



Issue Date: 29 April 2016

BALCA Case No.: 2016-PWD-00001
ETA Case No.: H-400-15337-897977

In the Matter of:

FORESTALL COMPANY, INC.,
Employer.

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For the Employer

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For the Certifying Officer

Before: Peter B. Silvain, Jr.
Administrative Law Judge

DECISION AND ORDER AFFIRMING PREVAILING WAGE DETERMINATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Forestall Company, Inc.’s (“Employer”) request for review of the Nation Prevailing Wage Center (“NPWC”) Center Director’s (“CD”) Prevailing Wage Determination (“PWD”) in the above-captioned H-2B temporary labor certification matter ¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United

¹ On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule, 80 Fed. Reg. 24042 (Apr. 29, 2015) (to be codified at 20 C.F.R. Part 655 and 29 C.F.R. Part 503). Pursuant to this rule, the Department will process an *Application for Prevailing Wage Determination* filed on or after April 29, 2015, with a start date of need after October 1, 2015, in accordance with all application filing requirements under the IFR. *Id.* at 24110. The Employer filed an *Application for Prevailing Wage Determination* after April 29, 2015, with a start date of need after October 1, 2015. Therefore, the IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

States (“U.S.”) on a one-time, seasonal, peak load, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).³ An employer seeking temporary labor certification under the H-2B nonagricultural guest worker program must obtain an individualized prevailing wage determination from the NPWC in accordance with the procedures in 20 C.F.R. § 655.10.⁴

A NPWC staff member reviews applications for prevailing wage determinations. If an employer desires review of the PWD, it may seek review by the Center Director of the NPWC.⁵ After exhausting this internal appeal, the employer may seek administrative review by BALCA.⁶

STATEMENT OF THE CASE

The Employer is a vegetation management company located in Alabama. (Employer’s Brief at 6). On December 3, 2015, the Employer submitted an Application for Prevailing Wage Determination, two ETA Form 9141, to the NPWC in accordance with the regulations governing the temporary employment of foreign workers in the United States for nonagricultural employment found at 20 C.F.R. Part 655, Subpart A. (AF 126).⁷ In its application, the Employer requested a PWD for laborers with a suggested Standard Occupational Code (SOC) code of Landscaping and Groundskeeping Workers (37-3011). (AF 19). The Employer described the job duties for the position at issue as follows:

Mix or spray fertilizers, herbicides, or insecticides shrubs, or trees, using hand or automatic sprayers or spreaders, analyze information and evaluate results, schedule events programs, activities, as well as the work of others and other related landscaping activities as per 37-3011 onetonline.org.

(AF at 22, 76).

On February, 12, 2016, the NPWC issued the Employer a PWD corresponding to SOC 37-1012, First-Line Supervisors of Landscaping, Lawn Service, and Groundskeeping. (AF at 21, 75). That same day, the Employer responded and requested a CD Review of the NPWC’s determination. (AF 15-17). In its request for review, the Employer asserted that the NPWC assigned the wrong SOC code because the workers at issue are not supervisors, and would spend none of their time performing supervisory duties. (*Id.*). The Employer explained that the job duties – “analyze information and evaluated results, schedule events, programs, activities, as well as the work of others” – were not meant to indicate any kind of supervision over others. (*Id.*). In response to the above referenced job duties, the Employer contended at the

² See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The definition of temporary need is now governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113), § 113 (Dec. 18, 2015).

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.15(d)(1).

⁵ 20 C.F.R. § 655.13(a) & (b).

⁶ 20 C.F.R. § 655.13(c).

⁷ In this Decision and Order, “AF” refers to the Appeal File.

Center Director Review that “[a]ll workers will have to have the ability to efficiently plan and execute their work for the day, as they work under supervisors. Those under this determination will all be in the same classification code/occupation and do not supervise the work of others in any way. They will essentially be landscape laborers.” (AF 16).

