

DBA Benchbook

Updated January 15, 2021

Davis-Bacon Act

- Enacted in 1949, amended in 1974, codified at 40 U.S.C. § 3141 *et seq.* (the Davis-Bacon Act was formerly codified at 41 U.S.C. § 276a *et seq.*)
- 29 C.F.R. Parts 5, 6

The Contract Work Hours and Safety Standards Act

- Enacted 1962, codified at 40 U.S.C. § 3701 *et seq.*
- 29 C.F.R. Parts 5, 6

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I. Generally

A. Purpose

These enactments operate to ensure the payment of proper wages, fringe benefits, and overtime. The Davis Bacon Act is designed to give local laborers and contractors a fair opportunity to participate in federal building programs, to protect the employees of government contractors from substandard wages, and to promote the hiring of local labor rather than cheap labor from distant sources. *United States v. Binghamton Construction Co.*, 347 U.S. 171, *reh'g denied*, 347 U.S. 940 (1954).

The dual purposes of the Davis-Bacon Act are to: (1) give local laborers and contractors a fair opportunity to participate in building programs when federal money is involved; and (2) protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the locality. *L.P. Cavett Co. v. U.S. Dep't of Labor*, 101 F.3d 1111 (6th Cir. 1996).

B. Contractor liable regardless of existence of contractual relationship

In *Arless D. Merrell, Inc.*, 1994-DBA-41 (ALJ Oct. 26, 1995), the ALJ observed that it was well-settled that a prime contractor is responsible for the back wages due employees of its subcontractor under the Davis-Bacon Act, and is responsible for ensuring that all persons engaged in performing the duties of a laborer or mechanic on the construction site receive the appropriate prevailing wage rate, irrespective of any contractual relationship alleged to exist or not to exist between the contractor and such persons. 29 C.F.R. §§ 5.2(o), 5.2(i), 5.5(a)(2), and 5.5(a)(6). *See also Palisades Urban Renewal*

Enterprises, LLP, 2006-DBA-1 (ALJ, Aug. 3, 2007), *aff'd*, ARB Case No. 07-124 (ARB July 30, 2009); **Dumarc Corp.**, Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006) (prime contractor is responsible for the payment of back wages owed to employees of its subcontractor, and contract funds may be properly withheld from the prime contractor to satisfy the violations of the subcontractor under 40 U.S.C. § 3142(c)(3) and 29 C.F.R. § 5.5(a)(2)).

1. Traditional employer/employee relationship not required

ERMG, Inc., 2004-DBA-5 (ALJ June 5, 2007); **Ray Wilson Co.**, ARB Case No. 02-086, 2000-DBA-14 (ARB Feb. 27, 2004) ("partnership" agreement irrelevant); **Superior Paving and Materials, Inc.**, ARB Case No. 99-065, 1998-DBA-11 (ARB June 12, 2002); **Commonwealth of Massachusetts v. U.S. Dep't of Labor**, Case No. 1998-JTP-6 (ALJ Oct. 29, 2001); **Star Brite Construction Co.**, ARB Case No. 98-113, 1997-DBA-12 (ARB June 30, 2000) (lack of a traditional employer/employee relationship between Star Brite and its workers did not absolve Star Brite from the responsibility to insure that they were compensated in accordance with the requirements of the Act); **All Phase Electric Co.**, WAB Case No. 85-18 (WAB June 18, 1986); **Tap Electrical Contracting, Inc.**, WAB Case No. 84-1 (WAB Mar. 4, 1985) (the prime contractor is not relieved of its obligations under the Davis-Bacon Act and the CWHSSA merely because it did not know about the violations of the subcontractor until after they occurred). Further, a subcontractor is also responsible for the violations of a lower tier subcontractor. 29 C.F.R. § 5.5(a)(6).

2. Prime contractor liable for lower tier contractor

In **Ray Wilson Co.**, ARB Case No. 02-086, 2000-DBA-14 (ARB Feb. 27, 2004), the Board held that the prime contractor "is ultimately liable for (the subcontractor's) failure to ensure its own lower-tier subcontractor's DBA compliance." See also **Palisades Urban Renewal Enterprises, LLP**, 2006-DBA-1 (ALJ Aug. 3, 2007), *aff'd*, ARB Case No. 07-124 (ARB July 30, 2009) (prime contractor responsible for back wages due employees of subcontractor, but subcontractor is also responsible for failing to pay prevailing wage rate to its employees) (on appeal to the ARB, Case No. 07-124).

3. The American Recovery and Reinvestment Act of 2009, impact of

The American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 ("Recovery Act") was signed into law on February 17, 2009. Construction and infrastructure programs funded by the Recovery Act are subject to the Federal prevailing wage requirements of the Davis-Bacon Act.

II. Jurisdiction

A. Administrative delay; laches

1. Actual prejudice required for dismissal of complaint

In **Bill J. Copeland**, 1996-DBA-18 (ALJ Jan. 28, 1997), Respondent moved that the case be dismissed because of the delay by the Wage and Hour Administration in investigating and referring the case to the Office of Administration Law Judges after Respondent's request for a hearing. The ALJ noted

that the four factors to consider when assessing whether there had been a denial of procedural due process in a case affected by administrative delay are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his/her rights; and (4) prejudice to the defendant.

In this case, the formal charges were not issued until two and one-half years after the investigation was initiated and more than two years after the initial withholding of funds. In addition, over a year passed between Respondent's initial request for a hearing and the Order of Reference. After assignment to an administrative law judge for hearing, counsel for the Administrator indicated that he would not be able to proceed to trial before an additional six months. The ALJ noted that, as a result, the hearing would be five years after the initial investigation and withholding of funds, and he classified this as excessive administrative delay.

The Administrator's reasons for the delay involved a variety of delays in the investigatory process, several due to the actions of Respondent. The ALJ found that most of the excuses failed to adequately explain the delay and that the Administrator's assertion that the delays were attributable to Respondent was incorrect. Specifically, the ALJ concluded that Respondent's efforts at conciliation could not be interpreted as a waiver of due process rights. The Administrator cites Respondent's petition to the Wage Appeals Board requesting an Order of Reference as one reason for delay. The ALJ disagreed, stating that the Administrator should have anticipated the dismissal of the petition as filed in the wrong forum and that he should have followed the Board's urging by filing the Order of Reference. The ALJ found this delay "almost completely unexplained."

The ALJ stated that Respondent repeatedly asserted his rights by requesting hearings, requesting referral to the OALJ, and objecting to continuances. As for the element of prejudice to Respondent, the ALJ decided that Respondent had demonstrated that he had been prejudiced where (1) his chief witness passed away, (2) other witnesses had moved and were unavailable, and (3) he was unable to secure documents from an employer that went out of business. Thus, the ALJ dismissed the matter, ordered that monies withheld be returned to Respondent, and denied the request for interest.

On appeal, in **Bill J. Copeland**, ARB Case No. 97-064, 1996-DBA-18 (ARB Oct. 31, 1997), the ARB reversed, in part, the ALJ's dismissal with prejudice based on the Administrator's various and inexcusable delays in processing the complaint and bringing it to hearing. The ARB remanded the case for a determination on the merits or a showing of "actual prejudice" as a result of the administrative delays. The ARB took the position that a dismissal without a determination on the merits of the action is detrimental to the rights of employees who may have been wrongfully underpaid pursuant to the DBA and the CWHSSA. The ARB found that the rights of the parties need to be balanced and mere allegations of prejudice due to delay are insufficient to warrant a dismissal - there must be actual prejudice. In reversing the ALJ's dismissal without a hearing or determination on the merits, the ARB cited **Slotnick Co.**, WAB Case No. 80-05 (WAB, Mar. 22, 1983); **Gemini Construction Co.**, WAB Case No. 91-23 (WAB, Sept. 12, 1991); **Tom Rob**, WAB Case No. 94-03 (WAB, June 21, 1994); **Barker v. Wingo**, 409 U.S. 514 (1977); **Public Developers Corp. (PDC)**, WAB Case No. 94-02 (WAB, July 29, 1994). See also **Ray Wilson Co.**, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004).

In **Public Developers Corp.**, 1992-DBA-36, *aff'd in part*, WAB Case No. 94-02 (WAB July 29, 1994), the Wage Appeals Board addressed the issue of whether the ALJ properly dismissed a case based on laches. Laches is the principle that a party who delays doing a thing at the proper time is barred from bringing a legal proceeding. The defense of laches may be brought against the federal government upon a showing that the government's actions were dilatory and resulted in actual prejudice against the

asserting party. Citing *Barker v. Wingo*, 407 US 514 (1972), the Board held that administrative delay must be examined in light of four factors: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his/her rights to a hearing; and (4) prejudice to the defendant. The Board held that, in the case before it, the ALJ erred both by failing to make findings or conclusions on the merits of the case and by failing to make specific findings of fact to support the conclusion that Respondent was prejudiced in its ability to present a defense. The laches defense required Respondent to demonstrate that it was "actually prejudiced" in its ability to present a defense. The presumption of prejudice may only be used in the most extreme circumstances where the defense may be utilized with or without demonstrating palpable injury.

By decision on remand in *Public Developers Corp.*, 1992-DBA-36 (ALJ Sept. 19, 1994), the ALJ held a party asserting "laches" or administrative delay has the burden of proving all elements of the defense. The party asserting the defense of laches must prove actual prejudice. Actual prejudice may be either evidentiary or economic. Evidentiary prejudice occurs when a respondent's inability to present a full and fair defense on the merits is due to the loss of records, the unavailability of witnesses, or the unreliability of memories of past events, thereby undermining the court's ability to judge the facts. Economic prejudice may occur where a respondent suffers the loss of monetary investments or incur damages that would have been prevented by earlier resolution of the matter. Upon review of these factors, the ALJ concluded that the extreme delay caused by DOL prejudiced Respondent both economically and evidentially.

1. Laches not applicable

a. Delay from date of hearing request and referral

The doctrine of laches was not applicable where a hearing was requested in January of 1992, but the case was not referred to OALJ until September 1994. There had been no delay in charging Respondent with the alleged violations, and Respondent did not demonstrate that its defense was impaired by the passage of time. Specifically, Respondent's contention that witnesses were unable to remember details, such as employees who were allegedly misclassified and underpaid, was not material as these details would not have bolstered Respondent's defense. The ARB further held that Respondent actually benefitted from the delay by having the opportunity to continue to secure government contracts in the interim. *P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116, 1994-DBA-72 (ARB Oct. 25, 1996).

b. Delay from commencement of investigation and notice of alleged violations

In *Star Brite Construction Co.*, ARB Case No. 98-113, 1997-DBA-12 (ARB June 30, 2000), the ARB held that a three year delay between the beginning of the investigation and the official notice of alleged violations did not result in injury or prejudice to the company such that the doctrine of laches was inapplicable. The ARB cited to the following four factors in determining whether to apply the doctrine: (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of his or her rights; and (4) prejudice to the defendants. The ARB noted that the company argued that passage of time "blurred the memories" of the Administrator's witnesses. However, this did not support the application of laches according to the ARB, where witness testimony at the hearing was consistent and the ALJ specifically found it to be credible. The ARB further noted that findings of fact turned on key pieces of documentary evidence, *i.e.*, the company's certified payroll records that were inconsistent with its own internal

payroll information. The ARB noted that "Star Brite itself controlled this information at one time or another and the mere passage of time could not prejudice the defense." As a result, the ARB concluded that general allegations of prejudice were insufficient to support dismissal under the doctrine of laches.

In ***KP & L Electrical Contractors, Inc.***, ARB Case No. 99-039, 1996-DBA-34 (ARB May 31, 2000), Respondent argued that a three year and seven month span of time between issuance of the Wage and Hour Division's "notice of issues" and its subsequent issuance of the Order of Reference to the Office of Administrative Law Judges had prejudiced Respondent in its defense of the charges. Respondent maintained that "the employee witnesses' memories had faded and their testimony at the hearing in 1997 conflicted with written statements they gave in 1992 soon after the events at issue in this case." The ARB pointed to four factors in determining whether a contractor's rights had been violated by reason of delay: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a hearing; and (4) prejudice to the defendant. In this vein, the ARB noted that KP&L "ha(d) not pointed out any particular instances in the record to support its contention that employee witnesses contradicted their own prior written statements (which were in the record for the ALJ to examine), or refused to testify because of lost memory." The ARB further noted that KP&L did not allege, or demonstrate, that any "critical witnesses were made unavailable because of the passage of time." The ARB then concluded that Respondent failed to make a showing of actual prejudice and the ALJ's decision, finding Respondent in violation of the Davis-Bacon Act, was affirmed.

c. Delay in scheduling hearing

In ***Peabody Construction Co.***, ARB Case No. 04-070, 1994-DBA-45 (ARB, Aug. 31, 2005), the Board upheld the ALJ's order that funds be disbursed to ten underpaid workers. In so holding, the Board rejected Respondent's argument that it suffered prejudice from the delay between its August 3, 1993 hearing request and the ALJ's denial of the hearing request on February 4, 2004. In support of this holding, the Board noted that 29 C.F.R. § 5.11 "does not specify a time limit for when the hearing must be scheduled or conducted." As a result, the Board denied Respondent's petition for review.

B. Motion for reconsideration

In ***Thomas & Sons Building Contractors, Inc.***, ARB Case No. 98-164, 1996-DBA-33 (June 8, 2001), the ARB held the following:

The Davis-Bacon Act has no explicit grant of authority to reconsider; therefore, if the Board has authority to reconsider, it perforce must be based on an 'inherent authority' theory. To determine whether the Board has such inherent authority in this debarment case, we would need to examine the statute underlying the decision to determine whether reconsideration would adversely affect its enforcement provisions or statutory purposes. Significantly, even if we were to conclude that we had reconsideration authority, any party seeking reconsideration by this Board would need to make the request within a reasonable period of time.

From this, the Board noted its concern in accepting motions for reconsideration in debarment matters because of the "possible conflicts between the Board's authority and the responsibilities of other Federal officials such as the Comptroller General" who maintains the debarment list. The Board stated that the question of its authority in non-debarment cases "may follow a different analysis from the

analysis used in debarment cases." Nevertheless, the Board concluded that it did not have to resolve the issue because:

In this case, Thomas and Sons filed their request for reconsideration more than five months after we issued our October 1999 D&O. No new evidence or changed circumstances have been cited by Thomas and Sons in support of their request, which essentially raises the same argument that was considered and squarely rejected by this Board in our prior decision. Moreover, no good cause has been shown for the delay. We therefore find that the request is untimely.

Slip op. at 7. *See also Thomas & Sons Building Contractors, Inc.*, ARB Case No. 00-050, 1996-DBA-37 (ARB Dec. 6, 2001).

C. Untimely petition for review; appeal period not jurisdictional

In *Superior Paving & Materials, Inc.*, ARB Case No. 99-065, 1998-DBA-11 (ARB Sept. 7, 1999), the ARB accepted an untimely petition for review and held that the 40 day appeal period was not jurisdictional; rather, it could be tolled based upon equitable grounds. Under the facts of the case before it, the ARB found that the government failed to establish that the contractor "slept on its rights" or that the claim presented was stale. The contractor filed its appeal with the ARB three days late because it misinterpreted the appeal regulations and initially filed the appeal with the Chief Docket Clerk of the Office of Administrative Law Judges within the time limits.

D. Portal-to-Portal Act is inapplicable

In *Cody Zeigler, Inc.*, 1997-DBA-17 (ALJ Apr. 7, 2000), *aff'd in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003), the ALJ cited to *Progressive Design & Build, Inc.*, WAB Case No. 87-31 (WAB, Feb. 21, 1990) to hold that the Portal-to-Portal Act at 29 U.S.C. § 255 is inapplicable to Davis-Bacon Act or Related Act proceedings. *See also KP & L Electrical Contractors, Inc.*, ARB Case No. 99-039, 1996-DBA-34 (ARB, May 31, 2000); *Glenn Electric Co. v. Donovan*, 755 F.2d 1028 (3d Cir. 1985).

E. Enforcement action not barred by statute of limitations

In *Irwin Co. v. 3525 Sage Street Associates, Ltd.*, 826 F. Supp. 1067 (S.D. Tex. 1992), the ALJ issued a decision on November 1, 1990 finding that the contractor was liable for \$136,024.72 in back wages due to 45 employees based upon its failure to pay the prevailing wage rate. The decision was not appealed and, therefore, it became final pursuant to 29 C.F.R. § 6.34. The contractor argued that the subcontractor's collection suit was time-barred but, as the entitlement issue was timely litigated and resolved by the ALJ's decision, the court held that "[t]his suit is simply a collection suit based on the violations previously found" and, as a result, it was not time-barred.

F. Interplay with the Contract Disputes Act

In *Herman B. Taylor Const. Co. v. Barram*, 203 F.3d 808 (Fed. Cir. 2000), the circuit court held that disputes over labor standards in federal contracts must be resolved through the provisions of the Davis Bacon and Related Acts:

Under the Federal Acquisition Regulations specifying the labor provisions that certain federal procurement contracts must include, disputes arising out of the labor standards provisions of the contracts are not to be subject to the Contract Disputes Act, but are to be resolved in accordance with the procedures of the Department of Labor (which clearly means by the department). *Emerald Maintenance v. United States*, 925 F.2d 1425, 1428 (Fed. Cir. 1991). A board of contract appeals must accept the Labor Department's adjudication of such a dispute, the Board has no jurisdiction itself to determine a labor provisions dispute or to review the labor Department's ruling on that issue (citations omitted).

The court further stated, however, that it must be "clear and beyond question that the Labor Department in fact has found under its established procedures that the contractor has committed such a violation." Under the facts of the case before it, the court held that, because the parties terminated the hearing process and settled the case, there was no clear adjudication that the contractor violated the labor provisions of the contract. Specifically, the court reviewed the terms of the agreement and the contractor did not concede any violation of the labor laws.

G. ARB lacks authority to intervene in Administrator's discretionary duties

In *Greater Kansas City Automatic Sprinkler Contractors Ass'n*, ARB Case No. 97-107 (ARB, Sept. 30, 1997), the ARB dismissed an appeal on grounds that it lacked authority to order the Administrator to initiate a prevailing wage rate survey for sprinkler fitters in the Kansas City area. The ARB stated that it has "routinely declined to intervene in matters pertaining to the Administrator's discretionary administrative management of the Wage and Hour Division." The ARB cited to *Veterans Canteen Service*, ARB Case No. 96-115 (ARB Oct. 25, 1996) (Administrator's decision not to enforce the Davis Bacon Act); *W.J. Menefee Constr. Co.*, WAB Case No. 90-15 (ARB Oct. 25, 1993) (Administrator's decision not to seek back wages); *Ames Constr., Inc.*, WAB Case No. 91-02 (ARB Feb. 3, 1993) (Administrator's decision to release withheld funds).

