

U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)



Issue Date: 07 August 2017

Case No.: 2009-DBA-00006

ARB Case Nos.: 12-093
12-095

In the Matter of:

Disputes concerning the payment of prevailing
wage rates and overtime pay by:

WEEKS MARINE, INC. (Contractor)
Respondent

With respect to laborers and mechanics employed
by the Contractor on:

Contract No. **W912DS-07-C-0027**
(Jobsite: Fire Island Inlet, Long Island, New York)

Appearances:

For the Complainant:
Judith Marblestone, Esquire
Daniel Hennefeld, Esquire

For the Respondent:
David M. Whitaker, Esquire

Before: THERESA C. TIMLIN
Administrative Law Judge

DECISION AND ORDER ON REMAND

On June 5, 2009, the Administrator, Wage and Hour Division, United States Department of Labor (“Administrator”) initiated this proceeding by issuing an Order of Reference, asserting that Weeks Marine, Inc. (“Respondents”) had failed to pay prevailing wage rates and fringe benefits. The Order of Reference alleged that Weeks Marine, Inc. disregarded their obligations to their employees under the Davis-Bacon Act, 40 U.S.C. §§ 3141–3148, and committed violations of the labor standards provisions of the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 3701–3708, during the dredging of the beach in Fire Island, New York.

This tribunal held a hearing on February 23, 2010 in Cherry Hill, New Jersey. On June 26, 2012, the undersigned issued a Decision and Order finding that Respondent committed a violation of the Davis-Bacon Act when it failed to reimburse nine Local 25 employees for minimal lodging costs above the thirty-five dollars per diem they received. (Decision and Order, pp. 24–31.) Both parties appealed to the Administrative Review Board (“the Board”).

By Decision and Order of Remand issued on April 29, 2015, the Board affirmed the undersigned’s Decision and Order in part and remanded the case for further consideration. Specifically, the Board agreed with this tribunal’s conclusion that the issue of whether Weeks Marine was obligated under Davis-Bacon to reimburse the employees from Local 25 for their lodging costs was subject to a “balancing of benefits” test. However, the Board found that the undersigned’s Decision and Order did not adequately set forth the evidence considered in finding that the on-site lodging primarily benefited Weeks Marine as opposed to the Local 25 employees. Thus, the Board remanded the case pursuant to 29 C.F.R. §7.1(e) for “the taking of additional evidence if necessary and the making of such findings of fact as are necessary and required to determine for whom the lodging for the Local 25 employees primarily benefits.” (Decision and Order of Remand, p. 13.) The Board also held that—should the employees prevail—they are entitled to reimbursement of their actual lodging costs. (Decision and Order of Remand, pp. 14–15.) Respondent’s thirty-five dollar stipend would then constitute a partial reimbursement of the employees’ actual housing costs. (Decision and Order of Remand, p. 15.)

On May 6, 2015, this administrative law judge issued an Order to Show Cause, directing the parties to state whether she should reopen the record for the taking of additional evidence. The parties jointly responded on May 14, 2015, stating that the issues on remand could be determined from the existing record. Accordingly, the undersigned directed the parties to submit briefs on remand. Both parties submitted briefs on July 27, 2015. The undersigned subsequently permitted and received reply briefs from both parties.

I. ISSUES ON REMAND

As specified by the Board, the sole issue to be resolved on remand is whether the Local 25 employees’ lodging at the Fire Island Project was primarily for the benefit and convenience of Weeks Marine or the Local 25 employees.

II. FINDINGS OF FACT

This tribunal incorporates by reference its prior Decision and Order, including its summaries of the evidence offered by both parties. (See Decision and Order, pp. 2–24.) Upon review of the evidence of record, and in light of the Board’s instructions on remand, the undersigned makes the following findings of fact.

The nine employees in question are members of the International Union of Operating Engineers, Local 25, Marine Division (“Local 25”). (Tr. 100.) Local 25 is a labor resource that allows dredging contractors to hire and lay off Local 25 members as needed. (Tr. 130.) This employment arrangement provides cost savings to employers because they do not have to maintain a dredging labor force when they do not have active projects. (Tr. 131.) Although

members can work for any contractor, Local 25 encourages portability of membership. (Tr. 129.) Members become acclimated to the vessel or piece of equipment on which they work as well as to the specific contractor's policies, operating procedures, and safety standards, which benefits the contractor. (Tr. 129.) Respondent has been a signatory contractor on Local 25's collective bargaining agreement ("CBA") for more than twenty-five years. (Tr. 103, JX 4, p. 555.)

The Local 25 CBA covers the territory from the northern tip of Maine to the western panhandle of Florida. (Tr. 104; JX 4, pp. 577, 583.) There are northern and southern addendums to the CBA; dredging projects in northern states paying higher wages and fringe benefits compared to those in the southern states. (Tr. 104, 169, 372.) Dredging projects typically take three to six months to complete. (Tr. 57.) Local 25 members are required to travel throughout the territorial zone covered by the Local 25 CBA if they want to remain actively employed. (Tr. 126–27.) To staff projects with union members who are not already employed by the company, Respondent will give the union a list of openings. (Tr. 320.) If Respondent knows of employees who have a history with the company, it asks for them first. (Tr. 320.) If there are no prior employees available, Local 25 supplies Respondent with an out-of-work list. (Tr. 320–21.) Respondent will contact individuals on the out-of-work list and go through its hiring procedure. (Tr. 321.) Employees hired through this process are not hired with the expectation that they are going to work for the company in any one location or to work primarily in their place of residence. (Tr. 321.)

For members "employed on work afloat or ashore," the CBA requires that employers either (1) make meals and sleeping quarters available to employees or (2) grant each employee a minimum subsistence allowance of thirty-five dollars per day. (JX 4, p. 566.) The purpose of this per diem payment is to defray the cost of obtaining housing, meals, laundry, and work clothes. (Tr. 131–32.) The CBA only specified a minimum subsistence allowance of thirty-five dollars to allow employers the flexibility to pay additional monies for subsistence at their will. (Tr. 133.) For instance, housing costs may be at a premium at the height of tourist season, and employers understand that members sometimes reject jobs when they cannot afford local lodging. (Tr. 133, 160.) Employers also occasionally provide increased subsistence allowances for valuable employees, such as high-producing operators or knowledgeable engineers. (Tr. 135.) However, contractors are not required to provide anything above the minimum subsistence allowance of thirty-five dollars, and the general industry practice is to simply pay that per diem rate. (Tr. 82, 97, 147, 323.) When Local 25 members work on jobs beyond a feasible daily commute—about an hour and a half—they typically stay in hotel rooms. (Tr. 124.) Since Local 25 members perform dredging work up and down the eastern seaboard, it is rare for a Local 25 member to have a job close enough to home to commute. (Tr. 57, 124.) If an assignment is long-term, members may start out in hotel rooms and end up in apartments if they find a local apartment with a short-term lease. (Tr. 127.)

At the start of a project, section 15 of the CBA also requires contractors to pay members a transportation allowance. (JX 4 p. 565) Although Local 25 members live in thirty-five states, the transportation allowance is designed to be sufficient to cover the entire cost of getting the member to the job and back home when it is complete. (Tr. 136, 161.) If members want to

travel back and forth to their homes while the project is still underway, they pay for those trips on their own dime. (Tr. 136.)

