



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

March 19, 2007

Ms. Christie Hammond, Administrator
Wage & Hour Division
Bureau of Labor and Industries
800 NE Oregon St., Suite 1045
Portland, OR 97232

Re: Opinion Request OP-2007-2

Dear Ms. Hammond:

The Commissioner of the Bureau of Labor and Industries (BOLI) determines the prevailing wage rate (PWR) for workers in each trade or occupation in each locality at least once a year through an independent wage survey. ORS 279C.815(2)(a). Construction contractors, among others, are required to respond to those surveys. ORS 279C.815(3). If a construction contractor fails to respond to the PWR survey, the Commissioner has authority to assess a civil penalty. ORS 279C.865. If a contractor fails to pay that civil penalty, the state may impose a lien on the contractor's assets pursuant to ORS 293.250(4); but the Commissioner has no authority to suspend a contractor's license for nonpayment of the civil penalty.

You inform us that the Commissioner considers it inappropriate for construction contractors to continue working under their licenses when they have unpaid civil penalties owing to the state. Accordingly, the Commissioner has asked the Construction Contractors Board (CCB) to suspend contractors' licenses for nonpayment of civil penalties imposed for failing to respond to PWR surveys. The CCB has refused to do so on the ground that it lacks authority to suspend licenses in those circumstances and that refusal has prompted the Commissioner to seek advice about whether the CCB does or does not have that authority.

QUESTION

Does the CCB have authority to suspend a construction contractor's license for nonpayment of a civil penalty imposed for failing to respond to a PWR survey?

SHORT ANSWER

No. ORS 701.102(2)(a) authorizes the CCB to suspend a contractor's license if the contractor owes a "construction debt." ORS 701.005 defines "construction debt" for purposes of ORS 701.102(2)(a) to include unpaid civil penalties "arising from construction activities."

Responding to a PWR survey is not a “construction activity” and an unpaid civil penalty imposed for failing to respond to a PWR survey, is, therefore, not a “construction debt” and cannot serve as the basis to suspend a contractor’s license under ORS 701.102(2)(a). Additionally, OAR 812-005-0160 provides no authority to suspend a construction contractor’s license for such an unpaid civil penalty, because that rule allows suspension for unpaid civil penalties described in ORS 701.102 and ORS 701.135, neither of which is applicable.

DISCUSSION

Your question requires us to interpret statutory provisions. When interpreting statutory provisions our task is to determine the legislature’s intent, and to do so we follow the methodology prescribed by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). We begin by reading the text, applying statutory and judicially developed rules of construction that bear directly on how to read text, such as to give words of common usage “their plain, natural, and ordinary meaning” and “simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted.” *Id.* at 611; ORS 174.010. We read the text in context, which includes other provisions of the same statute, related statutes and prior versions of the same statute. *PGE* at 611. If the legislature’s intent is clear from the text and context of the statute, we inquire no further; but if that intent remains unclear, we examine the legislative history. *Id.* at 611-12. If the legislative history fails to disclose the legislature’s intent we consult maxims of statutory construction, such as to assume that the legislature did not intend an absurd result. *Id.* at 612. With that framework in mind, we turn to your question.

Three statutes authorize the CCB to suspend construction contractors’ licenses: ORS 701.100; ORS 701.135; and ORS 701.102(2). The first of those - ORS 701.100 - authorizes the CCB to suspend the license of a contractor who fails to comply with the laws listed in that provision. ORS 279C.815(3), the law that requires people to respond to PWR surveys, is not among those laws, so ORS 701.100 provides no authority for the CCB to suspend a license for failing to respond to a PWR survey.

The second statute - ORS 701.135 - allows the CCB to suspend contractors’ licenses on several grounds, including: various types of fraudulent and dishonest conduct; conviction of various violent crimes or crimes involving dishonesty; violations of chapter 701 or CCB’s rules; failure to perform a contractual duty to pay money to a person that results in that person placing a lien on a structure under ORS 87.010 to 87.060 and 87.075 to 87.093; and, failure to pay persons for supplying labor or materials contracted for under a public contract for a public improvement when the public contracting agency has paid the contractor. ORS 701.135 also authorizes the CCB to *impose* civil penalties on certain grounds, but it does not authorize the CCB to suspend a contractor’s license for *failing to pay* a civil penalty. ORS 701.135 provides no authority for the CCB to suspend a contractor’s license for nonpayment of a civil penalty imposed for failing to respond to a PWR survey.

