

**U.S. Department of Labor**

Office of Administrative Law Judges  
50 Fremont Street - Suite 2100  
San Francisco, CA 94105

(415) 744-6577  
(415) 744-6569 (FAX)



**Issue Date: 03 February 2005**

CASE NO. 2003-SCA-0008

*In the Matter of:*

**ARTURO GONZALEZ, an individual,  
and d/b/a GONZALEZ FORESTRY,**  
Respondents.

Appearances:

Faye von Wrangel, Esq.  
Seattle, Washington

For the Department of Labor

Lee J. McFarland, Esq.  
Mercer Island, Washington

For the Respondent

BEFORE: ALEXANDER KARST  
Administrative Law Judge

**DECISION AND ORDER**

This case arises under the McNamara-O'Hara Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. §351 *et seq.*, the Contract Work Hours and Safety Standards Act of 1962 (CWHSSA), as amended, 40 U.S.C. §327, *et seq.*, and implementing regulations issued thereunder at 29 C.F.R. Parts 4, 6, and 18. The United States Department of Labor (DOL) alleges that Respondent Arturo Gonzalez, doing business as Gonzalez Forestry, (Respondent or Gonzalez Forestry) violated the recordkeeping requirements of both acts, the overtime provisions of the CWHSSA and the prompt payment requirements of the SCA. The DOL argues that debarment under the SCA is warranted because Respondent has not shown the existence of unusual circumstances which would obviate the need for debarment, and that debarment is warranted under the CWHSSA because Respondent's violations of that act were aggravated and willful. A formal hearing was held in Seattle, Washington on January 26-28, 2004, and the parties filed briefs in May 2004.

## BACKGROUND

Respondent Arturo Gonzalez, doing business as Gonzalez Forestry has performed work on government contracts since 1994, all of them involving reforestation work in Alaska. TR 241-42.<sup>1</sup> His wife, Linda Gonzalez, is the bookkeeper. The Gonzalezes live in Centralia, Washington. On August 25, 1997, the United States Department of Agriculture, Forest Service awarded Contract Number 52-01112-7-00249 (the Contract) to Respondent, which entailed pre-commercial tree-thinning in the Tongass National Forest on the Bradfield River near Wrangell, Alaska. DX 1, 62-63, 91-92; DX 2, 121-22. Respondent employed seven workers (Alexander Cruz, Jose Melendez, Juan Castillo, Jose Portillo, Juan Franco, Alberto Pineda, and Antonio Blaz Cruz) under the Contract, which was performed between July 24, 2000 and September 1, 2000.<sup>2</sup>

On January 9, 2002, Antonio Blas Cruz and Juan Franco complained to Lupe Rivera of the DOL's Wage and Hour Division that they had been underpaid for their work on the Contract. TR 32-34; and DX 8 at 202-07. Ms. Rivera testified that she spoke to the men in Spanish, which is her first language, and they told her that Mr. Gonzalez had promised to pay them \$100 per acre, but he had reduced their pay because some areas of the project had not passed inspection. TR 27-29; DX 8 at 202-07. On April 15, 2002, Ms. Rivera spoke to Juan Castillo, who also claimed that his pay was reduced and claimed that Respondent paid him after he returned to Washington. TR 28; DX 8 at 198-99. The employees informed Ms. Rivera that they had worked eleven hours per day, seven days per week to complete the project. TR 28; DX 8 at 198-207. Mr. Franco claimed that on other contracts he was paid the promised amount, but Mr. Gonzalez wrote incorrect dates on the timecards. DX 8 at 207.

After she took the employees' statements, Ms. Rivera contacted Ms. Gonzalez and informed her that a complaint had been filed against Gonzalez Forestry. TR 41. On February 1, 2002, Ms. Rivera faxed a letter to Ms. Gonzalez informing her to bring various business records to a compliance review on February 6, 2002. DX 6 at 195-96. The DOL requested task orders related to the project in Alaska, payroll records, and a notebook from the field that documented the employees' hours. DX 6 at 95-96. Respondent provided payroll records that indicated that the crew worked eleven hours per day, five days per week. RX 16-18. However, Respondent did not provide the notebook. TR 48-49. Although the Gonzalezes told her that the men were employed on the Branfield River contract, "the majority of the task orders were missing." TR 46. Ms. Rivera testified that she was only able to determine the precise task orders with the help of the Forest Service. TR 47; DX 11 at 279-80. The Contract involved two Task Orders: Task Order Nine was a 300 acre parcel, and Gonzalez Forestry was to be paid \$280 per acre, DX 5 at 186, and Task Order Ten was a 200 acre parcel, and Gonzalez Forestry was to be paid \$265 per acre. DX 5 at 191.

---

<sup>1</sup> The following abbreviations are used throughout this decision: TR = hearing transcript of January 26-28, 2004; DX = Department of Labor's exhibits; RX = Gonzalez Forestry's; and DOL Brief = Department of Labor's Post Trial Brief; Resp. Brief = Gonzalez Forestry's Post Trial Brief

<sup>2</sup> The DOL's complaint pertains only to the dates July 27, 2000 through August 27, 2000.

On January 23, 2003, the DOL filed a complaint on behalf of the above-named employees seeking recovery of \$12,127.50 for underpaid wages. In addition, the Complaint alleges that Respondent violated the SCA when it failed to pay the seven workers the appropriate wage rate specified in the wage determinations for reforestation services and failed to pay them on time. Moreover, the Complaint alleges that Respondent violated the CWHSSA's overtime provisions. Finally, the Complaint alleges the following violations of both acts: (1) failure to compensate the seven employees for time spent waiting for Respondent to bring supplies; and (2) failure to keep accurate records of all hours worked and wages paid on a daily and weekly basis.