On March 23, 2016, the CD affirmed the NPWC’s PWD. (AF 12, 13-14). The CD dismissed the Employer’s argument that the workers would not be supervising and explained that the job duties outlined on the Form ETA-9141 indicated supervision. (AF at 13). Specifically, the CD provided that “[n]othing in the SOC definition or O*Net defined tasks for the SOC 37-3011 – Landscaping and Groundskeeping Workers includes... analyzing, evaluating and scheduling the work of other staff.” (AF 14). As the CD found that the duties associated with SOC 37-1012 – First-Line Supervisors of Landscaping, Lawn Service, and Groundskeeping Workers more closely matched the duties as written on the Employer’s Application for Prevailing Wage Determination than SOC 37-3011 -- Landscaping and Groundkeeping Workers, the CD affirmed the NPWC’s PWD. (AF 12, 13-14).

The Employer contested the CD’s determination to affirm the original PWD and timely requested review by BALCA on March 28, 2016. (AF 1-11). In support of its appeal, the Employer asserted that: (1) the NPWC made its decision entirely based on the presence of the supervisory duty; (2) the NPWC was “clearly informed that Code 37-1012 did not apply to [the Employer’s] laborer jobs;” (3) the CD treated as mandatory all of the 28 listed tasks for 37-1012; (4) in so doing, the CD’s determination concludes that all of the Employer’s workers are supervisors; (5) a comparison of the two job codes 37-3011 and 37-1012 demonstrates there is little overlap between what the Employer’s workers will do and the supervisory job code; and (6) the CD erred in rejecting the Employer’ request for review. (*Id.*).

On April 15, 2016, I issued a Notice of Docketing and Order Setting Briefing Schedule. On April 20, 2016, the Employer and the CD filed appellate briefs. The Employer argued in its brief that its job description exactly matches the SOC Code for Landscaping and Groundskeeping Workers. Further, the Employer argued that because its workers will spend less than 80% of their time performing supervisory duties, they must be classified as line workers, not supervisors. Finally, the Employer averred that the NPWC’s reasoning is not persuasive. In its brief, the CD urged affirmance of the PWD, alleging that the CD reasonably exercised her discretion in assigned the SOC Code for First-Line Supervisors of Landscaping, Lawn Service, and Groundskeeping to the Employer’s offered job.

DISCUSSION AND APPLICABLE LAW

Standard of Review

The BALCA applies an abuse of discretion standard to the CD’s decision on an employer’s appeal of a PWD.⁸ Accordingly, I will review the CD’s decision in this case to determine

⁸ See *Emory University*, 2011-PWD-00001/2, slip op. at 6-7 (Feb. 27, 2012); *RP Consultants, Inc. d/b/a Net Matrix Solutions*, 2009-JSW-00001 (June 30, 2010); *Gopher State Expositions, Inc.*, 2014-PWD-00010, slip op. at 4 (Aug. 1, 2014).

whether it was consistent with the applicable regulations and was a reasonable exercise of that discretion.⁹

Upon review of the CD's determination, BALCA may only consider the Appeal File prepared by the NPWC, the legal briefs submitted by the parties, and the Employer's request for administrative review.¹⁰ Additionally, "[t]he request for review, statements, briefs, and other submissions of the parties must contain only legal arguments and may refer to only the evidence that was within the record upon which the decision on the PWD was based."¹¹ After considering the evidence of record, BALCA must: (1) affirm the CD's determination; (2) reverse or modify the CD's determination; or (3) remand the case to the CD for further action.¹²

Regulations and Guidelines

In order to apply for H-2B temporary labor certification, the regulations provide that an employer must request a PWD from the NPWC.¹³ In general, prevailing wages are determined as follows:

(1) Except as provided in paragraph (i) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms' length between the union and the employer, the wage rate set forth in the CBA is considered as not adversely affecting the wages of U.S. workers, that is, it is considered the "prevailing wage" for labor certification purposes.

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean of the wages of workers similarly employed in the area of intended employment using the wage component of the BLS Occupational Employment Statistics Survey (OES), unless the employer provides a survey acceptable to OFLC under paragraph (f) of this section.

