

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 June 2012

Case No. 2009-DBA-00006

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

This proceeding was initiated by the issuance of an Order of Reference dated June 5, 2009, by the Administrator, Wage and Hour Division, United States Department of Labor (Administrator), asserting the failure to pay prevailing wage rates and fringe benefits by Weeks Marine, Inc. ("Respondents"). The Order of Reference alleges that Weeks Marine, Inc. disregarded their obligations to their employees under the Davis-Bacon Act (DBA), 40 U.S.C. 276(a) *et seq.*, and committed violations of the labor standards provisions of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327 *et seq.*, during the dredging of the beach in Fire Island, New York.

At the time of its assignment to me, the parties had filed Partial Consent Findings, which were approved by Administrative Law Judge (ALJ) Stephen L. Purcell in an Order dated November 23, 2009. The sole issue remaining involves unreimbursed lodging costs. On

November 27, 2009 I issued an Order to Show Cause directing the parties to show cause within fifteen days as to whether they wanted a formal hearing or preferred to submit filings on the sole remaining issue. At the parties' request, I held a hearing on February 23, 2010 in Cherry Hill, New Jersey. The Administrator submitted a post-hearing brief on June 11, 2010 and Respondent submitted a posthearing brief on June 14, 2010. Based on the record made at the hearing, I find the following:

I. THE ISSUES

The issues to be resolved herein are:

1. Whether the Administrator¹ has carried her burden of proving that Weeks Marine's failure to pay temporary lodging costs for its workers on the project impermissibly reduced wages below the prevailing wage; and
2. If wages were impermissibly reduced below the prevailing wage, whether the Administrator assessed the appropriate amount of back wages.

II. EVIDENCE

The parties offered the following evidence into the record.

A. Joint Exhibits (JX)

- JX 1: Contract No. W12DS-07-C-0027 between Respondent as prime contractor and the U.S. Army Corps of Engineers for the Fire Island Project. ("The Contract".)
- JX 2: Certified payroll records submitted by Respondent to the U.S. Army Corps of Engineers for work performed on the Fire Island Project on work weeks ending November 11, 2007 through April 6, 2008.
- JX 3: Order Approving Partial Consent Findings and Order dated November 23, 2009 in this matter, signed by Chief Administrative Law Judge John Vittone.
- JX 4: Collective Bargaining Agreement for the International Union of Operating Engineers, Local 25, Marine Division, signed by Respondent as a signatory contractor. ("Local 25 CBA".)
- JX 5: Receipts for out of pocket lodging costs paid by Larry Campbell, Leon Evans, Terry Howell, William Johnson, Jr., Coy Polston and Richard Sellman during their work on the Fire Island project.

¹ Currently, the Wage and Hour Division of the Department of Labor is headed by Deputy Administrator Nancy Leppink.

- JX 6: Employee Change Authorization Forms from Respondent for Larry Campbell, Leon Evans, Michael Fricke, Terry Howell, William Johnson, William H. Johnson, Jr., Coy Polston, Richard Sellman and John Tatman.
- JX 7: Billing statements for lodging costs paid by Respondent for Michael Fricke for the periods of January 26 through February 2, 2008 and March 6 through April 3, 2008.
- JX 8: Respondent's per diem summaries for employees Larry Campbell, Leon Evans, Michael Fricke, Terry Howell, William Johnson, William H. Johnson, Jr., Coy Polston, Richard Sellman and John Tatman.

B. Complainant's Exhibits (CX)

- CX 1: Administrator's lodging computations for the nine Local 25 members employed by Respondent on the Fire Island project.
- CX 2: Emails between Noel Ramos, personnel director for the Respondent's dredging division, and Camille Coppola, Wage Hour investigator.
- CX 3: Employee statements, receipts for out of pocket lodging costs of Michael Fricke and Terry Howell and pay stubs for Terry Howell and Coy Polston (NOTE: CX 3 pages 8-9, 10-12, 17 and 21 have been excluded and not considered. See discussion *infra*.)
- CX 4: Listing of dates that certain of Respondent's employees stayed at the Marina Motel and the South Beach Motel during the Fire Island project.
- CX 5: Federal government per diem rates for fiscal year 2008 in New York State obtained from the General Services Administration ("GSA") website.
- CX 6: Webpage printouts from Respondent's public website.
- CX 7: Affirmation of Coy Polston regarding his employment by Respondent and the out-of-pocket expenses he incurred for temporary lodging. (NOTE: Excluded and not considered. See discussion *infra*.)
- CX 8: Collective Bargaining Agreement for the International Union of Operating Engineers, Local Union 138, 138A, 138B, 138C of Nassau and Suffolk Counties, New York, signed by Respondent as a signatory contractor. ("Local 138 CBA".)
- CX 9: Administrator's computation worksheets for the nine Local 25 members employed by Respondent on the Fire Island project.
- CX 10: Order of Reference.

C. Respondent's Exhibits (RX)

RX 1: Employment applications for the nine Local 25 members employed by Respondent on the Fire Island project.

