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~~FILED~~  
~~KING COUNTY~~  
~~SUPERIOR COURT~~

Honorable Jay White  
Hearing Date: May 20, 2011  
Hearing Time: 10:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

ZACHARY OWENS, CONRADO MORA,  
LUIS GARCIA, PAUL VARGAS, and  
MICHAEL PARDO, individually and on  
behalf of others similarly situated,

Plaintiffs,

v.

BETHLEHEM CONSTRUCTION  
INCORPORATED; FIDELITY AND  
DEPOSIT COMPANY OF MARYLAND;  
ZURICH AMERICAN INSURANCE  
COMPANY; FEDERAL INSURANCE  
COMPANY; and ST. PAUL FIRE AND  
MARINE INSURANCE COMPANY,

Defendants.

BETHLEHEM CONSTRUCTION  
INCORPORATED, a Washington  
corporation,

Third Party Plaintiff,

v.

WASHINGTON STATE DEPARTMENT  
OF LABOR AND INDUSTRIES, a division  
of the State of Washington,

Third Party Defendant.

No. 08-2-31509-6 KNT

FINDINGS, CONCLUSIONS AND  
ORDER GRANTING PLAINTIFFS'  
MOTION FOR CLASS  
CERTIFICATION

~~PROPOSED~~

ORIGINAL

1           THIS MATTER having come before the Court on Plaintiffs' Motion for Class  
2 Certification pursuant to CR 23(a) and (b)(3), the defendants having responded, and the  
3 Court having considered the pleadings on file and the following submissions, as well as the  
4 arguments of counsel at the hearing on the motion:  
5

- 6           1. Plaintiffs' Motion for Class Certification;
- 7           2. Declaration of Martin Garfinkel in Support of Plaintiffs' Motion for Class  
8 Certification with exhibits attached thereto;
- 9           3. Declaration of Josh Swanson in Support of Plaintiffs' Motion for Class  
10 Certification with exhibit attached thereto;
- 11           4. Declaration of Scott Kane in Support of Plaintiffs' Motion for Class  
12 Certification;
- 13           5. Defendants' Joint Response In Opposition to Plaintiffs' Motion for Class  
14 Certification;
- 15           6. Declaration of Marisa M. Bavand in Opposition to Plaintiffs' Motion for Class  
16 Certification together with exhibits attached thereto;
- 17           7. Declaration of Robert Connelly in Support of Defendants' Opposition to  
18 Plaintiffs' Motion for Class Certification;
- 19           8. Declaration of Matthew R. Harlow in Support of Defendants' Opposition to  
20 Plaintiff's Motion for Class Certification;
- 21           9. Plaintiffs' Reply in Support of Class Certification;
- 22           10. Second Declaration of Martin Garfinkel in Support of Plaintiffs' Motion for  
23 Class Certification together with exhibits attached thereto; and  
24  
25  
26

1 11. Second Declaration of Josh Swanson in Support of Plaintiffs' Motion for  
2 Class Certification,

3 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

4 The Court hereby finds, concludes, and orders as follows:

5  
6 1. Certification of class actions is governed by Civil Rule 23. At the class  
7 certification stage, doubts are resolved in favor of class certification. *Smith v. Behr Process*  
8 *Corp.*, 113 Wn. App. 306, 318-19, 54 P.3d 665 (2002). As the Court of Appeals has noted,  
9 "courts generally assume that the allegations in the pleadings are true and will not attempt to  
10 resolve material factual disputes or make any inquiry into the merits of the claim." *Miller v.*  
11 *Farmer Bros. Co.*, 115 Wn. App. 815, 820, 64 P.3d 49 (2003)(citations omitted). "Courts  
12 may, however, go beyond the pleadings and examine the parties' evidence to the extent  
13 necessary to determine whether the requirements of CR 23 have been met." *Miller*, 115 Wn.  
14 App. at 820 (citing *Oda v. State*, 111 Wn. App. 79, 94, 44 P.3d 8 (2002)). Because class  
15 actions are a specialized proceeding available in limited circumstances, the trial court must  
16 conduct a "rigorous analysis" of the CR 23 requirements to determine whether a class  
17 action is appropriate in a particular case. *Oda*, 111 Wn. App. at 93 (quoting *General Tel. Co.*  
18 *v. Falcon*, 457 U.S. 147, <sup>161</sup>~~160-61~~, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)).  
19  
20