K. ARB authority to review oral opinion of Assistant Director that is not a final opinion

In *Donald W. Murray*, ARB No. 11-043 (ARB July 14, 2011), the Petitioner had filed a complaint with the Wage and Hour Division alleging that he had been misclassified and underpaid on a contract covered by the DBA. Wage and Hour determined that there had been underpayments to the Petitioner and other workers, and the subcontractor issued checks to the effected workers for the amount calculated by Wage and Hour. Subsequently, the Petitioner wrote to Wage and Hour seeking review and modification of the back wage calculations. The Assistant District Director responded by telephone, explaining that because the case was closed, the SCA contract completed, and checks issued to workers, Wage and Hour lacked authority to pursue his claim. The Petitioner appealed to the ARB. The Acting Administrator filed a motion to dismiss stating that Wage and Hour did not consider the statements made in the telephone conversation to constitute a final ruling, noting that the Assistant District Director had only provided his opinion and had not indicated that it was a final ruling, that he had not issued a written decision with a notice of appeal rights, and that the oral statements had not been made by the Acting Administrator. The Acting Administrator stated without a final decision, the ARB lacks jurisdiction. The ARB issued an Order to Show Cause. The Petitioner informed the ARB that he had requested reconsideration and asked that the ARB stay his appeal pending the response from the Acting Administrator. The ARB construed the Petitioner's response as a concession that a final decision had not

yet been issued by Wage and Hour. The ARB denied the motion for a stay and dismissed the appeal without prejudice, noting the Petitioner could file a petition for review once the Acting Administrator issued a decision, should the Petitioner find it necessary to do so.

L. Chief Judge’s authority to reassign case on remand

In *William J. Lang Land Clearing, Inc.*, ARB Case Nos. 01-072 to 01-079, 1998-DBA-1 through 6 (ARB Sept. 28, 2004), *aff’d*, *William J. Lang Land Clearing, Inc. v. Administrator, Wage and Hour Div.*, 520 F. Supp. 2d 870 (E.D. Mich. 2007), *aff’d*, Case No. 07-2423, 2008 WL 3287097 (6th Cir. Aug. 6, 2008) (unpub.), contrary to certain conclusions of the ALJ, the ARB affirmed the Administrator’s findings that the contractor “had improperly taken credit towards its DBA obligations by treating subsistence payments (meals and lodging) as fringe benefits and by averaging its health insurance costs on an annual basis instead of using the actual amounts paid per employee per month.” The ARB’s decision was affirmed by the Sixth Circuit, which remanded the case to the OALJ in order for the ALJ to calculate back wages for violations found. The employer wanted the case to be returned to the original deciding judge; however, the Chief Judge assigned the matter to another judge on remand. By decision issued in *William J. Lang Land Clearing, Inc.*, ARB Case Nos. 01-072 and 01-079, ALJ Case Nos. 1998-DBA-1 through 6 (ARB, Nov. 20, 2008), the ARB noted that the original deciding judge had retired and that the Chief Judge properly reassigned the matter to another ALJ on remand:

. . . while we agree that it would be preferable for the same ALJ to hear the case on remand, and we believe that, generally, the Chief Administrative Law Judge routinely assigns remanded cases to the same ALJs who had originally heard them, the decision whether to assign a case to a particular ALJ on remand, is within the Chief Judge’s purview, not the Board’s.

Slip op. at 3-4.

M. Applicability of DBA to military privatization contracts that include a call for construction

ARB FINDS THAT AAM 222, ISSUED BY DOL IN RESPONSE TO THE D.C. CIRCUIT’S DECISION IN CITYCENTERDC, IS AN INTERPRETATIVE RULE THAT REASONABLY INTERPRETS DBA COVERAGE; GOVERNMENT OWNERSHIP IS NOT A PREREQUISITE TO A CONTRACT BEING CONSIDERED A “PUBLIC WORK” COVERED BY THE DBA

In *Choctawhatchee Electric Cooperative, Inc.*, ARB No. 2017-0032 (ARB June 14, 2019) (per curiam), the ARB affirmed the WHD Administrator’s determination that the Davis-Bacon Act’s prevailing wage and labor standards apply to the construction component of Eglin Air Force Base (Eglin AFB)’s electrical system privatization contract.

The Petitioner, which had been awarded a contract for the privatization asked the Administrator for a ruling on the applicability of the DBA in light of the D.C. Circuit’s ruling in *District of Columbia v. Dept. of Labor*, 819 F.3d 444 (D.C. Cir. 2016) (“CityCenterDC”). The Petitioner argued that under that decision, “the privatization of Eglin AFB’s utility was not a ‘contract for construction of a public work’ under the DBA.” *Slip op.* at 3. The Petitioner argued that “because the contractor will own the facility and the government will not finance the construction, the contract does not fall within the provisions of

the DBA.” *Id.* The Petitioner further argued that “[e]ven if the contract did involve public funding, . . . the lack of government ownership precludes the contract from being a ‘public work’ subject to the DBA.” *Id.* The Administrator, however, found that the privatization contract involved substantial construction upgrades that were more than incidental to the privatization, and that the DBA applied.

DBA applies to military privatization contracts where the contract includes construction.

The ARB reviewed the relevant legal authority. This legal background culminated, following the *CityCenterDC* decision, in DOL’s issuance of All-Agency Memorandum 222 (Jan. 11, 2017) (AAM 222). The ARB stated that “AAM 222 announces that the WHD will continue to apply the DBA to military privatization projects when those projects call for construction, even though the federal government is not directly a party to the construction contract. . . .” *Id.* at 8. The ARB noted that it has ruled that AAMs are interpretative rules which may be relied upon if they are a reasonable interpretation of the DBA, and concluded that AAM 222 is a reasonable interpretation of DBA coverage. The ARB noted that the facts of this case were similar to those in *CityCenterDC*, but found distinguishing factors:

In *CityCenterDC*, the District of Columbia leased to the private developers and the lease payments went to the District of Columbia. Moreover, the factors identified in the 1994 OLC Opinion were not present in *CityCenterDC*, and several factors distinguish the contract under review here: the federal government is heavily if not fully funding the construction upgrades and improvements; Eglin AFB’s privatization calls for a fifty-year contract after which time the federal government may reacquire ownership; and the primary use of the privatization contract is for CHELCO to supply electricity to Eglin AFB, a military reservation administered by the federal government. For these reasons, we affirm the Administrator’s decision that CHELCO’s privatization contract calls for significant and segregable construction and constitutes a “contract . . . for construction” for purposes of requiring DBA wages and benefits.

Id. at 9 (emphasis as in original).

“Public work” under the DBA does not require government ownership

The Petitioner argued that “both ‘public funding’ and ‘government ownership’ are required for ‘public works’” — an issue not reached in the *CityCenterDC* decision. The ARB found that under the facts of this case, “the value, the duration, and the variety of federal funding of the work [the Petitioner] has contracted to perform” supported the Administrator’s determination that the privatization contract included substantial public funding for construction. *Id.* at 11. The ARB next addressed the Petitioner’s position that, because the terms of the contract make the Petitioner the owner of the utility infrastructure and responsible for its use and maintenance, there is a lack of government use or ownership necessary to be considered a “public work” under the DBA. The Administrator contended in response that “government ownership is not a statutory requirement to be considered a ‘public work’”, and that “AAM 222 . . . advises that the WHD will not treat government ownership as a prerequisite to be considered a ‘public work’ because the ‘interest of [the] general public’ may be met without government ‘title.’ AAM 222, at 8, citing 29 C.F.R. § 5.2(k).” *Id.* at 12. The ARB also noted that “the factors which can establish government ownership under the DEA extend beyond evidence of title and deed, but can include ownership, occupancy, and use of the final project even in the absence of the federal government being listed as an owner on the relevant legal documents. AAM 222 at 9-10;

CityCenterDC, 819 F.3d at 452-53.” *Id.* Because it had found that the AAM 222 was a reasonable interpretation of the DBA’s requirements, the ARB declined to disturb the Administrator’s interpretation of “public work.”

III. Standard of Review

A. By the ALJ

Pursuant to 29 C.F.R. § 6.33(b)(1), the ALJ conducts a *de novo* review of the record. The regulation provides, in part, the following:

The decision of the Administrative Law Judge shall include findings of fact and conclusions of law, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record. Such decision shall be in accordance with the regulations and rulings contained in part 5 and other pertinent parts of this title. The decision of the Administrative Law Judge shall be based upon a consideration of the whole record, including any admissions made in the respondent’s answer (response) and § 6.32 of this title. It shall be supported by reliable and probative evidence.

29 C.F.R. § 6.33(b)(1).

1. Adoption of a party’s brief

In ***Abhe & Svoboda, Inc.***, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB July 30, 2004), *recon. denied* (ARB Oct. 15, 2004), *aff’d*, ***Abhe & Svoboda, Inc. v. Chao***, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff’d*, 508 F.3d 1052 (D.C. Cir. 2007), the ARB cautioned that, although “wholesale adoption of the prevailing party’s brief is to be discouraged, an ALJ’s findings of fact will not be set aside if the evidence supports them.”

B. By the ARB

In ***Star Brite Construction Co.***, ARB Case No. 98-113, 1997-DBA-12 (ARB June 30, 2000), the ARB held that it reviews the ALJ’s findings *de novo*. Credibility determinations, on the other hand, will be upheld absent “clear error.” *See also Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14 (ARB Feb. 27, 2004); ***Thomas and Sons Building Contractors, Inc.***, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB Aug. 27, 2001).

With regard to an Administrator’s decision, in ***Phoenix Field Office, Bureau of Land Management***, ARB Case No. 01-010 (ARB June 29, 2001) the ARB cited to 29 C.F.R. § 7.1(e) and held that “review of decisions issued by the Administrator is in the nature of an appellate proceeding,” and the Board “will not hear matters *de novo* except upon a showing of extraordinary circumstances.”

C. By the circuit court

In ***L.P. Cavett Co. v. U.S. Dep’t of Labor***, 101 F.3d 1111 (6th Cir. 1996), the circuit court held that the proper standard of review of a decision by the Wage Appeals Board was limited to the question of

whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); **Communities, Inc. v. Busey**, 956 F.2d 619, 623 (6th Cir.), *cert. denied*, 113 S. Ct. 408 (1992).

D. Statutory construction, generally

In interpreting statutory language, the court in **L.P. Cavett Co. v. U.S. Dep't of Labor**, 101 F.3d 1111 (6th Cir. 1996) (*citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)), held that the first issue is whether Congress has clearly spoken on the precise question at issue. Under the facts of the case, the Department of Labor asserted that truck drivers were covered by the DBA prevailing wage rates as the "site of the work" at 29 C.F.R. § 5.2(l) included "both a batch plant located at a quarry more than three miles away from the highway construction project and the Indiana highway system that was used to transport materials from the batch plant to the construction project." The circuit court held the language of the DBA was clear and that 29 C.F.R. § 5.2(l) was inconsistent with the statute, which requires the payment of prevailing wage rates for "employees working directly on the physical site of the public work under construction"

IV. Evidence

A. Burdens of proof

1. Generally

In **Cody Zeigler, Inc.**, 1997-DBA-17 (ALJ Apr. 7, 2000), *aff'd in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB Dec. 19, 2003), the ALJ held that the proponent of the Order of Reference in a Davis-Bacon Act case bears the initial burden of going forward with the evidence and establishing a *prima facie* claim. Then the burden shifts to the opposing party who bears the ultimate burden of proof by a preponderance of the evidence. *See also Pythagoras General Contracting Corp.*, 2005-DBA-14 (ALJ June 4, 2008), *aff'd*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011) (the Administrator has the initial burden of "establishing that the employees performed work for which they were improperly compensated"; the burden then shifts to Respondent "to come forward with evidence of the precise amount of work performed or with evidence to negate[e] the reasonableness of the inference to be drawn from the employees' evidence"); **Ray Wilson Co.**, ARB Case No. 02-086, 2000-DBA-14 (ARB Feb. 27, 2004) (Respondent has the burden to rebut Department's proof of extent and amount of violations); **Thomas & Sons Building Contractors, Inc.**, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB Aug. 27, 2001) ("the Administrator has the burden of establishing that the employees performed work for which they were improperly compensated").

2. Establishing back wages owed

In **Thomas & Sons Building Contractors, Inc.**, 1996-DBA-37 (ALJ Feb. 17, 2000), *aff'd*, ARB Case No. 00-050 (ARB, Aug. 27, 2001), *order denying reconsideration* (ARB Dec. 6, 2001), the ALJ cited to the Fair Labor Standards Act case of **Anderson v. Mt. Clemens Pottery Co.**, 328 U.S. 680 (1946), which was applied to Davis-Bacon Act cases by **Trataros Construction Corp.**, WAB Case No. 92-03 (WAB Apr. 28, 1993), to set forth the parties' burdens in a case involving recovery of unpaid wages. The ALJ determined that the employee has the initial burden "of proving that he performed work for which he was not properly compensated." The ALJ further held, however, that the employee is not required to establish

the "the precise extent of uncompensated work." Rather, the employee's burden is met "if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Once the employee's burden is carried, then it is the employer's burden to demonstrate the precise number of hours worked or to present evidence sufficient to negate "the reasonableness of the inference to be drawn from the employee's evidence." If the employer fails to carry this burden, then damages may be awarded to the employee, even if the amount of such damages is approximate. Moreover, the ALJ noted that, where the Department of Labor reconstructs an employer's payroll, the burden is on the employer to present evidence, which is sufficiently precise to contradict the reconstructed payroll. *See also Pythagoras General Contracting Corp.*, 2005-DBA-14 (ALJ June 4, 2008), *aff'd*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011); *Dumarc Corp.*, Case No. 2005-DBA-7 (ALJ Apr. 27, 2006) (because accurate payroll records were not maintained by Respondent, an ALJ may properly "rely on the testimony of witnesses to assess and reconstruct the hours worked"); *Northeast Energy Services, Inc. (NORESCO)*, Case No. 2000-DBA-3 (ALJ Feb. 12, 2002); *Cody Zeigler, Inc.*, 1997-DBA-17 (ALJ Sept. 18, 2000) (the ALJ concluded that the employer failed to sustain its burden in challenging the Department's calculations of back wages due its employees); *Peabody Construction Co.*, 1996-DBA-20 (ALJ Apr. 18, 2000); *Arliss D. Merrill, Inc.*, 1994-DBA-41 (ALJ Oct. 26, 1995); *Superior Masonry, Inc.*, 1994-DBA-19 (ALJ Oct. 13, 1994) (failure to maintain proper records of overtime wages paid).

In *Thomas & Sons*, The employer filed for reconsideration with the ARB and argued that, because its employees did not have written documentation that they were underpaid, then the burden of proof set forth in *Anderson* had not been satisfied. *Thomas & Sons Building Contractors, Inc.*, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB Dec. 6, 2001) (on reconsideration). The ARB noted two "fundamental errors" in the employer's position:

First, this enforcement case was initiated by the Wage and Hour Administrator. As the party who brought the case, the initial burden of proof falls on the Administrator – *not* the workers.

...

The Zagari employees participated in this case only as witnesses, not as parties, and therefore did not personally bear any proof burden. This is in contrast to *Anderson* - a case under the Fair Labor Standards Act - which was brought directly by the employees, and in which the employees therefore assumed the initial burden of proof.

Second, nothing in the *Anderson* methodology requires that any plaintiff or prosecuting party present 'written documentation' of wage underpayment. All that is required is *evidence* sufficient to show that the employees 'in fact performed work for which [they were] improperly compensated[,] and also sufficient. . . to show the amount and extent of that work as a matter of just and reasonable inference.'

Slip op. at 2.

It is noted that, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946), the Supreme Court held the following in a Fair Labor Standards Act case:

When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. (citation omitted).

B. Use of payroll records to demonstrate disregard for classification; business records exception to hearsay

In *P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116, 1994-DBA-72 (ARB Oct. 25, 1996), the payroll records did not reflect an effort by Respondent to properly compensate the laborers for the sheet metal work they had performed and which had been observed by the Wage and Hour investigator. In particular, the ARB noted that after the meeting with the DOL investigator, Respondent should have ensured that the sheet metal foreman was providing accurate payroll information reflecting the sheet metal mechanics' work being done by employees classified only as laborers. *See also Star Brite Construction Co.*, ARB Case No. 98-113, 1997-DBA-12 (ARB June 30, 2000) (given Respondent's lack of records, it was proper for the ALJ to rely on the testimony of witnesses). In *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14 (ARB Feb. 27, 2004), the Board held that, despite their hearsay character, certified payroll records are properly admitted as evidence under the hearsay exception of allowing "[r]ecords of regularly conducted activity." 29 C.F.R. § 18.803(a)(6).

C. Employer's obligation to learn applicable wage rates

WHERE A CONTRACT IS SUBJECT TO DAVIS-BACON WAGE RATES, IT IS THE EMPLOYER'S OBLIGATION TO LEARN WHAT THOSE RATES ARE

In *Administrator, Wage and Hour Div., USDOL v. Coleman Construction Co.*, ARB No. 15-002, ALJ No. 2013-DBA-4 (ARB June 8, 2016), a subcontractor feigned ignorance of the applicability of Davis-Bacon Act wage rates to a construction project. The ARB found, however, abundant evidence that the subcontractor knew, or should have known that the subcontract was subject to the DBA requirements. For example, the subcontractor had worked on DBA governed contracts in past and had signed subcontracting documents for the instant project with numerous references to the DBA requirements. Evidence of record showed that the subcontractor knew the precise DBA rates. The subcontractor

asserted that the relevant wage determination was unavailable on DOL's website. The ARB found no evidence in the record of the alleged website omission, but stated even if there was such an omission, it would not suffice to excuse the subcontractor's obligation to pay DBA prevailing wages. The ARB stated "The law is clear that, if a contract subject to Davis-Bacon lacks the wage determination, it is the employer's obligation—here, Coleman Construction's—to get it. So, even if Coleman Construction did not know what the correct Davis-Bacon prevailing wage rates were, it was its responsibility to figure it out." USDOL/OALJ Reporter at 10 (footnote omitted).

D. Terms of contract to pay prevailing wage controlling

Even if a contractor or developer is not required by force of statute to pay Davis-Bacon wages, it may elect to pay prevailing wages by contract. **Vulcan Arbor Hill Corp. v. Reich**, 81 F.3d 1110 (D.C. Cir. 1996), previously 87-WAB-04. In **Vulcan**, the contractor entered into an agreement with the Department of Housing and Urban Development (HUD) in which it agreed to pay locally prevailing wages under the Davis-Bacon Act. Vulcan later disputed that the DBA applied, and HUD agreed that the wage determinations should not apply to the project due to an exemption. The court, however, held that the contractor was liable for payment of the prevailing wage rates because it had contracted to pay such wages. The court reasoned that "[n]othing in the Davis-Bacon Act precludes the parties from contracting with reference to it, even if by proper interpretation its requirements may not have been applicable by force of law to the project in question." The court found the language of the contract unambiguous and declined to look at extrinsic material.