The third statute – ORS 701.102(2) is the only one that authorizes the CCB to suspend a contractor’s license for failing to pay a civil penalty. ORS 701.102(2) provides:

(2) The Construction Contractors Board may suspend or refuse to issue a license required under this chapter to a business if:

- (a) The business owes a *construction debt* * * * ; or
- (b) An owner or officer of the business owes a *construction debt* * * * ; or
- (c) An owner or officer of the business was an owner or officer of another business at the time the other business incurred a *construction debt* that is owing * * * .

(Emphasis added)

ORS 701.005(2) defines “construction debt,” for purposes of ORS 701.102(2), as “an amount owed under * * * a final order or arbitration award issued by the board; or * * * [a] judgment or *civil penalty arising from construction activities* within the United States.” ORS 701.005(2) (emphasis added). A civil penalty imposed by the Commissioner is not a “final order * * * issued by the board[,]” because “board” for purposes of ORS 701 means the CCB. ORS 701.005(1). So, to be a “construction debt” an unpaid civil penalty imposed for failing to respond to a PWR survey would have to be a “civil penalty arising from construction activities.”

“Construction activities” is not defined by the statute, so we give it its ordinary meaning. *PGE* at 610. The pertinent ordinary definition of “construction” is “**2a**: the act of putting parts together to form a complete integrated object: FABRICATION <during the ~ of the bridge>.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 289 (unabridged 2002). “Activity” means “**5a**: an occupation, pursuit, or recreation in which a person is active – often used in pl. <business *activities*> <social *activities*>.” WEBSTER’S at 22. Based on those definitions, “construction activities” means the pursuits involved in putting parts together to form a complete integrated object. That definition naturally encompasses all pursuits necessary to construct an object, such as buying materials, obtaining necessary permits, hiring and paying subcontractors and workers, as well as performing the actual building. The ordinary definition does not include pursuits that are unrelated to constructing an object, even if those pursuits are necessary for running a construction business, such as paying taxes, leasing office space, or complying with regulatory obligations which are unrelated to constructing an object. Responding to a PWR survey falls into the last category. Thus, the ordinary meaning of “construction activities” does not appear to include responding to PWR surveys.

We next examine the context in which “construction activities” is used to determine whether the legislature intended that phrase to have its ordinary meaning or whether it intended something different. “Construction activities” appears in ORS chapter 701, which governs “construction contractors.” ORS 701.005(3) defines “contractor” by describing what a contractor *does* and from that we can surmise that the legislature those activities to be “construction activities.” ORS 701.005(3) provides that a “[c]ontractor” is:

[A] person who, for compensation or with the intent to sell, arranges or undertakes or offers to undertake or submits a bid to construct, alter, repair, add to, subtract from, improve, inspect, move, wreck or demolish, for another, any building, highway, road, railroad, excavation or other structure, project, development or improvement attached to real estate or to do any part thereof. "Contractor" includes general contractors, residential-only contractors and specialty contractors as defined in this section.

ORS 701.005(3) suggests that the legislature intended "construction" to be more encompassing than the ordinary meaning, specifically: it intended "construction" to encompass repairing, demolishing and moving buildings and other improvements as well as building. Otherwise, it appears that the legislature considered "construction activities" to mean the work that a person would hire a construction contractor to perform; a meaning wholly consistent with the ordinary definition. Responding to PWR surveys is not part of the work that a person would hire a construction contractor to do.