21 Further, because this case is brought under the Prevailing Wage Act, RCW 39.12, it is  
22 recognized that workers, not contractors, are the intended beneficiaries of the statute. <sup>See</sup> *Everett*  
23 *Concrete Prods., Inc., v. Department of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112  
24 (1988).

25 2. In this case, plaintiffs have satisfied the CR 23(a) elements of numerosity,  
26 commonality, typicality, and adequacy of representation, as follows:

1 (A) CR 23(a)(1) - Numerosity: There are over 300 current and former  
2 workers who were employed by defendant Bethlehem Construction Incorporated  
3 ("Bethlehem") and classified by Bethlehem as "precast concrete worker" helping to build  
4 concrete bridge segments for the Sound Transit Light Rail Project which work began in or  
5 about April 2005 and continued through approximately mid-2007. A class should only be  
6 certified where a plaintiff demonstrates that the proposed class "is so numerous that joinder  
7 of all members is impracticable." *Miller*, 115 Wn. App. at 821, <sup>quoting CR 23(a)(1) OW</sup> Defendants do not contend  
8 that the size of the class is insufficient, and the Court concludes that the number of potential  
9 class members in this case satisfies the numerosity criterion, <sup>That joinder</sup>  
10 ~~is~~ <sup>of all members is impracticable" within the meaning of</sup> CR 23(a)(1). <sup>OW</sup>

11 (B) CR 23(a)(2) - Commonality: To satisfy this requirement, plaintiffs'  
12 allegations must derive from a "common course of conduct" with respect to the class. *Miller*,  
13 115 Wn. App. at 824. <sup>"</sup> The commonality test is qualitative rather than quantitative, that is, <sup>OW</sup>  
14 there need be only a single issue common to all members of the class." *Smith*, 113 Wn. App.  
15 <sup>320 (citations quoted from omitted). OW</sup> at 323. <sup>OW</sup> Here, plaintiffs have alleged on behalf of themselves and all others similarly situated  
16 that defendants have violated the Prevailing Wage Act, RCW 39.12, by paying class  
17 members at the rate for precast concrete worker, the "shop rate," for all hours worked rather  
18 than at the construction trades rates. <sup>Although appeared to contest OW</sup> Defendants ~~do not contest~~ that this element has been  
19 <sup>Overall argument, More primary contention is</sup> satisfied, but do argue that the predominance of common issues under CR 23(b)(3) has not been  
20 met. <sup>OW</sup>

21  
22  
23 In its March 23, 2011 Order Granting Plaintiffs' Motion for Partial Summary Judgment,  
24 the Court ruled that "Defendants are bound by the Department of Labor and Industries'  
25 administrative determination that prevailing wage rates for the construction trades apply to  
26 Plaintiffs' work on the Sound Transit C755 Central Link Light Rail Project." Because this

1 ruling would effectively apply on a classwide basis, there is no question that plaintiffs satisfy  
2 the element of commonality in CR 23(a)(2).

