THE COURT: Any objection? Weren't they admitted
11 already?

12 MR. ROGERS: Okay, I'm sorry.

13 THE COURT: I thought we pretty much had gotten
14 past that.

15 MR. ROGERS: Sorry for that.

16 THE COURT: I wouldn't know that, but Chris knows
17 all things which occur in this courtroom. So if she
18 says yes, then they were admitted.

19 Q. (BY MR. ROGERS) Then I would like you to turn to
12:48PM 20 Defendant's Exhibit F as in Frank.

21 A. Okay.

22 Q. The first page of Defendant's Exhibit F, who
23 prepared this document?

24 A. I prepared this spreadsheet.

25 Q. And what -- would you take the Court through each

1 column and explain to the Court what you are doing on this
2 chart? First of all, the people listed on the left-hand side,
3 are these the current plaintiffs in this lawsuit?

4 A. The plaintiffs in the lawsuit, yes.

5 Q. Okay. Then take the Court, please, through each
6 column and show the Court what you did.

7 A. Okay. And this is a similar worksheet as the --
8 to the one we went through in earlier January. But it is
9 based on the final PW-1s. I believe the state refers to them
12:50PM 10 as the detailed calculations. I took the PW-1s from the state

11 of Ohio and included in the first column as of 1/29/07 the
12 current per the state. And those are the gross amounts that
13 the state determined were due to the plaintiffs.

14 I then took the regular hours from July 16th,
15 which was the effective date of the wage increase that we
16 received in March of 2005 from Miami University. The regular
17 hours and the overtime hours from July 16th, 2004, through
18 March 28th, 2005, which that March 28th would have been the
19 first pay period that Salyers was officially notified of the
12:51PM 20 wage increase.

21 It was a 95 cent an hour increase, so the
22 journeyman rate should have gone up 95 cents. The overtime
23 rate would have been one and a half times that, \$1.43. The
24 rate did not affect the laborers, so in some cases there are
25 no changes to the amounts determined by the state.

1 I then extended those hours times the rates to
2 come up with the gross pay that should have been affected by
3 this rate increase. The column labeled NCC diff is just the
4 total of the rate change, the regular and the overtime. And
5 then the net revised is the column that I've calculated that
6 Monarch Construction Company is responsible for. And that is
7 the gross amount determined by the state less the portion that
8 is the responsibility of the state authority that -- for
9 failing to notify of the rate change in a timely manner.

12:52PM 10 Q. I think that you just finished it out, by I just
11 want to clarify to make sure that the record is clear. The
12 NCC difference column, is that the amount attributable to the
13 period when Miami had not notified Monarch of the correct
14 prevailing wage?

15 A. That's correct. That totals 12,102.57.

16 MR. ROGERS: And then at this point, I would move
17 the admission of Defendant's Exhibit F. All the pages
18 behind the summary sheet are PW-1s that
19 Ms. Hetteshelmerer said she prepared and which I
12:53PM 20 believe should come in under the same 803.8 exception.
21 And then the summary, Mr. Corbett just testified to.

22 THE COURT: Mr. D'Angelo?

23 MR. D'ANGELO: The same objections, Your Honor, as
24 well as -- I did articulate in day one. I failed to
25 today, but certainly incorporate it, anyway. But these

1 are also, in our view, in the nature of settlement
2 negotiations which would also be a basis for exclusion.
3 THE COURT: The Court would admit them over your
4 objection.

5 MR. D'ANGELO: Thank you.

6 MR. ROGERS: A, that is all the questions I have
7 for Mr. Corbett. B, I don't have any need at this
8 point for Ms. Hetteshelmerer unless Mr. D'Angelo does.

9 MR. D'ANGELO: I don't think so.

12:55PM 10 MR. ROGERS: I just needed her in case of an
11 issue.

12 MR. D'ANGELO: Would you mind waiting just in
13 case?

14 MR. ROGERS: I have no questions.

15 THE COURT: So then the witness will be --

16 MR. ROGERS: I think it is proper for cross.

17 THE COURT: Oh, I'm sorry.

18 MR. D'ANGELO: I do just have a few, Judge.

19 THE COURT: Go ahead.

12:57PM 20 MR. D'ANGELO: Thank you.

21 CROSS-EXAMINATION

22 BY MR. D'ANGELO:

23 Q. Mr. Corbett?

24 A. Yes, Jerry is fine.

25 Q. Thank you, Jerry. When you indicated with respect

Effective: January 18, 2009

Code of Federal Regulations Currentness

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) (Refs & Annos)

Subpart A. Davis-Bacon and Related Acts Provisions and Procedures (Refs & Annos)

→ § 5.5 Contract provisions and related matters.

(a) The Agency head shall cause or require the contracting officer to insert in full in any contract in excess of \$2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated), and which is subject to the labor standards provisions of any of the acts listed in § 5.1, the following clauses (or any modifications thereof to meet the particular needs of the agency, *Provided*, That such modifications are first approved by the Department of Labor):

(1) Minimum wages.

(i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of

the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in § 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided*, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the con-

tractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii)(B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, *Provided*, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) Withholding. The (write in name of Federal Agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, the (Agency) may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) Payrolls and basic records.