Prior versions of a statute also provide context for interpreting the terms in a more recent enactment. *PGE* at 611. Before 2005, former ORS 701.102(1)(b) authorized the CCB to suspend a license if the license holder owed any amount "under final judgment of a court or *civil penalty arising from construction business activities* in Oregon or any other state of the United States." Comparing that phrase to the current version, the difference is the deletion of the word "business" from the former version. "Business" means "**1b(1)**: a usu. Commercial or mercantile activity customarily engaged in as a means of livelihood and typically involving some independence of judgment and power of decision <the ~ of a printer being generally thought of as a poor one – Benjamin Franklin> * * * OCCUPATION, POSITION, TRADE, LINE **(2)**: a commercial or industrial enterprise <he's in ~ for himself> <he sold out his ~> * * *." WEBSTER'S at 302. Using the plain, natural and ordinary meaning of the germane terms, a civil penalty arising from "construction activities" does not capture certain activities that "construction business activities" potentially could include. For example, "construction activities" does not include work that keeps a commercial or industrial enterprise functioning, such as bookkeeping, leasing office space, and complying with regulatory obligations. While critical, such work is not included within the occupation or pursuit identified by the label "construction activities." Instead, the label "construction activities" identifies the work which a person would hire a construction contractor to perform. Deletion of the word "business" from the phrase "construction business activities" narrows the modifier of "activities" to those functions with which the enterprise is identified. We assume that the deletion was intentional. See *Odneal v. Arlint*, 142 Or App 106, 110-111, 919 P2d 508 (1996) (original statute recognized landowner liability for reckless failure to warn against dangerous condition; no liability for failure to warn of natural land condition was "obvious import" of deletion of "condition" from statute). Moreover, in interpreting statutes, courts are instructed not to insert what has been omitted. See also ORS 174.010 (rule of statutory construction prohibiting inserting what has been omitted and omitting what has been inserted by legislature).

Although we conclude that the most reasonable interpretation of "construction activities", based on the text and context, is only those pursuits which a person would hire a construction

contractor to perform, we examine the legislative history to the extent that any ambiguity remains. Our starting point was House Bill 2706, the 1995 legislation in which the legislature first used the phrase “construction business activities” in 1995. Or Laws 1995, ch 771. We found nothing in the history of that bill that explained what the legislature meant by “construction business activities.”

We turned next to the history of House Bill 2200, which included the 2005 amendment changing “construction business activities” to “construction activities.” Or Laws 2005, ch 432, § 6. That change was made as part of amendments designed to clarify and simplify the law by, among other things, defining “construction debt.” No legislators discussed why they changed “construction business activities” to “construction activities” or what they intended the latter to mean. Nor did any witnesses before the legislature directly address the meaning of “construction activities.” The only history that potentially bears on the issue does so indirectly. Specifically, the CCB submitted the following written testimony to the House Business, Labor and Consumer Affairs Committee:

2. Testimony Summary:

What would bill do? * * * Clarify * * * Contractor
Accountability (ORS 701.102)

* * * * *

Why is it important? * * * The statute is difficult to follow and interpret for both CCB and its customers * * * ORS 701.102 must be clarified to ensure that CCB has authority to hold business owners and officers accountable for damages caused by their construction businesses.

* * * * *

3. CCB Testimony:

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b. Contractor Accountability – Cleans Up ORS 701.102:

ORS 701.102 currently provides the CCB with authority to hold officers and owners of construction businesses accountable for their business practices. CCB believes this is very important and appropriate public policy. Oregonians expect the CCB to prevent principles of businesses that have caused damages to Oregonians from owning or managing a new construction business until damages from the previous business have been paid.

Section 10 of the bill rewrites this authority to clarify the law. Sections

4 and 6 provide definitions of “construction debt”, “owners”, and “officers” needed for the rewrite of ORS 701.102. This does not change public policy.

4: The Problem:

* * * * *

People who have been harmed by a construction contractor expect that the state will not allow individuals who were responsible for the damage to continue to own and manage a construction business. ORS 701.102 responds to this expectation. It holds individual owners, corporate officers, partners, and limited liability company members and managers responsible for the damage done by a construction contracting business they own or manage.