In **Cody Zeigler, Inc.**, 1997-DBA-17 (ALJ Apr. 7, 2000), the ALJ held that, where the contract stated that work would be performed in Franklin County and it was actually performed in Delaware County (where the prevailing wage rate was higher) it was too late to modify the contract to reflect the higher wage rate. Citing to 29 C.F.R. § 1.6(c)(2)(ii) and **M.A. Mortenson Dairy Development Ltd.**, WAB Case No. 88-35 (WAB Aug. 24, 1990), the ALJ determined that "changing the wage requirement from the Franklin County rate to the Delaware County rate would constitute an impermissible modification to the project wage determination after the contract award." The ALJ noted that Employer based its bid and performed work on the contract based on representations of the Postal Service that the project was located in Franklin County.

E. Testimony demonstrates lack of compliance with classification requirements

Employer's superintendent testified that the foremen were instructed to tell the laborers not to use sheet metal tools unless instructed by the foreman because the foreman could split the hours. The ARB held that this indicated an improper practice of utilizing employees who are otherwise classified as laborers to perform the work of sheet metal mechanics because it reflected a practice of segregating workers' hours for the different classifications in which work was performed. **P&N, Inc./Thermodyn Mechanical Contractors, Inc.**, ARB Case No. 96-116, 1994-DBA-72 (ARB Oct. 25, 1996).

In **Ray Wilson Co.**, ARB Case No. 02-086, 2000-DBA-14 (ARB Feb. 27, 2004), the Board upheld the ALJ's use of testimony by workers "in the absence of accurate employer records" from either the contractor or the subcontractor.

In **Pythagoras General Contracting Corp.**, 2005-DBA-14 (ALJ June 4, 2008), *aff'd*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011), the ALJ cited to **Donovon v. New Floridian**

Hotel, Inc., 676 F.2d 468 (11th Cir. 1982) and concluded that it “is permissible to award back pay to non-testifying employees based upon the representative testimony of a small number of employees.”

F. Foreman’s copies of handwritten time records

FOREMAN’S COPIES OF HANDWRITTEN TIME RECORDS SUFFICIENT EVIDENCE TO RAISE INFERENCE OF AMOUNT AND EXTENT OF DAVIS BACON ACT GOVERNED WORK; NON-MALICIOUS DESTRUCTION OF RECORDS BY RESPONDENT, AND FOREMAN’S ALLEGED LACK OF AUTHORIZATION TO MAKE COPIES, WERE BOTH IRRELEVANT TO QUESTION OF RESPONDENT’S LIABILITY

In *Administrator, Wage and Hour Div., USDOL v. Coleman Construction Co.*, ARB No. 15-002, ALJ No. 2013-DBA-4 (ARB June 8, 2016), the testimony of one of the subcontractor’s foreman, accompanied by a detailed spreadsheet maintained by the foreman, was sufficient evidence to “show the amount and extent of [DBA-governed] work as a matter of just and reasonable inference” and to shift the burden of proof to the Respondents. USDOL/OALJ Reporter at 12, citing Mt. Clemens Pottery . In the instant case, the Respondents had no evidence to rebut the inference. The possibility that it may have not had malicious intent when it destroyed time sheet records was not relevant to the Respondent’s liability. Similarly, the claim that the foreman did not have authorization to copy the handwritten time records was not relevant to the Respondent’s liability. The ALJ found that the foreman’s evidence was credible, and that the Respondent had nothing to rebut that evidence. This was sufficient to affirm the ALJ’s finding that the Respondent had undercounted hours and the ALJ’s determination of the number of those undercounted hours.

G. Contemporaneous calendar maintained by employee; business records exception to hearsay

In *Star Brite Construction Co.*, ARB Case No. 98-113, 1997-DBA-12 (ARB June 30, 2000), the foreman maintained a calendar for Respondent, which set forth the hours worked by employees on any given day. The company argued that it was prejudiced by the government's failure to provide it with a copy of the calendar prior to the hearing. The ARB disagreed and stated that “[t]he calendar was, in the first place, Star Brite's own business record” which was maintained by its foreman and used to report the hours worked. Moreover, the ARB held that the calendar qualified for the business records exception to the hearsay rule as provided at 29 C.F.R. § 18.803(6).

H. Stipulations

In *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14 (ARB Feb. 27, 2004), the Board held that a “trier of fact may properly reject a stipulation made by counsel or a party in the course of hearing if the stipulation does not conform to the evidence of record.”

I. Challenge to wage determination after contract issued held improper

In *Abhe & Svoboda, Inc.*, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB July 30, 2004), *recon. denied* (ARB Oct. 15, 2004), *aff’d*, *Abhe & Svoboda, Inc. v. Chao*, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff’d*, 508 F.3d 1052 (D.C. Cir. 2007), the Board held

that, "[i]f contractors wish to protest the use of union wage rates as prevailing, it must be at the wage determination stage, before the award of the contract, and not at the enforcement stage."

J. Persuasive value of Wage and Hour Division's Field Operations Handbook

ARB CITES SIXTH CIRCUIT DECISION AFFORDING THE FOH *SKIDMORE* DEFERENCE

In *Weeks Marine, Inc.*, ARB No. 2017-0076, ALJ No. 2009-DBA-00006 (ARB Mar. 10, 2020), the ARB looked to (in addition to the statute, regulations and caselaw) the Wage and Hour Division's Field Operations Handbook ("FOH") for the agency views on what evidence may rebut the presumption that lodging is for the benefit of the employee, and thus reimbursable under the interplay of the Davis Bacon Act, Copeland Act, and Fair Labor Standards Act. In this regard, the ARB noted the Eighth Circuit's decision in *Baouch v. Werner, Enter.*, 908 F.3d 1107 (6th Cir. 2018), in which the court determined that agency interpretative documents—like the FOH—are not afforded the force of law and therefore do not warrant *Chevron*-style deference, but nonetheless are entitled to respect under *Skidmore* based on their persuasiveness. The court stated that the FOH is not dispositive—but it is persuasive and cannot be discounted because DOL handles and regulates the application of the FLSA.

V. Discovery

A. Failure to comply with discovery orders

1. Summary decision proper

In *Tri-Gem's Builders, Inc.*, 1998-DBA-17 (ALJ July 14, 1999), the ALJ adopted the Acting Administrator's findings of fact and issued a summary decision against Tri-Gems Builder. The ALJ found that the contractor was afforded multiple opportunities to comply with the Administrator's discovery requests, but failed to do so. The ALJ concluded that summary judgment was proper under 29 C.F.R. § 18.6(d)(2)(v) "because the requested discovery encompassed all of the underlying facts and issues and because the Respondent's repeated and unjustified failures to cooperate in discovery either voluntarily or in response to Judge Donnelly's orders clearly established that compliance could not be achieved by less drastic sanctions." As a result, the ALJ ordered the payment of back wages owed and debarment as requested by the Acting Administrator. The Respondents appealed, but their appeal was dismissed by the ARB for failure to prosecute the case. *Tri-Gem's Builders, Inc.*, 1998-DBA-17 (ARB Feb. 25, 2000) (Order of Dismissal).

2. Ruling against interests

By supplemental order in *Cody Zeigler Inc.*, 1997-DBA-17 (ALJ June 14, 2000), the ALJ issued a ruling against the Department's interests for its failure to comply with his order directing disclosure of the witness statements. Specifically, the ALJ concluded that the contractor did not misclassify its employees and, therefore, it did not owe \$13,584.99 in back wages. The ALJ further directed that the contractor submit an itemized statement of costs and attorney fees "directly attributable to the defense of (the Department's) claim of the informer's privilege." Slip op. at 1. With regard to an award of fees and costs, the ALJ initially noted that the Equal Access to Justice Act (EAJA) "clearly applies to

administrative proceedings." However, in light of the regulatory provisions at 29 C.F.R. § 6.6(a), he found that EAJA's applicability in a Davis Bacon Act claim would appear to be precluded. The ALJ then cited to 5 U.S.C. § 504(a)(1) of the Administrative Procedure Act which he stated "provides direct authority for the payment of costs and fees by the United States in an adversary adjudication to the prevailing party unless it is determined that the position of the agency was substantially justified." Slip op. at 3. The ALJ noted that the OALJ's procedural rules at 29 C.F.R. §§ 18.1(a), 18.29(a)(6), and 18.29(a)(8) permit resort to the Federal Rules of Civil Procedure (FRCP). Turning to FRCP 37(a)(4) and 37(b)(2), the ALJ found that these rules "authorize sanction under circumstances where a party to the proceeding fails to make disclosure or cooperate in discovery, or comply with an order of the Administrative Law Judge." Slip op. at 4. Upon review of the record before him, the ALJ determined that the Department did not present any substantial justification for its refusal to produce the witness statements. As a result, the ALJ found that the Department was liable for a total of \$1,856.25 in attorney's fees.

B. Privileges

1. Informants' privilege

a. Upheld

By discovery order in ***Thomas & Sons Building Contractors, Inc.***, 1996-DBA-33 (ALJ Nov. 10, 1987), the ALJ noted that the provisions at 29 C.F.R. § 6.5 prohibited disclosure of the identity of any employee who makes a written or oral statement during an investigation under the Davis-Bacon Act without the prior consent of the employee. The ALJ further determined that the FOIA provisions at 5 U.S.C. § 552a(b)(7)(D) exempts from public disclosure matters which are part of "investigatory records" to the extent that such disclosure of a confidential source is at issue. The ALJ also stated that FRCP 26(b)(1) provides for discovery of all relevant information which is not privileged. From these rules and regulations, the ALJ concluded that the contractor was not entitled to obtain the names of those employees who made statements during the investigation. Rather, the ALJ held that redacted versions of their statements sufficiently protected the due process rights of the contractor. *See also Star Brite Construction Co.*, ARB Case No. 98-113, 1997-DBA-12 (ARB June 30, 2000) (in response to the company's allegations that it was prejudiced by the interview statement of one of its employees which was not provided before the hearing, the ARB noted that the ALJ relied upon the employee's testimony at the hearing which paralleled his interview statement; the interview statement was not relied upon in the ALJ's decision; and the ARB stated in a footnote that, pursuant to 29 C.F.R. § 6.5, "it is not likely that (the employee's) interview statement could have legally been disclosed prior to the hearing").

In ***Woodside Village v. Secretary of Labor***, 611 F.2d 312 (9th Cir. 1980), the court affirmed the ALJ's application of the informant's privilege to protect the names of persons making statements to the government as well as the statements where the action was brought on behalf of the government.

b. Denied

In ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ Apr. 7, 2000), the ALJ ordered that counsel for the DOL produce copies of all witness statements to Respondents where the DOL investigator testified that she relied, in part, upon the statements to determine the proper classification of the employees' jobs. Citing to 29 C.F.R. §§ 5.6(a)(5) and 6.5 and invoking the informant's privilege, counsel for DOL argued that such

statements would not be released unless the informants were called to testify. The ALJ acknowledged the validity of the informant's privilege, citing to *Roviaro v. United States*, 353 U.S. 53 (1957) which upheld the existence of such a privilege as a qualified, not absolute, one.

The ALJ further noted that, on January 2, 1997, the DOL issued *Secretary's Order 5-96* which "delegates from the Secretary authority for the Assistant Secretary for Employment Standards to carry out the functions to be performed by the Secretary of Labor under a variety of statutes including the Davis Bacon Act." Slip op. at 28. The ALJ stated that this delegation of authority specifically encompassed invocation of "all appropriate claims of privilege." Slip op. at 28. The ALJ determined that the interests of each of the parties to the case were compelling and he stated that "the reoccurring problem concerning production of witness statements in these proceedings is caused by a conflict in the government's interest in enforcing the Act, the informer's right to be protected against possible retaliation and also in the Respondents' need to prepare for trial."

The ALJ concluded that the regulatory provision at § 6.5 "does not address the question of non-testifying potential witnesses." He further stated that, pursuant to the *Secretary's Order 5-96*, the Wage and Hour Administrator must "personally" review the materials sought to be covered by the privilege and the privilege must be invoked in writing. In finding that the privilege was not properly invoked, the ALJ found that "[t]his case record includes no evidence of an Administrator affidavit claiming the privilege nor of any document review by the Acting Administrator." Given the government's failure to comply with the ALJ's discovery order, the ALJ concluded that the classification issue would be decided in favor of the Respondents pursuant to 29 C.F.R. § 18.6(d)(2)(ii). The ALJ further requested that Respondents submit an itemized statement of requested attorneys' fees and costs expended in defense of that part of the case directly attributable to the DOL's claim of informer's privilege.

C. Validity of prevailing wage determination; discovery not permitted

In *Thomas & Sons Building Contractors, Inc.*, 1996-DBA-33 (ALJ Nov. 10, 1997), the ALJ denied the contractor's request for discovery related to challenging the validity of the wage determination. The ALJ concluded that the proceedings before him were limited to proper classification of employees and the payment of wages owed. He noted that the Federal Acquisition Regulations contain the procedures which a contractor must use to challenge the validity of a wage determination.

D. Protective order

In *Northeast Energy Services, Inc. (NORESKO)*, 2000-DBA-3 (ARB Apr. 20, 2001), the ALJ issued an order to protect the identity of informants and "the information provided to the Department by them" pursuant to 29 C.F.R. §§ 6.5, 18.14, and 18.15. The ALJ held that it was proper to protect the informant's identity and the information s/he provided to the government but, citing to *Jencks v. United States*, 353 U.S. 657 (1957), once the informant is called to testify for the government, then his or her statement must be made available to the opposing party. The ALJ stated the following:

I find that neither the Department nor (subcontractor) Brilliant has standing to object from (contractor) Taj obtaining from Brilliant communications to the latter from any other party, so long as such communication does not reveal the identity of the Department's informants, statements of the informants to the Department, or the mental impressions, conclusions, opinions, legal theories, or work product of Brilliant's own counsel.

Slip op. at 4.

VI. Classification of employees

A. Disregard for classification established by payroll records

The payroll records did not reflect an effort by Respondent to properly compensate the laborers for the sheet metal work they had performed and which had been observed by the Wage and Hour investigator. Respondent only took steps to ensure that laborers would not be using sheet metal tools in the future. The ARB found that, after the meeting with the DOL investigator, Respondent should have ensured that the sheet metal foreman was providing accurate payroll information reflecting the sheet metal mechanics' work being done by employees classified as laborers. ***P&N, Inc./Thermodyn Mechanical Contractors, Inc.***, ARB Case No. 96-116, 1994-DBA-72 (ARB Oct. 25, 1996).

B. Wage determination determined solely by Secretary; cannot be determined by employer

It is noted that the Administrator's prevailing wage determinations, as well as his or her decisions whether to add classifications, must be directly appealed to the ARB. ***American Building Automation, Inc.***, ARB Case No. 00-067 (ARB Mar. 30, 2001).

The ALJ is without discretion to adjudicate the propriety of a prevailing wage determination. 29 C.F.R. §§ 1.8 and 1.9 (2000). The ALJ may, on the other hand, determine whether an employee is properly classified for purposes of determining the appropriate prevailing wage rate. ***Pythagoras General Contracting Corp.***, 2005-DBA-14 (ALJ June 4, 2008), *aff'd*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011).

In ***Thomas & Sons Building Contractors, Inc.***, ARB Case No. 98-164, 1996-DBA-23 (ARB Oct. 19, 1999), *recon. denied* (ARB June 8, 2001), the ARB cited to ***United States v. Binghamton Construction Co.***, 347 U.S. 171, 177 (1954) as support for its holding that the Secretary has sole authority to issue prevailing wage determinations under the Act, the propriety of which are not subject to review. With regard to job classifications, however, the ARB held the following:

In short, relevant precedent plainly affirms the Secretary's (and the ALJ's) authority to determine the correct trade classifications for Thomas and Sons' employees on the Naval Reserve and Air National Guard contracts.

In ***P&N, Inc./Thermodyn Mechanical Contractors, Inc.***, ARB Case No. 96-116, 1994-DBA-72 (ARB Oct. 25, 1996), the contractor challenged the ALJ's determination that it be debarred because it misclassified and underpaid its workers. The government maintained that it was improper to pay workers performing roofers' duties at the laborers' rate. The ARB held that an employer cannot unilaterally establish a classification for "sheet metal mechanics' helpers" by using semi-skilled laborers in a capacity that required them to use sheet metal tools with a pay rate less than that required by the relevant wage determination. The record provided no basis from which to conclude that the position of helper to a sheet metal mechanic would meet the requirements for a helper position under the pertinent guidelines.

See also *Actus Corp.*, 1996-DBA-1 (ALJ Jan. 29, 1999) (the Administrator has the right to rely upon the statement of employees to determine their proper classification and area collective bargaining agreements are properly considered in determining whether employees have been misclassified); *Berbice Corp.*, 1998-DBA-9 (ALJ Apr. 16, 1999) (a company cannot rely on a contracting officer's advice; the Secretary or Secretary's designee determines the classification of employees; reliance on classification of a prior contract is improper). See also *Dumarc Corp.*, Case No. 2005-DBA-7 (ALJ Apr. 27, 2006) (the ALJ is authorized to determine an employee's classification for purposes of determining the appropriate prevailing wage rate; a "worker's classification depends upon the tasks he performs and the tools he uses"); *Thomas and Sons Building Contractors, Inc.*, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB Aug. 27, 2001), *order denying reconsideration* (ARB Dec. 6, 2001) (Respondent's argument, that the Administrator's prevailing wage determination was incorrectly based on union wages in the area rather than the wage survey, amounted to a request for review of the wage determination which must be made prior to the contract award and must be timely filed directly with the ARB).

Cases involving the Department's conformance regulations at 29 C.F.R. § 5.5(a)(1)(ii)(A), which explain how the Secretary determines the wages for a type of job that is left out of the Department's pre-bid wage decision, but that a contractor subsequently requires for a project, are appealed directly from the Administrator to the Administrative Review Board. See *Mistick PBT v. Chao*, 440 F.3d 503 (D.C. Cir. 2006). For a discussion of an Administrator's obligations in conducting prevailing wage surveys, particularly with regard to considering collective bargaining agreements, see *Mistick Construction*, ARB Case No. 04-051 (ARB Mar. 31, 2006).

In *Cox v. Bland*, 2006 WL 3059988, Civil No. 3:00 CV 311 (CFD) (D. Conn. Oct. 27, 2006), the district court summarily denied an employer's challenge to the Davis-Bacon wage rates for a new classification of asbestos removal workers. The court determined that the contractor failed to exhaust its administrative remedies where "the U.S. Department of Labor . . . must hear most matters related to the Davis-Bacon wage rates in the first instance" as required by 29 C.F.R. §§ 5.5(a)(9), 5.11, and 5.13. Notably, the court stated that challenges to wage determinations must be first lodged with the Administrator. It noted that "[t]he DOL's wage rate decisions are final and a contractor's reliance on even incorrect wage rates which are later changed is not actionable by the contractor." In dicta, the court held that the Administrator's decision could be appealed to the administrative law judge and ultimately, to the Administrative Review Board.