(i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions

made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(ii)(A) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the (write in name of appropriate federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency). The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division Web site at <http://www.dol.gov/esa/whd/forms/wh347instr.htm> or its successor site. The prime contractor is respons-

ible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the (write in name of appropriate federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit them to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency), the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the sponsoring government agency (or the applicant, sponsor, or owner).

(B) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) That the payroll for the payroll period contains the information required to be provided under § 5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under § 5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other

than permissible deductions as set forth in Regulations, 29 CFR part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

(D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

(iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the (write the name of the agency) or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(4) Apprentices and trainees--

(i) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the

work they performed when they are employed pursuant to 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 Office, or if a person is employed in his or her 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. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the

full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable

wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

(5) Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

(6) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the (write in the name of the Federal agency) may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

(7) Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

(8) Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the

Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

(9) Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(10) Certification of eligibility.

(i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(b) Contract Work Hours and Safety Standards Act. The Agency Head shall cause or require the contracting officer to insert the following clauses set forth in paragraphs (b)(1), (2), (3), and (4) of this section in full in any contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by § 5.5(a) or 4.6 of part 4 of this title. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

(1) Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(2) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1) of this section.

(3) Withholding for unpaid wages and liquidated damages. The (write in the name of the Federal agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such

sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(2) of this section.

(4) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (b)(1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (4) of this section.

(c) In addition to the clauses contained in paragraph (b), in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in § 5.1, the Agency Head shall cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the Agency Head shall cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

(The information collection, recordkeeping, and reporting requirements contained in the following paragraphs of this section were approved by the Office of

Management and Budget:

Paragraph	OMB Control Number
(a)(1)(ii)(B)	1215-0140
(a)(1)(ii)(C)	1215-0140
(a)(1)(iv)	1215-0140
(a)(3)(i)	1215-0140, 1215-0017
(a)(3)(ii)(A)	1215-0149
(c)	1215-0140, 1215-0017

[29 FR 100, Jan. 4, 1964, as amended at 29 FR 13463, Sept. 30, 1964; 30 FR 13136, Oct. 15, 1965; 36 FR 19304, Oct. 2, 1971; 40 FR 30481, July 21, 1975; 41 FR 10063, March 9, 1976; 47 FR 145, Jan. 5, 1982; 51 FR 12265, April 9, 1986; 54 FR 4243, Jan. 27, 1989; 55 FR 50150, Dec. 4, 1990; 57 FR 28776, June 26, 1992; 58 FR 58955, Nov. 5, 1993; 61 FR 40716, Aug. 5, 1996; 61 FR 68641, Dec. 30, 1996; 65 FR 69693, Nov. 20, 2000; 73 FR 77511, Dec. 19, 2008; 74 FR 2862, Jan. 16, 2009]

© 2009 Thomson Reuters
END OF DOCUMENT

SOURCE: 48 FR 19541, April 29, 1983; 51 FR 12265, April 9, 1986; 61 FR 40716, Aug. 5, 1996; 65 FR 80278, Dec. 20, 2000; 73 FR 77511, Dec. 19, 2008, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 40 U.S.C. 3141 et seq.; 40 U.S.C. 3145; 40 U.S.C. 3148; 40 U.S.C. 3701 et seq.; and the laws listed in 5.1(a) of this part; Secretary's Order 01-2008; and Employment Standards Order No. 2001-01.; 40 U.S.C. 276a-276a-7; 40 U.S.C. 276c; 40 U.S.C. 327-332; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 5 U.S.C. 301; and the statutes listed in section 5.1(a) of this part.

29 C. F. R. § 5.5, 29 CFR § 5.5
Current through August 21, 2009; 74 FR 42571

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

Westlaw Delivery Summary Report for BYRNE, MATTHEW R

Date/Time of Request: Tuesday, September 1, 2009 09:48 Eastern
Client Identifier: MCC11 GN004
Database: OH-ST-ANN
Citation Text: OH ST RCP Rule 17
Lines: 38
Documents: 1
Images: 0

The material accompanying this summary is subject to copyright. Usage is governed by contract with Thomson Reuters, West and their affiliates.

Westlaw.

Civ. R. Rule 17

C

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Civil Procedure (Refs & Amos)

▣ Title IV. Parties

→ **Civ R 17 Parties plaintiff and defendant; capacity**

(A) Real party in interest

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. When a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of this state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(B) Minors or incompetent persons

Whenever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative the minor may sue by a next friend or defend by a guardian ad litem. When a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or shall make such other order as it deems proper

for the protection of such minor or incompetent person.

CREDIT(S)

(Adopted eff. 7-1-70; amended eff. 7-1-75, 7-1-85)

Current with amendments received through 5/8/09

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

C
 Baldwin's Ohio Revised Code Annotated Currentness
 Title XLI. Labor and Industry
 Chapter 4115. Wages and Hours on Public Works (Refs & Annos)
 Penalties
 → 4115.99 Penalties

(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.

CREDIT(S)

(1976 H 1304, eff. 8-25-76; 1974 H 1170; 1969 H 436; 131 v S 201; 1953 H 1)

Current through 2009 File 8, of the 128th GA (2009-2010), apv. by 7/16/09 and filed with the Secretary of State by 7/16/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.