3 (C) CR 23(a)(3) - Typicality: The claim of the proposed class  
4 representatives must be typical of the claims of other class members. A representative  
5 plaintiff's claim is typical if it arises out of the same course of conduct and is based on the  
6 same legal theory as all class members' claims. <sup>(in relation to all potential class members)</sup>  
7 <sup>SOR</sup> *Weston v. Emerald City Pizza, L.L.C.*, 137  
8 Wn. App. 164, 170, 151 P.3d 1090 (2007). Here, the Court finds that the claims of the five  
9 plaintiffs are typical and grounded on the same legal theories as the claims asserted on behalf  
10 of the class as a whole. While defendants contend that the five plaintiffs did not perform the  
11 same work as all employees on the project, the Court is ~~not~~ persuaded that plaintiffs ~~do not or~~  
12 <sup>and will</sup> ~~cannot~~ represent the interests of all employees regardless of the specific craft involved. All  
13 employees were underpaid at the shop rate and all have the same interest in being paid their  
14 respective construction pay rate. The Court concludes that plaintiffs have satisfied typicality  
15 under CR 23(a)(3).  
16

17 (D) CR 23(a)(4) - Adequacy of Representation: Under this element, there  
18 must not be any adversity of interest between the class representatives and other class  
19 members, and the attorneys for the class representatives must be qualified to conduct the  
20 proposed litigation.  
21

22 Here, there is no challenge to the qualifications of proposed counsel, but defendants  
23 do contend that the class representatives are not adequate to represent those employees who  
24 did not perform the same work as they did on the project. For the same reasons as stated in  
25 the Court's discussion of typicality above, the Court concludes that there is no conflict of  
26 interest between the class representatives and these other employees and that the class

1 representatives can adequately represent the interests of the whole class.

2 In addition, defendants contend that two of the named plaintiffs, Zachary Owens and  
3 Paul Vargas, are not adequate class representatives for reasons specific to each. At the  
4 outset, the Court notes that there is authority for the proposition that if a defendant challenges  
5 the adequacy of some but not all of the proposed class representatives, the CR 23(a)(4)  
6 adequacy requirement will be satisfied. *See Rodriguez v. West Publishing Corp.*, 563 F.3d  
7 948, 961 (9<sup>th</sup> Cir. 2009). Such is the case here since there is no challenge to three of the five  
8 proposed class representatives Conrado Mora, Luis Garcia, and Michael Pardo.

9  
10 In any event, the individualized challenges to Mssrs. Owens and Vargas fail both  
11 because it is usually immaterial that a proposed class representative has in their past engaged  
12 in “unrelated, unsavory, unethical, or even illegal conduct...”, and because defendants cannot  
13 show that their alleged shortcomings are related to the elements of plaintiffs’ claims or  
14 defendants’ defenses. *See Conte & Newberg*, 1 *Newberg on Class Actions* §3:36, p. 498 (4<sup>th</sup>  
15 ed. 2002). In Mr. Owens’ case, while he is a convicted felon and lied about it on his  
16 employment application, it is unrebutted he was open and truthful with his supervisors on his  
17 first day of employment and was successful on the job. The Court is ~~not~~ <sup>JW</sup> persuaded that the  
18 mere existence of the past felony conviction, and misrepresentation on his application for  
19 employment ~~are sufficient~~ <sup>even if admissible,</sup> to disqualify him as a class representative. With respect to  
20 ~~are insufficient~~ <sup>JW</sup> to disqualify him as a class representative. With respect to  
21 Mr. Vargas, defendants contend that he is not sufficiently knowledgeable or engaged in the  
22 lawsuit to act as a proper representative. The Court disagrees. A class representative is not  
23 required to fully understand the legal intricacies and ramifications of the case. It suffices that  
24 Mr. Vargas was generally aware of the nature of the case, showed sufficient personal  
25 knowledge and initiative to seek counsel to pursue his claim of being underpaid, and was  
26

1 willing to act on behalf of the larger group.

Protect the  
Interests of the class.

2 Accordingly, the proposed class satisfies CR 23(a)(4). *and the court*  
3 *finds that the representative parties will fairly and adequately*  
4 3. Plaintiffs also have satisfied the elements of CR 23(b)(3). CR 23(b)(3)

5 requires the Court to find that "questions of law or fact common to the members of the class  
6 predominate over any questions affecting only individual members, and that a class action is  
7 superior to other available methods for the fair and efficient adjudication of the controversy."

8 The rule requires the Court to consider the following factors in making this assessment: (a)  
9 the interest of members of the class in individually controlling the prosecution or defense of  
10 separate actions; (b) *OU* the extent and nature of any litigation concerning the controversy  
11 already commenced by or against members of the class; (c) *OU* the desirability or undesirability  
12 of concentrating the litigation of the claims in the particular forum; *[and] (d) [OU]* the difficulties  
13 likely to be encountered in the management of a class action." The purpose of the  
14 predominance and superiority requirements is to ensure that class treatment will promote  
15 economy of time, effort, and expense, and a uniformity of decisions to persons similarly  
16 situated.  
17

18 (A) Predominance: The CR 23(b)(3) predominance requirement is  
19 "somewhat more stringent than the CR 23(a) *OU* commonality requirement *it OU* but involves a  
20 similar inquiry. *Miller, 115 Wn App 825. Sitton, 116 Wn App 254,* This requirement "is not a rigid test," *but is a pragmatic inquiry that*  
21 focuses on judicial economy and looks to "whether there is a common nucleus of operative  
22 facts to each class member's claims." *Smith v. Behr Process Corp., supra, 113 Wn App 323; OU*  
23 *Sitton v. State Farm, 116 Wn. App. 245, 255, 63 P.3d*  
24 *198 (2003).* \* (citations omitted). *OU*

25 In this case, defendants argue that predominance is not satisfied because the  
26 predominant issue is not whether Bethlehem should have paid its employees the construction

1 rates instead of the shop rates, but rather which prevailing wage rates should be paid to each  
2 of the more than 300 putative class members. The Court disagrees. In this case, liability has  
3 been hotly contested and the applicability of the construction rates to work on the project has  
4 previously been presented to this Court as the central issue in this case. Moreover, liability  
5 has now been established at least insofar as the Court has held that defendant Bethlehem  
6 improperly paid the lower rate for precast concrete workers. The only issue that remains is  
7 for the Court to ascertain the specific back pay damages owed to each of the putative class  
8 members. The Court is persuaded that this question is an issue of damages, which is  
9 typically not a basis for denying class certification. *See Smith v. Behr Process Corp.*, 113  
10 Wn. App. 306, 323, 54 P.3d 665 (2003); and *Sitton v. State Farm Mutual Automobile Ins.*  
11 *Co.*, 116 Wn. App. 245, 63 P.3d 198 (2003). In addition, the Court is persuaded that these  
12 determinations can be made on a collective basis in light of Bethlehem's time and payroll  
13 records, its organization of the work, and the relatively limited number of potentially  
14 applicable construction trades classifications and types of work on the project. The Court  
15 also finds that judicial economy would be served by the certification of the proposed class.  
16  
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18 Accordingly, the Court finds that plaintiffs have satisfied the predominance prong of  
19 CR 23(b)(3).  
20

21 (B) Superiority: Defendants make two arguments challenging the superiority  
22 of class certification. First, they argue that plaintiffs should avail themselves of the  
23 administrative process afforded by the Department of Labor and Industries, and, second, that  
24 this Court lacks "expertise and authority" to make pay rate determinations. The Court does  
25 not find these arguments persuasive and concludes that plaintiffs have satisfied the  
26 superiority element.

1 L&I's administrative process is not superior here for two reasons. First, as this Court  
2 has previously recognized, plaintiffs have an unqualified right to bring their action in court  
3 pursuant to RCW 39.12.065. Second, L&I has determined that it is estopped from taking any  
4 enforcement action against Bethlehem. Thus, it is difficult to see why plaintiffs should be  
5 required to process their claims through an agency that has already decided that its hands are  
6 tied. Second, this Court is not persuaded that it has no jurisdiction to decide which rates  
7 apply in an action brought pursuant to RCW 39.12.065. See e.g., See *Heller v. McClure*, 92

8 Wn. App. at 341-42; see also *Ironworkers District Council v. University of Washington Bd.*  
9 *of Regents*, 93 Wn. App. 735, 739, 970 P.2d 351 (1999) (recognizing that "workers who have

10 ~~benefits were not~~ <sup>742</sup> ~~not been~~ paid have standing to bring a claim in superior court in their own names for unpaid  
11 ~~wages~~ <sup>but referencing different statutes, RCW 39.08.030 and RCW 60.28.030.</sup> ~~wages~~." <sup>Whose</sup> The Court also notes that any putative class member who does not wish to be a

12 part of this class action will be advised of his or her right to opt out under CR 23(c)(2).