C. Classification by work actually performed

DAVIS BACON ACT OBLIGATIONS REQUIRE CLASSIFICATION BY WORK ACTUALLY PERFORMED, NOT BY CLASSIFICATIONS BASED ON RESUMES, APPLICATIONS, LICENSURES, OR EXPERIENCE

In *NCC Electrical Services, Inc.*, ARB No. 13-097, ALJ No. 2012-DBA-6 (ARB Sept. 30, 2015), the ARB Majority (Igasaki and Corchado) upheld ALJ's summary decision that Respondents falsely certified nine employees on project as part of a bona fide apprenticeship program, and misclassified employees as "apprentices" or "laborers" as opposed to electricians. Board Majority finds that while mere violations of obligations under the law do not constitute a "disregard," for debarment, evidence must establish a level of "culpability beyond negligence." "Some element of intent" is required although intent need not arise to "willful attempts to *avoid* the DBA's requirements." (Italics in original)

Admission of subcontractor that he created his own classifications based on the applications, resumes, licensure, and experience of employees rather than the work performed as required under the DBA; its certification of apprenticeship program without verification of certification; and its failure to review DBA requirements, reflects necessary "element of intent." Three year debarment upheld.

D. False Claims Act

1. Held applicable

In *United States v. C.W. Roen Const. Co.*, 183 F.3d 1088 (9th Cir. 1999), the circuit court held that, where a contractor falsely certified to the government that its workers received the prevailing wage rate in a worker classification dispute, the contractor could be held liable under the False Claims Act.

2. Held inapplicable

In *United States v. DynCorp, Inc.*, 895 F. Supp. 844 (E.D. Va. 1995), the court held that the provisions of the False Claims Act, at 31 U.S.C. §§ 3729-3733, are designed to prevent federal contractors from defrauding the government in obtaining, concealing, or reducing federal monies to which the contractor was not entitled. In this vein, the court concluded that a worker classification dispute does not, in and of itself, support a claim under the False Claims Act. Rather, such a dispute must be resolved by the Department of Labor under the provisions of the Davis Bacon Act.

E. Sporadic nature of work irrelevant to classification determination

An employer who utilizes employees in more than one classification must ensure that those employees are properly paid for the various types of work performed and for the hours such work was performed. The ALJ erred in relying on the sporadic nature of the mechanics' work that was performed by the laborers; that some of Employer's laborers were underpaid on an intermittent, rather than a continuous, basis did not negate the finding that they were underpaid because they were misclassified. *P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116, 1994-DBA-72 (ARB Oct. 25, 1996).

F. Unforeseen circumstances; wage determination cannot be rescinded

For a Coast Guard construction project described as "New Family Housing," the ARB in *Joe E. Woods, Inc.*, ARB Case No. 96-127 (ARB Nov. 19, 1996), held that Wage and Hour correctly characterized the project as "residential" where the All Agency Memorandum 130 provided that residential construction projects were "those involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height." Woods argued, however, that the Coast Guard's description of the project was so inadequate that imposition of relief was justified pursuant to 29 C.F.R. § 1.6(f). The ARB disagreed, stating that the description submitted by the Coast Guard was sufficiently clear and unambiguous such that only the residential construction category clearly applied. The ARB also rejected Woods argument that it was forced to pay higher wage rates than those contained in the wage determination due to the complexity of the siting, terrain, and location in the Seismic 3 zone. The ARB responded that the wage determinations merely establish the

minimum wages and fringe benefits that must be provided. There is no guarantee that the minimum wages contained in a wage determination will be the wages required to actually be paid to perform the contract. Unforeseen circumstances do not constitute a legal basis for rescinding the application of the wage determination.

G. Retroactive imposition of wage determination

ADMINISTRATOR MUST CONSIDER EQUITABLE FACTORS OF DBA RULING LETTER 2004-01 WHEN CONSIDERING WHETHER TO IMPOSE THE ADDITIONAL WAGE DETERMINATION TO AN ALREADY COMPLETED PROJECT

In *City of Ellsworth, Maine, Bayside Road Wastewater Treatment Facility*, ARB No. 14-042 (ARB June 6, 2016), the ARB affirmed the Wage and Hour Division Administrator's determination that a contract for a road wastewater treatment facility and pump station, partially funded by the Federal government and therefore subject to the Davis-Bacon Act and related acts, should have included a wage determination for building construction in addition to a heavy construction wage determination. The contracting city argued that it had relied in good faith on guidance received on different project the threshold found in AAM 130 and 131. The ARB found, however, that the Administrator correctly determined that the building component was substantial and required a separate wage determination, the component meeting both 20% of the total project and independent \$1 million thresholds.

The city next argued that the WHD lacked authority under 29 C.F.R. 1.6(f) to impose the building wage post-bid and after contract commencement. The ARB, however, agreed with the Administrator that the WHD has the authority to require retroactive incorporation of a second building wage determination notwithstanding that the contract already had a valid wage determination. The ARB cited *Central Energy Plant*, ARB No. 01-057 (Sept. 30, 2003). The ARB, however, remanded the case to the Administrator to determine whether equitable grounds existed to decline to retroactively impose a wage determination to the already completed project. The ARB cited in this regard DBA Ruling Letter 2004-01 (June 3, 2004). The ARB found that the Administrator had only made generalized conclusions on the WHD's discretion to impose the wage determination retroactively. The ARB stated:

Where the Administrator has failed to articulate the factual basis, equitable or otherwise, upon which the decision requiring retroactive application of the Building wage determination was reached, the Board cannot conclusively determine whether the Administrator's determination in this case is reasonable, or, instead, an unexplained departure from past determinations.

USDOL/OALJ Reporter at 16.

I. Collateral estoppel

1. Held inapplicable

a. Work performed at "dedicated" plant

In *Lloyd T. Griffin, Jr.*, 1991-DBA-92 (ALJ 1999), *rev'd* ARB Case Nos. 00-032 and 00-033 (ARB May 30, 2003), the ALJ reconsidered his holdings in light of the remand issued by the United States District Court in *Griffin v. Reich*, 956 F. Supp. 98 (D.R.I. 1997). On remand, the ALJ was confronted with whether equitable estoppel should be applied against the Department of Housing and Urban Development (HUD) to preclude recovery of back wages owed from the contractor. Based on the evidence before him, the ALJ concluded that, if the contractor had not received erroneous advice from HUD, he would have abandoned the project or "handled labor matters differently." Under the final element of equitable estoppel as set forth by the district court, the ALJ found that the contractor complied with HUD's advice and policies on the project. Consequently, it was determined that the contractor was entitled to equitable estoppel relief for work performed at the Veazie Street plant and the DOL was precluded from recovering back wages owed to the Veazie Street plant workers.

By decision dated May 30, 2003, however, the Board reversed the ALJ's holding and concluded that collateral estoppel did not apply to the Veazie Street plant workers. In support of this holding, the Board cited to 29 C.F.R. § 5.2(l)(2) (1993) which provides, *inter alia*, that "an off-site fabrication facility like the Veazie Street plant would be covered by the prevailing wage regulation as long as its production was covered by the Davis-Bacon-covered project it was serving." Respondent again appealed to the district court and, by decision in *Phoenix-Griffin Group II, Ltd. v. Chao*, 376 F.Supp.2d 234, (D.R.I. 2005), the court affirmed the Board's conclusion that the contractor was not entitled to application of collateral estoppel with regard to wages owed to the Veazie Street plant workers. In this vein, the court noted its agreement with the Board that, because the prefabricated materials generated at the Veazie Street were for the sole purpose of DBA-covered construction sites, "[t]his single finding of fact alone should have served as an absolute bar" to use of collateral estoppel.

b. DOL debarment proceeding distinct from HUD criminal proceeding

In *Facchiano Const. Co. v. U.S. Dep't of Labor*, 987 F.2d 206 (3d Cir. 1993), the court held that collateral estoppel did not preclude the DOL from seeking debarment of the contractor, even when HUD already obtained debarment. The court reasoned that, by its regulatory authority, HUD only has authority to debar contractors from participation in HUD programs for a specific period of time. The DOL, on the other hand, has authority to debar a contractor from *any and all* federal contracts under 29 C.F.R. § 5.12(a)(1). The court further noted that the standard for obtaining debarment under HUD is different than that required for DOL debarment:

Not only are the parties different, but the two violations do not constitute the same cause of action. Although the HUD violation involved the same underlying wrongful conduct, the two debarment proceedings arose from different statutes and different evidence. What was material to the HUD proceeding was the criminal conviction and mitigating factors that would demonstrate that the Company was now a 'responsible' party that could again be entrusted with HUD contracts. The facts material to the DOL proceeding were actual evidence of the violations, the extent and nature of the mis-classification and under payments, evidence of previous violations and falsification of the certified payrolls. Finally, the demand for recovery in each of these proceedings was different. DOL demanded a three year, government-wide debarment for willful and aggravated violation of Davis-Bacon Related Acts. HUD demanded a debarment from HUD programs only, for a period of up to three years.

Id. at 213. See also *Actus Corp.*, 1996-DBA-1 (ALJ Jan. 29, 1999).

I. Contractual relationship between contractor and employees irrelevant

In *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14 (ARB Feb. 27, 2004), Respondent argued that certain workers were not covered employees because they were partners or owner-operators of the company. The ARB disagreed and noted that the Act required payment of the prevailing wage to all workers performing construction activity on a covered project "regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics." 40 U.S.C. § 3142(c); 29 C.F.R. § 5.2(o). See also *EMRG, Inc.*, 2004-DBA-5 (ALJ June 5, 2007).

Similarly, in *Pythagoras General Contracting Corp.*, 2005-DBA-14 (ALJ June 4, 2008), *aff'd*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011), the ALJ held that Respondent failed to properly pay janitorial employees who "were employed on the site of the work." The ALJ rejected Respondent's argument that janitorial work was not required under the contract and would not, therefore, be covered by the Davis-Bacon Act requirements. To the contrary, the ALJ concluded that requirements of the Act override contractual arrangements and "Respondents (had) failed to provide any support for their assertion that the DBA only covers work that is *required* under the contract" (italics in original).

J. Classification based on area of practice by unions and signatory contractors

In *Abhe & Svoboda, Inc.*, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB July 30, 2004), *recon. denied* (ARB Oct. 15, 2004), *aff'd*, *Abhe & Svoboda, Inc. v. Chao*, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd*, 508 F. 3d 1052 (D.C. Cir. 2007), the Board held the following:

[T]he contractors had to pay prevailing wages in accordance with the way local unions classified the work. Where, as in this case, previous wage rates are based upon a collective bargaining agreement, proper classification of duties under the Wage Determination must be determined by the area of practice of the unions that are parties to the agreement.

The Board further held that, in a Davis-Bacon Related case, "the rate to be paid for particular tasks is the rate found to be prevailing in the locality for that work, regardless of what tools the workers use." Thus, under the facts of *Abhe & Svoboda*, the Board noted that "[t]he industry paid painters' wage rates contained in the Connecticut Statewide Bridge Agreement for all tasks associated with bridge painting, including construction of scaffolds and containment structures, and cleanup of lead waste." In this vein, the Board held that it was improper for the contractors to make their classifications of workers "based on the tools of the trade" analysis where one worker using a blasting hose or spray gun would be paid as a painter and another worker using a screw gun and wood would be paid as a carpenter. See also *William J. Lang Land Clearing, Inc.*, ARB Case Nos. 01-072 to 01-079, 1998-DBA-1 through 6 (ARB Sept. 28, 2004), *aff'd*, *William J. Lang Land Clearing, Inc. v. Administrator, Wage and Hour Div.*, 520 F. Supp. 2d 870 (E.D. Mich. 2007), *aff'd*, Case No. 07-2423, 2008 WL 3287097 (6th Cir. Aug. 6, 2008) (unpub.).

K. "Side bar" agreements unenforceable

In **Abhe & Svoboda, Inc.**, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB July 30, 2004), *recon. denied* (ARB Oct. 15, 2004), *aff'd*, **Abhe & Svoboda, Inc. v. Chao**, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd*, 508 F.3d 1052 (D.C. Cir. 2007), the Board held that a "side bar" agreement between the contractor and local union for new classifications of employees, that was not in the wage determination, was unenforceable as a matter of law. *See also EMRG, Inc.*, 2004-DBA-5 (ALJ June 5, 2007) (alleged agreement between Respondent and worker that worker would accept substandard rate irrelevant; statutory requirements control).

L. No estoppel based on actions of contracting agency

In **Abhe & Svoboda, Inc.**, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB July 30, 2004), *recon. denied* (ARB Oct. 15, 2004), *aff'd*, **Abhe & Svoboda, Inc. v. Chao**, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd*, 508 F.3d 1052 (D.C. Cir. 2007), the Board held that "[t]he Department of Labor cannot be estopped by the actions of a contracting agency." Citing to **L.T.G. Construction Co.**, WAB Case No. 93-15 (WAB Dec. 30, 1994), the ARB noted that "mistakes of one agency cannot be used to estop another agency from carrying out its statutory responsibilities." As a result, the Board held that acquiescence or erroneous advice from the state's contract administrator with regard to classification and payment of employees on a Davis-Bacon Related Act job site was not binding on the Department of Labor.

M. Exempt employees

Under the Davis-Bacon Act, the term laborer or mechanic does not apply to workers whose duties are primarily administrative, executive, or clerical. The regulations at 29 C.F.R. § 5.2(m) provide that persons in a *bona fide* executive, administrative, or professional capacity "as defined in part 541 of this title are not deemed to be laborers or mechanics."

1. Executive employee

Under 29 C.F.R. § 541.1, an employee is considered to be "employed in a bona fide executive capacity" and exempt from coverage under the Act if his or her primary functions are executive in nature and s/he spends less than 20 percent of the work hours doing activities that are not directly and closely related to the performance of executive functions.

In **Dumarc Corp.**, Case No. 2005-DBA-7 (ALJ Apr. 27, 2006), the ALJ found that, although one employee "did act as a foreman or manager" of Respondent, "he spent the vast majority of his time working as a fire sprinkler fitter along with the other employees" and, thus, was covered by the Act.

2. Ownership interest and/or control

Under 29 C.F.R. § 541.1(e), an employee may be exempt from coverage under the Act if s/he "is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed."

In **Dumarc Corp.**, Case No. 2005-DBA-7 (ALJ Apr. 27, 2006), the ALJ noted that Respondent was legally owned by Mr. Hannan, who was involved with the company's operations as much as his illness

would permit. The evidence of record established that Mr. White "ran the company, made the payroll, and controlled company cash" and otherwise helped Mr. Hannan's wife keep the business operating after Mr. Hannan became ill. However, in determining whether Mr. White was exempt from the Act's coverage, the ALJ found that there was sufficient evidence that Mr. Hannan, his wife, Mr. White, and another employee of Respondent shared management of company such that Mr. White was not "in sole charge" of the business and he was not exempt from coverage under the Act.

N. Contractor presumed to know the *Frye Brothers* rule

In *Frye Brothers*, 1977 WL 24823 (W.A.B. 1977), a contractor is on notice under the Davis-Bacon Act that it must pay employees according to locally prevailing practices.

In *Abhe & Svoboda, Inc.*, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB July 30, 2004), *recon. denied* (ARB Oct. 15, 2004), *aff'd*, *Abhe & Svoboda, Inc. v. Chao*, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd*, 508 F.3d 1052 (D.C. Cir. 2007), the District Court of the District of Columbia held that the employer "may indeed have been *unaware* of the rule announced in *Frye Brothers*, but it is not unreasonable to hold plaintiff responsible for knowing the rule" (italics in original). The D.C. Circuit Court of Appeals agreed that the contractor had adequate notice of the *Frye Brothers* rule. In particular, the court noted that, while the case was not officially published "its inclusion in a commercial reporter and its treatment in subsequent judicial and administrative cases provide adequate notice that contractors must use the job classifications of signatory unions when wage determinations are based on collective bargaining agreements." The circuit court further noted that the Davis-Bacon Act "also should have alerted the company to the fact that it could not apply its own methodology of classifying jobs" because "[f]rom start to finish, the focus of the Act is on local practice."

In *George Campbell Painting Corp. v. Chao*, 463 F. Supp. 2d 184 (D. Conn. 2006), the district court agreed with the decision in *Abhe & Svogoda, Inc. v. Chao*, 2006 WL 2474202 (D.D.C. Aug. 25, 2006) and held that, "since the leading decision in *Fry Brothers Corp.*, 1977 WL 24823 (DOL W.A.B. 1977), contractors have been on notice under the DBA that they have to pay employees according to locally prevailing practices." The court held that, because DBA wage determinations only list job classifications and minimum wages without containing job descriptions, the contractor must turn to "locally prevailing practices, and that, where union rates prevail, the proper classification of duties under the wage determination is established by the area practice of union contractors signatory to the relevant collective bargaining agreement. Further, the court cited to 29 C.F.R. § 5.13 to hold that it was incumbent upon Respondent to obtain clarification of any questions or concerns from the Wage and Hour Administrator."

VII. "Site of work" determinations

A. Controlling law

The Davis-Bacon Act, 40 U.S.C. § 276a, provides that for all contracts involving the federal construction projects, mechanics and laborers employed directly on the site of the work shall be paid local prevailing wage rates as determined by the Secretary of Labor. 29 C.F.R. § 5.2(l) was amended in November and December 2000 and states:

(1) The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (1)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (1)(1) of this section;

(3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, and tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of work as stated in paragraph (1)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not a part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so to the performance of a contract.

29 C.F.R. § 5.2(l) (2000).

B. Scope of definition limited

In general, the courts have held that the statute requires the payment of prevailing wages for those workers "employed directly upon the site of the work" such that, in some cases, the courts have found the language at 29 C.F.R. § 5.2(l)(2) to be inconsistent with the plain, unambiguous language of the statute. In *L.P. Cavett Co. v. U.S. Dep't of Labor*, 101 F.3d 1111 (6th Cir. 1996), the Department asserted that the Secretary was not precluded from applying the broader definition of the phrase "site of the work," as encompassed in 29 C.F.R. § 5.2(l), than that permitted by the Davis-Bacon Act because the Federal-Aid Highway Act, which also applied, did not limit its scope to employees working directly at the site of the work. The court rejected this argument, noting that the Federal-Aid Highway Act, 23 U.S.C. § 113(a), provided that employees "shall be paid wages at the rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with the . . . Davis-Bacon Act . . ." (emphasis added). Thus, the court held that the Federal-Aid Highways Act incorporated from the Davis-Bacon Act not only its method of determining prevailing wage rates, but also its method of determining prevailing wage coverage. Accordingly, because the Department's interpretation of 29 C.F.R. § 5.2(l) was inconsistent with the Davis-Bacon Act, it was inconsistent with the Federal-Aid Highways Act. In addition, the court noted that if the Department of Labor truly believed that the Federal-Aid Highways Act dictated a more expansive prevailing wage coverage than the Davis-Bacon Act, it would not have enacted only one set of implementing regulations for both statutes. See also *Cody Zeigler, Inc. v. Administrator, Wage & Hour Division*, ARB Case Nos. 01-014 and 01-015 (ARB Dec. 19, 2003) (although prequalification and solicitation materials stated that project located in Franklin County, Ohio, work was performed in Delaware County, Ohio and workers were entitled to higher prevailing wage rate for that location).