20 C.F.R. § 655.10(b)(2).

Whether the Center Director Abused Her Discretion in Affirming the NPWC's Application of SOC Code 37-1012 -- First Line Supervisors of Landscaping, Lawn Service, and Groundskeeping

The Employer provided the NPWC with a description of the job duties for the position at issue to establish the prevailing wage for the job opportunity of "Landscaping and Groundskeeping Workers."

⁹ See *RP Consultants*, slip op. at 10.

¹⁰ 20 C.F.R. §§ 655.13(c)(3) and 655.61(c).

¹¹ 20 C.F.R. § 655.13(c)(2).

¹² 20 C.F.R. § 655.61(e).

¹³ 20 C.F.R. § 655.10(a).

The CD affirmed the NPWC's SOC assignment of SOC 37-1012 – First-Line Supervisors of Landscaping, Lawn Service, and Groundskeeping Workers over the Employer's requested SOC of SOC 37-3011 Landscaping and Groundskeeping Workers because it found that the tasks associated with SOC 37-1012 more closely matched the tasks as written on the Employer's Application for Prevailing Wage Determination than SOC 37-3011, citing the O*NET job description for each SOC code as legal support.

SOC 37-3011 Landscaping and Groundskeeping Workers

SOC 37-3011 generally describes the work of a Landscaping and Groundskeeping Worker as:

“[L]andscape or maintain grounds of property using hand or power tools or equipment. Workers typically perform a variety of tasks, which may include any combination of the following: sod laying, mowing, trimming, planting, watering, fertilizing, digging, raking, sprinkler installation, and installation of mortarless segmental concrete masonry wall units.”

More specifically, the “tasks” elaborated for SOC 37-3011 are:

Gather and remove litter. Use hand tools, such as shovels, rakes, pruning saws, saws, hedge or brush trimmers, or axes. Operate vehicles or powered equipment, such as mowers, tractors, twin-axle vehicles, snow blowers, chain-saws, electric clippers, sod cutters, or pruning saws. Water lawns, trees, or plants, using portable sprinkler systems, hoses, or watering cans. Prune or trim trees, shrubs, or hedges, using shears, pruners, or chain saws. Mix and spray or spread fertilizers, herbicides, or insecticides onto grass, shrubs, or trees, using hand or automatic sprayers or spreaders. Care for established lawns by mulching, aerating, weeding, grubbing, removing thatch, or trimming or edging around flower beds, walks, or walls. Follow planned landscaping designs to determine where to lay sod, sow grass, or plant flowers or foliage. Trim or pick flowers and clean flower beds. Attach wires from planted trees to support stakes. Plant seeds, bulbs, foliage, flowering plants, grass, ground covers, trees, or shrubs and apply mulch for protection, using gardening tools. Mow or edge lawns, using power mowers or edgers. Rake, mulch, and compost leaves. Decorate gardens with stones or plants. Use irrigation methods to adjust the amount of water consumption and to prevent waste. Provide proper upkeep of sidewalks, driveways, parking lots, fountains, planters, burial sites, or other grounds features. Shovel snow from walks, driveways, or parking lots and spread salt in those areas. Maintain irrigation systems, including winterizing the systems and starting them up in spring. Plan or cultivate lawns or gardens. Maintain or repair tools, equipment, or structures, such as buildings, greenhouses, fences, or benches, using hand or power tools. Care for artificial turf fields, periodically removing the turf and replacing cushioning pads or vacuuming and disinfecting the turf after use to prevent the growth of harmful bacteria. Install rock gardens, ponds, decks, drainage systems, irrigation systems, retaining walls, fences, planters, or playground equipment. Care for natural turf

fields, making sure the underlying soil has the required composition to allow proper drainage and to support the grasses used on the fields. Advise customers on plant selection or care. Haul or spread topsoil or spread straw over seeded soil to hold soil in place. Mark design boundaries and paint natural or artificial turf fields with team logos or names before events. Build forms and mix and pour cement to form garden borders.