The parties have stipulated that: Respondent, at all times material to this case, was in business as a pre-commercial tree-thinning contractor; Respondent personally recruited and hired the seven workers in Washington; Respondent supervised these workers from July 27, 2000 to August 27, 2000, while they performed under the Contract in Alaska; all seven workers are native Spanish speakers who have limited English language skills; the Contract and subsequent work orders exceeded \$100,000 and was subject to the SCA and CWHSSA; Wage Determination 96-0372, Revision 3, dated June 1, 1999, applies and provides for hourly wages of \$10.77 for pre-commercial tree thinners, plus fringe benefits of \$1.63 per hour, \$65.20 per week, or \$282.53 per month; and Respondent's payroll records reflect that the employees' regular hourly rate was \$15.00 and \$22.50 for overtime.

The parties disagree about the hours worked per week, the rate Mr. Gonzalez promised the employees when he recruited them for the Contract, how frequently Mr. Gonzalez was present at the workers' camp, and when the employees received their pay checks. The employees claim that they were promised \$100 per acre for the 200 acre parcel and \$120 per acre for the 300 parcel; that they worked eleven hours per day, seven days per week to complete the Contract; that they seldom saw Mr. Gonzalez during the Contract; and that they received their paychecks in October after they returned to Washington. Respondent contends that the employees were promised \$10.77 when they were recruited for the Contract; that they worked eleven hours per day, five days per week; that Mr. Gonzalez was at the camp almost every day; and that the workers received their paychecks in Alaska on the Friday following the end of the pay period. I found the testimony of the employees more credible than the Gonzalezes and for the reasons stated below, I find that Respondent has violated the recordkeeping requirements of the CWHSSA, failed to timely pay its employees under the SCA, and failed to pay overtime as required by the CWHSSA.

## **I. Violations of the SCA and CWHSSA**

### **A. Recordkeeping Violations of the SCA and CWHSSA**

The SCA and the CWHSSA both contain recordkeeping provisions that require contractors to make payroll records of the daily and weekly hours worked. *See* 29 C.F.R. § 4.6(g)(1)(iii) (SCA) and 29 C.F.R. § 5.5(a)(3)(i)(CWHSSA). Likewise, both acts require that contractors make records which document any deductions made from its employees' compensation. 29 C.F.R. § 4.6(g)(1)(iv) and 29 C.F.R. § 5.5(a)(3)(i). These records are to be maintained for a period of three years following completion of the work. 29 C.F.R. § 4.6(g)(1) and 29 C.F.R. § 5.5(a)(3)(1).

## 1. Timecards

The DOL contends that Respondent's payroll records are inaccurate because they incorrectly reflect the weekly hours worked. The DOL alleges that the timecards were completed after the work was completed. Respondent counters that the records were completed on a daily basis in Alaska and are accurate because the employees did not work on Saturdays or Sundays.

Mr. Cruz<sup>3</sup> testified that Mr. Gonzalez was not present when the men worked. TR 140. Rather, he said that Mr. Gonzalez came to their camp periodically to drop off gas and other supplies and he was present for about two hours. TR 140, 171-72. Mr. Cruz averred that he did not know if Mr. Portillo, the supervisor, kept records of how long the men worked. TR 172. Mr. Cruz also did not know who completed the timecards but testified that he signed the timecards on the same day in October that he received his checks. TR 164, 166.

Mr. Gonzalez claimed that he was present to record the hours worked on the timesheets. TR 281. According to Mr. Gonzalez, he completed timecards every day, and he was physically present from Monday through Friday for the duration of the Contract. TR 253-54, 268-69; DX 1 at 17-54. He averred that he was occasionally present on Saturdays, even though the men did not work during the weekends. TR 269. He explained that the hours recorded on the timecards did not vary because occasionally the workers finished before 7 p.m., but he would record a full day's work. TR 267. Mr. Gonzalez testified that the workers could have gone to Wrangell on their days off, "but they prefer to stay in camp." TR 301, 312. Mr. Gonzalez testified that he and his family slept on his boat about one or two miles down the river from the men and that he reached their camp by walking or using the boat. TR 254, 289, 321-22. He also testified that he sometimes stayed at an apartment in Wrangell, but he did not remember roughly how often he stayed at the apartment. TR 322, 330. Likewise, Ms. Gonzalez testified that she and her children either stayed at the apartment or on the boat. TR 346.

Ms. Gonzalez denied that she prepared the timecards and had the men sign them after returning to Washington in late September or October. TR 386. She also explained that the timecards were written with the same pen because she buys pens for the company "in bulk." TR 451. She testified that she saw her husband complete the timecards, but she acknowledged that she did not see him complete them on a regular basis. TR 365. Nevertheless, Ms. Gonzalez claimed that her husband must have completed the cards because she would not be able to do payroll if he did not. TR 365-66. She could not recall whether she or her husband had completed the paychecks. TR 372. She testified that her husband gave her the timecards, she calculated the deductions on the timecards, copied the timecards, and gave the timecards and checks to her husband to distribute to the workers. TR 373-75. She received the timecards and made the calculations either on the date indicated on the paychecks or "a couple days before that." TR 379-80. However, Mr. Gonzalez testified that his wife was with him "on the boat" when she completed the payroll portion of the timecard. TR 284-85. However, she testified that the workers signed the original timecards, and her husband would bring them back to her

---

<sup>3</sup> Two men with the surname "Cruz" worked on the Contract. "Mr. Cruz" refers to Alexander Cruz, who testified at the trial.

“probably the same day.” TR 382. Mr. Gonzalez claimed that the payroll calculations and the checks were completed and signed by the employees “the same day.” TR 286.

The Gonzalezes met with Ms. Rivera in Centralia on August 25, 2000. The timecards which the men signed for the pay period from August 4 to August 18, 2000, however, are also dated August 25, 2000. RX 17a-17g. Ms. Gonzalez explained, “When I do these, I write the date out that the checks are due on. So say this is a week before, did you notice, that 8/18 was the last day that they worked on that payroll. Therefore, their payroll isn’t due until 8/25, and that’s the date that I put right here, the 8/25, the date of the due, you know, payroll.” TR 455. She assumed that she prepared the August 25 payroll in Centralia. TR 456. Mr. Gonzalez acknowledged – despite his earlier assertion that he had been at the camp every day – that he was absent for “maybe one” day when he attended the conference with Ms. Rivera. TR 282. He then added that he was absent “when the crew is not working.” TR 283. He claimed that “[he] used to fly down and then go back up and put them back to work.” TR 283. As an example, he cited a week in which he claimed that the men did not work because the Forest Service would not allow them to begin a new task order. TR 283. However, Ms. Gonzalez testified that Mr. Gonzalez “would have not come down [to Washington]” more frequently than she did in July and August of 2000, and she claimed that she did not travel back and forth that summer. TR 349-50. She also claimed that she observed her husband going to the worksite “most of the time on a daily basis.” TR 367. Notably, she did not mention any prolonged absences or a week in which the employees did not work. According to Ms. Gonzalez, her husband carried the timecards in a briefcase or in his coat. TR 383-84.