Respondent entered into a federally funded contract, number W912DS-07-C- 0027, with the U.S. Army Corps of Engineers for the dredging of Fire Island Inlet, Fire Island, New York (“the contract”). (JX 1.) In the event that Respondent did not timely complete the contract (or receive a time extension), the contract provided for liquidated damages in the amount of \$1580.00 for each calendar day of delay until the work was completed or accepted. (JX 1, pp. 190, 225, 229–30.) The Fire Island project needed to be completed before the tourist beach season began and before piping plovers nested in April. (Tr. 175–76.) Incorporated into the contract were the CBAs for International Union of Operating Engineers Locals 25 and 138, which required the payment of certain prevailing wage rates and fringe benefits. (Tr. 248–257.) Local 25 members are qualified to do some dredge work that Local 138 members are not permitted to do, and Local 138 employees are paid a different wage rate pursuant to their Local 138 CBA. (Tr. 141, 225.) Respondent’s employees typically worked seven days a week on the Fire Island project; some in eight-hour shifts and others in twelve-hour shifts. (Tr. 77–78, 176–77; JX 2.)

Nine employees from Local 25 incurred lodging costs while working on the Fire Island dredging project: Larry Campbell, Leon Evans, Michael Fricke, Terry Howell, William H. Johnson, William E. Johnson, Jr., Coy Polston, Richard Sellman, and John Tatman (“the Employees”). (CX 1; Tr. 317–318.) All of the Employees worked on the Fire Island project for different lengths of time between November 2007 and April 2008. (JX 8.) Weeks Marine had employed most of the Employees prior to the Fire Island project. (Tr. 369–70.) The Employees were from Louisiana, Mississippi, Georgia, Alabama, Massachusetts, and New Jersey.¹ (Tr. 178.) The Employees stayed at motels or hotels during the Fire Island job because they were not residents of the area and had to reside within commutable distance of the jobsite. (Tr. 178.) The Employees paid for hotel lodgings for the duration of their work assignment, and Respondent did not reimburse them for the actual lodging costs.² (Tr. 179, 227; CX 1, pp. 1–2.) Pursuant to the Local 25 CBA, the Employees each received a thirty-five dollar per diem payment, intended to defray the cost of lodging, meals, and other incidental living expenses. (Tr. 250; JX 4.) The actual lodging costs alone for the Employees exceeded the thirty-five dollars per diem. (Tr. 238, 250–251, 271.) Pursuant to the CBA, the Employees also received payments from Respondent for transportation costs to cover their initial travel from their home residence to the work site on Long Island. (Tr. 219–22; JX 4 p. 565.)

By contrast, Local 138 employees at the Fire Island project generally lived within commuting distance of the job site and did not incur out-of-pocket lodging costs. (Tr. 219–22.) Local 138 members working on the Fire Island project did not receive any per diem or subsistence payments from Respondent. (Tr. 222.)

¹ The parties agreed that these nine employees worked in states and cities other than their home state as reflected on their employment applications. (Tr. 341; JX 6.)

² Weeks Marine did reimburse certain employees for the cost of their lodging, but not the nine at issue in this case. (Tr. 373–374.)

III. DISCUSSION

In its Decision and Order on Remand, the Board instructed the undersigned to perform the “balancing of benefits” test in light of the facts of this specific case. (Decision and Order of Remand, p. 13.) The Board summarized a handful of cases and found each to be factually distinct from the present set of facts. (Decision and Order of Remand, pp. 11–13.) However, aside from its brief summary, the Board gave no instruction on what facts are relevant to such a finding. Therefore, “to determine for whom the lodging for the Local 25 Employees primarily benefits,” the undersigned first examines the reasoning employed in the Board’s prior cases. Because the application of relevant factors and agency guidance to the facts of this case leads ineluctably to the conclusion that the primary benefit of the Employee’s housing accrued to the Respondent, the undersigned again finds that Respondent has failed to satisfy its obligation under Davis-Bacon to pay the Local 25 Employees the minimum prevailing wage unconditionally.

A. Governing Statutes and Regulations

The purpose of the Davis-Bacon Act is to protect local wage standards by ensuring that contractors would not base their bids on wages lower than those prevailing in the area. L.P. Cavett Co. v. U.S. Department of Labor, 101 F.3d 1111, 1113 (6th Cir. 1996). By tying government contracts to prevailing local wages, Davis-Bacon gives local labor and local contractors a fair opportunity to compete. Universities Research Ass’n v. Cotutu, 450 U.S. 754, 774 (1981). Davis-Bacon works to protect workers by ensuring that government contractors employ workers at fair wages. Walsh v. Schlecht, 429 U.S. 401, 411 (1977). Courts recognize that the Davis-Bacon Act is a “remedial act for the benefit of construction workers,” and therefore should be “liberally construed to effectuate its beneficent purposes.” Drivers Local Union No. 695 v. NLRB, 361 F.2d 547, 553 n.23 (D.C. Cir. 1966).

Davis-Bacon requires covered contractors to pay its employees the prevailing wage “unconditionally” and “without subsequent deduction or rebate.” 40 U.S.C. § 3142(c)(1). This requirement is subject to the exceptions issued by the Secretary of Labor under the Copeland Act. See 29 C.F.R. § 5.5(a)(1).³ With respect to housing, the Secretary has issued 29 C.F.R. § 3.5(j), which permits an employer to deduct from its employees’ wages the “reasonable cost” of lodging meeting the requirements of § 3(m) of the Fair Labor Standards Act (“FLSA”). As explained by the Board, FLSA § 3(m) and the accompanying regulations create a rebuttable presumption that the reasonable cost of lodging customarily furnished by an employer to its employees is deductible from Davis-Bacon prevailing wages. (Decision and Order of Remand, p. 9.) The question of whether the cost/expense of lodging is “reasonable” turns on whether the primary benefit of the lodging runs to the employer or the employees. See 29 U.S.C. § 203(m); 29 C.F.R. § 531.3(d)(1). If the lodging primarily benefits the employer, then the cost of lodging may not count towards prevailing wages. However, if the lodging primarily benefits the employees, the cost is deductible against prevailing wages provided that the lodging is “customarily furnished” under FLSA § (3)(m). (Decision and Order of Remand, p. 9.)

³ “The deductions permitted under 29 C.F.R. §§ 3.5 and 3.6 evince ‘an overarching concern that deductions from the employee’s prevailing wage under the Davis-Bacon Act do not benefit the employer directly or indirectly.’” BEW v. Brock, 68 F.3d 1194, 1203 (9th Cir. 1995) (quoting Building & Constr. Trades Dep’t. v. Reich, 40 F.3d 1275, 1281 (D.C. Cir. 1994)).

In addition, the Board recognized that there is no legal difference between an employer directly deducting the cost of lodging from its employees' prevailing wages and requiring them to bear the cost of housing themselves. (*Id.*, p. 6–7.) Under 29 C.F.R. § 531.35, an employer may not shift the cost of housing onto its employees if the housing is for the employer's benefit and the cost of housing brings the employee's pay below prevailing wage. *Arriaga v. Fl. Pacific Farms*, 305 F.3d 1228, 1236 (11th Cir. 2002). Requiring an employee to pay such housing costs out of her prevailing wages is indistinguishable from an employer who pays the cost and then deducts it from the employee's wages. (Decision and Order of Remand, p. 6–7.)

B. Wage and Hour Division's Field Operations Handbook

In addition to formal regulations, the Department of Labor has also issued general administrative guidance. Field Operations Handbook ("FOH") chapter 15 supplements the Department's Davis-Bacon regulations, including those related to housing deductions in 29 C.F.R. § 3.5(j). *See FOH* chapter 15a00. In chapter 15f19, the Department provides the following guidance:

Transportation and board and lodging expenses.

