



In the Matter of:

**Proposed Debarment for Labor Standards
Violations by:**

**NCC ELECTRICAL SERVICES, INC.,
SUBCONTRACTOR,**

and

JERRY NAPIE,

INDIVIDUALLY.

ARB CASE NO. 13-097

ALJ CASE NO. 2012-DBA-006

DATE: September 30, 2015

**With respect to laborers and mechanics
employed by the Subcontractor under
Subcontract No. AISCO-07-C-119-16 for
electrical work at the Ojo Encino Day School
construction project in Ojo Encino, McKinley
County, New Mexico.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondents:

Marcus E. Garcia, Esq., Albuquerque, New Mexico

For the Principal Deputy Administrator, Wage and Hour Division:

**M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Jonathan
T. Rees, Esq.; Erin M. Mohan, Esq.; U.S. Department of Labor, Washington, District
of Columbia**

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy
Chief Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*.
Judge Brown, dissenting.**

FINAL DECISION AND ORDER

This case arises under the Davis-Bacon Act, as amended (DBA), 40 U.S.C.A. §§ 3141-3148 (West Supp. 2013), and applicable regulations issued thereunder at 29 C.F.R. Parts 5 and 6 (2014). Respondents NCC Electrical Services, Inc. and Jerry Napie seek review and reversal of the Department of Labor Administrative Law Judge's (ALJ) summary decision and additional decisions related to the summary decision. The ALJ's summary decision was based on his finding that the Respondents disregarded their obligations under the DBA and are thereby subject to debarment for a period of three years, during which period they are prohibited from entering into any contract or subcontract with the U.S. Government. Upon de novo review of the summary decision, the Administrative Review Board (ARB) affirms the ALJ's summary decisions for the reasons that follow.

BACKGROUND¹

A. NCC's Subcontract

In 2004, the Bureau of Indian Affairs, U.S. Department of Interior, entered into an agreement with the U.S. Army Corps of Engineers (ACE) to design and construct a replacement of the K-8 Ojo Encino Day School in Ojo Encino, New Mexico. ACE thereafter entered into contract W912PP-08-C-0006 (Prime Contract) with Alutiiq International Solutions, LLC (Alutiiq) to design and build the Ojo Encino school.

In February 2009, Alutiiq subcontracted with NCC Electrical Services (NCC) to perform electrical work in the school, which covered a little more than a year of work. Respondent Jerry Napie is NCC's sole owner and President, as well as a licensed journeyman electrician under New Mexico law.² As president and sole owner of NCC, Napie oversaw and managed the company's general operations, signed the Ojo Encino subcontract on behalf of NCC, handled contracting issues, was responsible for the hiring of workers under the subcontract and supervised the work that was performed. Both the Prime Contract and the subcontract with NCC are subject to the DBA and its implementing regulations. The DBA required NCC to pay its

¹ The Background is taken from the undisputed facts.

² To become a licensed journeyman electrician, Napie had to, among other requirements, pass a written examination attesting to his knowledge of state and federal laws and regulations related to government contracts, including the DBA and requirements for a bona fide apprenticeship program. Administrator's Exhibit (AX) 126-129.

employees working on the Ojo Encino project prevailing wages established by Wage Determination Number NM070001 dated October 5, 2007.³

NCC performed electrical work under the subcontract between April 2009 and May 2010. To complete the job, NCC hired various workers which it classified as “journeyman electricians,” “apprentice,” or “laborer,” and paid them a corresponding wage. NCC did not operate a Department of Labor certified apprenticeship program during its work on the Ojo Encino project nor did anyone at NCC verify that the designated “apprentices” were part of any apprentice program during the months that NCC used the “apprentice” classification in its payrolls. Nevertheless, for the first nine months of the project, NCC classified several of its employees as “apprentices” on its payroll records, and certified that each employee listed as an apprentice was enrolled in a qualifying apprenticeship program. On behalf of NCC, Napie signed and submitted several “Statement of Compliance” forms accompanying NCC’s payrolls that included a provision attesting to the fact that all of NCC’s apprentices were enrolled in a bona fide apprenticeship program registered with a state apprenticeship agency recognized by the Department of Labor.⁴

Because the applicable Wage Determination did not establish a prevailing wage for apprentices, NCC unilaterally chose to treat employees it classified as apprentices on its payroll records as “laborers” and paid them the prevailing wage listed in one of the four different categories for “laborer” under the Wage Determination based on the employee’s level of experience. Upon being informed by Alutiiq that NCC should not classify any of its employees as apprentices, NCC reclassified all employees previously identified as “apprentices” on its payrolls as “laborers,” and amended previous certified payroll records to reflect this change. However, NCC continued to pay these employees as “laborers.”⁵

NCC and Napie unilaterally decided to pay laborers according to classification labels found in personnel records rather than for the work the laborers actually performed as required. Even worse, NCC did not have records of the work actually performed by the laborers. According to the evidence the Administrator submitted, a laborer’s prevailing hourly wage rate was approximately \$15 to \$17 lower than a journeyman’s prevailing hourly wage rate.⁶

³ See ALJ Order Granting in Part and Denying in Part the Acting Deputy Administrator’s Motion for Summary Decision, ALJ No. 2012-DBA-006 (May 16, 2013) (“ALJ May 16, 2013 Order”), slip op. at 2.

⁴ ALJ May 16, 2013 Order, slip op. at 3; see Certified Payroll, AX 54-104.

⁵ ALJ May 13, 2013 Order; AX 143-144.

⁶ AX 54-104.