Mr. Gonzalez and Ms. Gonzalez gave inconsistent testimony regarding their procedure for completing payroll and distributing the timecards to the employees. In addition, they contradicted themselves regarding Mr. Gonzalez’s movements between Alaska and Washington during the Contract. Moreover, the timecards appear to be in pristine condition. They bear no stains from sweat, grease or rain, and they do not look as if they were in a rainforest for two weeks at a time, transported on daily basis in Mr. Gonzalez’s coat or briefcase, and signed by workers who had handled chainsaws for eleven hours. In contrast, Mr. Cruz – who had no incentive to fabricate when he received the timecards – credibly testified that he received the timecards after returning to Washington in October. He also testified that the date “8/11/2000” next to his signature on the timecard was not in his handwriting. TR 161-62. Moreover, I find that his signature on the timecard under the statement “I certify the foregoing to be a correct account of the time worked and wages received” is not dispositive. When asked – without the aid of an interpreter – if he could understand that statement, he responded, “I didn’t understand a word.” TR 164-165. Further, when asked if he could read the same statement – which appeared above his signature on the timecard – he responded, “It’s in English. I hardly read Spanish.” TR 165. On balance, I find that the timecards were not completed on the dates indicated. Likewise, I find that Mr. Gonzalez was not at the camp on a daily basis and the timecards are not competent records of the dates that the employees worked because they were falsified to give the appearance of compliance with the SCA and CWHSSA. Respondent’s inaccurate payroll records constitute a violation of both the SCA and the CWHSSA.

## 2. Deductions

The DOL also charges that Respondent did not adequately document deductions made from the employees' paychecks during the Contract. Respondent believes that it maintained accurate records and submits that the DOL, through Ms. Rivera, is harassing Mr. and Ms. Gonzalez.

Respondent's timecards indicate that various amounts were deducted from the employees' paychecks in addition to deductions for taxes.<sup>4</sup> The deductions usually appear in a box labeled "Cash Advanced." Mr. Cruz denied that he received cash advances while he was working in Alaska. TR 165. He remembered, however, that Ms. Gonzalez lent him thirty dollars when he was in Alaska and this was deducted from his pay. TR 176. He also recalled that when he received his paychecks, money was deducted for "lunch." TR 176. Mr. Gonzalez claimed that he sometimes paid the men cash advances when they were in Alaska, but he did not keep any records. TR 283, 296-97. Likewise, Ms. Gonzalez testified that she does not record cash advances because her husband handles them and deductions for food. TR 395-96. She testified that she did not keep any records of monies dispersed to the workers on this job other than their paychecks. TR 401. Although Mr. Gonzalez charged the workers for food, he testified that he did not think that deductions for food were included on the timesheets. TR 288-89. Ms. Gonzalez also denied that the deductions listed on the timesheets were for food. TR 396. However, she later testified that the deductions on the timesheets could be food or cash because "I don't know what they do with their cash draws." TR 397-98. She did not know whether the men were required to pay for their food because "that was between Mr. Gonzalez and the crew." TR 399. She was also unaware of any records that her husband kept regarding expenses for food. TR 399. On cross-examination, however, she claimed to have receipts for food supplied to the crew. TR 431. In fact, she stated that she offered the receipts to Ms. Rivera, who refused to make copies of them because "they're really long receipts." TR 432.

Ms. Gonzalez recalled that Ms. Rivera sent her a letter in 2002 requesting various payroll documents. TR 388. Ms. Gonzalez believed that she brought records documenting any cash or check draws against payment to the men, "and I think [Ms. Rivera] saw them." TR 390-91. However, Ms. Gonzalez "did not know" if she brought everything that she had to Ms. Rivera. TR 393. When asked if she was distinguishing between records she could find and records that exist, Ms. Gonzalez responded, "No. I guess I'm not." TR 394. Ms. Gonzalez testified that the \$1,000 deduction that appears on Mr. Castillo's timecard for the pay period from July 24, 2000 to August 4, 2000 represents either a cash draw or a check that was written to him. TR 387; RX 16c. When asked whether a check for \$1,000 was made payable to Mr. Castillo, she responded "I don't recall. I would have to look through my records." TR 388. She testified that her husband told her to make deductions, but did not remember if he told her what it was for, and she did not have any records for the deduction. TR 398. When questioned further, Ms. Gonzalez did not remember whether the men received check draws, but she stated that she produced "everything that I could find at the time" to Ms. Rivera. TR 392.

---

<sup>4</sup> See RX 16a (Alexander Cruz: \$430); 16b (Jose Melendez: \$100); 16c (Juan Castillo: \$1,000); 16f (Alberto Pineda: \$100); 16g (Blaz Cruz: \$100); and 17d (Juan Castillo: \$ 1,000).

The regulations unambiguously require contractors to make and maintain records of deductions from their employees' compensation. Mr. Gonzalez candidly testified that he maintained no records of the deductions at issue. TR 296-97. Ms. Gonzalez, on the other hand, claimed that the deductions were not for food (TR 396), but also testified that the deductions may have been for food. TR 397-98. She also testified that she brought records documenting the deductions to the compliance review with Ms. Rivera in February 2002 (TR 390-91), but later testified that she kept no records of monies dispersed to the workers on the Contract. TR 401. Likewise, she testified that she believed that Ms. Rivera saw the records (TR 390-91), but later testified that Ms. Rivera not only saw food receipts, but also refused to make copies. TR 432. The testimony of the Gonzalezes struck me as unworthy of belief. On balance, I find that Respondent failed to make and maintain records pertaining to the deductions as required by both acts.