Where an employer sends employees who are regularly employed in their home community away from home to perform a special job at a location outside daily commuting distances from their homes so that, as a practical matter, they can return to their homes only on weekends, the assumption by the employer of the cost of the board and lodging at the distant location, not customarily furnished the employees in their regular employment by the employer, and of weekend transportation costs of returning to their homes and reporting again to the special job at the end of the weekend, are considered as payment of travel expenses properly reimbursable by the employer and incurred for its benefit. Such payments are not considered bona fide fringe benefits within the meaning of the DBRA, are not part of the employees' wages, and do not constitute board, lodging, or other facilities customarily furnished which are deductible from the predetermined wage pursuant to 29 CFR 3.5(j). *See* 29 CFR 5.29(f).

FOH chapter 15f18.

The Department offers similar guidance in *FOH* chapter 30c03 for application of its FLSA housing regulations:

Primarily for the benefit of the employee.

(a) The crediting by an employer of facilities furnished to employees as wages will depend on whether such facilities are furnished primarily for the benefit or convenience of the employee, as determined by the WHD. Where the primary benefit of such facilities is to the employer's business interest, credit will be denied. The following are commonly viewed as furnished primarily for the benefit or convenience of employees:

(2) *Lodging*

Lodging, like meals, is ordinarily considered for the benefit and convenience of the employee. Circumstances may exist, however, where housing is of little benefit to employees, as where an employer requires an employee to live on the employer's premises to meet some need of the employer, or where the employee must travel away from home to further the employer's business. In such circumstances, the housing will be considered as primarily benefiting the employer. (Note: while it may be to the employer's advantage to provide such facilities at or near the worksite, courts have consistently taken the view that the employer may take a wage credit when the facilities are primarily for the benefit or convenience of the employee.)

FOH chapter 30c03.

C. Case Law

The Board first discusses Soler v. G. & U., Inc., 833 F.2d 1104 (2d Cir. 1987), which established the rebuttable statutory presumption that housing and board are primarily for the benefit and convenience of the employee. (Decision and Order of Remand, pp. 9–10.) In Soler, the employer hired migrant farmworkers to work alongside year-round laborers to harvest crops at farms in New York. Soler, 833 F.2d at 1106. During the growing season from May to September, the employer offered housing to migrant workers who preferred to live on the farms rather than obtain alternative local housing. Id. The U.S. Court of Appeals for the Second Circuit first concluded that § 3(m) of the Fair Labor Standards Act (“FLSA”) evinced a congressional recognition that:

. . . housing facilities, like meals, are essential for human existence and are ordinarily paid for from an employee's earnings. An employee has to reside somewhere, and therefore rental payments for the employee are usual and customary items of his or her living expenses. If an employer absorbs this expense for an employee, it is only equitable and reasonable that the employee "reimburse" the employer from wages earned.

Id. at 1108. However, the court also found that the 29 C.F.R. § 531.3(d)(1) established a “balancing of the benefits” test that allowed this statutory presumption to be rebutted. Id. at 1109. The court noted that in special circumstances the lodging may provide little benefit to the employee, “such as when an employer requires an employee to live on-site to meet a particular need of the employer.” Id. at 1109–10. Where the housing constitutes a “burden imposed on the employee in furtherance of the employer's business” rather than a “benefit running primarily to the employee,” the statutory presumption would be rebutted. Id. at 1110.

The Soler court next reviewed the district court's decision below, which itself had overturned an ALJ's decision. The district court applied the balancing of the benefits test and concluded that although both parties benefitted from the provision of housing, "the personal benefit accruing to the employees was secondary and incidental to the growers' business interests." Soler v. G & U, Inc., 615 F. Supp. 736, 743 (S.D.N.Y. 1985). The district court found that the provided on-site lodging provided numerous benefits to the employers, such as permitting the growers to maintain an adequate workforce during the limited harvest season (as the migrant workers could not afford local housing), and increasing the efficiency of the farm operations by accommodating the workers' long, flexible hours and allowing them to start/stop working quickly in inclement weather. Id. at 743–46. The district court noted that the migrant workers benefitted from not having to secure or maintain their own lodging and avoiding daily transportation costs. Id. at 746. However, because the housing was necessary for the growers to complete the harvest, the district court found that the growers provided the housing in these labor camps primarily for their own benefit. Id. at 746.

The Second Circuit reversed the district court's holding and concluded that substantial evidence supported the ALJ's finding that the employer-provided housing primarily benefitted the employees. The court listed numerous factors as supportive of its finding:

. . . the workers were not required to live on the farms as a condition of employment; the growers employed many farmworkers from the local communities; off-site housing, albeit to a limited extent, was available; the workers were not "on call," and reporting to work was optional; resident workers did not incur daily transportation costs to and from the farms; during weeks in which work was not available, there was no charge for lodging; a substantial number of workers would be unemployed were it not for the growers' farms; the on-site housing provided comradeship to many who did not speak English; and, to the extent that the housing was shown to be substandard, the Administrator limited the amounts the growers could credit for such housing against the workers' wages.

833 F.2d at 1110–11. By affirming the ALJ's decision, the court rejected the district court's finding—and Judge Oakes' dissenting opinion—that the housing primarily benefitted the employer. See id. at 1111–12 (Oakes, J., dissenting). Although the majority did not discuss or analyze the benefits of housing flowing to the employer, it implicitly determined that such benefits were outweighed by the numerous housing benefits running to the employees.

The Wage Appeals Board ("WAB") addressed the creditability of board and lodging subsistence payments against Davis-Bacon Act prevailing wages in In re Calculus, Inc., WAB No. 93-06 (Oct. 29, 1993). Calculus required its employees to travel and stay at a company-selected motel to perform a federal construction contract. Calculus, slip op. at 1–2. Since the job was located about 100 miles from the employees' places of residence and their workday began at 7:00 a.m., Calculus did not permit its employees to commute. Id. To reduce its employees' tax liabilities, Calculus allowed its employees to receive part of their Davis-Bacon minimum wages as per diem subsistence payments. Id. at 2. The WAB held that the employer's per diem payments were not properly creditable toward the required Davis-Bacon prevailing

wage payments. Id. at 4. The WAB noted that the employees “had no choice about whether to commute to the job or stay at the hotel selected by Calculus,” and reasoned that “[s]ince employees were required to remain at the job site during the week and return on Sunday night, there can be no other conclusion than that the facilities were for the benefit and convenience of the employer.” Id. at 5.

The Administrative Review Board has also identified similar circumstances in which the primary benefit of temporary lodging for out-of-town employees accrues to employers rather than employees. See In re William J. Lang Land Clearing, Inc., ARB No. 01-072,-079; ALJ No. 1998-DBA-00001 (ARB Sept. 28, 2004); In re KP&L Elec. Contractors, Inc., ARB No. 99-039, ALJ No. 1996-DBA-034 (ARB May 31, 2000). In KP&L, the employer accepted a subcontract for work in a government project in Bowling Green, Kentucky—over two hours from KP&L’s location in Lexington, Kentucky. KP&L(ALJ), slip op. at 27.⁴ KP&L’s employees regularly worked in Lexington, and therefore had to travel to and stay overnight during the week in Bowling Green to complete the project. Id. KP&L initially paid the cost of its employees’ hotel bills. Id. But after KP&L realized that it had grossly underbid the job, it required its employees to foot the cost of their hotel stays so KP&L could cut costs and continue to pay higher Davis-Bacon prevailing wages. Id. The Board affirmed the ALJ’s finding that the hotel payments benefitted KP&L based upon (1) the employees’ confinement to Bowling Green for the duration of the workweek, and (2) KP&L’s initial agreement to pay its employees’ lodging costs.⁵ Id. at 28. Additionally, KP&L’s factual situation precisely mirrored the situation laid out in § 15f18 of the FOH, which, while not dispositive, lent “credence to the notion that the payment of hotel bills in such situations is for the benefit of the employer.” Id. at 28–29. Accordingly, the Board affirmed that the employees’ wages were not paid unconditionally, but were “kicked-back to KP&L for its benefit.” Id. at 29. As the employees’ out-of-pocket payments for lodging effectively lowered their wages below the Davis-Bacon prevailing wage, KP&L was required to reimburse its employees for their lodging costs.

