

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

PUBLIC WORKS CASE NO. 2018-018

**LOS ANGELES SOUTHWEST COLLEGE SCHOOL OF BEHAVIORAL AND SOCIAL
SCIENCES HVAC UPGRADE COMMISSIONING WORK**

PUBLIC WORKS CASE NO. 2018-031

**EAST LOS ANGELES COLLEGE CAMPUS STUDENT CENTER AND BOOKSTORE
COMMISSIONING WORK**

LOS ANGELES COMMUNITY COLLEGE DISTRICT

I. INTRODUCTION

On May 9, 2020, the Director of the Department of Industrial Relations (Department) issued a public works coverage determination (Determination) finding that commissioning work performed for the Los Angeles Southwest College's (LASWC) School of Behavioral and Social Sciences HVAC Upgrade project and the East Los Angeles College (ELAC) Campus Student Center and Bookstore project, both awarded by the Los Angeles Community College District (LACCD), is public work subject to California prevailing wage requirements.

On June 10, 2020, Climatec, LLC (Climatec) filed a "Petition for Reconsideration of Coverage Determination" and requested a hearing. The Department deems the petition to be a timely notice of appeal of the Determination (Appeal) under Labor Code section 1773.5 and California Code of Regulations, title 8, section 16002.5. All interested parties were thereafter given an opportunity to provide legal argument and any additional supporting evidence. The Division of Labor Standards Enforcement

(DLSE) and the International Brotherhood of Electrical Workers, Local 11 (Local 11) each filed separate oppositions to the Appeal. Climatec filed a reply.

The Director has sole discretion to decide whether to hold a hearing. (Cal. Code Regs., tit. 8, § 16002.5, subd. (b).) Because the material facts are not in dispute and the issues raised on appeal are solely legal, the request for a hearing is denied.

Climatec also requested that the Director amend the Determination to apply to several enforcement cases with pending requests for review. Local 11 specifically noted its non-opposition to Climatec's request. DLSE did not oppose or support the request. The existence of those cases was not made a part of the record of the Determination and the Director did not have an opportunity to review whether the projects in those cases are sufficiently similar to the projects at issue in the Determination. Those other cases are being raised now for the first time on appeal. For those reasons, the request to amend is denied.

All of the submissions have been reviewed in detail and given careful consideration. For the reasons set forth in the Determination, which is incorporated into this Decision on Administrative Appeal (Decision), and for the additional reasons set forth and discussed in detail below, the Appeal is denied and the Determination is affirmed.

II. RELEVANT FACTS AND CONTENTIONS ON APPEAL

The facts set forth in the Determination are largely undisputed, and to that extent, they are incorporated herein by reference.¹ A brief recitation of the facts is provided here for context.

LACCD awarded several HVAC systems upgrade projects to Climatec. Much of the work was performed by LACCD's subcontractors, and workers who performed the physical installation of the systems were paid prevailing wages. Climatec's own workers performed commissioning work, including programming, to verify that the systems were installed in accordance with industry accepted standards and with LACCD's operational

¹ Although Climatec claims the Determination contained "incorrect facts," none of the challenged facts are material to the conclusion, as discussed below.

needs. Climatec did not pay these workers prevailing wages because Climatec did not consider the commissioning work to be subject to prevailing wage requirements. The Determination concluded differently.

On appeal, Climatec offers three main reasons why it believes the Determination is erroneous.

First, Climatec claims that the Determination “relied upon incorrect facts” to reach the wrong conclusion. Second, Climatec reiterates that commissioning work performed on a public works project is not subject to prevailing wage requirements, even if the work is “integral and necessary for a project’s completion,” because it does not involve the “physical labor of construction” and the work is not included in a published scope of work. Finally, Climatec distinguishes *Bedard Controls, Inc.*, 09-0256-PWH (June 9, 2011) (*Bedard Controls*) as being inapplicable to the work at issue here. The Department considers each of these arguments in turn.

III. DISCUSSION

A. **The Determination Did Not Rely Upon Incorrect Facts.**

Climatec asserts in its Appeal that the Determination made “factual findings [that] are incorrect, not supported by the record before the Director, and should not and cannot serve as the basis for the Determination.” Climatec’s characterizations of the findings are inaccurate, but more importantly, none of the supposedly disputed facts affect the outcome.