## **B. CWHSSA Overtime Pay Violations**

The CWHSSA requires Federal contractors to pay their employees time-and-a-half for all hours worked in excess of forty in a week. *See* 40 U.S.C. §328; 29 C.F.R. § 5.5(b)(1). The principles enunciated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680; 66 S.Ct. 1187 (1946), governing claims for unpaid wages under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, also apply to the CWHSSA. *See Thomas & Sons Building Contractors, Inc.*, 1996-DBA-37 (ARB Aug. 27, 2001). Under these principles, the DOL bears the burden of proving that employees have performed work for which they were improperly compensated and carries this burden by proving that the employee has “in fact performed work for which he was improperly compensated and ... [producing] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” *Thomas & Sons*, slip op. at pp. 5-6 (citing *Mt. Clemens Pottery Co.*, 328 U.S. at 687-88. If the employer fails to produce reliable evidence of the hours worked, the employees are nevertheless entitled to an award of backwages “even though the result be approximate.” *Thomas & Sons*, *supra*, slip op. p. 6 (quoting *Mt. Clemens Pottery*, 328 U.S. at 687-88).

Mr. Cruz testified that he understood that he would work on two separate parcels in the vicinity of Wrangell, Alaska: one 200 acre parcel and one 300 acre parcel. TR 192-93. Mr. Cruz testified that Mr. Gonzalez promised the employees \$100 per acre for the 200 acre parcel and \$120 per acre for the 300 acre parcel – to be split equally among the seven workers. TR 193-94. Mr. Cruz denied that Mr. Gonzalez ever told him that he was being paid \$15.00 per hour and \$22.50 for overtime. TR 169. Likewise, Mr. Cruz testified that Mr. Gonzalez never told him that his hourly wage was \$10.77. Mr. Cruz denied ever seeing disclosure statements in Spanish which informed the workers of the wage determination of \$10.77 per hour. TR 169-70; DX 1 at 57-58. According to Mr. Cruz, the employees worked seven days per week, eleven hours per day, with a thirty minute lunch break. TR 150-51. Mr. Cruz was unsure of the time when his workday ended because he had “never used a watch.” TR 174. However, he testified that he “really wasn’t paying attention to the hours we worked, but I do know that there were eleven.” TR 174.

Mr. Gonzalez recalled recruiting the men for the Contract around April 10, 2000, when all of them were working for him in Washington. TR 246. Although he used to pay his workers on a piecework basis “a long time ago,” Mr. Gonzalez denied that the workers were paid by the acre for the Contract. TR 244. He testified that during the months of April and July he provided them with disclosure statements in Spanish that listed their pay as \$10.77 plus fringe benefits and their workweek as eight hours per day, five days per week. TR 249, 252; DX 1 at 57-58. At other times during the hearing, he did not remember whether he had told the workers in April 2000 that they would be paid on an hourly or piecework basis. TR 248. Mr. Gonzalez testified that \$15.00 per hour was the basic rate of pay, but he did not explain why he used \$15.00 per hour or whether he had ever promised his employees this amount. TR 255. Instead, he explained, “I didn’t do the calculus [sic], my wife did, so you have to ask her that.” TR 255. When asked how she determined the basic rate, Ms. Gonzalez testified that the workers determine the rate because “if they work good, they’re going to get – you know, I mean, if they do a good job, they’re probably going to get paid more.” TR 406. She acknowledged that her explanation described a piece rate, but maintained that the workers in Alaska were paid on an hourly basis. TR 408. Likewise, Mr. Gonzalez explained that he receives a document listing the wage determination for each Federal contract, but “then I usually go above the number.” TR 244.

Respondent contends that the employees are not credible because they had originally complained to officials in Alaska that they had worked ten hours per day, seven days per week and that they were improperly paid. Moreover, Respondent notes that the employees’ statements that they worked from “sunup to sundown” are incredible because the sun shines for over twenty hours in Alaska during the summer. Further, Respondent submits that the employees’ statements should be discredited because they were not sequestered from each other when Ms. Rivera interviewed them.

I find that the workers’ testimony that they were promised a piecerate is consistent with the fact that the Forest Service paid Respondent by the acre. In fact, the difference between the amount the Forest Service agreed to pay Respondent (\$265 per acre for the 200 acre parcel and \$285 per acre for the 300 acre parcel) is roughly the same as the rates that the employees claim they were promised (\$100 per acre for the 200 acre parcel and \$120 per acre for the 300 acre parcel). In addition, I find the employees’ claim that they worked seven days per week consistent with their credible testimony that they were promised a piecerate because this payment method would encourage them to clear the acreage in as few days as possible. This scenario echoes the combined testimony of Mr. and Ms. Gonzalez regarding the calculation of the hourly rate. Essentially, Ms. Gonzalez testified that the better (i.e. the faster) the employees worked, the higher their basic rate would be. Further, the DOL produced a time sheet documenting Alexander Cruz’s pay for the period of September 25, 2000 through October 6, 2000 for services performed in Alaska. DX 15d. This timesheet shows that Mr. Cruz worked eighty hours during the two weeks and received \$1,680 – which yields an hourly rate of \$21.00. *Id.* I find that these arbitrary “basic rates” are consistent with wages based on a piecerate.

In addition, Mr. Cruz testified that the crew continued to work even when they had inadequate supplies “because that’s what we there for, to work.” TR 149. By comparison, I find that Mr. Gonzalez’s testimony that the employees declined his offer to take them to Wrangell on

weekends because they preferred to stay at the camp is inconsistent with Mr. Cruz's credible testimony. TR 301. Moreover, Mr. Gonzalez testified that he made deductions for food from the employees' pay. TR 288-89, 301, 312. In light of that testimony, the workers would have all the more incentive to clear the acreage in as few days possible because they would spend less money on food. Indeed, Mr. Cruz said as much in his testimony, "the thing we wanted to do is just, you know, complete the work there." TR 174-75. On balance, I find as a matter of just and reasonable inference that Mr. Gonzalez promised to pay the employees by the acre and that they worked seven days per week to clear the acreage as quickly as possible. Respondent contends that the employees' previous statements that they worked ten hours per day impugns their credibility. Although I do not find that Respondent's payroll records accurately reflect the number of days that the crew worked per week, I nevertheless accept its representation that the crew worked eleven hours per day. Accordingly, I accept the DOL's approximation that the employees worked eleven hours each day of the week.