Similarly, in Lang, the Board found that the cost of board and lodging for employees working outside of their home community was not creditable towards Davis-Bacon prevailing wages. Lang, slip op. at 4. Lang was a land clearing corporation based out of Bearton, Michigan, but nearly all of its land clearing projects were located outside of a daily commuting distance from its county of residence. Id. at 5–6. To obtain and keep their jobs, Lang’s employees were required to travel to these land clearing projects. Id. at 6. However, Lang informed its employees upon hire that it would provide their meals and lodging while travelling. Id. Due to the long distances involved, Lang did not permit its employees to commute back and

⁴ The Board’s decision in KP&L adopted by reference the ALJ’s Decision and Order of December 31, 1998. Therefore, this decision will often cite to the ALJ’s Decision and Order, which this decision cites as “KP&L(ALJ).”

⁵ The mere fact that an employer supplies lodging or pays for its cost is not a reason in and of itself to conclude that the lodging primarily benefits the employer. This would cut against the Soler presumption that employer-supplied housing is primarily for the benefit of the employee. The crucial fact that supplied such an inference here is that KP&L initially paid its employees’ lodging costs *in addition to* paying Davis-Bacon prevailing wages.

forth each day, and employees stayed in company-provided motels five nights per week. Id. It was too expensive for Lang to hire and train local employees at each new distant jobsite. Id. Lang regularly took Davis-Bacon credit for the meals and lodging it provided to its employees while working on these distant jobs. Id.

To determine whether these board and lodging expenses could permissibly offset prevailing wages, the Board applied the balancing of the benefits test. First, the Board turned to the Administrator’s interpretation of the regulations in the FOH, which the Board recognized as deserving some degree of deference. Id. at 13 (citing Reich v. Miss Paula's Day Care Ctr., Inc., 37 F.3d 1191, 1194 (6th Cir. 1994)). Interpreting FOH § 15f18,⁶ the Board concluded that “special jobs” are simply those jobs which lie outside of employees’ daily commuting distance from their homes. Id. at 15. All of Lang’s jobs at issue, therefore, were “special” because they were all located outside of a daily commuting distance for their employees. Id. The Board also noted that FOH § 30c03(a), which contains the Administrator’s guidance for FLSA regulations, similarly prohibited wage credits “where the employee must travel away from home to further the employer’s business.” Id. at 16–17 (citing FOH § 30c03(a)).

Next, the Board applied the Administrator’s guidance and the WAB’s holding in Calculus to find that the board and lodging expenses were “clearly undertaken for Lang’s primary benefit.” Id. at 17. The Board reasoned that the employer could only perform its distant contracts if its employees “incurred the substantial detriment of traveling to locales far from their homes for most of every work week.” Id. To obtain and keep their jobs, Lang required its employees to travel and stay at facilities near the jobsites, permitting them to come home only on weekends. Id. at 17–18. “There was little, if any, personal benefit to Lang’s employees in this arrangement.” Id. at 18. Rather, the board and lodging expenses were expended in furtherance of Lang’s business—“the solicitation and construction of Federally-assisted projects.” Id. at 18–19. Accordingly, Lang’s board and lodging expenses could not be credited towards prevailing wages. Id. at 19.

The Board also supplied limited guidance for the present case in its Decision and Order of Remand. It noted that, unlike in KP&L, FOH 15f19 is of little assistance in resolving this case because the facts of this case differ significantly from the situation described in FOH 15f19. (Decision and Order of Remand, pp. 7–8.) The Board also observed that “[n]either Lang nor Calculus address a situation where employees working at a jobsite beyond commuting distances are required to pay for their lodging. Yet both are relevant to the question of what constitutes a ‘conditional’ payment of DBA wages.” (Decision and Order of Remand, p. 11.) Following its summary of these cases, the Board stated that although the undersigned properly applied the “balancing of benefits” test, it was unable to determine the evidentiary basis for her conclusion. Accordingly, this decision now weighs the evidence to determine “for whom the lodging for the Local 25 employees primarily benefits.” (Decision and Order of Remand, p. 13.)

⁶ The current FOH contains this chapter in § 15f19. See https://www.dol.gov/whd/FOH/FOH_Ch15.pdf.

D. Analysis

The facts of this case support a finding that the housing for the Employees primarily benefitted Respondent. While benefits redounded to both parties, the Administrator has rebutted the Soler presumption by demonstrating that the benefits from the Employees' Fire Island lodging accruing to the Respondent outweighed those running to the Employees.

1. Benefits to the Respondent

Respondent benefitted from the Employees' temporary Fire Island lodging primarily because it permitted the Respondent to obtain experienced and highly qualified employees that were essential to the completion of the Fire Island dredging project. This finding is supported by Calculus, KP&L, and Lang, each of which axiomatically held that employees working at temporary distant jobsites benefit their employer by furthering their employer's business there. Temporary housing at distant jobsites benefits the employer primarily in virtue of its function: permitting the employees to work at a job to which they could not commute. As noted by the Board, FOH chapters 15f19 and 30c03 support this general proposition.

In this case, the lodging's benefit to the Respondent can also be seen in the contrast between Local 138 and Local 25 employees. Local 138 employees generally reside in New York within commuting distance of Fire Island, and are qualified to perform some kinds of dredging work. (Tr. 219–22.) Local 138 members working on the Fire Island project did not incur temporary lodging expenses and did not receive any per diem or subsistence payments from Respondent. (Tr. 222.) By contrast, Local 25 members live in thirty-five states and work up and down the eastern seaboard. Local 25 members possess greater machine-operation qualifications than Local 138 members, and are therefore qualified to perform dredging work that Local 138 members cannot do. (Tr. 141, 225.) Thus, while Respondent hired Local 138 employees for some of the Fire Island work, Respondent needed to bring in Local 25 members for the work that Local 138 members could not perform. Like the employers in Calculus, KP&L, and Lang, Respondent imported the labor it needed to complete its government contracts, and therefore benefitted significantly from the temporary lodging that allowed them to do so. Respondent's utilization of nonlocal labor is highly similar to the employer's practices in Lang, where the Board specifically noted that the employer sent nonlocal employees to its distant jobsites because it would have been prohibitively expensive to train local labor at each distant jobsite. Lang, slip op. at 6. Further, Respondent had previously employed most of the Local 25 Employees, and it additionally benefitted from their familiarity with its operations and procedures. (Tr. 129–31, 369–70.) In sum, Respondent could only acquire the skilled and experienced labor it required if the Local 25 Employees obtained temporary lodging within commutable distance of the Fire Island project. In accord with Calculus, KP&L, and Lang, the Employees' Fire Island lodging benefitted Respondent because it was a necessary component that allowed Respondent to complete its government contract.

Additionally, Respondent's partial payment of the Employees' travel-related expenses—i.e., the transportation and subsistence allowances—in addition to prevailing wages supports an inference that the Employees' Fire Island lodging primarily benefitted Respondent. The purpose of the transportation allowance was to offset the cost of transporting the Employees to and from

the jobsite, and the purpose of the subsistence allowance was to defray the cost of obtaining housing, meals, laundry, and work clothes. (Tr. 131–32, 219–22.) As in KP&L, Respondent’s willingness to undertake these costs over and above prevailing wages in order to obtain the Employees’ labor implies that Respondent benefitted significantly from the Employees’ temporary lodging that allowed them to work on the Fire Island project.