Climatec claims that the Determination “found that Climatec was ‘performing testing, adjusting and balancing (TAB) of the HVAC system’ and that Climatec was also responsible for ‘ensuring that all electrical connections are correct.’”² But the

² Climatec also challenges the Determination’s description of the conditions of its Honeywell warranty, but that description was taken directly from a declaration submitted by one of Climatec’s representatives and supported by the Department’s independent assessment of the warranty provisions. In any event, like the other facts Climatec challenges, the conditions of the warranty are of no import to the resolution of the issues in this Appeal because the Determination reasoned that “whether the warranty is voided when a specific type of worker is used is irrelevant to whether the work is covered under the prevailing wage law,” a principle that Climatec does not dispute.

Determination merely recited the fact that Local 11 submitted a declaration which stated that Climatec was responsible for “ensuring that all electrical connections are correct.” Climatec does not dispute the incontrovertible fact that Local 11 made such a statement in its declaration. While Climatec further complains that the Department relied on Local 11’s declaration in reaching its conclusion, Climatec does not cite any instance where the Determination’s analysis referred to the declaration or the facts within.

What the Determination did rely on were contract documents provided by LACCD which stated unequivocally that Climatec was responsible for “performing testing, adjusting, and balancing (TAB) of the HVAC system.” This is again a mere recitation of language in the LACCD contract documents governing Climatec’s responsibilities under the contract. Climatec could have satisfied this contractual obligation to LACCD by subcontracting that work, which it insists it did, and is a fact no other party disputes, or even raises. Contrary to Climatec’s assertions, the Determination made no finding that Climatec performed TAB work with its own employees. Moreover, these facts are not of any special significance to the Determination, which makes Climatec’s insistence on quarreling with them all the more puzzling.

In short, even if resolved completely in Climatec’s favor, all of the above disputed facts are immaterial because they have no bearing on the Determination’s conclusion that “commissioning work, which entails *programming*, calibration, and verification that the energy management system is installed correctly” is subject to prevailing wage requirements.

B. The Commissioning Work Here, Including Computer Programming, Is Subject to Prevailing Wage Requirements.

Aside from disputing largely inconsequential facts, Climatec makes two primary arguments why commissioning work, including programming, is not public work in this case. First, Climatec argues that not all work on a public works project is covered and work that does not involve the “physical labor of construction” is in the category of work not covered by the prevailing wage law. In its reply brief, Climatec refines that argument slightly by asserting that work is not “automatically . . . covered by the prevailing wage law” merely because it is “integral and necessary for a project’s successful completion.”

While it is true that not all work performed on a public works project is covered, it is likewise true that work need not involve the “physical labor of construction” in order to be covered. No “physical labor of construction” requirement is included in the relevant statutory or regulatory provisions, nor has such a requirement ever been announced in prior coverage determinations. Climatec was also unable to point to any express authority for its asserted requirement that “physical labor of construction” is a prerequisite for coverage under the prevailing wage law.³

Climatec’s discussion of the “physical labor of construction” issue was limited to describing a list of prior coverage determinations and enforcement decisions where certain types of work were excluded from coverage, and then stating, in a conclusory fashion, that “[i]n reconciling the above decisions, it becomes clear that a coverage determination turns on whether the work at issue includes the physical labor of construction.” This form of argument was criticized by the Court of Appeal in another public works case. (See *Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 218 [“That is the sum and substance of its argument, for which it cites no authority nor evidence.”])

In its reply brief, Climatec maintains that only “physical labor” tasks can be covered work, even though it concedes that “computer programming work is essential for the project’s successful completion.” According to Climatec, tasks such as “supervisory and clerical work performed on a project site” are also “necessary for the successful completion of the project,” but are nonetheless not considered covered work. On this point, Climatec’s contentions are again constrained by a lack of reasoned discussion or citation to authority.

The relevant standards in determining coverage here are whether the work is considered “construction” or “installation” (§ 1720, subd. (a)(1)) and whether the work tasks are “integral to the process of construction.” (*Sheet Metal Workers’ Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 213 (*Local 104*)). Clerical work like preparing paychecks, for instance, may be “necessary for the successful completion

³ The Determination noted that the prevailing wage law “extends to work not envisioned as construction or installation work in the traditional sense, but done as the final step to ‘complete’ the public works project.”

of the project” in a broad sense, but typically is not integral to the process of construction or installation. Preparing paychecks bears no direct relationship to the process of installation - unlike commissioning, which is done to ensure that whatever was installed works as intended and contracted for. (*Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, 753 (*Williams*) [inquiry is whether the function formed an “integral part of the process of the public works project.”]) Given the facts in this case, the Determination properly found that not only was commissioning work integral to the installation process, commissioning is such an integral component of the process that it is essentially the final phase of installation. Climatec makes no real attempt to refute this reasoning.