### **C. Untimely Payment under the SCA**

Under the SCA, employers are required to pay their employees wages "promptly and in no event later than one pay period following the end of the pay period in which they are earned." 29 C.F.R. § 4.165(a)(1). Respondent utilizes a fortnightly (i.e., once every two weeks) pay period. Therefore, the employees' wages were due no later than two weeks after Respondent's pay period ended. Thus, wages were due for the three pay periods in question no later than August 21, 2000; September 4, 2000; and September 18, 2000. The DOL contends that the employees were not paid until October 2000. Respondent claims that the employees were promptly paid in Alaska on the Friday following the close of each pay period – i.e. August 11, 2000; August 25, 2000; and September 8, 2000.

As noted earlier, Mr. Cruz testified that he signed the timecards after he returned to Washington. TR 161. He claimed that he received the checks on the same date because "you sign everything on the same day that you get the checks because that says that you have received everything." TR 161, 164. He testified that he took his three paychecks to the bank the same day he received them from Mr. Gonzalez. TR 156, 163; DX 1 at pp. 19-20, 33-34, and 45. All three of Mr. Cruz's checks are stamped with the date "11/24/00." RX 16(originals of Respondent's payroll checks).

Ms. Castillo averred that her husband returned from Alaska sometime after August 2000, he called about picking up his check the day that he returned, and Ms. Gonzalez answered the phone. TR 207-08. Because Mr. Castillo cannot speak English, Ms. Castillo spoke to Ms. Gonzalez, who advised that she was "doing all the calculations and that I could go the following day to pick up the check." TR 208. She remembered that she drove her husband and Juan Franco to the Gonzalezes' house to pick up the checks and go to the bank. TR 216. I note that five of the six checks made payable to Mr. Castillo and Mr. Franco were clearly cashed on October 30, 2000, and one of the checks made payable to Mr. Castillo does not have a date stamped on it and may have also been cashed on October 30. TR 216; RX 16 (originals of Respondent's payroll checks).

Ms. Rivera testified that Ms. Gonzalez informed her that she completed the payroll on the dates indicated on the checks, and she forwarded them to her husband in Alaska to distribute to the employees. TR 74. However, Mr. Gonzalez testified that he gave the timecards to his wife – who he claimed was also in Alaska – and she calculated the fringe benefits and deductions. TR 285-86. He explained that his wife was with him when the employees received their paychecks in Alaska. TR 284-85. However, Ms. Gonzalez testified that she gave the checks to her husband at their apartment in Wrangell, and he took them to the camp to distribute to the workers – who signed for them inside a tent. TR 381-83. In fact, she testified that she only went to the camp a few times, TR 383, and Mr. Cruz only recalled seeing her a few times when Mr. Gonzalez delivered supplies. TR 170. According to Mr. Gonzalez, the employees signed the timecards and they received their paychecks on the same day. TR 286. After returning to Washington from Alaska in 2000, Mr. Gonzalez recalled that some of the workers came to his house but he claimed that they came to complain that he had deducted too much money from them. TR 295. Ms. Gonzalez could not recall when her husband and the workers returned from Alaska, and she did not know whether the workers came to her house in Washington to receive the paychecks because she cannot speak Spanish. TR 418-19.

Ms. Gonzalez was unsure whether she had prepared the checks in Centralia. TR 419. Upon reviewing the canceled checks she received from her bank, she testified that the August 11 and August 25, 2000 checks to Juan Castillo appeared to have cleared the bank on October 30, 2000. TR 419-20 and DX 1, 29-32. Likewise, she testified that the check dated August 11, 2000 to Antonio Blas Cruz appeared to have cleared the bank on October 20, 2000. TR 420, SX 1, at 21. Ms. Gonzalez could not explain why the checks cleared the bank about two months after the date they were supposedly written. TR 422. She testified that she understood that the workers “hold on to their checks because they don’t want to send them down to their girlfriends or wives.” TR 431. Moreover, she testified that the workers had difficulty cashing pay checks because banks in Alaska cashed Respondent’s out-of-state checks only after the bank on which the check was drawn approved payment. TR 431. Ms. Gonzalez testified that this policy resulted in a “15-day layover” when the men presented Respondent’s checks to an Alaskan bank. TR 431. When asked whether this practice explained why the workers received cash advances, she agreed. TR 431. Ms. Gonzalez also testified that she pays for the company’s bills with its checking account and often pays some of the family’s bills with its account instead of her personal account. TR 436-37. She estimated that she pays approximately four or five bills per month with the company account. TR 438. When asked to explain why the only checks written on the company’s account from August 11, 2000 to September 8, 2000 were the payroll checks, she responded that she pays for everything in Alaska with cash. TR 440-41. In fact, the next check in the sequence after the payroll checks was written on September 27, 2000. RX 20a.

Respondent’s theory regarding the disparity between the dates the checks were supposedly given to the employees and the dates that the employees cashed them is plausible on its face. However, Mr. Gonzalez was vague about his movements in Alaska, and I find that he was not a credible witness. In addition, Ms. Gonzalez was vague about her presence in Alaska and even contradicted herself when she testified about where she prepared the payroll. Likewise, Mr. Cruz and Ms. Castillo credibly testified that they picked up the checks at the Gonzalezes’ house after they returned from Alaska. Moreover, Ms. Gonzalez’s testimony that the employees determine their so-called basic rate suggests that she completed the payroll sometime after

Respondent knew how much it would be paid for the Contract. The Gonzalezes' inconsistencies and evasive demeanor casts a pall over their testimony and discredits their contention that the employees kept their checks until they returned to Washington. The DOL's witnesses were credible and the evidence of record corroborates their testimony. Accordingly, I find that Respondent violated the SCA when it paid its employees in October 2000, which was well beyond the dates required by the SCA. 29 C.F.R. § 4.165(a)(1).