The Administrator argues that numerous second-order benefits of housing should also be recognized as accruing to Respondent. She points out that local lodging allowed the Employees to work long shifts (twelve hours a day, seven days a week) and enabled Respondent to timely complete the Fire Island project without incurring liquidated damages for delay. (Administrator’s Br., p. 13–14.) The Administrator also notes that Respondent benefits from the flexible staffing arrangement between Respondent and Local 25, which results in cost savings for the Respondent. (Id., p. 16–17.) The undersigned agrees. While courts have generally focused the “balance of benefits” test on the first-order benefits of housing, e.g., permitting the employer to import labor, Respondent undoubtedly benefited from its employees’ ability to work long shifts and complete its projects in a timely manner. Thus, although they constitute secondary benefits from housing, these factors tend to show that the Employees’ Fire Island lodging benefitted Respondent to a greater degree than merely facilitating an adequate workforce.

Accordingly, this tribunal finds that Respondent benefitted significantly from the Employees’ temporary Fire Island lodging.

2. Benefit to the Employees

The benefit of temporary lodging running to the Employees here closely mirrors the benefits accruing to the employees in Calculus, KP&L, and Lang. Like the employees in those cases, the Local 25 Employees travelled to Fire Island for the sole purpose of furthering Respondent’s business by performing its government contract. Their temporary lodging served the singular function of permitting the employees to commute to the jobsite, and there is no indication that the Employees benefitted in any special way from travelling or residing in Fire Island for the duration of the project. Much like the employees in Lang, the requirement that the Local 25 Employees obtain housing to work at Respondent’s distant jobsite provided them with “little, if any, personal benefit.” Lang, slip op. at 18.

Respondent argues that the temporary housing benefitted the Local 25 Employees because it permitted them to work at Fire Island while living elsewhere. Respondent points out that at least one of the Employees—Mr. Howell—testified that he chose to live in Florida in part due to Florida’s reduced cost of living and lower taxes. (Tr. 61.) Mr. Howell also testified that he did not consider relocating to New York for the Fire Island project because the job was short and taxes were high in that locale. (Id.) Respondent’s argument fails to take the nature of Local 25 member’s work into account. It is undisputed that the Employees’ dredging work for Local 25 took them up and down the eastern seaboard. (Tr. 80–82, 104.) Wherever dredging projects were located, Local 25 members went. Thus, any attempt by a Local 25 member to live within a consistent commutable distance of all dredging jobs would have been futile. Indeed, even for Mr. Howell, who lived on the eastern seaboard in Tampa, Florida, securing a dredging job within a commutable distance was extremely rare. During thirty years of dredging work while living in

Tampa, Mr. Howell only worked at one job for four months that did not require him to travel. (Tr. 82.) For typical employees with fixed worksites, Respondent correctly notes the obvious need to obtain housing within a reasonable commutable distance. But for Local 25 members, a choice to live in a specific locale for any number of non-job-related reasons does not indicate that temporary housing near a dredging project benefits them by allowing them to live elsewhere. Rather, it reflects the reality that Local 25 members will always have to travel due to the nature of their job, and thus non-work considerations dominate their place-of-residence calculus. Accordingly, the temporary Fire Island housing did not benefit the Employees by allowing them to live elsewhere.

3. The Balance of the Benefits

Based on the evaluation of the Employees' Fire Island lodging benefits running separately to Respondent and the Employees, the undersigned finds Respondent to be the primary beneficiary. The lodging permitted Respondent to import highly qualified and experienced labor that was crucial to the completion of its Fire Island government contract, but redounded no appreciable benefit to the Employees. In accord with the findings of Calculus, KP&L, and Lang, this tribunal finds that the Employees' Fire Island lodging primarily benefitted the Respondent.⁷ And while they are not directly on point in this case, FOH chapters 15f19 and 30c03 also support the general proposition that temporary lodging at distant jobsites primarily benefits employers.

This tribunal also recognizes that—contrary to Respondent's contention—Calculus, KP&L, and Lang issued *after Soler*. These WAB and Board cases expand on Soler's holding, and provide this tribunal with more precise guidance in cases where an employer sends its employees to jobs where temporary lodging is required. Respondent's reliance on Soler ignores the fact that Calculus, KP&L, and Lang are subsequent authorities that more closely approximate the facts of this case.

Respondent does correctly note that this case does not present either of the two "special circumstances" noted by Soler; however, these "special circumstances" were merely illustrative of situations where lodging is of "little benefit to an employee." See Soler, 833 F.2d at 1109–10. The Soler court did not indicate that these two "special situations" were exclusive, nor did it state that housing had to meet a "particular need" of an employer for an adjudicator to find that the lodging primarily benefitted the employer. Similar to Calculus, KP&L, and Lang, the undersigned finds that the Employees' temporary Fire Island lodging constitutes a "burden imposed upon the employee[s] in furtherance of the employer's business," rather than a "benefit running primarily to the employee[s]." See id. at 1110.

⁷ The undersigned notes that this finding holds even if the secondary benefits of the Employees' Fire Island lodging (*e.g.*, enabling the Employees to work long shifts and Respondent to avoid liquidated damages) are excluded from her analysis. In other words, Respondent would be the primary beneficiary of the Employees' Fire Island lodging even if the only benefit it provided was allowing Respondent to import an adequate workforce.

But putting Calculus, KP&L, and Lang aside, Soler is still distinguishable from the present case. The Soler majority noted that the migrant farmworkers benefitted in numerous unique ways from the farm's lodging, such that "reporting to work was optional; resident workers did not incur daily transportation costs to and from the farms; during weeks in which work was not available, there was no charge for lodging; a substantial number of workers would be unemployed were it not for the growers' farms; [and] the on-site housing provided comradeship to many who did not speak English" See id. at 1110. By contrast, here the Local 25 Employees were required to report to work, they still incurred daily transportation costs to and from the jobsite, their temporary lodging was not free during weeks in which work was not available, there is no evidence that a substantial number of the Employees would be unemployed if it were not for Respondent's work, and the lodging did not provide the Employees with special comradeship ameliorative of linguistic barriers. Thus, even a direct comparison of the facts of this case to Soler supports a finding that the Fire Island lodging did not primarily benefit the Local 25 Employees.

However, a few factual differences between the present case and prior cases warrant discussion. These differences include: (1) the Local 25 Employees understood from the beginning of their employment that they would be required to secure and pay for their own lodging near Fire Island, and (2) the Employees never had an ordinary commuting distance in connection with their work for Respondent, but took the job with full knowledge of the jobsite location and its distance from their place of residence.⁸ Neither of these distinctions warrants a different outcome.

The undersigned finds the first factual distinction to be without legal significance. As the Board correctly observed at the outset of its Decision and Order of Remand, "there is no legal difference between an employer directly deducting a cost from a worker's wages, and shifting to the employee a cost that the employer could not lawfully directly deduct from wages." See Decision and Order of Remand, p. 6 (citing Arriaga v. Fl. Pacific Farms, 305 F.3d 1228, 1236 (11th Cir. 2002); Salazar-Martinez v. Fowler Bros., 781 F. Supp. 2d 183, 191 n.5 (W.D.N.Y. 2011)). Requiring the Employees' to pay for their Fire Island lodging carries the same legal effect as if Respondent had provided such housing and directly deducted the cost from Employees' paychecks. Moreover, Davis-Bacon requires that prevailing wages be paid "unconditionally . . . regardless of any contractual relationship" between the contractor and employees. See 40 U.S.C. § 3142(c)(1); 29 C.F.R. § 5.5(a)(1)(i). Accordingly, the fact that the Employees knowingly entered into an employment contract in which they would be required to supply their own housing is of no consequence. Respondent's liability for back wages turns upon the application of the balance of the benefits test, not whether the Employees agreed to unlawful contractual conditions.