B. WHD Investigation

In 2011, the Wage and Hour Division (WHD) conducted a labor standards investigation of NCC's compliance with the DBA and other federal laws, including the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C.A. § 3701 et seq. (Thomson Reuters 2015). The Administrator for WHD found that the Respondents violated the DBA by failing to pay certain employees the applicable wages prevailing in the locality.⁷

Regarding the DBA violations, the Administrator found that the Respondents misclassified several of NCC's employees as "laborers" and "apprentices" notwithstanding that none were enrolled in a bona-fide apprenticeship program and that all performed the work of electricians. The Administrator thus found that the Respondents failed to pay their employees the correct wages under the Wage Determination, and failed to submit accurate certified payroll records. The amount of underpayment of wages was \$217,917.40, representing thousands of hours of work paid below the prevailing wage rate. This amount is 17 percent of the initial amount of the contract. The record contains an itemized list of the underpaid employees. NCC underpaid Bruce Pinto \$42,000 and several others at least \$20,000.⁸ Neither NCC nor Napie has challenged these amounts. Based on these findings, the Administrator determined that the Respondents should be debarred from doing business with the federal government for three years.

In May of 2012, the Administrator initiated proceedings before the Office of Administrative Law Judges, by filing an Order of Reference requesting a determination as to whether debarment was appropriate.

C. Proceedings Before the ALJ and Appeal to the ARB

On April 4, 2013, the Administrator filed a Motion for Summary Decision asserting that NCC and Napie disregarded their DBA obligations through at least four violations of the Act, and that they did so with a level of culpability warranting debarment from further contracts with the federal government. Respondents filed a response opposing the debarment of NCC and Napie but otherwise did not dispute that NCC violated the DBA. By order issued May 16, 2013, the ALJ granted in part and denied in part the Administrator's motion. Upon concluding that NCC's subcontract with Alutiq was subject to the provisions of the DBA, the ALJ found Napie to be a "responsible officer" within the meaning of 29 C.F.R. § 5.12(a)(2), and thus subject to potential debarment under the DBA together with NCC. We see no challenge to the ALJ's finding that Napie is a responsible party and accept that ruling as final. The ALJ also concluded that the undisputed material facts supported finding that the Respondents falsely certified that

⁷ The Administrator also cited Respondents for violations under the CWHSSA.

⁸ See Department of Labor's Response to Prehearing Order, Exhibit A.

nine of NCC's employees working on the Ojo Encino project were in a bona fide apprenticeship program. At the same time, the ALJ concluded that issues of material fact existed as to whether the Respondents committed other alleged DBA violations,⁹ and whether any violations committed by the Respondents were the result of a level of culpability beyond mere negligence warranting debarment.

Three days after the issuance of the ALJ's order on summary decision, the Administrator filed a Motion to Reconsider and Supplement Motion for Summary Decision, which the ALJ granted by order dated June 11, 2013.¹⁰ The Respondents had until June 11, 2013 to respond to the Administrator's motion for reconsideration and supplementation. On that day, curiously, the ALJ issued a substantial order not only granting reconsideration and supplementation but also deciding the merits of the summary decision. The Respondents filed their opposition only one day after the deadline, arguably timely if the delivery to FedEx was on June 11th, but obviously received by the ALJ one day after the ALJ had ruled. The ALJ granted summary decision on the grounds that additional deposition testimony of Tom Tapaha, a former NCC foreman, established that the undisputed material facts established that the Respondents misclassified employees engaged in electrical work as "laborers" and "apprentices," as opposed to "journeyman electricians," and as a result failed to pay them the DBA prevailing wage rate to which they were entitled as electricians. The ALJ held that the DBA violations, which were found to be knowing and willful, thereby established that the Respondents acted with a level of culpability beyond mere negligence which supported debarment. Accordingly, the ALJ directed the Administrator to transmit to the Comptroller General the names of both NCC and Napie with the recommendation that they be debarred for a period of three years from entering into any contract or subcontract with the U.S. Government.

After the June 11th Order granting summary decision, the case descended into a procedural quagmire. First, despite the fact that the Respondents actually filed an opposition to the Administrator's motion for reconsideration, the ALJ treated the Respondents' submission as a motion seeking reconsideration of the ALJ's June 11, 2013 Order Granting the Administrator's Motion for Reconsideration and for Summary Decision. Upon review of the Respondents' filing, on June 13, 2013 the ALJ issued an Order Denying Respondents' Request for Reconsideration. Then, on July 9, 2013, the Respondents filed a Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b)(1) and Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. Rule 59 (e). While that motion was pending, given the procedurally confusing posture of the case, the Respondents filed a Petition for Review with the Administrative Review

⁹ The other alleged DBA violations included the Administrator's charge that the Respondents misclassified employees performing electricians' work as "laborers" or "apprentices," that the Respondents falsely certified the number of employees working on the Ojo Encino project on NCC payroll records, and that they failed to compensate 19 employees for actual work performed as electricians. *See* ALJ May 16, 2013 Order, slip op. at 9-10.

¹⁰ Order Granting the Acting Deputy Administrator's Motion for Reconsideration and for Summary Decision, ALJ No. 2012-DBA-0006 (June 11, 2013) ("ALJ June 11, 2013 Order").

Board on July 22, 2013 challenging all of the ALJ's orders to that point. On August 28, 2013, the ALJ issued an Order Denying Respondents' Request for Reconsideration.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or Board) has jurisdiction to hear and decide petitions for review of ALJ decisions arising under the DBA. 29 C.F.R. § 7.9; *see also* Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012).