Additionally, the “work activity” list provided with SOC 37-3011 includes:

Using hands and arms in handling, installing, positioning, and moving materials, and manipulating things. Using either control mechanisms or direct physical activity to operate machines or processes (not including computers or vehicles). Performing physical activities that require considerable use of your arms and legs and moving your whole body, such as climbing, lifting, balancing, walking, stooping, and handling of materials. Developing constructive and cooperative working relationships with others, and maintaining them over time. Observing, receiving, and otherwise obtaining information from all relevant sources. Keeping up-to-date technically and applying new knowledge to your job. Inspecting equipment, structures, or materials to identify the cause of errors or other problems or defects. **Analyzing information and evaluating results to choose the best solution and solve problems.** Developing specific goals and plans to prioritize, organize, and accomplish your work. Identifying information by categorizing, estimating, recognizing differences or similarities, and detecting changes in circumstances or events. Developing, designing, or creating new applications, ideas, relationships, systems, or products, including artistic contributions. Servicing, repairing, adjusting, and testing machines, devices, moving parts, and equipment that operate primarily on the basis of mechanical (not electronic) principles. Running, maneuvering, navigating, or driving vehicles or mechanized equipment, such as forklifts, passenger vehicles, aircraft, or water craft. Providing personal assistance, medical attention, emotional support, or other personal care to others such as coworkers, customers, or patients. Using relevant information and individual judgment to determine whether events or processes comply with laws, regulations, or standards. Identifying the developmental needs of others and coaching, mentoring, or otherwise helping others to improve their knowledge or skills. **Scheduling events, programs, and activities, as well as the work of others.** Getting members of a group to work together to accomplish tasks. Providing information to supervisors, co-workers, and subordinates by telephone, in written form, e-mail, or in person. Monitoring and reviewing information from materials, events, or the environment, to detect or assess problems. Assessing the value, importance, or quality of things or people. Encouraging and building mutual trust, respect, and cooperation among team members. Identifying the educational needs of others, developing formal educational or training programs or classes, and teaching or instructing others. Estimating sizes, distances, and quantities; or determining time, costs, resources, or materials needed to perform a work activity. Establishing long-range objectives and specifying the strategies and

actions to achieve them. Compiling, coding, categorizing, calculating, tabulating, auditing, or verifying information or data. Identifying the underlying principles, reasons, or facts of information by breaking down information or data into separate parts. Performing for people or dealing directly with the public. This includes serving customers in restaurants and stores, and receiving clients or guests. Handling complaints, settling disputes, and resolving grievances and conflicts, or otherwise negotiating with others. Convincing others to buy merchandise/goods or to otherwise change their minds or actions. Entering, transcribing, recording, storing, or maintaining information in written or electronic/magnetic form. Providing guidance and direction to subordinates, including setting performance standards and monitoring performance. Monitoring and controlling resources and overseeing the spending of money. Translating or explaining what information means and how it can be used. Providing guidance and expert advice to management or other groups on technical, systems-, or process-related topics. Communicating with people outside the organization, representing the organization to customers, the public, government, and other external sources. This information can be exchanged in person, in writing, or by telephone or e-mail. Recruiting, interviewing, selecting, hiring, and promoting employees in an organization. Servicing, repairing, calibrating, regulating, fine-tuning, or testing machines, devices, and equipment that operate primarily on the basis of electrical or electronic (not mechanical) principles. Performing day-to-day administrative tasks such as maintaining information files and processing paperwork. Providing documentation, detailed instructions, drawings, or specifications to tell others about how devices, parts, equipment, or structures are to be fabricated, constructed, assembled, modified, maintained, or used. Using computers and computer systems (including hardware and software) to program, write software, set up functions, enter data, or process information. (emphasis added).

Of note, the “tasks” description for SOC 37-3011 does not include directly, or by inference, any indication of supervisory duties. However, the “work activity” list provided for SOC 37-3011, does include both “[a]nalyzing information and evaluating results...” and the “[s]cheduling events, programs, and activities, as well as the work of others” language that the Employer quoted in its application.