The second factual distinction between this case and prior cases—that the Employees never had an ordinary commuting distance in connection with their work for Respondent—also does not alter this tribunal's "balancing of benefits" analysis. On this point, Respondent argues that by describing a situation in which an employee has both "regular" jobs within an ordinary

⁸ Indeed, the Board noted "[n]either Lang nor Calculus address a situation where employees working at a jobsite beyond commuting distances are required to pay for their lodging." (Decision and Order of Remand, p. 11.)

commuting distance and “special” jobs that require out-of-town travel, FOH 15f19 indicates that the expectations of employees with regard to travel can demonstrate that temporary lodging is for their benefit. (Respondent’s Br. at 15–16.) Here, where the Employees were hired with the expectation of working at a single job in a single distant location, Respondent argues that the Employees incurred the Fire Island lodging costs as a result of their own economic decisions and thus for their own benefit. (Id.) The undersigned disagrees.

First, Lang presented a nearly identical factual situation with respect to the amount of jobs that required out-of-town lodging. In Lang, “almost all” of the employer’s jobs were located outside of a normal commuting distance, and travel was required for the employees to obtain and keep their jobs. Lang, slip op. at 6, 17–18. Thus, with regard to the ratio of local (“regular”) jobs to nonlocal (“special”) jobs, this case differs from Lang by only a marginal degree: all jobs are “special,” rather than “almost all.” Standing alone, this slight difference is insufficient to compel or even suggest a different finding than that affirmed by the Board in Lang. Second, the Local 25 Employees’ expectations regarding travel and lodging related to the nature of their work, not a measured choice to maximize personal benefit. As explained above, the necessity of finding temporary lodging near roving dredging sites along the eastern seaboard is simply an inescapable part of the Local 25 members’ profession. The Employees thus reasonably expected the need to travel to every job. However, this expectation does not indicate that the lodging they would require while on the road returned any special benefit to the Employees. Indeed, even though the employees in Lang fully expected to travel to nearly all jobsites, the Board affirmed a finding that the temporary lodging at distant jobsites primarily benefitted the employer.⁹

Respondent’s argument also trades on the temporary employment to which the Local 25 Employees agreed. However, the fact that the Employees were technically “new hires” for the Fire Island job does not upend this tribunal’s “balancing of benefits” analysis. As demonstrated by hearing testimony, Local 25 members are generally temporary employees whose employment with a specific employer is ordinarily confined to unique dredging sites. (See Tr. 79–81.) Local 25 is a flexible labor resource that provides costs savings to dredging contractors by permitting them to hire and lay off workers as needed. (Tr. 129–31.) Respondent benefits from this employment arrangement, and had hired most of the affected Employees on other projects prior to Fire Island. (Tr. 369–70.) Accordingly, it would be improper to consider the technical status of the Employees as “new hires” when applying the “balancing of benefits” test, particularly where Respondent benefits from using the flexible hiring/layoff system that gives employees a

⁹ There could be a case in which an employee’s travel expectations do show that temporary lodging was acquired for the employee’s benefit. For instance, if a job was located in a permanent area and an employee chose to live elsewhere rather than relocate, such a situation would support an inference that the employee obtained duplicative housing for her personal benefit. Here, there is no indication that the Local 25 Employees would have been able to maintain a permanent residence within commuting distance of a substantial number of dredging sites, and thus, no inference of personal benefit from duplicative housing is warranted.

technical “new hire” status for most jobs they acquire.¹⁰ More importantly, however, the Board’s analysis in Lang indicates that Davis-Bacon imposes the same lodging reimbursement requirements on employers of new and old hires alike. The Board noted that the employees in Lang had “no choice but to travel on their employer’s business; their *hiring and retention* depended on complying with the employer-mandated travel.” Lang, slip op. at 18 (emphasis added). Therefore, the Board appears to reject the proposition that an employee’s choice to accept new employment that requires travel has any bearing on whether temporary lodging at remote jobsites primarily benefits the employer or its employees.

Finally, Respondent argues that, to overcome the Soler presumption, the Administrator must show that each affected Employee bore duplicative living expenses. (Respondent’s Br., p. 10–14.) Respondent points out that the Employees’ addresses of record are simply mailing addresses, such that the Employees’ places of residence between jobs are unknown. Accordingly, it is possible that the Employees’ do not incur any expenses in connection with those mailing addresses and may even choose to live where they work. Since the Administrator has only provided evidence to show that one of the Employees—Mr. Howell—incurred personal housing expenses in addition to Fire Island lodging expenses, Respondent contends that benefits may not be awarded to the remaining eight Employees. The undersigned disagrees.

Nothing in Soler or Board precedent indicates that the presumption may be overcome only upon proof of duplicative housing expenses. The “balancing of benefits” test focuses on the lodging provided by the employer or acquired by the employee in connection with job for which lodging was required. Accordingly, it is irrelevant to that test whether the employee individually maintains a permanent residence or lives for free with relatives when not working at distant jobsites. The undersigned recognizes that employees must live somewhere, and thus, an employee’s acquisition of housing near a job for which he was hired could demonstrate that the housing primarily benefits the employee. This holds true particularly where an employee acquires a semi-permanent residence for a longer-term job at a fixed location. Here, however, the Employees each stayed at hotels and individually worked less than five months at the Fire Island project.¹¹ (Tr. 178–79; JX 8.) Such a temporary relocation for a short-term project suggests that the Fire Island lodging primarily benefitted the Employer, not the Employees. Accordingly, the Administrator’s failure to present evidence of the personal living arrangements and non-work housing expenses of eight of the Employees does not foreclose a finding that the Fire Island lodging for those eight Employees primarily benefitted the Respondent.

¹⁰ The record illustrates this dynamic. Respondent hired, laid off, and rehired John Tatman and William H. Johnson, Jr. numerous times between 1998 and the 2007 Fire Island project. (JX 6, pp. 707–740, 759–845.)

¹¹ Mr. Howell testified that a typical dredging job lasts only three to five months. (Tr. 57.)

For all these reasons, the undersigned adheres to her prior finding and concludes that the primary benefit of the Local 25 Employees' Fire Island lodging accrued to the Respondent.¹² Accordingly, the cost of the Employees' Fire Island lodging was not "reasonable" under 29 U.S.C. § 203(m) and 29 C.F.R. § 531.3(d)(1). By requiring its Employees to bear the cost of this lodging, Respondent forced them to kickback a portion of their wages to a third party for its own benefit. These kickbacks resulted in some of the Employees being paid less than the prevailing wage. Therefore, Respondent failed to satisfy its Davis-Bacon obligation pay its employees the prevailing wage "unconditionally" and "without subsequent deduction or rebate." See 40 U.S.C. § 3142(c)(1).

E. Remedy

In the prior Decision and Order, the undersigned found that the Local 25 Employees "should be reimbursed at the rate of the lowest cost, shared room (\$28.58)." (Decision and Order, p. 30.) The Board reversed this finding on remand, holding that the Local 25 Employees are entitled to reimbursement of their actual lodging costs if they ultimately prevailed. (Decision and Order of Remand, p. 14–15.) Respondent's thirty-five dollar stipend would then constitute a partial reimbursement of the employees' actual housing costs. (Decision and Order of Remand, p. 15.)