The Board reviews an ALJ's grant of summary decision *de novo*,¹¹ applying the same standard applicable to the ALJ for granting summary decision under 29 C.F.R. § 18.40. In ruling on a motion for summary decision, the evidence is not weighed to determine the truth of the matters asserted.¹² Under 29 C.F.R. § 18.40, the question is whether, upon viewing the evidence in the light most favorable to the nonmoving party, "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact" and if not, whether the moving party is thus entitled to summary decision as a matter of law.¹³ Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.¹⁴

The ARB reviews an ALJ's procedural and evidentiary rulings under an abuse of discretion standard.¹⁵ Given the troubling procedural path of this matter below, we have opted to consider *de novo* the summary decision by considering the initial motion and all of the parties' filings and exhibits filed thereafter. We believe that the parties had ample opportunities to argue the issue of summary decision. More importantly, we find that the initial motion and response provide sufficient grounds to fully resolve the question of debarment. The Tapaha

¹¹ *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999-STA-021, slip op. at 2 (ARB Nov. 30, 1999).

¹² *Siemaszko v. First Energy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012). *See also Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027, slip op. at 6 (ARB May 29, 2009) (citation omitted); *Seetharaman v. G.E. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 4 (ARB May 28, 2004) (citations omitted); *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-14, slip op. at 5-6 (ARB Sept. 26, 2012).

¹³ *Siemaszko*, slip op. at 3; *Hasan*, slip op. at 6; *Franchini*, slip op. at 5-6.

¹⁴ *Id.*

¹⁵ *Id.*

deposition and all procedural objections related to that deposition do not alter our view. Consequently, we see as inconsequential all the procedural wranglings that followed the first round of summary decision arguments.

DISCUSSION

As a preliminary matter, we note that the Respondents do not challenge the ALJ's conclusion that NCC violated the DBA. We therefore accept as final the ALJ's rulings that NCC violated the DBA by falsely certifying that nine of its employees were in a bona fide apprenticeship program and misclassified nineteen of its employees as "apprentices" or "laborers" when, in fact, they should have been classified as "journeyman elections" and paid accordingly. The sole remaining issue is whether the undisputed material facts of record, when viewed in the light most favorable to the Respondents, support finding that the Respondents disregarded their obligations under the DBA to their employees, thereby subjecting the Respondents to debarment.

In cases arising under contracts covered by the DBA, the Comptroller General is required to "distribute to all departments of the Federal Government a list of the names of persons whom the Comptroller General has found to have disregarded their obligations to employees and subcontractors."¹⁶ Upon publication of the list, no contract may be awarded to any identified person or to any firm, corporation, partnership, or association in which the person has an interest for three years.¹⁷ In implementing this mandate and statutory prohibition, the Administrator is required to transmit to the Comptroller General the names of contractors or subcontractors, and their responsible officers, "who have been found to have disregarded their obligations to employees" under the DBA, along with the recommendation of the Secretary of Labor or the Secretary's authorized representative regarding debarment.¹⁸ Neither the DBA nor the regulations implementing the Act define the term "disregard" as it relates to an employer's obligations. We must therefore begin our analysis with the plain language of the regulation.

As discussed above, the regulations implementing the DBA impose a number of obligations on employers who participate in government construction contracts. Contractors and subcontractors are obligated to pay workers employed on the contract at least the locally prevailing wages (including fringe benefits) listed in the Davis-Bacon wage determination in the contract. They must also, for example, properly classify employees according to the wage

¹⁶ 40 U.S.C.A. § 3144(b)(1).

¹⁷ 40 U.S.C.A. § 3144(b)(2). Once grounds for debarment under the DBA have been established, the three-year debarment period is mandatory, "without consideration of mitigating factors or extraordinary circumstances." *In re Thomas & Sons Bldg. Contractors*, ARB No. 00-050, ALJ No. 96-DBA-037, slip op. at 4 (ARB Aug. 27, 2001).

¹⁸ 29 C.F.R. § 5.12(a)(2).

determination, maintain and submit accurate and timely payroll records, and comply with guidelines for employing apprentices and trainees. Employers are reminded of these obligations when they complete Statement of Compliance forms, in conjunction with their payroll submissions. The forms require the signatory to confirm that its workers have been paid “not less than the applicable wage rates contained in any wage determination incorporated into the contract” and that any apprentices employed on the project are participating in “a bona fide apprenticeship program” or are registered with the Bureau of Apprenticeship and Training.

With these obligations in mind, we must next determine how an employer’s action or inaction can constitute a “disregard” of these obligations. Prior cases have noted that DBA violations do not, by themselves, constitute a disregard of an employer’s obligations within the meaning the law, and that, to support a debarment order, the evidence must establish a level of culpability beyond negligence.¹⁹ We agree. An innocuous mistake may trigger a violation of the DBA, but such mistakes, especially those that do not result in harm to employees, do not necessarily evidence an employer’s disregard of its DBA obligations.

A number of cases have clarified that disregard of obligations under the DBA must involve “some element of intent.”²⁰ Again, we agree. Some previous case law has developed under which the underpayment of prevailing wages, coupled with the falsification of certified payrolls, has constituted disregard of a contractor’s obligations to employees.²¹ While these cases have announced one way to find “intent” under the DBA debarment provisions, they do not exclusively define what constitutes “disregard” of an employer’s obligations. For example, bad faith on the part of the employer as well as gross negligence regarding compliance have each been found to constitute disregard of obligations under the DBA.²²

Obviously, when an employer falsifies documents, it is disregarding its obligations. But an employer’s acts need not be the equivalent of intentional falsification to qualify as a disregard of its DBA obligations. We reach this conclusion by, again, going to the regulatory language.

