

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Themeworks, Inc.,
Petitioner Below, Petitioner**

vs) No. 11-0884 (Kanawha County 10-AA-125)

**West Virginia Division of Labor,
and David W. Mullins, Commissioner,
Respondents Below, Respondents**

FILED

June 8, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Themeworks, Inc. appeals the Circuit Court of Kanawha County’s May 3, 2011, order affirming the July 8, 2010, order of David W. Mullins, Commissioner of the West Virginia Division of Labor. The Commissioner found that Themeworks failed to pay its employees prevailing wage rates for work performed on the new West Virginia State Museum in violation of West Virginia Code §§ 21-5A-1 – 11, commonly known as the the West Virginia Prevailing Wage Act (“the Act”). Themeworks appears by counsel Charles M. Johnstone II and Sarah A. Stewart. Respondents, the Commissioner and the Division of Labor (“DOL”), appear by counsel Elizabeth G. Farber.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The State of West Virginia awarded a contract to Design and Productions, Inc. (“D&P”) for the fabrication and installation of museum exhibits in the new State Museum that was being constructed. The pre-bid documents and contract specifically stated that the work was subject to the payment of prevailing wage rates. The Act, at West Virginia Code § 21–5A–2, “requires the prevailing wage to be paid to all workmen who are employed ‘on behalf of any public authority’ and who are ‘engaged in the construction of public improvements.’” Syl. Pt. 9, in part, *State ex rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor*, 222 W. Va. 588, 668 S.E.2d 217 (2008).

D&P subcontracted with Themeworks to research, fabricate, and install certain historical exhibits in the new State Museum. The subcontract between D&P and Themeworks contained a

“flow down” provision stating that all terms and conditions of the State’s contract with D&P shall also apply to Themeworks including “the prevailing wage rates of the WV Division of Labor[.]”

Themeworks did not pay prevailing wages rates to its employees for their work on the State Museum. The DOL investigated and its Director of the Wage and Hour Section determined that Themeworks had violated the Act. Themeworks disputed this finding, asserting that the Act did not apply to the type of work that its employees performed, and an administrative hearing was held. Based upon the evidence and argument presented at the hearing, the Commissioner concluded that Themeworks violated the Act and ordered Themeworks to pay its employees the difference between prevailing rates and the wages actually paid for a total of \$222,020.55. In arriving at this amount, the DOL used the prevailing hourly rate for carpenters.

Themeworks appealed to the circuit court, which affirmed, and Themeworks now appeals to this Court. “‘On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.’ Syllabus point 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).” Syl. Pt. 1, *McDaniel v. West Virginia Division of Labor*, 214 W.Va. 719, 591 S.E.2d 277 (2003).

Application of the Prevailing Wage Act

Themeworks argues that, while the Act may apply to work on the museum performed by employees of D&P or other subcontractors, the Act does not apply to the speciality work that its employees performed. Based upon its reading of the Act’s definitions of the terms “construction,” “public improvement,” and “construction industry,”¹ Themeworks argues that the Act only applies

¹ West Virginia Code § 21-5A-1 defines these terms as follows:

(2) The term “construction,” as used in this article, shall mean any construction, reconstruction, improvement, enlargement, painting, decorating, or repair of any public improvement let to contract. The term “construction” shall not be construed to include temporary or emergency repairs.

....

(4) The term “public improvement,” as used in this article, shall include all buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports, and all other structures upon which construction may be let to contract by the State of West Virginia or any political subdivision thereof.

(5) The term “construction industry,” as used in this article, shall mean that industry which is composed of employees and employers engaged in construction of buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports, and all other structures or works whether private or

(continued...)

to routine and systematic work, such as following a blueprint to construct a building or road. Themeworks explains that its employees use a degree of skill and creative ability that goes much further than simply following blueprints. They have to determine the best way to fabricate an item, such as determining how to make a piece of plastic look like a piece of rusty metal. They must take into account fire codes, visitor safety, and ease of installation, while also being true to historical materials, to create unique museum-quality pieces.