#### **D. Backwages Owed**

The DOL argues that Respondent owes each employee compensation for seventy-seven hours performed over the course of seven days: two days for the week ending on July 29, 2000; two days for the week ending on August 5, 2000; one day for the week ending on August 12, 2000; and two days for the week ending on August 26, 2000.<sup>5</sup> The DOL submits that the employees are entitled to their overtime rate of \$22.50 for seventy-seven hours, which yields \$1,732.50 per employee (\$12,127.50 total).<sup>6</sup> Respondent concedes that the employees are entitled to their overtime rate for any uncompensated hours. However, it argues that it is entitled to a credit for days that the employees were paid but did not work. Specifically, Respondent claims that the employees did not work between task orders from August 10 through August 15, 2000, but they were paid for working eleven hours on August 10, 11, 14 and 15 – which were all weekdays. In addition, Respondent claims that the employees did not work on July 29, August 5, August 11, and August 19, 2000. The DOL counters that the employees are entitled to compensation on these days because they were “engaged to wait.” See 29 C.F.R. § 4.178 and 29 C.F.R. § 785.14 *et seq.* Respondent claims that the employees did not work between August 10 and August 15, 2000 because they were between task orders, and the Forest Service would not allow them to begin a new task order.

The regulations specify that “[D]eterminations of hours worked will be made in accordance with the principles applied under the Fair Labor Standards Act as set forth in [29 C.F.R. § 785] .... In general, the hours worked by an employee include all periods in which the employee is suffered or permitted to do work whether or not required to do so, and all time during which the employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace.” 29 C.F.R. § 4.178. The regulations distinguish between being “engaged to wait” and “waiting to be engaged.” 29 C.F.R. § 785.14 (*citing Skidmore v. Swift*, 322 U.S. 134 (1944)). An employee is “engaged to wait” when “the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer.” 29 C.F.R. § 785.15. An employee is waiting to be engaged, on the other hand, when “he is definitively told in advance that he may leave the job and that he will not have to commence work until a definitively specified hour has arrived.” 29 C.F.R. § 785.16(a). In *Owens v. Assn. of Western Pulp & Paper Workers*, 971 F.2d 347, 350 (9th Cir. 1992) the Ninth Circuit observed

---

<sup>5</sup> The DOL's wage calculation lists the week as ending on August 27, 2000, which was a Sunday. However, all the other dates used to designate the end of a week in the DOL's wage calculation were Saturdays. In addition to this error, the DOL appears to have omitted Sunday, August 27, 2000 from its backwage calculation.

<sup>6</sup> The DOL's calculations and post-trial brief argues that back wages are treated as violations of both the SCA and the CWHSSA – i.e. a contractor commits an SCA violation for the amount of the straight time wages due and also commits a CWHSSA violation for one-half the SCA amount. The DOL did not cite a case or regulation in support of this argument, and I have not found authority for that proposition.

two factors are predominant in determining whether waiting time is spent primarily for the benefit of the employer: “(1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties.” In the absence of an agreement, the circumstances of the case determine what the parties intended regarding waiting time. *Rural Fire Protection Co. v. Hepp*, 366 F.2d 355, 360 (9th Cir. 1966)(citing *Skidmore, supra*, 323 U.S. at 137).

Mr. Cruz testified that the crew had to move their camp within the 200 acre parcel because it was separated by a river. TR 139-140. He claimed that they were unable to work for three to five days because they were waiting for a boat to arrive to take them to the other side of the river and flooding. TR 139-40. During his interview with Ms. Rivera, Juan Castillo stated that the crew did not work from August 9, 2000 through August 16, 2000 because “the river had grown and we couldn’t cross the river to the other side where we were going to work.” DX 8 at 198. In addition, Mr. Cruz kept a record of the time he worked during the Contract, and his records indicate that he worked zero hours from August 10, 2000 through August 15, 2000. DX 9 at 212. However, he worked three hours on August 9, 2000 and five hours on August 16, 2000. *Id.* Likewise, Mr. Castillo claimed to have worked three hours on August 9, 2000. DX 8 at 198. Respondent argues that the employees were not “engaged to wait” because they had “other things to do besides work while at the work location,” such as fishing and visiting taverns. Resp. Post-Trial Brief, p. 3. However, Mr. Cruz’s brief testimony about fishing is not dispositive of whether the employees were “engaged to wait” during the week in question. Although he claimed to have caught salmon in Alaska, he did not indicate the dates that he fished, and he said that the fish were “easy to catch” because they spawning. TR 180-81. Likewise, he testified that Ms. Gonzalez lent him thirty dollars *before* he started work on the Contract, and he disputed that he borrowed the thirty dollars in a tavern. TR 189; *see also* RX 16a (\$430 dollars deducted from Mr. Cruz’s first paycheck).

The only evidence Respondent has submitted to suggest that the employees were “waiting to be engaged” during this period was Mr. Gonzalez’s testimony that the employees chose to stay at the camp instead of going to Wrangell, that the Forest Service would not allow the employees to begin the next task order for one week, and an acknowledgement from Mr. Cruz that he caught salmon during the month covered by the Complaint. Mr. Gonzalez claimed that he offered to take the employees to Wrangell to explain why they were not paid for working weekends, and I have already found that he was not credible and that the employees worked on weekends. Further, Mr. Cruz’s testimony about conditions in the camp is a stark contrast to Mr. Gonzalez’s characterization that the employees leisurely fished and enjoyed the rustic surroundings. Mr. Cruz complained that the tents leaked and he had to use two sleeping bags to stay dry, TR 142-43, and he testified that mosquitoes were so prevalent that “... you would need to be working all the time so that with the smoke of the gasoline you would scare them off.” TR 140. Finally, the agreement between the Forest Service and Respondent specifically addressed stop work orders. DX 3 at 140. The stop-work order procedure allowed the Forest Service’s Contracting Officer to modify the Contract if the order results in an increase of the time or costs needed to complete the Contract. *Id.* Any modifications of the Contract shall be in writing. *Id.* Respondent never produced a written stop-work order to verify its explanation that it was delayed one week between task orders, and I find that Mr. Gonzalez was not credible on this issue. Indeed, when asked if he would be entitled to pay the employees in the event of a flood,