¹⁹ See, e.g., *In re Sundex, Ltd.*, ARB No. 98-130, ALJ No. 94-DBA-058, slip op. at 6 (ARB Dec. 30, 1999).

²⁰ See, e.g., *In re Thomas & Sons Bldg. Contractors*, slip op. at 3; *In re Structural Concepts, Inc.*, WAB No. 95-02, slip op. at 3 (Nov. 30, 1995).

²¹ See, e.g., *In re Star Brite Constr. Co.*, ARB No. 98-113, ALJ No. 97-DBA-012, slip op. at 6 (ARB, June 30, 2000) (underpayment of prevailing wages coupled with the submission of certified payrolls “falsified to feign compliance with the DBA prevailing wage requirements”); *In re Sundex, Ltd.*, *supra*, at 6-7 (underpayment of wages, coupled with failure to keep accurate records and the submission of falsified payroll records to conceal fact that prevailing wages were not paid held to constitute “serious violations of law, fully justifying debarment”).

²² See, e.g., *In re P.J. Stella Constr. Corp.*, WAB Case No. 80-13, slip op. at 5-6 (Mar. 1, 1984); *In re Vicon Corp.*, WAB Case No. 65-03, slip op. at 6-7 (Dec. 15, 1965).

The regulations distinguish the DBA’s “disregarded their obligations” standard from the standard governing debarment under the Davis Bacon-related Acts (DBRA).²³ The language governing debarment under the DBRA states:

Whenever any contractor or subcontractor is found by the Secretary of Labor to be in **aggravated or willful** violation of the labor standards provisions of any of the applicable statutes listed in § 5.1 other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years...²⁴

This provision directly precedes the DBA debarment provision and contains a clearly distinguishable standard for debarment, an aggravated or deliberate violation as opposed to intentionally failing to look at what the law requires. It is therefore logical that, if an employer must act with an “element of intent,” that act need not rise to the level of a willful violation contemplated in the debarment standard under the DBRA; intentional failure to look at the law is sufficient.²⁵ Intentional disregard of obligations may therefore include acts that are not willful attempts *to avoid* the requirements of the DBA.

Read in its proper context, the regulation does not allow contractors and subcontractors to ignore the rules and regulations applicable to DBA contracts, pay their employees less than prevailing wages, and avoid debarment by asserting that they did not intentionally violate the DBA because they were unaware of the Act’s requirements. Such was the conclusion of the Board in *Ray Wilson Co.*, ARB No. 02-086, ALJ No. 2000-DBA-14 (ARB Feb. 27, 2004). In that case, an ALJ granted summary decision and debarred Aztec Fire Protection, a subcontractor of Ray Wilson Co., as well as Abraham Yazdi, and David Naim (Aztec’s President and Vice President) for failing to pay prevailing wages to some of their employees. In affirming the ALJ’s debarment order, the Board concluded that the company’s assertion that it was unaware of the DBA’s requirements did not excuse its violation of the Act:

²³ The Davis-Bacon Related Acts incorporate the Davis-Bacon prevailing wage requirements into contracts between a non-Federal entity, such as a State or local government, and a contractor where the Federal government provides funding indirectly. *See, e.g., Palisades Urban Renewal Enters., LLP*, ARB No. 07-124, ALJ No. 2006-DBA-001 (ARB July 30, 2009).

²⁴ 29 C.F.R. § 5.12(a)(1) (emphasis added).

²⁵ The Respondents argue that debarment may not be ordered in this case because their violations were “not willful or fraudulent.” *See, e.g., Respondents’ Brief in Support of Petition for Review* at 19; AX 118. But as we explain in our analysis, the proper standard for determining debarment in this case is whether the Respondents disregarded their obligations to their employees.

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” Yazdi admitted that he did not read the DBA provisions which prime contractor Wilson included in Aztec’s own subcontract. Tr. at 773. Such failures constitute disregard of obligations, i.e., Aztec’s obligations to be aware of DBA requirements and to ensure that its lower-tier subcontractor R&F properly complied with the wage payment and record keeping requirements on the project.

Id. slip op. at 12 (citations omitted).

Turning to this case, the ALJ reconsidered his May 16th Order and ultimately granted summary decision because of Tapaha’s testimony. But Tapaha’s testimony is secondary, in our view, and only corroboration of NCC and Napie’s own admissions that he disregarded the DBA requirements. In his deposition testimony, Napie described the process by which he classified employees. According to Napie, he classified and paid employees according to their applications, resumes, licensure and experience.²⁶ He testified that, because the applicable wage determination did not have a classification for “apprentices,” and he considered “apprentices” and “laborer” to be “the same,” Napie testified that he paid the employees as laborers within one of four categories listed in the wage determination.²⁷ In their Answers to Administrator’s First Set of Interrogatories, the Respondents asserted that Napie would confer with a supervisor regarding some employees and direct that they be classified according to their “application, resume, licensure and experience.” These actions are unequivocally inconsistent with the DBA requirement that laborers be paid according to the work they perform.²⁸ Napie’s admission that he relied on his own formula for determining the proper wages is an admission that he did not look to his obligations under DBA. They failed to keep proper records tracking the actual work performed by the workers, which further prevented them from complying with the DBA obligations to pay workers according to the work performed.

If a job applicant stated he or she was an apprentice, Napie would classify the employee as “apprentice” on NCC’s payroll records. Classification of employees as “apprentices” or “laborers,” Napie testified, was “[b]ased on the number of years they had worked as electricians,

²⁶ AX 117, 138-139, 144, 145, 151.