C. Sites which are not covered

1. Batch plants - truck drivers hauling asphalt from batch plant to site

In *L.P. Cavett Co. v. U.S. Dep't of Labor*, 101 F.3d 1111 (6th Cir. 1996), Cavett was awarded a contract to resurface ten miles of Indiana road. The contract specified that Cavett would perform surface and shoulder removal, widening of the highway, and then resurfacing with a bituminous mix. The parties decided that a bituminous plant would be established approximately three miles from the midpoint of the highway to be reconstructed. Cavett obtained a subcontractor to haul materials, supplies, and equipment from the bituminous batch plant to the highway. This subcontract did not contain a Davis-Bacon prevailing wage standard. The DOL determined that the truck drivers hauling asphalt from the batch plant to the highway site should have been paid at the prevailing wage rate because the batch plant could be considered as part of the "site of the work" and assessed \$11,202 in back wages against Cavett. The Wage Appeals Board and magistrate upheld this determination.

The Sixth Circuit Court of Appeals held that the phrase "directly upon the site of the work" in the statute is not ambiguous, and it followed the D.C. Circuit which had ruled that the provisions in the Davis-Bacon Act were unambiguously intended to apply only to workers on the actual physical site of the public work. *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994); *Building & Construction Trades Dep't. AFL-CIO v. U.S. Dep't of Labor Wage Appeals Bd.*, 932 F.2d 985 (D.C. Cir. 1991) ("Midway" case). In *Ball*, subcontractors transporting sand and gravel from a batch pit two miles from the nearest point of the construction site were not covered. In *Midway*, the court found that the phrase "mechanics and laborers employed directly on the site of the work" restricted the coverage to employees working directly on the physical site of the building." Thus, stating that it was not unreasonable to conclude that a facility located three miles from the site was not considered a part of that site, the court in *L.P. Cavett Co. v. U.S. Dep't of Labor*, 101 F.3d 1111 (6th Cir. 1996), ruled that the employees at issue were not working directly at the site of the work and, therefore, Cavett was not responsible for payment of the prevailing wage rate.

In *Bechtel Constructors Corp.*, 1991-DBA-3 (ALJ Aug. 21, 1997) (remand from ARB Case No. 95-045A), the ALJ held that batch plants located 2 to less than 1/4 miles from the construction site were not on the "site of the work" pursuant to the regulation at 29 C.F.R. § 5.2(l). See *Building and Const. Trades Dep't, AFL-CIO v. U.S. Dep't of Labor Wage Appeals Board (Midway)*, 932 F.2d 985 (D.C. Cir. 1991).

2. Transportation to and from dedicated borrow pit

In *Les Calkins Trucking*, 1990-DBA-65 (ALJ July 13, 1995), the ALJ cited to *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994) and held that the statutory phrase "employed directly upon the site of work," means "employed directly upon the site of work." Consequently, laborers who fit that description are covered by the statute. *Id.* at 1452-53. On the other hand, those workers who are not employed directly upon the site of work are not covered by the DBA. *Id.* at 1453. Based on the facts before him, the ALJ concluded that employees engaged in the transporting of materials from a dedicated borrow pit to the actual construction site were not entitled to the prevailing wage rate under the Davis-Bacon Act.

3. Tow truck operators assisting motorists on public highways

In *Aetna Bridge Holding Co. v. Coletta's Downtown Auto Services, Inc.*, ARB Case No. 97-095, 1994-DBA-54, slip op. at 2 (ARB Oct. 29, 1996), the ARB held that tow truck drivers who assist motorists and tow disabled vehicles from travel lanes on a bridge undergoing repair are not "laborers" or "mechanics" performing "construction" within the meaning of the DBA and its related Acts, specifically the Federal-Aid Highway Act, 23 U.S.C. § 113. The applicable wage determination did not contain a wage for tow truck drivers, but the Wage and Hour Administration argued that the tow trucker drivers should have been paid the wages provided in the wage determination for two-axle heavy or highway construction vehicles. The ALJ determined that the tow truck drivers performed work on the site of the construction, as required by the DBA, because they were located in actual or virtual adjacency to the construction site. He also found that the drivers are analogous to employees of traffic service companies who set up and service traffic control devices and are specifically covered by the DBA. The ARB disagreed, stating that the tow truck drivers were clearly not part of a construction crew and that their service was provided as a convenience to the public. Slip op. at 2-3. The tow truck operators performed no work that facilitated the completion of the construction project, and the ARB held that, under these facts, the work performed was too removed and weakly connected with actual construction work for the tow truck operators to be considered "laborers" or "mechanics" under the DBA and related Acts. See also *Aleutian Constructors and Universal Services, Inc.*, WAB Case No. 90-11 (WAB Sept. 27, 1991) (holding that food service workers and janitors were too indirectly tied to the construction project to be covered).

C. Sites that are covered

1. Batch plant employee - site was integral and adjacent to work area for long, continuous project ("dedicated" plant)

In *Bechtel Constructors, Corp.*, ARB Case No. 95-045A (ARB July 15, 1996), Respondents were engaged in a massive construction project consisting of 330 miles of aqueduct and pumping plants. Batch plants were constructed near each of the pumping stations under construction, but were also used to supply concrete for the aqueduct construction. The issue was whether employees at the temporary batch plants were employed on the "site of work" and consequently covered by the DBA. See 29 C.F.R. § 5.2(l)(1). The ARB interpreted the decision of the D.C. Circuit in *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994), to permit coverage of workers working at "temporary batch plants on land integrated into the work area adjacent to the pumping plants." The Board also held that in work of the kind involved in the case before it, where the project consisted of miles of narrow aqueduct, "work performed in actual or virtual adjacency to one portion of the long continuous project is to be considered adjacent to the entire project." The ARB thereby rejected an interpretation that the *Ball* decision requires that the statutory phrase "directly upon the site of the work" limits the wage standards of the DBA to the "physical space defined by contours of the permanent structures that will remain at the close of work."

The ARB noted that one Respondent argued that because "it supplied concrete to more than one contractor on the project, its temporary batch plants were not dedicated exclusively to one contract and therefore the functional test was not satisfied which the regulations and our predecessor, the Wage Appeals Board applied in determining whether work was performed on site. *United Construction Co.*, WAB Case No. 82-10, January 14, 1983." The Board found, however, that "the applicable section of

the regulations, Section 5.2(l)(1) does not explicitly contain a functional test" and that "to the extent that a functional test is read into Section 5.2(l)(1), the Board refuses to draw an artificial distinction between one portion of the project that is let under one contract and another portion of the same project that is let under a separate contract." (footnote omitted). *See also Phoenix-Griffin Group II, Ltd. v. Chao*, 376 F.Supp.2d 234 (D.R.I. 2005) (workers at a pre-fabrication facility "dedicated" to producing material for a Davis-Bacon-covered worksite are covered); *Winzler Excavating Co.*, 1987-DBA-3 (ALJ Feb. 17, 1988), *aff'd.*, WAB Case No. 91-02 (WAB, Feb. 23, 1993) (a borrow pit located 12 miles from the sewer construction site was covered); *Abhe & Svoboda, Inc.*, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB July 30, 2004), *recon. denied* (ARB Oct. 15, 2004), *aff'd*, 508 F.3d 1052 (D.C. Cir. 2007).

2. Off-duty police officers directing traffic

In *Superior Paving & Materials, Inc.*, 1998-DBA-11 (ALJ Feb. 19, 1999), *aff'd in relevant part*, ARB Case No. 99-065 (ARB June 12, 2002), the ALJ held that off duty police officers, who directed traffic around a federal highway construction site, were entitled to the prevailing wage rate as flaggers. The company argued that the police officers were independent contractors. Citing to *N.B.A. Enterprises, Ltd.*, CCH Lab. Cas. Admin. Rulings 32,068 (WAB 1991), the ALJ held that "if a person works on a job site covered by the Davis-Bacon Act, that person is an employee within the meaning of the Act regardless of the contractor. Congress clearly intended covering such workers regardless of the attempts of the contractor to distance itself from Davis-Bacon obligations." In affirming the ALJ's decision, the Board noted that the police officers "performed the manual and physical work of 'flaggers'" and they were, therefore, "laborers" under the Act. The Board stated that the terms "laborer" and "mechanic" are defined as follows in the regulations:

The term laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), distinguished from mental or managerial The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual.

29 C.F.R. § 5.2(m) (2001). *See also Arliss D. Merrell, Inc.*, 1994-DBA-41 (ALJ Oct. 26, 1995).

3. Warehouse workers

In *Dworshak Dam, Idaho*, WAB Case No. 72-04 (WAB June 1, 1973) (holding that duties of warehouse workers were directly related to the completion of the project such that they were covered).

4. Lease for construction of federal facility

In *Phoenix Field Office, Bureau of Land Management*, ARB Case No. 01-010 (ARB June 29, 2001), the ARB held that the Bureau of Land Management's (BLM) "lease" contract for construction of a field office building in Phoenix was subject to the DBA's prevailing wage requirements. In so holding, the ARB stated that "Davis-Bacon coverage does not depend on the contracting agency exercising complete authority over the building that will be leased" and it cited to *Military Housing, Ft. Drum, New York*, WAB Case No. 85-16 (Aug. 23, 1985) wherein the Wage Appeals Board held that the DBA applies to "a

lease construction contract even while explicitly recognizing that the developers had some flexibility with regard to building design, materials, and equipment."

VIII. Compensation

A. Constitutes part of prevailing wage rate; properly deemed a fringe benefit

Of central importance in determining whether certain fringe benefits are properly credited against a worker's prevailing wage rate is whether the fringe benefit is "vested." In **Cody Zeigler, Inc.**, ARB Case Nos. 01-014 and 01-015 (ARB Dec. 19, 2003), the Board held that "pension or other fringe benefit plans which provide for immediate vesting are similar to deferred cash payments, whereas a fringe benefit plan that does not provide for immediate vesting is not the functional equivalent of a deferred cash payment that is creditable for DBA purposes."

Moreover, citing to 40 U.S.C. § 3142(2)(B) and 29 C.F.R. § 5.29(c) and (d), the Board noted that "a particular fringe benefit need not be recognized beyond a particular area for the Secretary to find it prevailing in that area; but in the ordinary case a fringe benefit will be considered *bona fide* only if it is common in the construction industry." **William J. Lang Land Clearing, Inc.**, ARB Case Nos. 01-072 to 01-079, 1998-DBA-1 through 6 (ARB Sept. 28, 2004), *aff'd*, **William J. Lang Land Clearing, Inc. v. Administrator, Wage and Hour Div.**, 520 F. Supp. 2d 870 (E.D. Mich. 2007), *aff'd*, Case No. 07-2423, 2008 WL 3287097 (6th Cir. Aug. 6, 2008) (unpub.).

1. Contributions to employee pension plans

In **Cody Zeigler, Inc.**, ARB Case Nos. 01-014 and 01-015, 1997-DBA-17 (ARB Dec. 19, 2003), the Board held that "only the proportion of the pension fund contributions attributable to Davis-Bacon work is credited toward the prevailing wage requirement." The Board noted that Employer contributed to the pension fund at a rate that varied depending on an employee's job classification while working on a Davis-Bacon contract. Employer also contributed "at a lower flat rate for all employees when working on a private, non-Davis-Bacon project." Employer was not permitted to take a credit for pension plan contributions based on non-Davis-Bacon work. *But see* **Mistick v. Reich**, 54 F.3d 900 (D.C. Cir. 1995) (pension plan contributions not required to be annualized as the Department "presented no evidence that Employer (was) funding its private pension fund contributions with Davis-Bacon Act work" and the plan was vested).

B. Does not constitute part of prevailing wage rate

1. Bonuses

In **Cody Zeigler, Inc.**, 1997-DBA-17 (ALJ Apr. 7, 2000), *aff'd in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB Dec. 19, 2003), the ALJ disallowed Respondents' Christmas bonus as a fringe benefit. Citing to **Cody-Zeigler, Inc.**, WAB Case No. 89-19 (WAB Apr. 30, 1991), the ALJ held that bonuses do not constitute *bona fide* fringe benefits or wages under the Davis-Bacon Act.

In **William J. Lang Land Clearing, Inc.**, 1998-DBA-1 through 6 (ALJ Feb. 22, 2001), *aff'd in relevant part*, ARB Case Nos. 01-072 to 01-079 (ARB Sept. 28, 2004), *aff'd*, **William J. Lang Land Clearing, Inc. v. Administrator, Wage and Hour Div.**, 520 F. Supp.2d 870 (E.D. Mich. 2007), *aff'd*, Case No. 07-2423, 2008 WL 3287097 (6th Cir. Aug. 6, 2008) (unpub.), the ARB upheld the ALJ's finding that "the irregularly made cash payments to employees were not bona fide vacation fringe benefits"; rather, they constituted "bonus" payments that could not be considered fringe benefits under the Act. The Board cited to testimony of the employees and pre-hearing deposition testimony in support of finding that the irregular cash payments were "bonuses."

2. Employer's administrative costs

In **Cody Zeigler, Inc.**, 1997-DBA-17 (ALJ Apr. 7, 2000), *aff'd in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB Dec. 19, 2003), the ALJ cited to **Collinson Construction Co.**, WAB Case No. 76-09 (WAB, Apr. 20, 1997) and held that Employer improperly sought to claim its administrative costs in providing employee benefits as a fringe benefit. Employer argued that 29 C.F.R. § 5.5(a)(1) provided for a deduction for such costs. However, the ALJ noted that Employer was required to obtain approval from the Secretary of Labor before making these payments to a third party to administer the employees' benefits which it failed to do.

3. Vacation and holiday benefits, unfunded plans

In **Cody Zeigler, Inc.**, 1997-DBA-17 (ALJ Apr. 7, 2000), *aff'd in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB Dec. 19, 2003), the ALJ noted that vacation plans are among the enumerated fringe benefits at 29 C.F.R. § 5.29. However, he found that Employer's plan was unfunded "as there (was) no evidence that Employer relinquished control over the fringe benefit funds involved." As an unfunded plan, the ALJ noted that it did not comply with the requirements of 29 C.F.R. § 5.28(b). He stated that there was no evidence that Employer "had provided a written explanation of the vacation plan to its employees or that it even had a written plan." Slip op. at 37. Moreover, the ALJ found that employees were not eligible for the vacation plan until they had worked for the company for one year such that those working for Employer less than a year "clearly could not legally enforce their rights pursuant to § 5.27(b)(2) to the amount deducted from their prevailing wage for this claimed benefit." As a result, the ALJ ordered Employer to pay back wages to those employees ineligible for vacation or who did not receive their vacation. *See also William J. Lang Land Clearing, Inc.*, 1998-DBA-1 through 6 (ALJ Feb. 22, 2001), *aff'd in relevant part*, ARB Case Nos. 01-072 to 01-079 (ARB Sept. 28, 2004), *aff'd*, **William J. Lang Land Clearing, Inc. v. Administrator, Wage and Hour Div.**, 520 F. Supp. 2d 870 (E.D. Mich. 2007), *aff'd*, Case No. 07-2423, 2008 WL 3287097 (6th Cir. Aug. 6, 2008) (unpub.) (vacation payments did not qualify as fringe benefits under 29 C.F.R. § 5.5(a)(1)(i) because they were not paid on a regular basis- *i.e.* , at least quarterly).

4. Apprentice training program; no "reasonable relationship" established

In **Royal Roofing Co.**, 1999-DBA-29 (ALJ June 11, 2003), *aff'd*, ARB Case No. 03-127 (ARB Nov. 30, 2004), the ALJ held that, pursuant to **Miree Const. Corp. v. Dole**, 930 F.2d 1526 (11th Cir. 1991), Respondent violated the Act by taking "credit for excessive training contributions it made to . . . (the) apprenticeship training program" and the amount claimed by Respondent did "not bear a reasonable relationship to the actual benefit received by Royal Roofing employees." The ALJ noted that "contributions were taken from employees' paychecks without their knowledge and without any

tangible benefit to the employees." Further, Respondent "failed to offer a reasonable explanation for the high administrative and legal expenses other than apparently as start-up costs either predating or postdating the period at issue . . ." The ALJ noted that Respondent deducted hourly contributions in the amounts of \$0 to \$6.99 from employees who were making the same wages. Moreover, Respondent admitted that \$0.20 per hour per employee was sufficient to meet training expenses. The ALJ found that the "unreasonableness of the excess contributions" was buttressed by the "erratic and disorganized manner in which employees were charged with fringe benefit contributions . . ." Specifically, the ALJ noted that fringe benefits payments to apprenticeship programs were charged "against both apprentices and journeymen despite journeymen lacking a direct benefit." Finally, the ALJ found the contributions were unreasonable because of Respondent's failure to place the contributions in a fund managed by a trustee or third person as required by 40 U.S.C. § 276a(b) and 29 C.F.R. § 5.26.

The ALJ concluded that "[u]sing funds contributed on behalf of Royal Roofing's employees to defend a case against these employees does not benefit these employees" and "[c]learly, this is not a 'fringe benefit' for these employees." The ALJ also noted that Respondents failed to notify employees, in writing, of the fringe benefit contributions as required by § 276a of the Act. Finally, the ALJ held that Respondent must apply the "annualization principle" to determine proper fringe benefit contributions per Davis-Bacon Act employee "when the actual contributions are not reasonably related to training": [T]he IRCC plan contemplates year round training and thus year-long benefits to the apprentices enrolled therein. Since Royal Roofing contributed only to the IRCC plan during Davis-Bacon projects and the IRCC plan contemplates year-round benefits for its apprentices, Royal Roofing's contributions must be annualized.

In this vein, the ALJ held that dividing Royal Roofing's total contribution into the IRCC plan in 1996 by the total number of hours working by Royal Roofing employees on all projects in 1996 in order to yield an annualized credit amount of \$.50 per hour for apprentice training for each Davis-Bacon employee.

As previously noted, the ALJ's decision was subsequently affirmed in ***Royal Roofing, Inc. v. Administrator, Wage & Hour Division***, ARB No. 03-127 (ARB Nov. 30, 1994). Notably, a federal district court and the Ninth Circuit also affirmed the ALJ's decision in ***Independent Roofing Contractors Council Apprentice Training Trust Fund ex rel, Royal Roofing, Inc. v. Chao***, Case No. 5:05-CV-03603 JW (N.D. Cal. Sept. 18, 2006), *aff'd*, Case No. 06-16983 (9th Cir. Nov. 14, 2008) (unpub.).

5. Profit-sharing plans

In ***Cody Zeigler, Inc. v. Administrator, Wage & Hour Division***, ARB Case Nos. 01-014 and 01-015 (ARB Dec. 19, 2003), the Board affirmed disallowance of Employer's claim for credit for contributions to a profit-sharing plan as a fringe benefit credit against the prevailing wage rate. See 29 C.F.R. § 5.28(b)(4).