SOC 37-1012 – First-Line Supervisors of Landscaping, Lawn Service, and Groundskeeping Workers

SOC 37-1012 generally describes the duties of a First-Line Supervisor of Landscaping, Lawn Service, and Groundskeeping Worker as:

Monitor project activities to ensure that instructions are followed, deadlines are met, and schedules are maintained; Inspect completed work to ensure conformance to specifications, standards, and contract requirements; Provide workers with assistance in performing duties as necessary to meet deadlines;

Schedule work for crews, depending on work priorities, crew or equipment availability, or weather conditions; and Direct or perform mixing or application of fertilizers, insecticides, herbicides, or fungicides.

The “tasks” particularized for a SOC 37-3011 First-Line Supervisor of Landscaping, Lawn Service, and Groundskeeping Worker are:

Monitor project activities to ensure that instructions are followed, deadlines are met, and schedules are maintained. Establish and enforce operating procedures and work standards that will ensure adequate performance and personnel safety. Inspect completed work to ensure conformance to specifications, standards, and contract requirements. **Provide workers with assistance in performing duties as necessary to meet deadlines. Direct activities of workers who perform duties such as landscaping, cultivating lawns, or pruning trees and shrubs.** Confer with other supervisors to coordinate work activities with those of other departments or units. **Schedule work for crews, depending on work priorities, crew or equipment availability, or weather conditions.** Direct or perform mixing or application of fertilizers, insecticides, herbicides, or fungicides. Direct or assist workers engaged in the maintenance or repair of equipment, such as power tools or motorized equipment. Perform administrative duties, such as authorizing leaves or processing time sheets. Answer inquiries from current or prospective customers regarding methods, materials, or price ranges. Inventory supplies of tools, equipment, or materials to ensure that sufficient supplies are available and items are in usable condition. Investigate work-related complaints to verify problems and to determine responses. Perform personnel-related activities, such as hiring workers, evaluating staff performance, or taking disciplinary actions when performance problems occur. Review contracts or work assignments to determine service, machine, or workforce requirements for jobs. Prepare service estimates based on labor, material, and machine costs and maintain budgets for individual projects. Plant or maintain vegetation through activities such as mulching, fertilizing, watering, mowing, or pruning. Order the performance of corrective work when problems occur and recommend procedural changes to avoid such problems. Maintain required records, such as personnel information or project records. Train workers in tasks such as transplanting or pruning trees or shrubs, finishing cement, using equipment, or caring for turf. Prepare or maintain required records, such as work activity or personnel reports. Negotiate with customers regarding fees for landscaping, lawn service, or groundskeeping work. Identify diseases or pests affecting landscaping and order appropriate treatments. Recommend changes in working conditions or equipment use to increase crew efficiency. Confer with managers or landscape architects to develop plans or schedules for landscaping maintenance or improvement. Tour grounds, such as parks, botanical gardens, cemeteries, or golf courses, to inspect conditions of plants and soil. Design or supervise the installation of sprinkler systems, calculating water pressure, or valve and pipe coverage needs. Install or maintain

landscaped areas, performing tasks such as removing snow, pouring cement curbs, or repairing sidewalks. (emphasis added).

Finally, the “work activity” list provided with SOC 37-1012 includes:

Providing information to supervisors, co-workers, and subordinates by telephone, in written form, e-mail, or in person. **Analyzing information and evaluating results to choose the best solution and solve problems.** Providing guidance and direction to subordinates, including setting performance standards and monitoring performance. Getting members of a group to work together to accomplish tasks. **Scheduling events, programs, and activities, as well as the work of others.** Developing specific goals and plans to prioritize, organize, and accomplish your work. Keeping up-to-date technically and applying new knowledge to your job. Communicating with people outside the organization, representing the organization to customers, the public, government, and other external sources. This information can be exchanged in person, in writing, or by telephone or e-mail. Observing, receiving, and otherwise obtaining information from all relevant sources. Assessing the value, importance, or quality of things or people. Encouraging and building mutual trust, respect, and cooperation among team members. Identifying the educational needs of others, developing formal educational or training programs or classes, and teaching or instructing others. Developing, designing, or creating new applications, ideas, relationships, systems, or products, including artistic contributions. Developing constructive and cooperative working relationships with others, and maintaining them over time. Running, maneuvering, navigating, or driving vehicles or mechanized equipment, such as forklifts, passenger vehicles, aircraft, or water craft. Performing for people or dealing directly with the public. This includes serving customers in restaurants and stores, and receiving clients or guests. Identifying information by categorizing, estimating, recognizing differences or similarities, and detecting changes in circumstances or events. Inspecting equipment, structures, or materials to identify the cause of errors or other problems or defects. Identifying the developmental needs of others and coaching, mentoring, or otherwise helping others to improve their knowledge or skills. Estimating sizes, distances, and quantities; or determining time, costs, resources, or materials needed to perform a work activity. Monitoring and controlling resources and overseeing the spending of money. Establishing long-range objectives and specifying the strategies and actions to achieve them. Compiling, coding, categorizing, calculating, tabulating, auditing, or verifying information or data. Convincing others to buy merchandise/goods or to otherwise change their minds or actions. Performing day-to-day administrative tasks such as maintaining information files and processing paperwork. Handling complaints, settling disputes, and resolving grievances and conflicts, or otherwise negotiating with others. Monitoring and reviewing information from materials, events, or the environment, to detect or assess problems. Using relevant information and individual judgment to determine whether events or processes comply with laws, regulations, or

standards. Recruiting, interviewing, selecting, hiring, and promoting employees in an organization. Using computers and computer systems (including hardware and software) to program, write software, set up functions, enter data, or process information. Providing personal assistance, medical attention, emotional support, or other personal care to others such as coworkers, customers, or patients. Translating or explaining what information means and how it can be used. Performing physical activities that require considerable use of your arms and legs and moving your whole body, such as climbing, lifting, balancing, walking, stooping, and handling of materials. Entering, transcribing, recording, storing, or maintaining information in written or electronic/magnetic form. Using either control mechanisms or direct physical activity to operate machines or processes (not including computers or vehicles). Using hands and arms in handling, installing, positioning, and moving materials, and manipulating things. Providing documentation, detailed instructions, drawings, or specifications to tell others about how devices, parts, equipment, or structures are to be fabricated, constructed, assembled, modified, maintained, or used. Providing guidance and expert advice to management or other groups on technical, systems-, or process-related topics. Identifying the underlying principles, reasons, or facts of information by breaking down information or data into separate parts. Servicing, repairing, adjusting, and testing machines, devices, moving parts, and equipment that operate primarily on the basis of mechanical (not electronic) principles. Servicing, repairing, calibrating, regulating, fine-tuning, or testing machines, devices, and equipment that operate primarily on the basis of electrical or electronic (not mechanical) principles.

The Employer asserts in its arguments that “Forestell’s job matches SOC/O*NET 37-3011 exactly.” (Employer’s Brief at 8). The Employer then charts a comparison of the “occupational definitions” of the positions. However, the Employer (in both its initial application and appeal arguments) has made the understandable, but not justified, mistake of conflating the “tasks” and “work activities” of each of the SOCs. O*NET defines “tasks” relevant to a position as “*work activities that are specific to each occupation.*” “Work activities,” on the other hand, are defined as “*tasks that may be performed across multiple occupations*”.¹⁴

Beyond the definitions provided, a review of some of the content of the “work activities” included for the SOC 37-3011 Landscaping and Groundskeeping Workers makes it clear that these elements are for positions beyond the manual labor described in the SOC 37-3011 position. For example, the “work activities” listed under SOC 37-3011 include things such as “recruiting, interviewing, selecting, hiring, and promoting employees in an organization”, and “using computers and computer systems...to program, write software, set up functions, enter data, or process information.” The Employer could not reasonably argue that it might have included these

¹⁴ O*NET explanation of position descriptors found at http://www.onetcenter.org/dl_files/desk_aid.pdf and <http://www.onetonline.org/help/online/details>. These definitions are provided to the applicant Employer on the O*NET website, and, to any extent necessary, I take judicial notice of their content.

cross positional “work activities” and still remained within the relevant “tasks” defined for SOC 37-3011 Landscaping and Groundskeeping Workers.