²⁷ *Id.* at 143-144.

²⁸ 29 C.F.R. § 5.5(a)(1)(i).

based on their applications. Their applications came in as – one of them showing as apprentice, one-year, two-year, then the other one shows as a laborer. . . . So I classified them that way, based on the number of years they have been in construction or with electrical experience.”²⁹ He classified certain employees as “apprentices,” he testified, “because that is what it said on the paperwork on their [individual employee] application. . . . They told me what they were, what their title was, what they did.”³⁰ Finally, because he was inexperienced with DBA contracting, Napie testified that he also confirmed his classification practice with the prime contractor.³¹ Again, NCC and Napie repeatedly certified these apprentices as being enrolled in an approved apprenticeship program based on their own rationale without checking their legal obligations under the DBA and actually verifying the truth of this certification. NCC and Napie ultimately reclassified apprentices and then laborers.

In deciding this case on summary decision, we need not determine whether NCC and Napie intended to underpay their employees. The issue is whether there was an “element of intent” in failing to look at the DBA requirements.

The Respondents’ assertions are insufficient to create a genuine issue of fact regarding their disregard of their obligations to their employees. They admit that NCC “failed to furnish certain employees engaged in electrical work the wages and fringe benefits required by” the contract.³² The Respondents’ DBA violations resulted in the underpayment of thousands of dollars due to workers on the Ojo Encino project. In sum, the undisputed material facts of record, viewed in the light most favorable to the Respondents, support finding that the Respondents disregarded their obligations under the DBA to their employees, thereby subjecting them to debarment.

CONCLUSION

For reasons stated above, we **AFFIRM** the ALJ’s May 16, 2013 Order Granting in Part and Denying in Part the Acting Deputy Administrator’s Motion for Summary Decision. The ALJ’s June 11, 2013 Order Granting the Acting Deputy Administrator’s Motion for Reconsideration and for Summary Decision is **AFFIRMED in PART** for the reasons set forth above. Because we performed a de novo review and considered all of the Respondents’ arguments and evidence, the Respondents’ challenges to the ALJ’s June 13, 2013 Order Denying Respondents’ Request for Reconsideration, and to the ALJ’s August 28, 2013 Order Denying Respondents’ Motion for Reconsideration are rendered moot. Accordingly, the Secretary is

²⁹ AX 138.

³⁰ AX 139.

³¹ AX 141, 145-146.

³² AX 025.

directed to forward the names of the Respondents, both NCC Electrical Services, Inc. and Jerry Napie, to the Comptroller General as provided by 41 U.S.C.A. § 6706(b).

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, dissenting.

A credible question exists as to the scope of Respondents' challenge of the ALJ's decision and accompanying rulings on appeal to the Administrative Review Board.³³ Respondents' challenge to the merits of the ALJ's May 16, 2013 and June 11, 2013 Decision and Orders is certainly no paragon of clarity. The primary issue on appeal is whether the undisputed material facts of record, when viewed in the light most favorable to Respondents, support finding that Respondents disregarded their obligations under the DBA to their employees, thereby subjecting Respondents to debarment proceedings pursuant to 29 C.F.R. § 5.12(a)(2). Nevertheless, before turning to that issue, I address the propriety of the ALJ's summary decision finding that Respondents violated the DBA by certifying that certain of its employees were in a bona fide apprenticeship program, and by misclassifying employees engaged in electrical work as "apprentices" or "laborers," resulting in the failure to pay such employees the DBA prevailing wage to which they were entitled -- giving Respondents the benefit of the doubt that their challenge on appeal effectively encompasses these issues in addition to challenging the ALJ's determination that Respondents' violations of the DBA were the result of a level of culpability beyond mere negligence warranting debarment.³⁴

³³ The majority interprets Respondents' appeal as not challenging the ALJ's conclusion that NCC and Napie violated the DBA; that the sole issue on appeal is whether Respondents are subject to debarment. I tend to agree. Nevertheless, given the importance of the underlying issues to the proper enforcement of the Davis-Bacon Act, I address the merits of the ALJ's summary decisions concerning the DBA violations with which Respondents have been charged before turning to the issue of debarment.

³⁴ Clearly not challenged by Respondents is the ALJ's May 16, 2013 ruling holding Napie liable for the DBA violations as a "responsible officer" within the meaning of 29 C.F.R. § 5.12(a)(2), and thus potentially subject to debarment along with NCC. Had there been such a challenge, I would have affirmed the ALJ's ruling regarding Napie's potential debarment liability.

Under the DBA an employer is permitted to hire apprentices, and pay them at less than the predetermined rate for the work they perform, when they are employed “pursuant to and individually registered in bona fide apprenticeship program registered with the U.S. Department of Labor . . . or with a State Apprenticeship Agency or . . . in the first 90 days of probationary employment as an apprentice in such an apprenticeship program.” 29 C.F.R. § 5.5(a)(4). Employees who are not enrolled in a bona fide apprenticeship program or in their first 90 days of probationary employment as a bona fide apprentice must be paid the “applicable wage determination for the classification of work actually performed.” *Id.* It is undisputed that, at all times relevant to this action, nine of NCC’s employees identified as apprentices were not registered in a bona fide, approved apprenticeship program, and that Respondents had no such program. Additionally, the undisputed material facts establish that Respondents certified on documents accompanying payroll records that these nine employees were properly classified as “apprentices.”³⁵