* * * * *

As ORS 701.102 is written it is very difficult to understand and apply. The proposed amendments to this statute are designed to simplify the statute and make it easier to understand and apply. * * * They simplify the statute by:

* * * * *

Creating definitions of “construction debt” and “officer” in Section 6 of the Act. * * * Using these defined terms in the amendments to ORS 701.102 in Section 10 of the Act, in a shorter, more direct statement than the one in current law.

These amendments to [sic] not change the authority of the CCB under ORS 701.102, nor do they change the manner in which that authority is exercised.

Minutes, House Business, Labor and Consumer Affairs Committee (HB 2200), April 19, 2005, Exhibit C, Written Testimony of CCB (emphasis in original).

We can draw two inferences from that history. First, the amendments were intended to clarify and simplify the law. We assume that “construction activities” was considered to be a clearer statement of the activities the legislature intended to capture than “construction business activities” or this change would not have been made. Second, the amendments were not intended to change the public policy of the statute, which is to prevent construction contractors who have harmed people from continuing to own and manage a construction business until they have paid for those damages. Our interpretation of “construction activities” allows the CCB to suspend the license of a construction contractor for failing to pay civil penalties arising from the work that people hired them to do and is completely consistent with the identified public policy.

We conclude that, if anything, the legislative history supports the same interpretation of “construction activities” as does the text and context.

We conclude that “construction activities” means the work which a person would hire a construction contractor to perform. Responding to PWR surveys, although part of the work entailed in operating a construction contracting business (and a legal requirement), is not a “construction activity” within the meaning of ORS 701.005(2). For that reason, an unpaid civil penalty imposed for failing to complete a PWR survey is not a “construction debt” and the CCB lacks authority under ORS 701.102(2)(a) to suspend a construction contractor’s license on that basis.

As a final matter, you point us to a CCB rule, OAR 812-005-0160, as potential authority for the CCB to suspend a contractor’s license for failure to pay a civil penalty imposed for not responding to a PWR survey. OAR 812-005-0160 provides that the CCB may suspend a contractor’s license “for failure to pay a civil penalty which has become due and payable.” That language is sweeping and, read in isolation, could mean that the CCB may suspend a contractor’s license any time that the contractor has an unpaid civil penalty arising from any source – even one wholly unrelated to construction contracting. But administrative rules, like statutes, must be read in context. *See Perlenfein and Perlenfein*, 316 Or 16, 20, 848 P2d 604 (1993) (stating that, in interpreting administrative rules, we apply the same rules that apply to construction of statutes). The most critical context for an administrative rule is the statutes which the rule implements. OAR 812-005-0160 cites ORS 701.135 and ORS 701.102 as the statutes which it is intended to implement. Both of those statutes address civil penalties imposed *for particular reasons specified in those statutes*. Read in context, OAR 812-005-0160’s reference to “civil penalties” can only mean the “civil penalties” described in ORS 701.135 and ORS 701.102.

ORS 701.135 allows the CCB to impose civil penalties for violations of ORS chapter 701 or CCB’s rules. *See* ORS 701.135(1) (authorizing CCB to assess civil penalties as provided in ORS 701.992) and ORS 701.992 (authorizing CCB to impose civil penalties for violations of chapter 701 or CCB’s rules). Although ORS 701.135 also allows the CCB to *suspend* a license for violations of chapter 701 or a CCB rule, it does not authorize the CCB to suspend a contractor’s license for *failing to pay* a civil penalty imposed for such violations. OAR 812-005-0160 purports to give CCB that authority. Failing to respond to a PWR survey is not a violation of chapter 701 or a CCB rule, and therefore a civil penalty imposed for that reason is not the type of civil penalty addressed in ORS 701.135. We have already concluded that the type of civil penalty described in ORS 701.102, the other statute that OAR 812-005-0160 implements, does not include a civil penalty imposed for failing to respond to a PWR survey. Accordingly, OAR 812-005-0160 provides no authority to suspend a construction contractor’s license for such an unpaid civil penalty.

Christine Hammond, Administrator
March 19, 2007
Page 8

We conclude that the CCB lacks authority to suspend a construction contractor's license on the ground that the contractor has failed to pay a civil penalty imposed for not responding to a PWR survey.

Sincerely,

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Chief Counsel
General Counsel Division

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