Climatec’s other main argument is that the commissioning work in this case cannot be covered because commissioning, including programming, is not included in the scopes of work for any existing prevailing wage classifications. The argument depends on the premise that commissioning work, including programming, falls outside “any existing prevailing wage determination.” Though Climatec assumes the truth of its premise, both DLSE and Local 11 strongly contest that assertion. In addition, the Department has not made any finding in this proceeding regarding what classification commissioning work falls under, nor has it had occasion to make such a finding, because the purview of a coverage determination is limited to determining “whether a specific project or type of work” is a public work. (§ 1775.5, subd. (b).) Determining which classification applies to the work at issue is a charge reserved for the factfinder in a separate proceeding. (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 129 (*Ericsson*); § 1742, subd. (b).) Climatec’s challenge fails because the argument rests on a faulty premise.⁴

⁴ Even if the premise were true, Climatec’s argument is still flawed because it depends on the supplementary assertion that “it is only what the DIR adopts as the Scope of Work which is covered.” That bare assertion represents a misunderstanding of the longstanding prevailing wage determination process. Nearly 40 years ago, the Court of Appeal explained that “the determination of the classification or type of work covered is an essential step in the wage determination process and a rate cannot be fixed without such a determination.” (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128.) In other words, the Department makes “two determinations; *first*, whether a particular type of worker or work is covered by the

C. *Bedard Controls* Is Consistent with the Conclusion in the Determination.

Climatec also takes issue with the Determination's citation to the *Bedard Controls* enforcement decision. Climatec again underscores its primary factual claim - a fact no party appears to dispute - that Climatec's direct employees did not perform the physical installation. By contrast, Climatec contends the workers in *Bedard Controls* performed both the physical installation and the commissioning work immediately following. Climatec deems this difference to be crucial. According to Climatec, *Bedard Controls* hinged on the fact that the same worker performed both the "physical labor of construction" and commissioning work, and the *Bedard Controls* decision therefore "ruled that all the work performed by the worker was covered work."

Climatec's argument misconstrues the reasoning in *Bedard Controls*. The *Bedard Controls* decision described commissioning work in part as using "proprietary software installed on a laptop computer" to connect "each control box and air handler to the system's computerized central interface." (*Bedard Controls, supra*, 09-0256-PWH at p. 4.) The issue for decision in *Bedard Controls* was "whether the commissioning work performed [by a worker] on an admitted public work requires the payment of prevailing wages." (*Id.* at p. 8.) Resolution of that issue did not depend on whether any additional non-commissioning work was also performed by the same worker. Although not designated as precedential, *Bedard Controls* was cited because it offered additional support for the Determination in this case. The Determination also drew support from out-of-state appellate decisions that all found commissioning following physical installation work covered, regardless of whether the same workers performed both the physical installation and commissioning work. (See, e.g., *Niles v. Huntington Controls, Inc.* (Mass. App. Ct. 2017) 92 Mass.App.Ct. 15.)

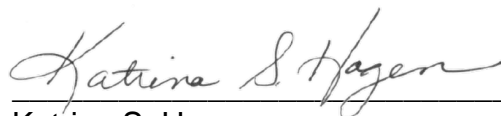
prevailing wage laws, and *second, if so*, what the prevailing wage for that category of worker should be." (*Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 352, italics added.) Climatec would have the law put the proverbial cart before the horse by insisting that coverage is divined solely from the advisory scopes of work, which are a component of the prevailing wage determinations. (*Henson v. C. Overaa & Co.* (2015) 238 Cal.App.4th 184, 189.) Climatec's position is an untenable one.

As explained in the Determination and in this Decision, the commissioning work in this case is considered integral to the installation process. Work integral to the installation process is performed “in the execution” within the meaning of section 1772 and subject to prevailing wage requirements under relevant Court of Appeal precedent. (See e.g., *Local 104, supra*, 229 Cal.App.4th at pp. 205-206; *Williams, supra*, 156 Cal.App.4th at p. 753.) In fact, the work is so integral that it is considered the final phase of installation. On appeal, Climatec is unable to meaningfully mount an attack on this reasoning, which is the foundation for the Determination’s conclusion.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination, as supplemented by this Decision on Administrative Appeal, the Appeal is denied and the determination that prevailing wages are required for the commissioning work performed for the Los Angeles Southwest College’s School of Behavioral and Social Sciences HVAC Upgrade project and for the East Los Angeles College Campus Student Center and Bookstore project under the specific factual circumstances described is affirmed. This Decision constitutes the final administrative action in this matter.

Dated: December 9, 2020



Katrina S. Hagen
Director of Industrial Relations