Contractors performing work under a DBA contract, or subcontract, are required to maintain documentation of the time each of its employees spends in each classification of work under the wage determination, and to pay them accordingly.³⁶ When a contractor or subcontractor fails to maintain such records, as occurred in the instant case, employees performing work in multiple classifications, as also occurred in this case, are entitled to be paid the higher classification for the period of their employment worked in the higher classification, as established through the testimony of employees or a compliance officer’s reconstruction of the time worked.³⁷ Based on the evidentiary record developed pursuant to the Administrator’s renewed motion for summary decision, the ALJ found that “Respondent’s non-journeyman electrician employees, classified variously as ‘helpers,’ ‘laborers’ and ‘apprentices,’ were performing work on the Ojo Encino project which should have been performed only by licensed journeyman electricians or apprentices enrolled in a bona fide, approved apprenticeship program.”³⁸ Because Respondents admitted that they failed to pay these employees the prevailing wage rate for electricians while engaged in electrical work, the ALJ held that “[t]he undisputed material facts thus establish that Respondents failed to pay non-journeyman electricians the wage rate for journeyman electricians to which there were entitled in violation of

³⁵ The payroll certification states: “That any apprentices employed in the above period are duly recognized in a bona fide apprenticeship program registered with a State apprenticeship agency recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, or if no such recognized agency exists in a State, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.” Administrative Exhibit (AX) 55, 57, 59.

³⁶ *Pythagoras General Contracting*, ARB Nos. 08-107, 09-007, ALJ No. 2005-DBA-014 (ARB Mar. 1, 2011).

³⁷ *Trataros Constr. Corp.*, WAB Nos. 87-55, -56 (Feb. 26, 1991).

³⁸ ALJ June 11, 2013 Order, slip op. at 6.

the DBA and applicable regulations.”³⁹ It is thus undisputed that nineteen of NCC’s employees who performed the work of electricians were misclassified as apprentices or laborers and, as a result, were paid a lower wage rate than that to which they were entitled for the electricians’ work they performed.

Based on careful review of the evidentiary record, I am in agreement with the ALJ that the undisputed material facts not only establish that Respondents violated the DBA by certifying that nine of its employees were in a bona fide apprenticeship program, the undisputed facts also establish that Respondents misclassified nineteen of NCC’s employees as “apprentices” or “laborers” when, in fact, they should have been classified as “journeyman elections” and paid accordingly. I would, therefore, affirm the ALJ’s rulings, per the ALJ’s Orders of May 16, 2013, and June 11, 2013, on both of these counts.

Concerning the issue of debarment, in cases arising under contracts covered by the Davis-Bacon Act, the Comptroller General is required to “distribute to all departments of the Federal Government a list of the names of persons whom the Comptroller General has found to have disregarded their obligations to employees and subcontractors.”⁴⁰ Upon publication of the list, no contract may be awarded to any identified person or to any firm, corporation, partnership, or association in which the person has an interest for three years.⁴¹ In implementation of this mandate and statutory prohibition, the Administrator is required to transmit to the Comptroller General the names of contractors or subcontractors, and their responsible officers, “who have been found to have disregarded their obligations to employees” under the DBA, along with the recommendation of the Secretary of Labor or the Secretary’s authorized representative regarding debarment.⁴² Any person, and any firm, corporation, partnership, or associations in which the person has an interest, appearing on such list, are barred from the award of any contract or subcontract with the federal government, the District of Columbia, or any contract or subcontract subject to the labor standards provisions of the DBA.⁴³

While the evidence of record clearly establishes that Respondents committed violations of the DBA, “[v]iolations of the DBA do not *per se* constitute a disregard of an employer’s

³⁹ *Id.*

⁴⁰ 40 U.S.C.A. § 3144(b)(1).

⁴¹ 40 U.S.C.A. § 3144(b)(2). Once grounds for debarment under the DBA have been established, the three-year debarment period is mandatory, “without consideration of mitigating factors or extraordinary circumstances.” *In re Thomas & Sons Bldg. Contractors*, ARB No. 00-050, ALJ No. 96-DBA-037, slip op. at 4 (ARB Aug. 27, 2001).

⁴² 29 C.F.R. § 5.12(a)(2).

⁴³ 40 U.S.C.A. § 3144(b)(2); 29 C.F.R. § 5.12(a)(2).

obligations within the meaning of 29 C.F.R. § 5.12(a)(2)” giving rise to debarment.⁴⁴ “To support a debarment order, the evidence must establish a level of culpability beyond mere negligence.”⁴⁵ “Disregard of obligations” under the DBA “has been interpreted to mean a level of culpability beyond mere negligence, involving some element of intent.”⁴⁶ Accordingly, bad faith on the part of the employer or gross negligence regarding compliance has been found to constitute disregard of one’s obligations under the DBA.⁴⁷ In virtually all instances, however, as the Wage Appeals Board (WAB) noted, a contractor has never been debarred under the DBA “for an act or omission that did not include an element of intent.”⁴⁸

Consistent with the foregoing, it has been recognized that in certain instances, proof of DBA violations such as misclassification of employees or failure to pay prevailing wage rates, when coupled with the submission of falsified certified payrolls masking the violation(s), is sufficient to create a rebuttal presumption of the requisite intent, and thus a disregard of Davis Bacon Act obligations.⁴⁹ Failure to pay prevailing wage rates when coupled with “the submission of falsified payrolls raises a *prima facie* case that the violations were intentional.”⁵⁰ Upon establishment of a *prima facie* case, the burden shifts “to the employer to come up with an explanation excusing its disregard of its obligations to its employees.”⁵¹

⁴⁴ *P&N, Inc./Thermodyn Mech. Contractors, Inc.*, ARB No. 96-116, ALJ No. 94-DBA-072, slip op. at 5 (ARB Oct. 25, 1996).