This tribunal previously found that "the investigator's calculations were supported by the underlying documentary and testimonial evidence." (Decision and Order, p. 29.) Investigator Coppola determined that the nine Local 25 Employees incurred lodging costs at four hotels near the Fire Island project. (Tr. 178.) The Employees produced some documentation of their Fire Island lodging costs, and she extrapolated back wages based on their submitted receipts, interviews with the Employees and hotel operators, and Respondent's payroll data. (Tr. 174, 178, 196–98.) Specifically, Ms. Coppola used Respondent's certified payroll to count the number of nights that each employee was at the Fire Island jobsite, and multiplied it by the daily cost of lodging that she determined each employee incurred. (Tr. 231, 237–38; CX 3.)

The following table summarizes Ms. Coppola's calculations at CX 1:

¹² This tribunal also notes that this finding accords with the purpose of the Davis-Bacon Act by protecting local labor. Requiring employers to pay for the lodging costs of nonlocal labor raises the cost of nonlocal labor vis-à-vis local labor, which motivates employers to hire locally. Thus, when employers import nonlocal labor, it will generally only be due to some other factors that render accepting the higher cost of nonlocal labor a rational economic choice; such as where there is a lack of qualified local labor (like here) or where training new employees in every locale would be prohibitively expensive. This also prevents nonlocal employees from undercutting local wages by functionally accepting lower pay (lower net pay after accounting for lodging expenses) than local prevailing wages.

EMPLOYEE	TOTAL NIGHTS	DAILY LODGING EXPENSES	TOTAL LODGING EXPENSES	PER DIEM DAYS/CREDIT ¹³	REIMBURSEMENT DUE
Larry Campbell	59	28.58	4028.96	(33 days / 1155.00)	2873.96
	41	57.14			
Leon Evans	17	58.57	3167.67		3167.67
	60	28.58			
	8	57.14			
Michael Fricke	60 ¹⁴	75.47	4528.20	(90 days / 3150.00)	1378.20
Terry Howell	28	40.62	4208.45	(74 days / 2590.00)	1618.45
	32	28.58			
	3	55.00			
	30	29.29			
	19	58.57			
William H. Johnson, Jr.	42	55.00	2310.00		2310.00
William Johnson	22	75.47	2424.32	(36 days / 1260.00)	1164.32
	14	54.57			
Coy Polston	28	40.62	3146.30		3146.30
	28	28.58			
	6	55.00			
	30	29.29			
Richard Sellman	79	75.47	5962.13	(79 days / 2765.00)	3197.13
John Tatman	17	55.00	935.00		935.00
TOTAL:			30,711.03	(10,920.00)	\$19,791.03

1. Standard of Proof

Respondent argues that the investigator’s “reconstruction” at CX 1 is insufficient to support an award of the Employees’ “actual lodging costs.” (Respondent’s Br. at 19–21.) Respondent asserts that the Mt. Clemens’ relaxed standard of proof is not applicable to wage kickback claims, and contends that any award must be limited to those actual costs proven by receipts. The undersigned disagrees.

¹³ Ms. Coppola testified that if the Respondent properly classified an employee and paid him the appropriate fringe benefit, then Respondent received the full credit of thirty-five dollars per day for each day that the employee worked at Fire Island. (Tr. 240, 280.) However, because Respondent failed to pay the appropriate benefits to certain employees and/or misclassified their positions, some per diem payments had already been used as an offset against these Davis-Bacon violations. (Id.) Accordingly, Respondent received reduced or no credit from per diem payments for a number of the employees above.

¹⁴ Respondent paid for Mr. Fricke’s lodging costs for two periods in 2008: January 26 to February 2, and March 6 to April 3. See JX 7. This sixty-night figure represents the nights when Mr. Fricke paid for his own lodging, not every night that he was present at the Fire Island project.

In Mt. Clemens, the Supreme Court found that the remedial nature of the FLSA warranted a reduced standard of proof for FLSA wage claims, particularly where an employer failed to keep proper employment records. Anderson v. Mt. Clemens Pottery Co., 328 U.S. at 680, 686–87 (1946). The Court recognized that FLSA employers are under a duty to keep employment records and are therefore in the best position to know and produce the most probative facts. Id. at 687. Employees, by contrast, seldom keep detailed records of their employment. Id. Accordingly, the Court held that when an employer fails to keep proper records of an employee’s wages and hours, a claimant/employee may successfully prove a claim by showing “the amount and extent of that work as a matter of just and reasonable inference.” Id. To hold an employee to an exacting standard of proof in such a situation would unduly penalize the employee and reward the employer for its failure to keep proper records. Id.

As the Administrator correctly noted in her post-hearing brief, the Board has held that Mt. Clemens applies in Davis-Bacon cases. See Charles Igwe, ARB No. 07-120, ALJ No. 2006-SCA-20, slip op. at 7–8 (ARB Nov. 25, 2009). Mt. Clemens reduces the Administrator’s burden of proof in two ways: (1) an ALJ may draw reasonable inferences from employees’ evidence where an employer’s records are inaccurate or incomplete, and (2) an ALJ may award back wages to non-testifying employees based on representative testimony of a small number of employees. Igwe, slip op at 7–8 (citing Mt. Clemens, 328 U.S. at 680, 693).

Respondent points out that the Board has only invoked the Mt. Clemens relaxed standard of proof in cases where the employer has failed to maintain records of its employees’ wages and hours worked. It argues that since the Local 25 Employees—not Respondent—are best positioned to produce specific records of their lodging expenses, the Mt. Clemens relaxed standard of proof should not apply. The undersigned disagrees.

First, like FLSA employers, Respondent was required to keep records of its employees’ hours, wages, and deductions. See 29 C.F.R. § 5.5(a)(3). Thus, since the cost of the Employees’ Fire Island lodging constituted a “subsequent deduction” under 29 C.F.R. § 5.5(a)(1)(i), Employer should have kept records of its Employees lodging expenditures to ensure that it paid them the prevailing wages. Second, while the undersigned recognizes that the Employees likely had sole possession of their lodging receipts, Respondent caused the Employees to bear an expense that should have been borne by Respondent and for which the Employees did not know they needed to document. To hold the Administrator to an exacting standard of proof here would unduly penalize the Employees and reward Respondent for offloading the expenses of temporary lodging to its Employees and failing to record those costs. Thus, the present case is sufficiently analogous to other wage and hour claims to warrant application of the Mt. Clemens relaxed standard of proof.

The undersigned is mindful of the fact that Respondent did not anticipate a need to document its Employees’ lodging costs. The arrangement between Respondent and Local 25 Employees regarding housing simply reflects the current standard practice in the dredging industry. Thus, it is no surprise that Respondent did not require the Employees to turn over their lodging receipts for reimbursement or documentation. Nevertheless, the Mt. Clemens relaxed standard of proof can be fairly applied in the present case. The burden of proof is still on the Administrator, and an award of back wages must be based on “just and reasonable inference[s]”

that can be drawn from the evidence produced. Mt. Clemens, 328 U.S. at 680, 687. In light of the fact that the Employees' Fire Island lodging primarily benefitted Respondent, such a standard is eminently fair.

2. Analysis

This tribunal finds the majority of Investigator Coppola's calculated back wages to be supported by the admitted documentation. Specifically, the various employee statements and admitted receipts support Ms. Coppola's findings with respect to Leon Evans, Michael Fricke, Terry Howell, William H. Johnson, Jr., Coy Polston, and Richard Sellman. While she did not possess receipts for every hotel expense, Ms. Coppola testified that she used employee statements and the receipts she had to reconstruct the individual Employees' daily lodging costs. (Tr. 174, 178, 196-98.) She then used Respondent's certified payroll to determine the number of nights that each employee stayed at the Fire Island project, and multiplied the number of nights by their daily expenses. (Tr. 231, 237-38; CX 1; CX 3.) The undersigned finds this method to be reasonable. For the six named employees above, the admitted receipts and employee statements broadly support Ms. Coppola's calculations at CX 1. Accordingly, the Administrator has met her burden under the Mt. Clemens relaxed standard of proof with respect to these six employees.

However, the record does not fully substantiate Ms. Coppola's calculated back wages for Larry Campbell, William Johnson, and John Tatman. For Larry Campbell, Ms. Coppola determined that he stayed a total of 100 nights at Marina Motel. (See CX 1.) From December 4, 2007 to January 31, 2008 she found his daily expense to be \$28.58, and from February 15, 2008 to March 26, 2008 she found his daily expense to be \$57.14. Apparently, Ms. Coppola determined that Larry Campbell shared a room during the first period but not that latter period. Ms. Coppola's finding with respect to the latter period is contradicted by Larry Campbell's statement dated February 26, 2008, in which he states that he was then staying in a room at the Marina Motel with a coworker at a personal cost of \$200.00 per week. (CX 3, p. 5.) He further stated that Marina Motel charged \$400.00 to rent a room to two workers, but would charge \$375 to a worker staying by himself. (CX 3, p. 5.) JX 5 contains a receipt showing a \$400.00 payment from Larry Campbell to Marina Motel for the week of February 28, 2008 to March 6, 2008. (JX 5, p. 594.) Thus, for both periods the evidence indicates that Larry Campbell split a room at the Marina Motel with a coworker for \$200.00 per week, bringing his daily lodging expenses for all 100 nights to \$28.58. His total lodging expenses therefore totaled \$2,858.00. Since Respondent had \$1,155.00 in remaining per diem payments that were creditable against these lodging expenses, the back wages owed to Larry Campbell total \$1,703.00.

For both William Johnson and John Tatman, the record contains almost no evidence of their lodging expenses. Ms. Coppola testified that she conducted employee interviews (Tr. 174), and learned that each of the nine Employees obtained temporary lodging in connection with their work at Fire Island because they were not residents of the area. (Tr. 178.) The undersigned credits this testimony in light of the parties' stipulation that none of the Employees maintained mailing addresses within commutable distance of Fire Island (Joint Stip. ¶14) and Respondent's certified payroll data (JX 2) showing that William Johnson and John Tatman worked at Fire Island for the dates that Ms. Coppola recorded at CX 1. However, the record contains no

reference to William Johnson's and John Tatman's actual lodging expenses. An unsigned document containing a South Bay Motel letterhead lists both employees in connection with certain dates, but no cost per person is indicated.¹⁵ (CX 4.) As noted by the undersigned during the hearing, this unsigned document has no independent probative value. (Tr. 21–216.) Thus, aside from Ms. Coppola's assertions in CX 1, the record contains no evidence of the actual cost of William Johnson's and John Tatman's actual lodging expenses. Nevertheless, the record does credibly show that both employees incurred lodging expenses during their employment with Respondent at the Fire Island project.

Under the Mt. Clemens relaxed standard of proof, this is sufficient to award some back wages for William Johnson's and John Tatman's actual lodging expenses. The record discloses that the cheapest lodging option for the Fire Island Employees was Marina Motel—\$200.00 per week for workers who shared a room. (See JX 5, pp. 600–602.) Mr. Howell testified that this was the cheapest option he could find in the Fire Island area after driving around and looking in newspapers (Tr. 73–74), and the lowest daily lodging expenses incurred by any employee (\$28.58/night) comports with his finding. (See CX 1.) Accordingly, this tribunal finds that the actual lodging costs of William Johnson's and John Tatman's were at least \$28.58 per night.

Based on my review of the record, William Johnson spent fifty-eight nights at Fire Island: November 26, 2007 to December 23, 2007 (twenty-two nights); December 31, 2007 to January 21, 2008 (twenty-two nights); and March 20, 2008 to April 2, 2008 (fourteen nights). (See JX 2.) At \$28.58 per night, William Johnson's actual lodging expenses thus total \$1,657.64. However, Respondent's per diem credits of \$35.00 per day (\$2030.00 in total) completely offset this amount.¹⁶ Therefore, Respondent owes no back wages to William Johnson. The record also shows that John Tatman spent seventeen nights at Fire Island from March 17, 2008 to April 2, 2008. (JX 2.) At \$28.58 per night, his actual lodging costs total at least \$485.86. Ms. Coppola's calculations indicate that no per diem credits were available to offset Respondent's obligation to reimburse John Tatman for his lodging costs. (See CX 1.) Therefore, Respondent owes John Tatman \$485.86 in back wages.

The modified table below summarizes this tribunal's findings and Respondent's liability for back wages:

¹⁵ The dates listed for William Johnson in this unsigned document correlate with Respondent's payroll data, but not Ms. Coppola's report. It appears Ms. Coppola underestimated William Johnson's time at Fire Island, missing his work and apparent stay at South Bay Motel from December 31, 2007 to January 21, 2008.

¹⁶ As Ms. Coppola miscalculated the number of days that William Johnson worked at Fire Island, she also miscalculated the number of per diem credits that he received. Rather than working for thirty-six days and receiving thirty-six per diem payments (see CX 1), this tribunal finds that William Johnson worked for fifty-eight days and received fifty-eight per diem credits.

EMPLOYEE	TOTAL NIGHTS	DAILY LODGING EXPENSES	TOTAL LODGING EXPENSES	PER DIEM DAYS/CREDIT	REIMBURSEMENT DUE
Larry Campbell	100	28.58	2858.00	(33 days / 1155.00)	1703.00
Leon Evans	17	58.57	3167.61		3167.61
	60	28.58			
	8	57.14			
Michael Fricke	60	75.47	4528.20	(90 days / 3150.00)	1378.20
Terry Howell	28	40.62	4208.45	(74 days / 2590.00)	1618.45
	32	28.58			
	3	55.00			
	30	29.29			
	19	58.57			
William H. Johnson, Jr.	42	55.00	2310.00		2310.00
William Johnson	58	28.58	1657.64	(58 days / 2030.00)	0.00
Coy Polston	28	40.62	3146.30		3146.30
	28	28.58			
	6	55.00			
	30	29.29			
Richard Sellman	79	75.47	5962.13	(79 days / 2765.00)	3197.13
John Tatman	17	28.58	485.86		485.86
TOTAL:			28,324.19	(11,690.00)	\$17,006.55

IV. CONCLUSION

For the reasons explained above, the Administrator has shown that Respondent committed a violation of the Davis-Bacon Act when it failed to reimburse the nine Local 25 Employees for their lodging costs above the thirty-five dollar per diem specified in the CBA.

V. ORDER

In consideration of the aforesaid, it is hereby **ORDERED** that:

1. The Army Corps of Engineers shall release to the Administrator the \$21,831.35 which is being withheld from Respondent for the purpose of distributing 17,006.55 to the underpaid workers in accordance with this decision; and
2. The Administrator shall return to Weeks Marine the funds withheld by the Army Corps of Engineers remaining after distribution of the monies paid to the underpaid workers referred to by paragraph 2, herein.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within forty (40) days of the date of issuance of the administrative law judge’s decision. *See* 29 C.F.R. § 6.34. The Petition must refer to the specific findings of fact, conclusions of law, or order at issue. *See* 29 C.F.R. § 6.34.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings

from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

When a Petition is timely filed with the Board, the administrative law judge's decision is inoperative until the Board either (1) declines to review the administrative law judge's decision, or (2) issues an order affirming the decision. *See* 29 C.F.R. § 6.33(b)(1).

At the time you file the Petition with the Board, you must serve it on the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. *See* 29 C.F.R. § 6.34.