he answered, "... Nothing I can do to prevent the river from overflowing or knowing that was to happen. *But I tried to be fair and still pay them some.*" TR 299(emphasis added). Mr. Gonzalez's answer acknowledges that there was flooding and contradicts his statements that the Forest Service prevented the work from going forward. Mr. Cruz credibly testified that the two parcels (*i.e.* the task orders) were separated by a river, and they were unable to cross the river because of flooding and Mr. Gonzalez's neglect. Although there was not an agreement between the employees and Respondent regarding waiting time, the conduct of the parties indicates that the understanding between them was that the employees would be paid by the acre. As a result, the employees customarily worked eleven hours per day to complete the project. Although compensable waiting time is "usually of short duration," 29 C.F.R. § 785.15, I find that the employees were not free to use the time effectively for their own purposes because they were stranded in the middle of a rainforest with no means of contacting Mr. Gonzalez. TR 141-42, 143-44.<sup>7</sup> Respondent is not entitled to offset the straight time or the overtime hours that he paid to the employees on August 9-11 and August 14-15, 2000. Likewise, Respondent is not entitled to a credit for Saturday, August 12, 2000 and Sunday, August 13, 2000 because he did not pay the employees for these dates and the DOL evidently did not factor these dates into its calculation.<sup>8</sup>

Next, Respondent argues that it should receive a credit for July 29, August 5, August 11, and August 19, 2000 because Alaska Peak and Seas performed transportation services for Respondent and the employees did not work on these days. TR 308-09; RX 8 at 32. However, August 19, 2000 was not included in the DOL's calculations because no backwages are sought for the week ending August 19, 2000 – which would necessarily include Saturday August 19, 2000. For the other days, Respondent only produced an undated memorandum from Alaska Peak and Seas documenting the days that it performed transportation services for Respondent. This memorandum includes the following handwritten statement by Mr. Gonzalez, "These are the dates that we don't work because we are waiting for the boat, for the lunch." TR 309; RX 8, p. 32. However, Mr. Cruz testified that Mr. Gonzalez was only at the camp about "two hours" when he dropped off gas and supplies. TR 171-72. In addition, Mr. Gonzalez did not explain why dropping off supplies would preclude the employees from working the rest of the day. On balance, I find that Respondent has not proven that the employees did not work on these days. More importantly, unloading supplies that are integral to completing the job is time that "belongs to and is controlled by the employer." 29 C.F.R. § 785.15. Accordingly, they were "waiting to be engaged" and entitled to compensation. Respondent correctly points out that the DOL should not include two days in its backwage calculations for the week ending July 29, 2000 because the Complaint only covers the period beginning on July 27, 2000, which only includes Saturday, July 29, 2000 (one day). Accordingly, the amount of backwages Respondent owes is reduced by \$1,732.50 (eleven hours at \$22.50 per hour multiplied by seven workers). Respondent is hereby ORDERED to pay backwages of \$10,395 (\$1,485 per employee) for the period from July 27, 2000 through August 27, 2000.

---

<sup>7</sup> See also *Cross v. Arkansas Forestry Comm'n*, 938 F.2d 912, 916-17 (8th Cir. 1991)(forestry workers were "waiting to be engaged" because they were required to remain within a thirty-five to fifty mile radius to monitor radio signals and this requirement also dramatically affected their use of personal time when on-call).

<sup>8</sup> See DX 14 at 322. Only one day of compensation is sought for the week ending August 12, 2000, and no compensation is sought for the week ending August 19, 2000.

## II. DEBARMENT

The SCA and CWHSSA both provide for debarment, but each statute imposes different standards for assessing liability. *Hugo Reforestation, Inc.*, ARB 99-003, slip op. p. 9 (ARB April 30, 2001). Under the CWHSSA, a respondent shall be debarred if the DOL establishes that the respondent's violations are "aggravated or willful." 29 C.F.R. § 5.12(a). Under the SCA, debarment is presumed once violations have been established – unless the respondent can prove the existence of "unusual circumstances" that warrant relief from debarment. 29 C.F.R. § 4.188(a) and (b); *Hugo Reforestation, Inc., supra*, slip op. p. 9.

The debarment sanction under each act is also different. The SCA provides that debarment shall be for three years, without modification. 41 U.S.C. §354(a). However, under the CWHSSA, a violator is debarred for a period "not to exceed" three years, 29 C.F.R. § 5.12(a)(1), and may petition to be removed from the ineligibility list after six months. 29 C.F.R. § 5.12(c).

### A. Debarment under the CWHSSA

The regulations promulgated under Davis-Bacon Related Acts such as the CWHSSA provide that any contractor found to have committed aggravated or willful violations of the labor standards provisions of the applicable statutes "shall be ineligible for a period not to exceed 3 years ... to receive any contracts or subcontracts subject to the Davis-Bacon or Related Acts." 29 C.F.R. § 5.12(a)(1). "Aggravated or willful" is strictly construed and does not "encompass merely inadvertent or negligent behavior." *A. Vento Construction*, WAB 87-51, slip op. p. 7 (WAB Oct. 17, 1990). Thus, a violation is aggravated or willful if the "employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited..." *Hugo Reforestation, Inc.*, ARB 99-003, slip op. p. 10, n.8, (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)).