6. Health insurance

In ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ Apr. 7, 2000), *aff'd in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB Dec. 19, 2003), the ALJ held that health insurance constitutes a *bona fide* fringe benefit which justifies a credit towards the prevailing wage determination. However, the ALJ found that the employer failed to properly account for co-pays and it used a "blended rate for family and individual health coverage rather than determining the benefit to each employee based on his or her type of coverage" such that back wages were due for these violations. Moreover, the ALJ held that it was

improper for the employer to seek a "deduction for benefits that employees were ineligible to receive" because they were on a union plan with a waiting period. *See also William J. Lang Land Clearing, Inc.*, 1998-DBA-1 through 6 (ALJ Feb. 22, 2001), *aff'd in relevant part*, ARB Nos. 01-072 to 01-079 (ARB Sept. 28, 2004), *aff'd*, *William J. Lang Land Clearing, Inc. v. Administrator, Wage and Hour Div.*, 520 F. Supp. 2d 870 (E.D. Mich. 2007), *aff'd*, Case No. 07-2423, 2008 WL 3287097 (6th Cir. Aug. 6, 2008) (unpub.) (it was improper to take a prevailing wage credit by averaging more expensive family premiums with less expensive individual premiums).

7. Meals and lodging

In *William J. Lang Land Clearing, Inc.*, ARB Case Nos. 01-072 to 01-079, 1998-DBA-1 through 6 (ARB Sept. 28, 2004), *aff'd*, *William J. Lang Land Clearing, Inc. v. Administrator, Wage and Hour Div.*, 520 F. Supp. 2d 870 (E.D. Mich. 2007), *aff'd*, Case No. 07-2423, 2008 WL 3287097 (6th Cir. Aug. 6, 2008) (unpub.), the ARB noted that the provisions at 40 U.S.C. § 276(b)(2)(B) provide for a number of fringe benefits which may be credited towards the prevailing wage rate, but the provisions do not specifically mention meals and lodging. The ARB further concluded that meals and lodging do not constitute "other *bona fide* fringe benefits" that are creditable against the prevailing wage rate. In disallowing meals and lodging paid by Respondent for long-distance Davis-Bacon contracts, the Board reasoned:

The employee lodging and food expenses in this case were clearly undertaken for Lang's primary benefit. Lang could only perform its far distant DBA contracts (and benefit thereby) if its employees incurred the substantial detriment of traveling to locales far from their homes for most of every work week. Lang's employee travel to the 'special' out-of-area jobs served the primary purpose and benefit of the employer. Lang required employees to travel to the 'special' jobs as a condition of their employment. The employees had no choice but to travel on Lang's business in order to get and keep their jobs. (citations omitted). We accordingly conclude Lang's subsistence payments for its employees meals and lodging were for the primary purpose of furthering the employer's business and not for the primary benefit of the employees. These subsistence payments cannot be credited as acceptable DBA cash payments in lieu of fringe benefits.

Slip op. at 18. *See also Matter of Calculus, Inc.*, 1993 WL 537381, WAB Case No. 93-06 (WAB Oct. 29, 1993).

ARB FINDS IN SPLIT DECISION THAT A BALANCING OF BENEFITS TEST APPLIES TO DETERMINE WHETHER AN EMPLOYER IS OBLIGATED TO REIMBURSE EMPLOYEES FOR LODGING EXPENSES DAVIS-BACON ACT; REIMBURSEMENT FOR LODGING EXPENSES SHOULD BE BASED ON ACTUAL EXPENSES WHERE EMPLOYER LEFT IT TO EMPLOYEES TO FEND FOR THEMSELVES; PER DIEM MAY BE CONSIDERED, HOWEVER, WHERE IT WAS A PARTIAL PAYMENT FOR SUBSISTENCE COSTS

In *Weeks Marine, Inc.*, ARB Nos. 12-093, -095, ALJ No. 2009-DBA-6 (ARB Apr. 29, 2015), the ALJ concluded that the Respondent violated the Davis-Bacon Act (DBA) by failing to reimburse certain of its employees who did not live within daily commuting distances, for lodging costs for the amount above the per diem during the dredging of the beach at Fire Island, New York. The ALJ, however, rejected WHD's assessment that the Respondent owed \$21,831.35 in unreimbursed lodging costs to the employees based on their actual incurred lodging costs. Instead, the ALJ ordered the Respondent to pay a total of \$9,058.84 to the employees based on the lowest lodging rate incurred by the employees, less

credit for any CBA per diem received that was not previously credited against other violations pursuant to an earlier partial settlement. Both the Respondent and the WHD Administrator appealed to the ARB. The ARB stated that "the primary issue before [it] is whether an employer is obligated under 40 U.S.C.A. § 3142 of the Davis Bacon Act to reimburse lodging expenses incurred by employees who exclusively work for the employer at a job site beyond commuting distance from their home residence." USDOL/OALJ Reporter at 6. The ARB further stated that "[t]he question before us is thus whether, by requiring the Local 25 employees to pay their own lodging costs, Weeks Marine effectively shifted to the employees a cost that was the employer's obligation to bear; a cost that could not lawfully have been directly deducted from the employees' wages had Weeks Marine provided their lodging at company expense." *Id.* at 7.

Reviewing statutory and caselaw authorities, the ARB found that to determine whether the Respondent is obligated under the DBA to reimburse the employees their lodging costs, it must initially be determined "whether the employees' on-site, away-from-home lodging was primarily for the benefit and convenience of Weeks Marine or primarily benefited the Local 25 workers. If the substantial evidence of record supports the ALJ's finding that the lodging was primarily for Weeks Marine's benefit and convenience, the company is obligated to reimburse the employees, as the failure to do so would effectively constitute a de facto deduction in the employees' required prevailing wages. If, on the other hand, the lodging was primarily for the benefit of the employees, Weeks Marine is not obligated to reimburse the Local 25 employees, provided Weeks Marine establishes that it regularly furnishes such lodging to all of its employees or that the same or similar facilities are customarily furnished by other employers engaged in the dredging business." *Id.* at 11. The ARB remanded to the ALJ to make findings of fact on these questions.

The ARB rejected the Respondent's contention that a ruling requiring it to reimburse its employees' lodging costs constitutes an unlawful rule by adjudication and/or violates its due process rights. The ARB held that it rejected "both contentions to the extent that any final ruling eventually issued in this case is consistent with the 'balancing of benefits' test, which relies on established legal principles. While *KP&L*, *Lang*, and *Calculus* may address different contexts in which the applicability of 40 U.S.C.A. § 3142(c)(1) was raised, the test in each instance, equally applicable in this case (as has been discussed) is whether or not the lodging at issue is for the primary benefit and convenience of the employer or the employees. Consequently, if the final decision reached in this case requires Weeks Marine to reimburse its employees' lodging costs, that decision constitutes neither rulemaking through adjudication nor a violation of Weeks Marine's due process rights." *Id.* at 14 (footnote omitted). The precise nature of the Respondent's argument is not set out in the ARB's decision, but it appears to have been centered on whether a Respondent is required to affirmatively reimburse employees for lodging costs, as opposed to refraining from deducting those costs from their pay.

The ARB reversed the ALJ's determination that employees were only entitled to a discounted lodging reimbursement. The ARB found that should the employees ultimately be found to prevail, they would be entitled to reimbursement of actual lodging costs because "40 U.S.C.A. § 3142(c)(1) requires the "unconditional" payment of the prevailing wage without deduction or rebate." *Id.* at 14. The ARB, however, found that the per diem payment, which was effectively a partial reimbursement for subsistence costs, could be taken into consideration in calculating the amount of any reimbursement owed. The ARB found that the Respondent, by leaving it to the employees to find their own lodging, placed itself at risk for paying whatever lodging costs the employees were forced to assume. The ARB suggested that an employer subject to the DBA had options, such as providing reasonable lodging, or identifying reasonable lodging for which the employer would provide reimbursement.

One member of the ARB panel dissented:

I would reverse the ALJ and, therefore, respectfully dissent for several reasons. I will simply list those reasons due to the age of this case and that we are remanding it for further consideration. The precise question I see in this unique case is whether federal law requires Weeks Marine to pay the relocation, lodging, and food expenses of a non-employee (new hire) who accepts new employment at a worksite disclosed in the job solicitation for employment under the facts of this case. In my view, none of the law cited by the Administrator (statutes, regulations, written guidance policy manual, cases) requires the payment of such extraordinary expenses for a new employee who chooses to work away from his home. After the bidding and contracting process ended in this case, nothing in the record shows that a payment of this extraordinary expense was required or that such payment was the prevailing practice in the industry. Weeks Marine hired individuals for a job at Fire Island, New York. Folks who took that job chose to go there. The record is unclear about the emergency work in Philadelphia and perhaps that needs to be clarified. To send this back to the ALJ to apply a "balancing test" assumes that there is a statute, regulation, or other binding law that would potentially obligate Weeks Marine for the expenses sought in this case. I believe the "benefit of the employer" rule does not apply to this case. In my view, Congress must pass this type of legislation.

Id. at 16.

ADMINISTRATOR FAILED TO REBUT PRESUMPTION THAT LODGING IS FOR THE BENEFIT OF EMPLOYEES WHERE: EMPLOYEES WERE REQUIRED TO TRAVEL IF THEY WANTED TO REMAIN ACTIVELY EMPLOYED—EMPLOYEES HIRED OFF OUT-OF-WORK LIST OF LOCAL UNION EMPLOYEES DID NOT HAVE EXPECTATION OF WORKING IN ANY ONE LOCATION OR PRIMARILY IN THEIR PLACE OF RESIDENCE—CBA PROVIDED FOR A PER DIEM—EMPLOYEES STAYED AT MOTELS OR HOTELS BECAUSE THEY WERE NOT RESIDENTS OF THE AREA

In *Weeks Marine, Inc.*, ARB No. 2017-0076, ALJ No. 2009-DBA-00006 (ARB Mar. 10, 2020), the ARB had previously remanded the case for the ALJ to indicate what evidence was weighed when finding that lodging secured for nine Local 25 employees was primarily for the benefit of Weeks Marine, Inc. ("Weeks"), the contractor on a dredging project subject to the Davis-Bacon Act ("DBA"). The question was whether Weeks was liable for lodging costs above a \$35 per diem provided for by the collective bargaining agreement. On remand, the ALJ made further findings of fact, weighed the balance of the benefits, and again concluded that the housing primarily benefited Weeks. The ALJ ordered payment of \$17,006.55 to the Local 25 employees for the underpayment. On appeal, the ARB reversed, vacated the ALJ's award of relief, and remanded with instructions for the ALJ to deny the claim for relief. The ARB first outlined the relevant provisions of the DBA, the Copeland Act, the Fair Labor Standards Act, the implementing regulations, and the Second Circuit's decision in *Soler v. G. & U. Inc.*, 833 F.2d 1104 (2d Cir. 1987). The ARB noted that under *Soler*, the Administrator has the burden to rebut a presumption that lodging is for the benefit of the employees by showing that the lodging instead benefited the employer. The ARB stated that it agreed with Weeks that "the DBA does not affirmatively require an employer to pay employee lodging costs in addition to prevailing wage and fringe benefits and the ALJ erred in so concluding." Slip op. at 5. The ARB also looked to the Wage and Hour Division's Field Operations Handbook ("FOH") for guidance on what constitutes rebuttal evidence. Taking all this into consideration, the ARB held that:

the Administrator can rebut the presumption that lodging is primarily for the benefit of the employee by showing that the employee fits under the on-the-road exception, where the employee is required to live on site, where the employee has to be “on call,” or where the employee is burdened by the lodging for the convenience of the employer.

Id. at 7.

In the instant case, the ARB found that testimony that most dredging jobs are not near employees’ homes and require employees to travel to the work site was sufficient to invoke the presumption that the lodging secured by Weeks for the Local 25 employees was for the benefit of those employees. The ARB was not persuaded by the findings relied on by the ALJ to find that the Administrator rebutted the presumption: that dredging employers need experienced and qualified employees to further the employer’s job; that Local 25 employees were more specialized than Local 138 employees, as they were capable of operating more sophisticated machinery but who may live outside the commuting area; that the CBA’s partial payment supported an inference that the expense benefits the employer; and that local lodging allowed the employees to work long shifts which allowed for timely completion of the project.

The ARB determined that none of these reasons was relevant rebuttal. The ARB observed that the ALJ had not cited findings that Local 25 employees were “on the road” or that Weeks mandated where they stayed. The ARB stated the Local 25 employees were not “on call” and that it could not be said that where the employees chose to live was for the convenience of Weeks. The ARB was not persuaded by the comparison to Local 138 employees as those employees worked under a different CBA. The ARB also distinguished the caselaw precedent relied on by the ALJ. The ARB determined that the ALJ had made sufficient findings of fact for the ARB to conclude that the WHD failed to rebut the presumption. Specifically, the ARB pointed to the following findings of fact:

- Local 25 members are required to travel throughout the territorial zone covered by the Local 25 CBA if they want to remain actively employed.
- Employees hired off of an out-of-work list of Local 25 employees “are not hired with the expectation that they are going to work for the company in any one location or to work primarily in their place of residence.”
- The CBA provides for a minimum subsistence allowance of thirty-five dollars a day to defray the costs of obtaining housing, meals, laundry, and work clothes.
- The Employees stayed at motels or hotels during the Fire Island job because they were not residents of the area and had to reside within commutable distance of the job site.

Id. at 8-9 (citations to ALJ decision omitted).

C. Overtime wages cannot be reduced by fringe benefits

In *Cody Zeigler, Inc.*, 1997-DBA-17 (ALJ Apr. 7, 2000), *aff’d in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB Dec. 19, 2003), the ALJ held that the regulations at 29 C.F.R. §§ 5.32(a) and 5.32(c)(2) prohibit the reduction of overtime rates based on Davis Bacon fringe benefit contributions. He cited to *Delta Construction*, WAB Case No. 81-15 (WAB Sept. 20, 1983) and held that “[c]ash wages may not be reduced when determining overtime wages.”

D. Integral and indispensable part of the principle activity, compensation required

In *Pythagoras General Contracting Corp.*, 2005-DBA-14 (ALJ June 4, 2008), *aff'd*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011), Respondent had a contract with the New York Housing Authority to renovate interiors and exteriors of residential buildings. Respondent argued that employees should only be compensated for performing actual work on the buildings. The ALJ, on the other hand, held that “the time Pythagoras employees spent gathering tools and supplies and receiving daily instructions is an integral and indispensable part of the principle activity (of renovating the buildings), and, therefore, these actions are compensable” under *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956).

IX. Relief

A. Debarment

1. Generally

a. Different debarment standards under DBA and DBA-related acts

DEBARMENT STANDARDS ARE DIFFERENT UNDER THE DAVIS-BACON ACT (DBA) AND THE DAVIS-BACON RELATED ACTS (DBRA); DBA STANDARD IS MERE DISREGARD WHERE AS DBRA STANDARD IS AGGRAVATED OR WILFUL; DBA STANDARD MANDATES A THREE-YEAR PERIOD OF DEBARMENT WHEREAS DBRA DEBARMENT IS “NOT TO EXCEED” THREE YEARS

In *Administrator, Wage and Hour Div., USDOL v. Coleman Construction Co.*, ARB No. 15-002, ALJ No. 2013-DBA-4 (ARB June 8, 2016), the ARB found that the ALJ had erred by conflating the standards for debarment under the Davis-Bacon Act, and the standard under the Davis-Bacon Related Acts. The ARB explained:

The legal standards for debarment under the Davis-Bacon Act are different from the legal standards for debarment under Davis-Bacon Related Acts. Under the Davis-Bacon Act, the Comptroller General keeps “a list of the names of persons whom the Comptroller General has found to have disregarded their obligations to employees.” Davis-Bacon prohibits federal contracts from being awarded to such persons “until three years have elapsed from the date of publication of the list.”

In contrast, the National Housing Act and Contract Work Hours and Safety Standards Act, the two Davis-Bacon Related Acts under which this case is being brought, do not include a debarment provision. Rather, it is the Department of Labor regulations, duly promulgated pursuant to Reorganization Plan No. 14 of 1950, that provide for debarment for violations of a Related Act. While similar to the Davis-Bacon Act language, the relevant regulatory language applicable to Related Acts is not identical. The relevant provision prohibits the awarding of federal contracts to those “found . . . to be in aggravated or willful violation ” of the labor standards provisions of a Davis-Bacon Related Act and

imposes debarment “for a period not to exceed 3 years.” In other words, debarment under the Davis-Bacon Act differs from debarment under Related Acts in two substantive ways: First under Davis-Bacon, the standard for debarment is relatively low—a mere “disregard[ing]” of one’s obligations suffices—whereas under Related Acts such as at issue here, the standard for debarment is a tad more stringent—one has to have been in “aggravated or willful violation” of the relevant labor standards provisions. Second, the Davis-Bacon Act and implementing regulations mandate a three-year period of debarment, whereas under a Related Act, the regulations provide for a debarment period “not to exceed 3 years.”

USDOL/OALJ Reporter at 16-17 (footnotes omitted). In the instant case, the ALJ’s conflation of the two standards was harmless because the Respondent’s violations unequivocally were deliberate and intentional within the meaning of the regulatory “willful” standard. The ARB noted that its predecessor, the Wage Appeal Board, held that “once the Administrator shows that a violation is ‘aggravated or willful,’ debarment should be for the full three years except in ‘extraordinary circumstances.’” *Id.* at 80 (footnote omitted). In the instant case, the Respondent knowingly misclassified workers, and purposely destroyed time records in an attempt to shortchange workers of nearly \$100,000 in wages. The ARB noted that this was precisely the type of behavior for which a three year debarment will be upheld. The ARB also debarred the subcontractor’s president.