Upon a review of the record and the parties' arguments, we conclude that the Commissioner was not clearly wrong in finding that work by Themeworks's employees on the new State Museum was subject to the Act. West Virginia Code § 21-5A-2 "requires the prevailing wage to be paid to all workmen who are employed 'on behalf of any public authority' and who are 'engaged in the construction of public improvements.'" Syl. Pt. 9, in part, *State ex rel. Tucker County Solid Waste Authority*, supra. Unquestionably, the State Museum project was on behalf of a public authority, the State of West Virginia. W.Va. Code § 21-5A-1(1). Moreover, the museum project was a "public improvement" as that term is broadly defined by West Virginia Code § 21-5A-1(4); specifically, the museum was a "structure[] upon which construction may be let to contract by the State of West Virginia[.]"

Petitioner objects to the Commissioner's determination that this work constituted "construction." To make this determination, the Commissioner was required to examine and make factual findings about the nature of the work performed. We must give deference to the factual findings of an administrative officer unless those findings are clearly wrong. Syl. Pt. 1, *McDaniel*. Upon a review of the record and the parties' arguments, we conclude that the Commissioner was not clearly wrong. "Construction" is "any construction, reconstruction, improvement, enlargement, painting, decorating, or repair of any public improvement let to contract." W.Va. Code § 21-5A-1(2). Evidence presented at the administrative hearing proved that, when creating and installing the museum displays, Themeworks's employees constructed, improved, enlarged, painted, and decorated. Contrary to the interpretation urged by Themeworks, nothing in the statutory definitions limits the application of the Act solely to the rote execution of blueprints.

Use of the Carpenter Wage Rate Classification

Themeworks argues that even assuming, *arguendo*, this work was "construction" subject to the Act, the DOL still erred by using the prevailing wage rate category for carpenters. Themeworks argues that the work performed by its employees is not similar to work performed by carpenters; that DOL's own inspector could find no existing category that describes the type of work performed by these employees; and DOL's lack of an existing category did not give the agency authority to apply

¹(...continued)

public on which construction work as defined in subsection (2) of this section is performed.

a category that did not fit. In a related assignment of error, Themeworks argues that the Commissioner and the circuit court failed to resolve direct conflicts in evidence concerning the type of work that its employees performed.

Pursuant to its authority in West Virginia Code § 21-5A-5 to establish the prevailing rates, the DOL has defined the carpenter classification to include “workers who construct, erect, install and repair structures, structural members and fixtures made of wood, plywood, wallboard and materials that take the place of wood, such as plastic, metals, composites, fiberglass, and Transite sheeting and Cemesto Board, using carpenter hand tools and power tools.” The DOL argues that there was substantial evidence presented during the administrative hearing to support the finding that these employees engaged in carpentry work, including multiple photographs of the work as it was being performed and the testimony of two experienced carpenters. One of the carpenters testified that he was familiar with the fabrication and installation of exhibits of similar character in other locations in West Virginia, and the work on those other exhibits was performed by carpenters. Furthermore, the testimony included several specific examples of carpentry work and carpentry techniques used by Themeworks’s employees while creating and installing the museum exhibits.

Themeworks also asserts that there was no basis to use the carpenter classification for *all* of the work its employees performed. In response, the DOL argues that Themeworks failed to comply with the requirements of West Virginia Code § 21-5A-8 and West Virginia Code of State Rules § 42-7-7.1 that require a contractor or subcontractor to maintain an accurate record for each employee, including the daily and weekly hours worked in each classification. The DOL states that, in the absence of these records from the employer, its policy is to use the prevailing wage classification with the highest wage rate that is consistent with the scope of work. The DOL asserts that, otherwise, an employer could circumvent the Act by arguing that the DOL had no basis upon which to determine classification and rates.

Upon a review of the record and the parties’ arguments, we cannot conclude that the Commissioner was clearly wrong in finding that the carpentry classification applied to the work performed by Themeworks’s employees on the State Museum.

Findings Regarding Language in the Subcontract

Themeworks argues that the circuit court erred in finding that it was contractually obligated to pay prevailing rates. Themeworks argues that the DOL was not a party to its subcontract with D&P and had no authority to enforce contractual terms. Themeworks asserts that based upon its prior contracts and history with D&P, the subcontract did not put Themeworks on notice of its requirement to pay prevailing rates for this work. However, the ultimate conclusion of the Commissioner and the circuit court was that Themeworks violated the Act, not that Themeworks breached a contract. Accordingly, we find no error.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 8, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh