

Summary of SC90963, *Utility Service Co. Inc. v. The Department of Labor and Industrial Relations and the Labor and Industrial Relations Commission of Missouri*

Appeal from the Cole County circuit court, Judge Richard G. Callahan

Argued and submitted Dec. 1, 2010; opinion issued March 1, 2011

Attorneys: The department and commission were represented by Jeremiah J. Morgan of the attorney general's office in Jefferson City, (573) 751-3321; and Utility Service was represented by Charles Hatfield, Tricia A. Workman and Jeremy A. Root of Stinson Morrison Hecker LLP in Jefferson City, (573) 636-6263.

Several organizations filed briefs as friends of the Court: The Missouri State Building and Construction Trades Council, AFL-CIO, was represented by Ronald C. Gladney, James R. Kimmey and James P. Faul of Bartley Goffstein LLP in St. Louis, (314) 531-1054; the Missouri School Boards' Association was represented by Susan Goldammer of the association in Columbia, (573) 445-9920; the Missouri Association of School Administrators was represented by Penney R. Rector of the association in Jefferson City, (573) 638-4825; and the Missouri Municipal League was represented by Joseph G. Lauber of Williams & Campo PC in Lee's Summit, (816) 524-4646.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The labor and industrial relations department appeals the trial court's finding that work to be performed under a public works contract is "maintenance work" that does not require prevailing wages to be paid. In a unanimous decision written by Judge Mary R. Russell, the Supreme Court of Missouri reverses the trial court's judgment. Any work encompassed in the plain meaning of the statutory language broadly defining "construction" is work that requires payment of prevailing wages, regardless of whether the work changes the size, type or extent of an existing facility. Because the work described in the contract at issue here involves "construction," the trial court erred in determining the work was "maintenance work" exempt from the act. Prevailing wages must be paid for the work described in the contract.

Facts: Monroe City entered into a water tank maintenance contract with Utility Services Inc. for work on the city's elevated water storage tank and tower. The state's prevailing wage act, at section 290.230.1, RSMo 2000, requires that a prevailing hourly rate of wages be paid to all workers employed by or on behalf of any public body "engaged in the construction of public works, exclusive of maintenance work." The contractor sought a written statement from the Missouri Department of Labor and Industrial Relations outlining whether the contractor was required to pay prevailing wages for its annual inspections, painting and welding repairs of the water storage tank. The contractor maintained that the work is "maintenance work" that is exempt from coverage under the act; the Missouri Department of Labor and Industrial Relations asserted that the work is "construction" that is subject to the act. Ultimately the contractor sued the department, seeking a declaratory judgment that the contracted work was "maintenance work" exempt from the act. The trial court entered summary judgment in the contractor's favor. The department appeals.

REVERSED.

Court en banc holds: (1) Any work encompassed in the plain meaning of the statutory language defining “construction” is work that requires payment of prevailing wages, regardless of whether the work changes the size, type or extent of an existing facility. Section 290.210(1), RSMo 2000, broadly defines “construction” to include “construction, reconstruction, improvement, enlargement, alteration, painting and decoration, or major repair.” No statute provides a guide for assessing the magnitude of work that requires payment of prevailing wages for “construction” work under section 290.210(1). Without such statutory guidance, this Court considers the department’s interpretation and construction of the act. When the act is silent or ambiguous about an issue, the department may fill gaps left by the legislature. It is not this Court’s role to provide quantitative boundaries for applying the act. Here, the department has promulgated 8 CSR 30-020, which provides that “the term construction ... includes, without limitation, the construction of buildings, structures and improvements of all types ... [and] all work done in the construction ... of a public works project, including without limitation, altering, remodeling, demolishing existing structures, installation on the site of the construction of items fabricated off-site, [and] painting and decorating”

Because the prevailing wage act is a remedial statute, its exceptions or exclusions are construed narrowly. “Maintenance work” is exempt from coverage under the act; therefore, its definition must be read narrowly. Section 290.210(4), RSMo 2000, defines “maintenance work” as “the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased.” Accordingly, the limitation in this definition cannot be applied in a way that reduces the scope of what is “construction” under the plain meaning of section 290.210(1), which encompasses work that can occur without any change to a facility’s size, type or extent. Further, no statute or regulation instructs that “construction” is limited to work performed on new public works projects; in fact, the definition of “construction” includes “reconstruction,” which necessarily must be done on something that already exists. As such, this Court disagrees with the suggestion in *State Department of Labor & Industrial Relations v. Board of Public Utilities of City of Springfield*, 910 S.W.2d 737, 744 (Mo. App. 1995), that work on an existing facility is “maintenance work” unless it changes the size, type or extent of the facility.

(2) Because the contracted work here fits within the terms defining “construction” under section 290.210(1), the trial court erred in determining the work was “maintenance work” for purposes of applying the prevailing wage act. More than one defining term under that statute applies to the work here. These terms include “reconstruction,” “improvement,” “alteration,” “painting” and “major repairs.” Here, the contracted work involves restoration and remodeling – as described as repairs to component parts of the tank and tower – which is “reconstruction;” the replacement of major parts and the installation of an anti-climb device, which are “improvements;” the replacement of major parts, which involves “alteration;” complete repainting of the interior and exterior of the water storage tank and tower, which involve “painting;” and the replacement of major component parts, particularly after “severe pitting or steel loss” damages occur, constitutes “major repairs.”