STANDARD FOR DEBARMENT FOR A DAVIS-BACON RELATED ACT VIOLATION IS HEIGHTENED, REQUIRING A FINDING OF A WILLFUL OR AGGRAVATED VIOLATION; ALJ’S APPLICATION OF WRONG STANDARD MAY BE HARMLESS ERROR WHERE SHE FOUND A WILLFUL VIOLATION, BUT ONLY IF THE FINDING OF WILLFUL VIOLATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE (WHICH IN THE INSTANT CASE IT WAS NOT)

WILLFUL OR AGGRAVATED VIOLATION OF A DAVIS-BACON RELATED ACT (DBRA) REQUIRES ACTUAL KNOWLEDGE OR AWARENESS OF THE VIOLATION, AND NOT MERELY ONE’S OBLIGATIONS UNDER THE DBRA OR ANY APPLICABLE CONTRACTS

In *J.D. Eckman, Inc.*, ARB No. 2017-0023, ALJ No. 2015-DBA-00030 (ARB July 9, 2019) (per curiam), the ALJ had ordered certain Respondents (a first-tier subcontractor — 446 Painting — and its president — Hauth) to be debarred for violating the prevailing wage provisions at 29 C.F.R. § 5.5(a)(1) and (4), in a matter involving the Federal-Aid Highway Act, which is a Davis-Bacon Related Act (DBRA). On appeal, it was uncontroverted that the ALJ had cited the wrong debarment standard. She had “applied the debarment standard for the DBA [29 C.F.R. § 5.12(a)(2)] (requiring only a disregard of obligations for debarment), rather than the heightened requirement for debarment for DBRA violations [29 C.F.R. §5.12(a)(1)] (requiring a willful or aggravated violation for debarment).” Slip op. at 4-5 (footnotes omitted). The WHD Administrator, however, argued that this was harmless error because the ALJ had found that the Respondents in question had willfully violated the Act. The ARB stated that this finding may have been dispositive if supported by substantial evidence—however it was not. The ALJ had relied on the fact that a then vice-president of one of the Respondents had failed to read the “DBA” provisions in the contract and had not ensured compliance as warranted. The ARB wrote:

Willful or aggravated violation of the DBRA requires actual knowledge or awareness of the violation, and not merely one’s obligations under the DBRA or any applicable

contracts. The closest the ALJ came to finding that Hauth had any knowledge of violations was “that he was at least on notice that there was a delay in Panthera’s payrolls” because of “paperwork requirements, ” despite his and Respondent Manganas’ denials at the hearing that Hauth had anything to do with payroll. While these findings of constructive knowledge may tend to support a “disregard of obligations” debarment standard, they fall significantly short of satisfying the appropriate “aggravated or willful” standard. Indeed, the Assistant District Director for the district office of the Wage and Hour Division testified that other than the contract that originated the work in this case, he did not have any documentation that would support a contention that Hauth willfully violated the Act. . . . He also testified that there was no evidence that Hauth knew about a violation other than that he represented himself as vice-president and signed the contract as such. . . . Thus, we hold that the ALJ’s putative finding that Hauth “committed willful violations of the DBA,” . . . is not supported by a preponderance of the evidence of record.

Slip op. at 6 (citations and footnotes omitted) (emphasis as in original). The ARB also found that the ALJ’s finding that Respondent Hauth was not “entirely credible” did not constrain a reversal by the ARB, as credibility was not relevant to the ALJ’s legal error; her credibility determination was ambiguous insofar as it was not linked to any specific findings of fact related to the error; and the ALJ’s reference in relation to the credibility determination to the “DBA” rather than the “DBRA” was clearly erroneous. The ARB remanded for the ALJ to issue revised findings of fact and conclusions of law consistent with the record, the ARB’s decision, and the correct regulation.

b. Debarment is remedial, not punitive

In finding that Respondent failed to pay the prevailing wage and fringe benefits and misrepresented that rates paid to the contracting agency, the ALJ, in **Minor Construction Co.**, 1995-DBA-42 (ALJ June 12, 1997), held that debarment for three years was a remedial measure, rather than a punishment. *See also Palisades Urban Renewal Enterprises, LLP*, 2006-DBA-1 (ALJ Aug. 3, 2007), *aff’d*, ARB Case No. 07-124 (ARB July 30, 2009) (debarment is intended to be “remedial” in nature; violations of the Act “do not *per se* result in debarment”) (on appeal to the ARB, Case No. 07-124); **S.A. Healy Co. v. Occupational Safety & Health Review Comm’n**, 96 F.3d 906, 911 (7th Cir. 1996); **United States v. Bizzell**, 921 F.2d 263, 267 (10th Cir. 1990); **Bae v. Shalala**, 44 F.3d 489, 493 (7th Cir. 1995).

c. Intent to violate required

In **Pythagoras General Contracting Corp.**, 2005-DBA-14 (ALJ June 4, 2008), *aff’d*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011), the Administrative Law Judge properly concluded that debarment was warranted because company officials signed and certified the accuracy of incomplete and inaccurate payroll records reflecting misclassification of workers, these records were “manipulated” with regard to one employee, the company did not correct ongoing violations to ensure future compliance, and company officials engaged in attempted witness coercion or intimidation. The only modification made by the Board was that the back pay and fringe benefit award was increased from the judge’s finding of \$447,670.36 to \$792,396.19.

In **Sundex, Ltd.**, ARB Case No. 98-130, 1994-DBA-58 (ARB Dec. 30, 1999), the ARB declined to disturb the ALJ’s findings that the contractor’s owner was not a credible witness and violations of the Davis-Bacon Act and the CWHSSA were committed. The ARB noted that the ALJ’s findings were based

upon his first-hand observations of the witness' demeanor on the stand. Turning to the issue of debarment, the ARB found that establishment of a "level of culpability beyond mere negligence, involving some element of intent" was required. Citing to **G&O General Contractors, Inc.**, WAB Case No. 90-35 (WAB Feb. 19, 1991), the ARB stated that, once an intentional violation is established, "the standard for debarment is a 'bright-line' test, *i.e.* a 3-year debarment period is mandatory, without consideration of mitigating factors or extraordinary circumstances." The ARB noted that, while there is a statutory debarment provision under the Davis-Bacon Act, the DOL's regulations also provide for debarment for violations of "related acts," including the CWHSSA. Therefore, where the contractor intentionally failed to pay proper overtime as required by the CWHSSA, the ALJ properly entered an order of debarment.

*For additional cases, see **Cody Zeigler, Inc. v. Administrator, Wage & Hour Division**, ARB Case Nos. 01-014 and 01-015 (ARB Dec. 19, 2003) (employer was on notice that certain fringe benefit costs could not be credited against the prevailing wage rate and fact that Employer still claimed a credit constituted a "willful" violation); **Thomas and Sons Building Contractors, Inc.**, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB Aug. 27, 2001), *order denying reconsideration* (ARB Dec. 6, 2001) ("disregard for obligations" under the Act means a level of culpability beyond mere negligence, involving some element of intent; "once a violation is established, the standard for debarment is a 'bright line' test, *i.e.*, a three-year debarment period is mandatory, without consideration of mitigating factors or extraordinary circumstances"); **Berbice Corp.**, 1998-DBA-9 (ALJ Apr. 16, 1999) (evidence must establish a level of culpability beyond mere negligence).*

DEBARMENT REQUIRES DISREGARD OF OBLIGATIONS UNDER THE DAVIS BACON ACT INVOLVING SOME ELEMENT OF INTENT

In **NCC Electrical Services, Inc.**, ARB No. 13-097, ALJ No. 2012-DBA-6 (ARB Sept. 30, 2015), the ARB Majority (Igasaki and Corchado) upheld ALJ's summary decision that Respondents falsely certified nine employees on project as part of a bona fide apprenticeship program, and misclassified employees as "apprentices" or "laborers" as opposed to electricians. Board Majority finds that while mere violations of obligations under the law do not constitute a "disregard," for debarment, evidence must establish a level of "culpability beyond negligence." "Some element of intent" is required although intent need not arise to "willful attempts to *avoid* the DBA's requirements." (Italics in original) Admission of subcontractor that he created his own classifications based on the applications, resumes, licensure, and experience of employees rather than the work performed as required under the DBA; its certification of apprenticeship program without verification of certification; and its failure to review DBA requirements, reflects necessary "element of intent." Three year debarment upheld.

Dissent (Brown) would have found that Napie's testimony created a sufficient issue of material fact as to "intent." Dissent asserts that prior cases do not support Majority's conclusions as to intent. He would remand for an evidentiary hearing.

d. Authority to lessen three year period of debarment

i. ALJ without authority

In **Structural Concepts, Inc.**, 1994-DBA-23 (ALJ Feb. 23, 1995), the ALJ held that while mitigating factors may affect debarment under labor standards regulations, they do not have an impact on the

debarment issue under the Davis-Bacon Act. 29 C.F.R. § 512(a)(1). Additionally, it was held that an ALJ lacks the discretion to lessen the three year period of debarment as contained in 40 U.S.C. § 276(a)(2).

ii. Administrator has authority

Abuse of authority

In **Bhatt Contracting Co.**, ARB Case No. 97-068, 1993-DBA-124 (ARB Jan. 26, 1998), the ARB rejected the "untimely decision" of the Administrator who denied the contractor relief from debarment. The ARB noted that the Acting Administrator "breached a material term of the consent decree by not placing Bhatt on the ineligible list for nine months." Moreover, the ARB stated that the Acting Administrator "failed to take advantage of the remedial nature of our prior ruling by not 'immediately' issued a decision regarding Bhatt's renewed request for relief." Rather, the ARB noted that it took the Acting Administrator 78 days to issue its denial of the contractor's request for relief from debarment pursuant to 29 C.F.R. § 5.12(c) (a contractor may request removal from the debarment list after six months). As a result, the ARB rejected the Acting Administrator's decision and determined that the contractor's petition set forth sufficient facts under § 5.12(c) to support relief from debarment.

d. Debarment of individuals, as well as company, authorized

In **Facchiano Const. Co. v. U.S. Dep't of Labor**, 987 F.2d 206 (3d Cir. 1993), the circuit court held that, pursuant to 29 C.F.R. § 5.12(a)(1), it was proper to debar responsible corporate officers, in addition to the company, for a period three years. However, the court declined to assess liability against corporate officers unless they had knowledge of the violations committed by their subordinates, *i.e.* their conduct was "willful or aggravated." See also **Pythagoras General Contracting Corp.**, 2005-DBA-14 (ALJ June 4, 2008), *aff'd*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011) (company president was also debarred as he had "constructive knowledge" that Respondent's employees were misclassified for wage payment purposes and his certified payroll records were not corrected to comply with the Act's requirements); **Abhe & Svoboda, Inc.**, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB July 30, 2004), *recon. denied* (ARB Oct. 15, 2004), *aff'd*, **Abhe & Svoboda, Inc. v. Chao**, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd*, 508 F.3d 1052 (D.C. Cir. 2007); **Ray Wilson Co.**, ARB Case Nos. 02-086, 2000-DBA-14 (ARB Feb. 27, 2004) (debarment of subcontractor and its president and vice president was proper because of disregard to employees); **Hugo Reforestation, Inc.**, ARB Case No. 99-003, 1997-SCA-20 (ARB Apr. 30, 2001) (owner and president of Respondent charged with supervision of day-to-day operations must be debarred for CWHSSA and SCA violations); **Berbice Corp.**, 1998-DBA-9 (ALJ Apr. 16, 1999); **Superior Masonry, Inc.**, 1994-DBA-19 (ALJ Oct. 13, 1994) (president and owner of company was debarred; he controlled and managed company operations and directed falsification of the payroll records).

e. CWHSSA and SCA violations - different debarment standards

In **Hugo Reforestation, Inc.**, ARB Case No. 99-003, 1997-SCA-20 (ARB Apr. 30, 2001), the ARB held the following with regard to debarment under the CWHSSA and SCA:

[T]he SCA and CWHSSA impose different standards for assessing liability for debarment. Under the CWHSSA - a Davis-Bacon Related Act - the burden is on the Secretary to

establish that the violations are 'aggravated or willful' such that debarment is warranted. 20 C.F.R. § 5.12(a). Under the SCA, on the other hand, debarment is presumed once violations of that Act have been found, unless the violator is able to show the existence of 'unusual circumstances' that warrant relief from SCA's debarment sanction. 29 C.F.R. § 4.188(a) and (b). *Ventilation and Cleaning Eng'rs., Inc.*, Case No. SCA-176 (Sec'y Sept. 27, 1974) Labor L. Rep. (CCH) ¶ 30,946.

The debarment sanction differs under the two Acts as well. By statute, debarment under the SCA is for three years, without modification. By comparison, under the Department's regulations and Board precedent, a contractor debarred under the Davis-Bacon Related Acts (including the CWHSSA) is placed on the ineligibility list for a period 'not to exceed' three years, 29 C.F.R. § 5.12(a)(1), from which the contractor may petition to be removed after six months. 29 C.F.R. § 5.12(c).

Accordingly, charges of CWHSSA violations (*e.g.*, overtime under payments and recordkeeping) must be analyzed under the Davis-Bacon Related Acts applicable to the CWHSSA, while SCA violations (*e.g.*, fringe benefit and holiday under payments, and recordkeeping) must be analyzed under the SCA debarment standard.

Slip op. at 8-9.

2. Debarment not proper

a. Unsuccessful attempts to pay required wages established

In *Mr. Paint, Inc.*, 1992-DBA-27 (ALJ Mar. 31, 1995), the ALJ examined what constitutes a disregard of obligation necessary to debar a respondent under the Davis-Bacon Act. The ALJ noted that a respondent's failure to pay the required wages to its employees alone does not equate to a disregard of obligation in support of debarment. When a respondent makes valiant efforts to pay employees, it has not disregarded its obligations under the Act.

b. No evidence of fraud; consistent payment practices

In *Cody Zeigler, Inc.*, 1997-DBA-17 (ALJ Apr. 7, 2000), the ALJ held that debarment was not warranted where there was "no evidence of altered records, fraud, deceit or any of the other telltale signs of knowing violation of the law." Slip op. at 40. The ALJ noted that the issues presented in the case were "highly technical" and Employer's "methods were consistent" and were unquestioned during prior audits.

3. Debarment proper

e. Falsification of payroll records

In *P & L Fire Protection, Inc.*, 1994-DBA-66 (ALJ May 15, 1997), the ALJ determined that debarment is warranted where a respondent has "disregarded its obligations to employees." Falsifying payroll records and certified payrolls constitutes a sufficient basis for debarment. *See also Dumarco*

Corp., Case No. 2005-DBA-7 (ALJ Apr. 27, 2006); **Abhe & Svoboda, Inc.**, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB July 30, 2004), *recon. denied* (ARB Oct. 15, 2004), *aff'd*, **Abhe & Svoboda, Inc. v. Chao**, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd*, 508 F.3d 1052 (D.C. Cir. 2007) (the Board held that underpayment of prevailing wages and submission of falsified payrolls "that masks the underpayments" constitute a willful violation of the DBRA and warrants debarment); **Commonwealth of Massachusetts v. U.S. Dep't of Labor**, Case No. 1998-JTP-6 (ALJ Oct. 29, 2001); **Star Brite Construction Co.**, ARB Case No. 98-113, 1997-DBA-12 (ARB June 30, 2000); **KP&L Electrical Contractors, Inc.**, 1996-DBA-34 (ALJ Dec. 31, 1998), *aff'd in part*, ARB Case No. 99-039 (ARB May 31, 2000) (failure to pay prevailing wages and failure to submit accurate certified payroll records in compliance with the Copeland Act constitutes grounds for debarment); **Fred Wiggins**, 1999-DBA-30 (ALJ Mar. 3, 2000); **Thomas & Sons Building Contractors, Inc.**, ARB Case No. 00-050, 1996-DBA-37 (ARB Aug. 27, 2001), *order denying reconsideration* (ARB Dec. 6, 2001) (Employer's "failure to offer any verifiable explanation of the discrepancies between the certified and home payroll records"); **Sundex, Ltd.**, 1994-DBA-58 (ARB Dec. 30, 1999) (significant discrepancies between the employee's paychecks and certified payrolls constituted violations of the Davis-Bacon Act and CWSSA sufficient to warrant debarment); **Superior Masonry, Inc.**, 1994-DBA-19 (ALJ Oct. 13, 1994) (debarment proper where Contractor falsified payroll records to simulate prevailing wage compliance); **Trataros Construction Corp.**, WAB Case No. 92-03 (WAB Apr. 28, 1993); **Ace Contracting Co.**, WAB 76-23 (WAB May 30, 1980); **Thomas L. Moore, T.A.M., Inc.**, WAB 79-5 (WAB Aug. 16, 1979).

Although the evidence in **P&N, Inc./Thermodyn Mechanical Contractors, Inc.**, ARB Case No. 96-116, 1994-DBA-72 (ARB Oct. 25, 1996) did not demonstrate flagrant, intentional payroll falsification, the circumstances clearly demonstrated that Respondent's misclassification of laborers, especially after the meeting with the Wage and Hour investigator, was more than merely negligent. Having been reminded of its obligations under the DBA and advised of its failure to fulfill those obligations by misclassifying and underpaying employees, Respondent was responsible for policing the supervision of such employees to ensure compliance with DBA requirements. Conduct which evidences intent to evade its DBA obligations, and a purposeful lack of attention to statutory responsibilities, support debarment. The ARB held that "blissful ignorance" is no defense to debarment. Consequently, rather than simply relaying the direction to the sheet metal foreman on site, Respondent's managers should have taken steps such as regularly visiting the site, observing the work being done, and reviewing payroll records, to ensure that the employees, who were actually performing the work of sheet metal mechanics, were being paid the proper hourly rate.

b. Actual or constructive knowledge of misclassification

The ALJ improperly required evidence that Respondent's officers had direct, certain knowledge that employees classified as laborers were performing the work of sheet metal mechanics. An earlier meeting with a Wage and Hour investigator put Respondent on notice regarding the misclassification of laborers who were, during some periods, performing the work of sheet metal mechanics. Allowing the violations to persist demonstrated a "reckless disregard" for Respondent's obligations to pay its employees in accordance with the wage determination. **P&N, Inc./Thermodyn Mechanical Contractors, Inc.**, ARB Case No. 96-116, 1994-DBA-72 (ARB Oct. 25, 1996). *See also* **KP&L Electrical Contractors, Inc.**, 1996-DBA-34 (ALJ Dec. 31, 1998), *aff'd in part*, ARB Case No. 99-039 (ARB May 31, 2000) (the ALJ held that Respondent misclassified employees as laborers when they actually performed the work of electricians or carpenters).

In ***Pythagoras General Contracting Corp.***, 2005-DBA-14 (ALJ June 4, 2008), *aff'd*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011), the ALJ held that Respondent should be debarred and reasoned the following:

While the violations in the instant case do not demonstrate flagrant, intentional payroll classification, the evidence clearly demonstrates that Respondents misclassified the majority of employees as Tier B laborers, even after meeting with the Wage and Hour investigator. Said actions are more than merely negligent and demonstrate an intent to evade the prevailing wage requirements under the DBA. As such, Respondent's actions are willful and subject them to debarment.

Also, the judge found the evidence of record sufficient to conclude that "shortly after several witnesses were identified, or before they were scheduled to testify, they received unannounced home visits by the owner and manager of Pythagoras" designed to discourage testimony against the company, which the judge found to be "wholly inappropriate." Finally, the ALJ found that the company president should be debarred as he also had "constructive knowledge" that his employees were misclassified for wage payment purposes and his certified payroll records had not been corrected to meet the requirements of the Act.

c. Failure to pay prevailing wages

In ***Lloyd T. Griffin, Jr.***, 1991-DBA-94 (ALJ Dec. 12, 1999), the ALJ noted on remand that the violation of a prevailing wage statute does not, in and of itself, constitute a *per se* aggravated or willful violation warranting debarment. Citing to ***Miller Insulation Co.***, WAB Case No. 91-38 (WAB Dec. 30, 1992), slip op. at 10-11, the ALJ stated that finding that "reckless disregard" satisfies the standard for debarment and there is no *de minimus* principle to avoid debarment where the violation is aggravated or willful. The ALJ noted that, in ***Miller Insulation***, the contractor falsified payroll records to conceal its failure to pay overtime and the violation was no less willful or aggravated where only three employees on one contract were affected. The ALJ found, in the case before him, that the contractor engaged in multiple schemes to avoid payment of prevailing wages to its workers including:

. . . failing to pay its own employees . . . for hours worked on the project laying linoleum; failing to pay employees prevailing wage rates for hours worked on the project at the housing sites; using LTGs Veazie Street employees to lay linoleum, treating these workers as 'independent contractors' and failing to pay them the prevailing wage for such work; failing to keep accurate certified payroll records and encouraging falsification of payroll records; failing to pay the workers hired by Gatsby, and affiliated corporation, the prevailing wage for cleaning work done at the housing sites

Slip op. at 29. As a result, the ALJ concluded that debarment for three years was proper. However, on appeal, in ***Phoenix-Griffin Group II, Ltd.***, ARB Case Nos. 00-032 and 00-033, 1991-DBA-94 (ARB May 30, 2003), *aff'd*, ***Phoenix-Griffin Group II, Ltd. v. Chao***, 376 F. Supp. 2d 234 (D.R.I. 2005), the Board was notified that Lloyd Griffin had died. Because all of the Respondent corporations served as his "alter egos," the Administrator dropped its claim for debarment and the Board vacated the previous debarment orders. See also ***LTG Const. Co. v. Reich***, 956 F. Supp. 98 (D.R.I. 1997); ***KP&L Electrical Contractors, Inc.***, 1996-DBA-34 (ALJ Dec. 31, 1998), *aff'd in part*, ARB Case No. 99-039 (ARB May 31, 2000) (the ALJ found that employees work with Respondent predated their "appearance on the company's payrolls"; Respondent failed to pay hotel expenses for employees who traveled two hours to

job site and stayed during the week to perform work-these expenses are not considered fringe benefits, but were part of expenses to be reimbursed by the employer because they were for the employer's benefit; and Respondent accepted a kickback of back owed wages from the employees). See also **Thomas & Sons Building Contractors, Inc.**, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB Aug. 27, 2001), *order denying reconsideration* (ARB Dec. 6, 2001).

d. Destruction of time cards

In **Fred Wiggins**, 1999-DBA-30 (ALJ Mar. 3, 2000), the ALJ found that the contractor destroyed relevant time cards which constituted a "clear cut, willful violation of the record keeping requirements of the Act and were part of Respondent's pattern of business practice on this project which violated the provisions of the Act." Consequently, the ALJ ordered that the Respondent be debarred.

e. Receipt of kickback of back owed wages

In **KP&L Electrical Contractors, Inc.**, 1996-DBA-34 (ALJ Dec. 31, 1998), *aff'd in part*, ARB Case No. 99-039 (ARB May 31, 2000), the ALJ found that the Respondent violated the Davis-Bacon Act based upon the testimony of four employees who stated that Respondent requested that they cash checks received for back wages owed and return the money to him. As a result, the ALJ directed that Respondent repay the back wages to the employees as they were entitled to these monies. The ALJ described Respondent's conduct as "a blatant attempt to undermine the administration and enforcement of the Federal employment laws."

f. Overtime violations; liquidated damages

In **KP&L Electrical Contractors, Inc.**, 1996-DBA-34 (ALJ Dec. 31, 1998), *aff'd in part*, ARB Case No. 99-039 (ARB May 31, 2000), the ALJ found that Respondent committed violations of the CWHSSA warranting debarment where it failed to pay its employees for work performed in excess of 40 hours per week. The ALJ then concluded that Respondent was liable for liquidated damages in the amount of \$160.00 to account for each calendar day on which an employee was required or permitted to work overtime without compensation. See 29 C.F.R. §§ 5.5(b)(2) and 5.8.

In **Hugo Reforestation, Inc.**, ARB Case No. 99-003, 1997-SCA-20 (ARB Apr. 30, 2001), a case involving Respondents' failure to pay overtime compensation, the ARB held that the "aggravated or willful" standard requiring debarment has been strictly applied. The Board cited to the "seminal case" of **A. Vento Constr.**, WAB Case No. 87-51 (Oct. 17, 1990) to state that "'aggravated or willful' has not been expanded to encompass merely inadvertent or negligent behavior." Rather, the ARB applied the Supreme Court's standard for establishing willful conduct under the Fair Labor Standards Act (FLSA) in **McLaughlin v. Richland Shoe Co.**, 486 U.S. 128, 133 (1988) which requires establishing that "the employer know or showed reckless disregard for the matter of whether its conduct was prohibited by statute." The Board also cited to the First Circuit's decision in **Baystate Alternative Staffing v. Herman**, 163 F.2d 668 (1998), which rejected the negligence standard of liability in line with the Supreme Court's **Richland Shoe** decision to hold that an employer does not act willfully "'even if it acts unreasonably in determining whether it is in compliance with the FLSA.'" Applying this standard to the facts before it, the ARB concluded that Respondents willfully violated the overtime pay requirements of the CWHSSA. In this vein, the Board noted that Respondents were on notice of the overtime requirements which were incorporated by reference in their procurement contract. Moreover, the

records established that Wage and Hour Division officials as well as officials from the Bureau of Land Management notified Respondents on "numerous occasions" of the overtime pay requirements. Finally, the ARB found that Respondents falsified their payroll records in order to simulate compliance with the CWHSSA. Citing to *Miller Insulation*, WAB No. 91-38 (WAB Dec. 30, 1992), the Board held that it is well-established that "failure to pay employees the appropriate wage rate or overtime compensation, accompanied by falsifying certified records in an effort to conceal Related Acts violations, warrants debarment" under the CWHSSA." In a footnote, the ARB indicated that falsifying payroll records to simulate compliance or conceal violations "may of itself constitute willful violation of the Related Acts."

g. Ignorance

In *Berbice Corp.*, 1998-DBA-9 (ALJ Apr. 16, 1999), the ALJ held that "[b]lissfully ignorant is no way to operate a business and is certainly no defense to debarment under the DBA." The ALJ cited to the company's long history of performing federal government contract work. He found that, where the company's officers allowed the violations to persist (such as mis-classification of workers), there is "evidence of an intent to evade or a purposeful lack of attention to a statutory responsibility in support of debarment." The ALJ found that the company's owner continued to misclassify and underpay his employees after being informed of the DBA violations by a government investigator. As a result, the ALJ concluded that the contractor's actions were "willful" and debarment was proper.

h. Experienced Federal government contractor; presumption of knowledge

In *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14 (ARB Feb. 27, 2004), the ALJ properly debarred a subcontractor and its officers, who had ten years of federal contracting experience such that they were likely aware that the prevailing wage requirements applied despite a "partnership agreement" its subcontractor had with workers on the job. The Board held the following:

When the government awards a contract, or when a portion of the work is subcontracted, 'there has to be a presumption that the employer who has the savvy to understand government bid documents and to bid on a Davis-Bacon Act job knows what wages the company is paying its employees and what the company and its competitors must pay when it contracts with the federal government . . . (citation omitted).

Slip op. at 12.

i. Failure to read contract requirements

In *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14 (ARB Feb. 27, 2004), the Board held debarment was proper where the contractor admitted that it did not read the requirements of its federal contract.

4. Early removal from debarment list under 29 C.F.R. § 5.12(c)

a. Administrator entitled to presumption that factors properly considered in denying early removal

In **IBEW, Local No. 103**, ARB Case No. 96-123 (ARB Nov. 12, 1996), the union sought review of the Deputy Assistant Administrator's decision to remove Wayne J. Griffin Electric, Incorporated from the three year debarment list for violations of Davis-Bacon Related Acts. See **Wayne J. Griffin Electric, Inc.**, WAB Case No. 93-05 (WAB Oct. 23, 1993). IBEW argued that the Administrator did not consider all of the factors contained in 29 C.F.R. § 5.12 in determining that it was appropriate to remove the company from the debarment list after ten months. Not only does 29 C.F.R. § 5.12 require that the petitioner be in full compliance with the labor standards and that full restitution be made for the past violations, but it also provides that the Administrator should consider factors such as the severity of the violations, the contractor's attitude towards compliance, and the past compliance history of the firm. The ARB stated that the record demonstrated that the Administrator considered all of these factors, and had even stated so in the letter granting the company's request, and that the Wage and Hour Division is entitled to a presumption that the Administrator properly carried out his administrative responsibilities.

b. Administrator's decision reviewed by the ARB

In **IBEW, Local No. 103**, ARB Case No. 96-123 (ARB Nov. 12, 1996), the ARB held that it has the authority to review the decision of the Wage and Hour Division's granting a request for early removal from the debarment list. Although 29 C.F.R. § 5.12(c) only refers to the right to appeal from a denial of a request for removal, the ARB noted that the general regulatory provision dealing with debarment includes a right to petition for review of a "final decision in any agency action." 29 C.F.R. § 7.9(a). Because a decision by the Administrator to remove an employer from the debarment list is a "final decision," the ARB ruled that it had jurisdiction to decide a petition for review of such a decision.

c. Abuse of authority

In **Bhatt Contracting Co.**, ARB Case No. 97-068, 1993-DBA-124 (ARB Jan. 26, 1998), the ARB rejected the "untimely decision" of the Administrator who denied the contractor relief from debarment. The ARB noted that the Acting Administrator "breached a material term of the consent decree by not placing Bhatt on the ineligible list for nine months." Moreover, the ARB stated that the Acting Administrator "failed to take advantage of the remedial nature of our prior ruling by not 'immediately' issued a decision regarding Bhatt's renewed request for relief." Rather, the ARB noted that it took the Acting Administrator 78 days to issued its denial of the contractor's request for relief from debarment pursuant to 29 C.F.R. § 5.12(c) (a contractor may request removal from the debarment list after six months). As a result, the ARB rejected the Acting Administrator's decision and determined that the contractor's petition set forth sufficient facts under § 5.12(c) to support relief from debarment.

B. Pre-judgment interest against government disallowed

In **Aetna Bridge Holding Co.**, ARB Case No. 97-095 (ARB Sept. 9, 1997), a contractor whose employees had been found in an earlier decision not to be laborers or mechanics covered by the DBA or the FHWA, sought an award of prejudgment interest on progress payment funds withheld in 1993 by the state transportation department at the request of the Wage and Hour Administrator. The ARB held that it did not have ". . . statutory authority to waive sovereign immunity and award interest." See **Mast Construction, Inc.**, WAB Case No. 84-22 (WAB Mar. 14, 1986); **Library of Congress v. Shaw**, 478 U.S. 310, 314-15 (1986).

C. Withheld funds

1. Department's claim superior to surety

By *Amended Decision and Order Approving Partial Consent Findings and Decision and Order, Liberty Mutual Ins. Co.*, 1999-DBA-11 (ALJ Nov. 4, 1999), *aff'd*, ARB Case No. 00-018 (ARB June 20, 2003), the ALJ held that, because the surety did not pay fringe benefits due the employees under its contract, it did not have a right to withheld funds over the right asserted by the Secretary of Labor. The ARB agreed and concluded as follows:

Liberty Mutual was obligated to complete the entire Coast Guard contract, including the responsibility to ensure the payment of prevailing wages. And although Liberty did not violate the Act, nevertheless as the completing surety here, it is also the 'contractor' from whom 'accrued payments' may be withheld. Therefore, whether the funds are deemed 'accrued' or 'unaccrued,' and notwithstanding the terms of the takeover agreement to the contrary, the Administrator properly withheld contract monies from Liberty to pay prevailing back wages to the Brunoli laborers and mechanics. Moreover, the Administrator may also rely on recoupment or setoff to claim the funds on behalf of the Brunoli employees.

Slip op. at 14.

2. Due process rights of Respondent

In *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14 (ARB Feb. 27, 2004), the Board held that a prime and subcontractor's due process rights were not violated with regard to withheld contract funds. The Davis Bacon regulations provided for an administrative hearing and appellate process to determine Respondent's rights to the funds. As a result, neither the prime nor subcontractor had any "present entitlement" rights to the withheld funds. The Board cited to 29 C.F.R. § 5.5(a)(2) to state that Respondent had notice on its contract of the government's right to withhold funds in the event of underpayment allegations. *See also Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001).

D. Sanctions and attorney's fees; Equal Access to Justice Act inapplicable

In *Cody Zeigler, Inc. v. Administrator, Wage & Hour Division*, ARB Case Nos. 01-014 and -1-015 (ARB Dec. 19, 2003), *aff'g in part, vacating and rev'g in part*, 1999-DBA-17 (ALJ June 14, 2000), the Board vacated the ALJ's award of fees under the Equal Access to Justice Act holding that "administrative proceedings under the DBA and Related Acts are not subject to the attorney's fee and costs provisions of the EAJA, 5 U.S.C. § 504, as they are not 'adversarial adjudications' within the meaning of the EAJA, because there is no statutory requirement for an administrative proceeding conducted pursuant to the APA and as DBA proceedings are not listed in the enumerated types of DOL administrative proceedings subject to the EAJA, *see* 29 C.F.R. § 16.104." *See also* 29 C.F.R. § 6.6(a).

In *Bhatt Contracting Co.*, ARB Case No. 98-097, 1993-DBA-65 (ARB May 19, 1998), the ARB declined to award attorney's fees and costs under EAJA. It stated that it previously ruled that "DBA administrative proceedings are not 'adversarial adjudications' within the meaning of the EAJA, because there is no statutory requirement for an administrative proceeding conducted pursuant to the Administrative Procedure Act." Moreover, the ARB noted that DBA proceedings are not listed at 29

C.F.R. § 16.104 as proceedings which are subject to EAJA and 29 C.F.R. § 6.6(a) specifically excludes DBA proceedings from coverage by EAJA.

E. Liquidated damages

Not permitted under the CWHSSA

Pursuant to 20 C.F.R. § 6.19(b)(3), "[t]he Administrative Law Judge shall make no findings regarding liquidated damages under the Contract Work Hours and Safety Standards Act."

X. Types of dispositions

A. Stipulations and withdrawal therefrom

In **Bechtel Constructors Corp.**, ARB Case No. 95-045A (ARB July 15, 1996), the primary issue was whether workers were employed at the "site of work." Prior to the hearing, the Administrator entered into a stipulation that the concrete batch plants at issue were located from one-half to fifteen miles from the physical locations of the construction. After the close of the hearing, but prior to issuance of the ALJ's decision, the D.C. Circuit issued **Ball, Ball & Brosamer, Inc. v. Reich**, 24 F.3d 1447 (D.C. Cir. 1994). The effect of this case was to reverse prior decisions that indicated that any batch plant within fifteen miles of the work site was sufficient geographic proximity. The record at the hearing also indicated that, in fact, the minimum one-half mile stipulation was false; the sites were closer. The ALJ did not permit the Administrator to withdraw from the stipulation. The Board found that this was an abuse of discretion because the Administrator had entered into the stipulation "unable to appreciate the effect that a subsequent change in the case law would give to the stipulation."

B. Consent findings

The regulations at 29 C.F.R. § 6.32 provide that the parties in Davis-Bacon Act and Contract Work Hours and Safety Standards Act (unrelated to the Service Contract Act) proceedings may enter into consent findings which dispose of the case in whole or in part. See **Western Pacific Roofing Corp.**, 1999-DBA-13 (ALJ Jan. 19, 2000) (decision and order approving consent findings); **Yeroush Corp.**, 1999-DBA-18 (ALJ Nov. 18, 1999) (ALJ approved consent findings in case involving Davis-Bacon Act and CWHSSA claims). Also, in **John J. Kuqali**, 1999-DBA-9 (ALJ Jan. 13, 2000), the ALJ issued an *Order Granting Assented to Motion to Dismiss* and dismissed the Davis-Bacon Act case based upon settlement by the parties which was not submitted to the judge for review. See also 29 C.F.R. § 6.43 (permitting disposal by consent findings in substantial interest cases).

C. Settlements

In **Black Star Drywall, Inc.**, 1999-DBA-3 and 1999-DBA-5 (ALJ Feb. 29, 2000), the parties requested that the cases be referred to a settlement judge. An agreement was executed by the parties to settle claims under the Reorganization Plan No. 14 of 1950 and the CWHSSA. The ALJ accepted and approved of the agreement pursuant to 29 C.F.R. §§ 5.11, 5.12(b), and 6.32. See also **D&R Building and Remodeling**, 1999-DBA-4 (ALJ Apr. 14, 2000); **Sharp Construction Co.**, 1997-DBA-15 (ALJ Nov. 29, 1999)

(settlement regarding violations of the Reorganization Plan No. 14 of 1950, the Davis-Bacon Act, and the CWHSSA).

D. Dismissal

1. No final decision from Administrator on request for addition of positions under wage determination conformance process

In **Caroma Construction Co.**, ARB No. 11-045 (ARB July 26, 2011), the Petition for Review was dismissed without prejudice because the Petitioner failed to establish that there had been a final decision from the Administrator on a request for the addition of two positions under the DBA wage determination conformance process, as required by 29 C.F.R. § 7.9.

2. Untimely challenge to wage determination

In **Joe E. Woods, Inc.**, ARB Case No. 96-127 (ARB Nov. 19, 1996), the ARB held that the contractor's failure to raise a challenge until well after the contract award rendered the request for the application of residential rates to the contract untimely. Citing **Dairy Development, Ltd.**, WAB Case No. 88-35 (WAB Aug. 24, 1990), *aff'd sub nom. Dairy Development v. Pierce*, Civ-86-1353-R (W.D. Okla. 1991), the ARB explained the policy behind this rule: that manifest injustice would result to bidders if the successful bidder could challenge the contract wage determination rates after all other competitors were excluded from participation. Other concerns noted by the ARB were ensuring certainty of the procurement processes of the government and protection of wage standards for employees by providing a floor for wages of which all potential bidders were aware. The ARB stated that an appeal of a wage determination must be made before the contract is awarded and modifications to wage determinations are applicable to a project only if they are published before the contract award or start of construction where there is no contract award. 29 C.F.R. §§ 1.6(c)(ii) and 1.6(c)(2).

3. For lack of prosecution

In **Tri-Gems Builders, Inc.**, ARB Case No. 99-117, 1998-DBA-17 (ARB Feb. 25, 2000), the ARB dismissed an appeal by the contractor for failure to prosecute. In so holding, the ARB stated that "[c]ourts possess the 'inherent power' to dismiss a case for lack of prosecution." The ARB further noted that the power is not governed by statutory or regulatory provisions "'but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"

XI. FOIA requirements regarding issued decisions

In **Bechtel Constructors Corp.**, ARB Case No. 95-045A, 1991-DBA-3 (ARB July 15, 1996), one Respondent argued that the Administrator unlawfully relied upon Wage Appeals Board decisions that have not been indexed and appropriately made available pursuant to the Freedom of Information Act (FOIA). 5 U.S.C. § 552(a)(2). The Board found this argument to be without merit. It cited to the Department of Labor's notice to the public, through the "Guide to Freedom of Information Indexes," published in the *Federal Register*, of the availability of an index and digest for Wage Appeals Board

decisions. Moreover, the Board noted that the full text of Wage Appeals Board decisions was also available through a computer bulletin board. The Board found that the decisions cited only served to highlight the Department's regulation 29 C.F.R. § 5.2(l)(1), which constituted the basis for the reversal of the ALJ's decision in this matter.