13 <sup>\* (overruled on other grounds, *International Ass'n of Firefighters Local 1789 v. Spokane Amalgamated*, 106 WJ 2d 207 (2002); *222 Southgate v. Washington Co Building & Trades Council v. L&I*, 91 WJ 2d 41 (1998).)</sup>

14 For the foregoing reasons,


15 IT IS ORDERED that a class be certified and defined as follows: all employees of  
16 Bethlehem Construction Incorporated employed in Cashmere, Washington on the Sound  
17 Transit Link Light Rail Project who were classified as precast concrete workers as shown by  
18 the certified payrolls submitted by Bethlehem to the Washington Department of Labor and  
19 Industries;  
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23 IT IS FURTHER ORDERED that Martin Garfinkel and Adam Berger of Schroeter  
24 Goldmark & Bender, and Richard Robblee and Jacob Black of Robblee Detwiler & Black  
25 shall be designated as counsel to the class, and that Zachary Owens, Conrado Mora, Luis  
26 Garcia, Paul Vargas, and Michael Pardo shall be designated as the class representatives;

<sup>\* The court has determined that RCW 39.12.015, .060 do not apply under the circumstances of this case.</sup>

1 IT IS FURTHER ORDERED that the parties shall confer and attempt to agree upon a  
2 Notice to class members no later than June 3, 2011. If no agreement can be reached, each  
3 party shall submit to the Court a proposed Notice no later than June 10, 2011;

4 IT IS FURTHER ORDERED that once a Notice is approved, defendants' counsel  
5 shall provide to Class Counsel, within ten (10) business days of the date of such Order, a  
6 complete and corrected list of the putative class members with their last known addresses,  
7 telephone numbers and social security numbers (which shall only be used to identify correct  
8 addresses if necessary). The social security numbers shall be kept confidential in conformity  
9 with the Protective Order entered in this matter;

10 IT IS FURTHER ORDERED that class members shall have <sup>forty-five (45) </sup> ~~thirty (30)~~ days from the  
11 mailing of the Class Notice within which to return their exclusion requests advising counsel  
12 of their desire to opt-out of the case;

13  
14  
15 IT IS FURTHER ORDERED that any class member who does not request exclusion  
16 may enter an appearance through counsel;

17 IT IS FURTHER ORDERED that in the event any notice is returned undeliverable,  
18 all counsel shall use their best efforts to obtain corrected addresses. When corrected  
19 addresses are obtained, Class Counsel shall mail promptly to the affected individuals the  
20 approved Notice, with exception that the deadline for returning the exclusion forms shall be  
21 at least thirty (30) days after the date of mailing;

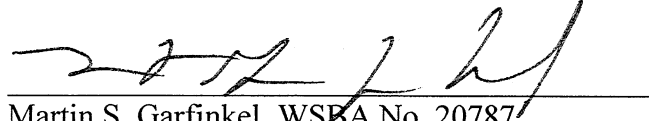
22  
23 IT IS SO ORDERED this 20<sup>th</sup> day of May, 2011.

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JUDGE JAY V. WHITE  
King County Superior Court

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PRESENTED BY:

SCHROETER GOLDMARK & BENDER



Martin S. Garfinkel, WSBA No. 20787

Adam J. Berger, WSBA No. 20714

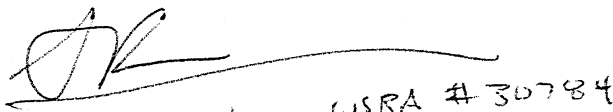
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