In this matter, I find that Respondent willfully violated the overtime and recordkeeping provisions of the CWHSSA. Respondent obviously knew that its employees were entitled to time and a half for hours worked in excess of forty during a week because the timecards it submitted to the DOL purported to pay the employees at 1.5 times their stated hourly rate. Although I am not convinced that Respondent completed the timecards as required by the CWHSSA, these timecards nevertheless establish that Respondent was aware of its obligation to pay time-and-a-half for hours worked over forty. Mr. Cruz testified that the employees worked seven days per week because they understood that they would be paid on a per acre basis. In light of Mr. Cruz's credible testimony, Mr. Gonzalez's testimony that the employees did not work on Saturdays and Sundays simply does not ring true. Moreover, I find that Respondent's violations of the recordkeeping requirements of the CWHSSA were aggravated because it submitted falsified records to the DOL. Respondent knew that they were required to keep contemporaneous records of the hours worked because the timecards were completed in a manner to feign compliance with the CWHSSA's requirements: either Mr. Gonzalez or Ms. Gonzalez wrote a date on the timecards next to where the employees signed to give the appearance that the timecards were signed on the dates indicated. Respondent's conduct establishes a level of culpability beyond mere inadvertence or negligence. Based on the

foregoing, I find Respondent in aggravated and willful violation of the overtime pay and recordkeeping requirements of the CWHSSA and subject to debarment pursuant to 29 C.F.R. § 5.12(a)(1).

## **B. Debarment under the SCA**

Any person or firm found to have violated the SCA shall be declared ineligible to receive Federal contracts for a period of three years unless the Secretary recommends otherwise because of “unusual circumstances.” 41 U.S.C. § 354(a). However, the Secretary’s discretion to relieve a violator from the sanction of debarment is limited, and a contractor seeking such an exemption “must, therefore, run a narrow gauntlet.” 29 C.F.R. § 4.188(b)(1); *Sharipoff, dba BSR Co.*, 1988-SCA-32, slip op. at p. 6 (Sec’y Sept. 20, 1991). In order to prove “unusual circumstances,” a contractor must satisfy all prongs of the three-part test promulgated in the Department’s regulations. First, the contractor must establish that its violations were neither willful, deliberate, nor of an aggravated nature, and that the violations were not the result of culpable conduct. 29 C.F.R. § 4.188(b)(3)(i). Next, the contractor must show that it has a good compliance history, cooperated in the investigation, repaid the moneys due, and has made sufficient assurances of future compliance. 29 C.F.R. § 4.188(b)(3)(ii). Finally, numerous factors bearing on the contractor’s good faith must be considered before relief from debarment will be granted, *e.g.*, whether the contractor has previously been investigated for SCA violations, whether the contractor has committed recordkeeping violations which impeded the Department’s investigation, and whether determination of liability under the SCA was dependent upon resolution of *bona fide* legal issues of doubtful certainty, and the contractor’s efforts to ensure compliance. *Id.* The second and third prongs need not be considered if a contractor does not satisfy the first prong. *Hugo Reforestation, Inc, supra*, slip op. at p. 15.

Under the first prong of the unusual circumstances test, “culpable conduct” includes “culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records).” 29 C.F.R. § 4.188(b)(3)(i). Ignorance of the law has constituted “unusual circumstances” in limited circumstances. *See Integrated Resource Management, Inc.*, 1997-SCA-14 (ALJ Aug. 5, 1997)(when notified that he was violating the SCA and CWHSSA, the contractor – who was performing his first federal contract – immediately raised employees’ pay rates, paid backwages as soon as he was notified, and sent all records to the DOL’s investigator).

Ms. Gonzalez could not recall discussing the recordkeeping requirements under the Acts. TR 360-61. Likewise, she could not recall if she had received a copy of the SCA and the regulations pertaining to recordkeeping and when to pay workers, but she remembered receiving some packets from the government pertaining to the Migrant and Seasonal Agricultural Workers Protection Act. TR 361. At best, this testimony would establish ignorance of the law. Respondent, however, obviously was not ignorant because it falsified its records to give the appearance of timely payment and contemporaneous recording of the hours worked. Moreover, Respondent has performed government contracts since 1994, and Ms. Rivera testified that it was investigated for violations of the Migrant and Seasonal Agricultural Workers’ Protection Act in 1996. TR 24. She averred that she discussed the requirements of the SCA with Mr. Gonzalez

during the 1996 investigation. TR 26. In addition, Ms. Rivera completed an investigation of Mr. Gonzalez for violations of the SCA in October 2000 that resulted in an agreement to pay back wages. TR 25-26 (discussing DX 10). Ms. Gonzalez recalled meeting with Ms. Rivera on August 25, 2000 but could not remember if she had discussed violations of the Services Contract Act. TR 353. Although Ms. Gonzalez could not recall when her company paid for violations, she recalled paying for violations not because the company had committed them, but because she wanted to “get Lupe off my back, basically.” TR 429. Records prepared by Ms. Rivera indicate that although Respondent denied that it had violated the SCA at its meeting with her on August 25, 2000, Ms. Gonzalez agreed to pay for violations of the SCA on September 21, 2000. DX 10, pp. 217-220b. In addition, Respondent issued three checks to the employees that were pre-dated to give the appearance of compliance with the SCA’s timely pay requirements. On balance, I find that Respondent knew about the SCA’s requirements and decided to violate them. Accordingly, I find that Respondent has not demonstrated “unusual circumstances” and shall be debarred for three years pursuant to 41 U.S.C. § 354(a).

**ORDER**

1. Arturo Gonzalez d/b/a Gonzalez Forestry is found to be in violation of the overtime pay requirements of the CWHSSA and is delinquent in the payment of \$10,395 as follows:

<u>Employee:</u>	<u>Amount Due:</u>
Alexander Cruz	\$1,485
Jose Melendez	\$1,485
Juan Castillo	\$1,485
Jose Portillo	\$1,485
Juan Franco	\$1,485
Alberto Pineda	\$1,485
Antonio Blaz Cruz	\$1,485;

2. Arturo Gonzalez d/b/a/ Gonzalez Forestry’s violations of the CWHSSA’s overtime pay and recordkeeping requirements were aggravated and willful, and Arturo Gonzalez d/b/a Gonzalez Forestry is subject to debarment pursuant to 29 C.F.R. § 5.12(a)(1); and
3. Arturo Gonzalez d/b/a Gonzalez Forestry has violated the SCA’s recordkeeping and timely pay requirements and shall be debarred pursuant to 41 U.S.C. § 354(a).

**A**

ALEXANDER KARST  
Administrative Law Judge

AK:jb