⁴⁵ *Id.*

⁴⁶ *In re Thomas & Sons*, ARB No. 00-050, slip op. at 3. *Accord, In re Sundex, Ltd.*, ARB No. 98-130, ALJ No. 94-DBA-058, slip op. at 6 (ARB, Dec. 30, 1999).

⁴⁷ *See, In re P.J. Stella Constr. Corp.*, WAB Case No. 80-13, slip op. at 5-6 (Mar. 1, 1984); *In re Vicon Corp.*, WAB Case No. 65-03, slip op. at 6-7 (Dec. 15, 1965).

⁴⁸ *In re Structural Concepts, Inc.*, WAB No. 95-02, slip op. at 3 (Nov. 30, 1995).

⁴⁹ *See e.g., In re Star Brite Constr. Co.*, ARB No. 98-113, ALJ No. 1997-DBA-012, slip op. at 6 (ARB June 30, 2000) (underpayment of prevailing wages coupled with the submission of certified payrolls “falsified to feign compliance with the DBA prevailing wage requirements”); *In re Sundex, Ltd., supra*, at 6-7 (underpayment of wages, coupled with failure to keep accurate records and the submission of falsified payroll records to conceal fact that prevailing wages were not paid held to constitute “serious violations of law, fully justifying debarment”). *See also In re Structural Concepts, supra; In re Howell Constr., Inc.*, WAB No. 93-12 (May 31, 1994); *In re Marvin E. Hirschert*, WAB No. 77-17 (Oct. 16, 1977).

⁵⁰ *In re R.J. Sanders*, WAB No. 90-25, slip op. at 2 (Jan. 31, 1991).

⁵¹ *In re Phoenix Paint Co.*, WAB NO. 87-08, slip op. at 7 (May 5, 1989). (The use by the WAB of the phrase “*prima facie* case” is consistent with its use and application under Title VII and whistleblower protection law, *i.e.* the establishment of a rebuttable presumption. *See Texas Dep’t of*

In the instant case, the ALJ granted the Administrator's renewed motion for summary decision based on the deposition testimony of Tom Tapaha, a licensed journeyman electrician who had worked as a foreman and field supervisor for NCC on the Ojo Encino project from May 2009 until January 2010.⁵² In addition to his testimony that NCC's non-journeyman electrician employees, classified variously as "helpers," "laborers" and "apprentices," were actually performing the work of electricians on the Ojo Encino project, Tapaha testified that he informed Napie that NCC was required to have an approved apprenticeship program in order to pay employees doing electrical work as "apprentices" or "laborers" and that, if it did not, the DBA required that NCC's employees performing electrical work had to be paid the prevailing rate for electricians under the applicable wage determination.⁵³ Tapaha testified that he observed NCC employees he called "helpers," who were classified as "apprentices" or "laborers," performing the tasks of journeyman electricians, and that he told Napie that, because NCC did not have an approved apprenticeship program, federal law required NCC to compensate its helpers who performed electricians' tasks at the journeyman electrician rate.⁵⁴ Based on this testimony, the fact that Napie himself was a journeyman electrician, and the fact that Napie knew that NCC's non-journeyman employees were performing electricians' work on the project, the ALJ concluded that Napie "clearly knew that the workers classified by Respondents in their certified payroll records as "laborers" and "apprentices" were performing electrical work and were being paid less than the applicable wage rate for journeyman electricians. Respondents' false certification of the submitted payroll records was thus knowing and willful as opposed to "merely negligent."⁵⁵ Accordingly, the ALJ held that "[t]he undisputed material facts show that Respondents disregarded their obligations to employees, and their DBA violations were knowing, willful, and the result of a level of culpability beyond merely negligence," thus supporting an order recommending debarment.⁵⁶

The ALJ's summary decision on the question of debarment is not sustainable. The primary problem with the ALJ's decision is his failure to take into consideration Napie's testimony contradicting that of Tapaha's in reaching his conclusion that the undisputed facts

Cnty. Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981); *Wright v. Southland Corp.*, 187 F.3d 1287, 1292 (11th Cir. 1999).

⁵² Tapaha's deposition was taken on January 26, 2013, but was not submitted to the ALJ in support of the Administrator's initial motion for summary decision that resulted in the ALJ's May 13, 2013 Order.

⁵³ ALJ June 11, 2013 Order, slip op at 2, 3 and 7.

⁵⁴ AX 162-173.

⁵⁵ ALJ June 11, 2013 Order, slip op. at 7.

⁵⁶ *Id.*

support finding that Respondents' DBA violations rose to a level of culpability beyond mere negligence supporting debarment. When NCC's evidence, and in particular Napie's testimony, is taken into consideration, the evidence of record, when viewed in the light most favorable to Respondents, presents an issue of material fact concerning Respondents' intent, particularly that of Napie's, with respect to the DBA violations. In his deposition testimony, and in NCC's response to interrogatories, Napie testified that he classified and paid employees according to their applications, resumes, licensure and experience.⁵⁷ According to Napie, if a job applicant stated he or she was an apprentice, he would classify the employee as "apprentice" on NCC's payroll records. Classification of employees as "apprentices" or "laborers," Napie testified, was "[b]ased on the number of years they had worked as electricians, based on their applications. Their applications came in as – one of them showing as apprentice, one-year, two-year, then the other one shows as a laborer. . . . So I classified them that way, based on the number of years they have been in construction or with electrical experience."⁵⁸ He classified certain employees as "apprentices," he testified, "because that is what it said on the paperwork on their [individual employee] application. . . . They told me what they were, what their title was, what they did."⁵⁹ "I went ahead by their – by their paperwork, application and resume. It had 'apprentice' on it, so I just put apprentice on their classification. If it said 'laborer,' I put 'laborer' on it." . . . "Then if they was [sic] going to be a licensed electrician, I made sure they gave me a license from any state . . . and that is how I classified them as journeyman licensed electricians."⁶⁰ Also, because the applicable wage determination did not have a classification for "apprentices," and he considered "apprentices" and "laborer" to be the same thing, Napie testified that he paid the employees as laborers within one of four categories listed in the wage determination.⁶¹ Finally, because he was inexperienced with DBA contracting, Napie testified that he also confirmed his classification practice with the prime contractor.⁶²