By including the language “analyze information and evaluate results, schedule events programs, activities, as well as the work of others and other related landscaping activities,” which is present in the “work activities” but not the “tasks” of SOC 37-3011, the Employer indicated to the NPWC that they intended job duties beyond those of a Landscaping and Groundskeeping Worker. In response, the NPWC reasonably found that the “tasks” included in the application most closely resembled SOC 37-1012 First-Line Supervisor of Landscaping, Lawn Service, and Groundskeeping Worker as this position’s “tasks” actually include “[s]chedule work for crews, depending on work priorities, crew or equipment availability, or weather conditions” and “direct or perform mixing or application of fertilizers, insecticides, herbicides, or fungicides.”

Further, the only actual indication provided in the application that the workers would not be supervisory is a check-box response to Question 4 of page 2 of the Form 9141; “Does this position supervise the work of other employees?” Response “No” is checked. (AF 19). However, this checkbox is clearly contraindicated by the incongruous supervisory language discussed above, and I do not find it sufficient to rule out the applicability of the SOC 37-1012 supervisory position. Given the NPWC’s definitions and differentiation of “tasks” versus “work activities” in assigning an SOC code, I find that the NPWC and the CD were reasonable in assigning SOC 37-1012 rather than SOC 37-3011 to the Employer’s proposed position.

Employer next argues that because its workers will spend less than 80 percent of their time performing supervisory duties, they must be classified as line workers, not supervisors.¹⁵ This argument, raised for the first time in this appeal, is beyond the scope of permissible review. However, even were it in within the scope of the appeal, I would not find that the argument had merit. Despite Employer’s argument that it had indicated the positions would have “0%” supervisory work, beyond the contraindicated check-box described above, the application is devoid of any evidence to support the conclusion that the Employer’s workers *will or will not* spend more than 80 percent of their time performing supervisory activities. As the Employer’s application did not include any indication as to percentages of time spent performing particular duties, the Employer should not have included “supervisory” duties in the offered job duties description if those duties were not to be performed. In the alternative, the Employer should have presented evidence providing relative percentages with regard to each “supervisory” duty. Due to a lack of credible evidence, it is impossible to intuit the percentage of time that the Employer’s offered job would require employees to perform duties outside the general scope of SOC 37-3011. Thus, the Employer’s argument is not persuasive and would be insufficient to mandate a

¹⁵ Employer References Coding Guideline 5 of the 2010 SOC User Guide, which states that “[w]orkers in Major Groups 33-0000 through 53-0000 who spend 80 percent or more of their time performing supervisory activities are coded in the appropriate first-line supervisor category in the SOC. In these same Major Groups (33-0000 through 53-0000), persons with supervisory duties who spend less than 80 percent of their time supervising are coded with the workers they supervise.” (emphasis in original). Again, as these definitions are provided to the applicant Employer on the O*NET website, I take judicial notice of their content.

different result. The NPWC can only assign a PWD for the job as described in the application. As argued by the CD, were the NPWC to permit an employer to revise the fundamental nature of the job after a PWD has been issued, many employers would seek to appeal and revise the previously submitted job duties in order to achieve a more favorable results, i.e., a lower prevailing wage.

Given the foregoing, I find that the CD was reasonable in their determination that the Employer's job duties are beyond the scope of the requested SOC, as the duties indicated on the submitted Form 9141 included supervisory activities outside of the defined tasks for the requested SOC 37-3011 – Landscaping and Groundskeeping Workers includes analyzing, evaluating, and scheduling the work of other staff. Accordingly, I find that because the Employer's job duties include supervising the work of others, the assigned SOC 37-1012 – First Line Supervisors of Landscaping, Lawn Service, and Groundskeeping Workers with a wage of \$19.29 per hour is appropriate.

Based on the foregoing, I find that the CD did not abuse their discretion in affirming the NPWC's PWD because her determination was consistent with the applicable regulations and was a reasonable exercise of discretion.

ORDER

In light of the above, it is hereby **ORDERED** that the CD's prevailing wage determination be, and hereby is, **AFFIRMED**.

For the Board:

PETER B. SILVAIN, JR.
Administrative Law Judge