Napie's testimony, which appears to have been completely ignored by the ALJ, raises an issue of material fact as to Respondents' intent in misclassifying and underpaying their non-journeyman employees as "apprentices" or "laborers" rather than as "journeyman electricians," and with respect to whether the documentation submitted with the certified payroll records was intended to cover up, or mask over any DBA violations.⁶³ Consequently, I would overturn the

⁵⁷ AX 139, 144, 145, 151.

⁵⁸ AX 138.

⁵⁹ AX 139.

⁶⁰ AX 151.

⁶¹ AX 143-144.

⁶² AX 141, 145-146.

⁶³ As previously noted, NCC's payroll certifications included the statement that, "any apprentices employed in the above period are duly recognized in a bona fide apprenticeship program

ALJ's decision granting summary decision in the Administrator's favor on the matter of debarment, and return the matter of debarment to the ALJ for an evidentiary hearing.

Nor am I persuaded by the majority's interpretation of the requirements for debarment under the DBA. Aside from embracing a rather novel interpretation of the debarment requirement that a contractor or subcontractor must be "found to have disregarded their obligations to employees," an interpretation without citation to any ARB or WAB precedent, the majority's ruling disregards the fundamental of DBA case law that a violation of the DBA does not constitute a "disregard for obligations" in and of itself. As I understand the majority's ruling, it holds that Respondents' admission that NCC failed to pay certain of its employees engaged in electrical work the wages to which they were entitled due to their misclassification as apprentices or laborers is sufficient to find that Respondents disregarded their DBA obligations, thereby subjecting Respondents to debarment. The majority's ruling is a far cry from DBA case authority (previously cited) in which *proof of DBA violations* (such as misclassification of employees or failure to pay prevailing wage rates) *when coupled with the submission of falsified certified payrolls designed to mask the violations* has been held sufficient to create a *rebuttal presumption of the requisite intent* to disregard Davis-Bacon Act obligations.

Where intent is at issue, as it is with debarment, extreme caution should be exercised in ordering debarment as a matter of summary decision. The U.S. Supreme Court has cautioned that "summary procedures should be used sparingly . . . where motive and intent play lead roles. . . ." ⁶⁴ Consistent with U.S. Supreme Court and federal appellate court decisions, the ARB has considered intent to involve questions of fact "ordinarily precluding a grant of summary judgment." ⁶⁵ I do not mean to suggest that summary decision is not appropriate in all cases

registered with a State apprenticeship agency . . . or, if no such recognized agency exists in a State, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor." AX 55, 57, 59. Again, construing the evidence for summary decision purposes in the light most favorable to Respondents, this certification could be interpreted, as Napie appears to have interpreted it, to mean that the employees in question were recognized as having previously participated in a recognized apprenticeship program.

⁶⁴ *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962).

⁶⁵ *Nelson v. Norfolk Southern Ry. Co.*, ARB No. 12-045, ALJ No. 2011-FRS-035, slip op. at 7 (ARB, Sept. 25, 2013). *Accord, Franchini vs. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 9 (ARB Sept. 26, 2012); *Richter, et al., v. Baldwin Assocs.*, Case No. 84-ERA-9, 1986 WL 327039 (Sec'y March 12, 1986), slip op. at 6. *See e.g., White Motor Co. v. United States*, 372 U.S. 253, 259 (1963) (summary judgment generally inappropriate "where motive and intent play leading roles"); *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1476 (11th Cir. 1991) ("[a]s a general rule, a party's state of mind (such as knowledge or intent) is a question of fact for the fact finder, to be determined after trial"); *Pfizer, Inc. v. Int'l Rectifier Corp.*, 538 F.2d 180, 185 (8th Cir. 1976) ("[s]ummary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles"). *See also McCoy v. WGN Cont'l Broad.*, 957 F.2d 368, 370-71 (7th Cir. 1992); *Stumph v. Thomas &*

where debarment is at issue; only that, as the U.S. Supreme Court has admonished, it should be used sparingly and only after a most careful examination of whether intent is self-evident and undisputed.

For the reasons stated, I thus would affirm the ALJ's May 16, 2013 Order Granting in Part and Denying in Part the Acting Deputy Administrator's Motion for Summary Decision, affirm in part and vacate in part the ALJ's June 11, 2013 Order Granting the Deputy Administrator's Motion for Reconsideration and for Summary Decision, and remand the matter of debarment to the ALJ for an evidentiary hearing. I thus dissent from the majority's recommendation of debarment.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Skinner, 770 F.2d 93, 97 (7th Cir. 1985); *Kephart v. Inst. of Gas Tech.*, 630 F.2d 1217, 1218 (7th Cir. 1980); *Staren v. American Nat'l Bank and Trust Co. of Chicago*, 529 F.2d 1257, 1261 (7th Cir. 1976) (“questions of motivation or intent are particularly inappropriate for summary judgment”).