D. Admissibility of Evidence

At the hearing, the Administrator attempted to introduce into evidence "Employee Personnel Interview Statements" for Larry Campbell, Leon Evans, Michael Fricke, William H. Johnson, Jr., Coy Polston, and Richard Sellman. (Tr. 198-202.) None of these individuals testified at the hearing, and Respondent objected to their statements on the ground that they constituted inadmissible hearsay. (*Id.* 198-99.) I admitted the evidence but afforded the parties an opportunity to reargue the issue in their post-hearing briefs. (*Id.* 202.) For the reasons set forth below, I have concluded that the Employee Personnel Interview Statements of Leon Evans (selected pages), Michael Fricke, Coy Polston (selected pages) and Richard Sellman, and the Affirmation of Coy Polston must be excluded. (CX 3 at pp. 8-9, 10-11, 17, and 21; CX 7.) However, the statements made by Larry Campbell, Leon Evans (selected pages), Terry Howell, William H. Johnston, Jr., and Coy Polston (selected pages) are admissible under § 18.801(d)(2)(iv). (CX 3 at pp. 5-7, 13-14, 15 and 16.)

Employee Personnel Interview Statements (CX 3, 7)

The Department of Labor regulations governing administrative hearings reproduce the evidentiary limitations contained in the Federal Rules of Evidence. 29 C.F.R. § 18.101 *et. seq.* To this end, § 18.802 states that "[h]earsay is not admissible except as provided...by rules or regulations of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress." The regulations in turn contain nonhearsay and hearsay exceptions identical to those of the Federal Rules.

Nonhearsay Party Admissions

The Administrator contended that the statements should be admitted as party admissions pursuant to 29 C.F.R. § 18.801(d)(2)(iv). This Section provides that a statement is not hearsay if it is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. 29 C.F.R. § 18.801(d)(2)(iv). Respondent countered that the statements constitute inadmissible hearsay because several of the statements were made by former employees no longer working for Weeks Marine and thus their statements were outside the scope of the employment.

With regard to Respondent's argument, the Employee Personnel Interview Statements completed by Leon Evans, Michael Fricke, Coy Polston, and Richard Sellman were made subsequent to their employment with Weeks Marine.² As Section 18.801(d)(2)(iv) makes clear,

² According to Evans's Statement, he worked for Weeks Marine from November 16 to February 16, 2008. (CX 3 at p. 8.) He made his statement on March 5, 2008. (*Id.* at p. 9.) Fricke was employed from November 25, 2007 to April 4, 2008. (*Id.* at p. 10.) His statement was made on May 5, 2008. (*Id.* at p.

in order to be a nonhearsay party admission a statement by an employee offered against an employer must have been made “during the existence of the relationship.” Thus, the statements in CX 3 made after termination of the employment are not party admissions and must be excluded absent an applicable hearsay exception.

However, with regard to the remaining statements, I find that they fall within the scope of employment and are admissible under § 18.801(d)(2)(iv). Respondent argued at the hearing that the statements did not constitute nonhearsay party admissions because they were made by non-management personnel. (Tr. 200.) Respondent further argued in its brief that the relevant analysis is “whether the employee possessed any general authority to make statements concerning the issue.” (Resp. br. at 16.) However, § 18.801(d)(2)(iv) says nothing about any requisite authority to make a statement on a particular subject. Once an employer/employee relationship is established, § 18.801(d)(2)(iv) requires only that the statement “concern a matter within the scope of [the] agency or employment.” Northern Oil Co., Inc. v. Socony Motor Oil Co., Inc., 347 F.2d 81 (2d Cir. 1965), cited by Respondent for the proposition that an employee must have authority to make statements in a given area, was decided before the enactment of Rule 801(d)(2)(D).³ In fact, Northern Oil was referred to in the Advisory Committee Notes to Rule 801(d)(2)(D) as an example of the older and more narrow view not favored by the Committee. Rule 801(d)(2)(D) takes the broader view that an employee who speaks on any matter within the scope of his agency or employment during the existence of that relationship is unlikely to make statements damaging to his principal or employer unless those statements are true. Nekolny v. Painter, 653 F.2d 1164, 1172-73 (7th Cir. 1981).

The majority of the statements at issue concern the wages, hours, dates of employment, and lodging during the relevant period. The compensation the employer agreed to pay, the hours the employer ordered to be worked, and the date the employer ordered work to commence could hardly be said to exceed the scope of the employment. Further, the lodging expenses incurred in this case were solely attributable to the employees’ work on the Fire Island project on behalf of Respondent. I therefore find that the statements made by Larry Campbell, Terry Howell, William H. Johnston, Jr. and Coy Polston during the scope of their employment are admissible under § 18.801(d)(2)(iv). (CX 3 at pp. 5-6, 13-14, 15 and 16.)

Business Records

The Administrator contended that the statements are admissible under the business records exception at 29 C.F.R. § 18.803(a)(6). This Section provides an exception to the hearsay rule for statements made “in the course of a regularly conducted business activity” by a “person with knowledge.” The business records exception is based on a presumption of accuracy for information transcribed as part of a regularly conducted activity because it is customarily kept by “those trained in the habits of precision, and because of the accuracy demanded in the conduct of the nation's business.” United States v. Snyder, 787 F. 2d 1429 (10th Cir. 1986).

11.) Polston worked for Weeks Marine from December 2007 to March 2008. One of his statements is dated June 30, 2008. (Id. at p. 17.) Sellman was employed from November 2007, but reported in his statement dated April 4, 2008 that he had “recently been laid off”. (Id. at p. 21.)

³ Fed. R. Evid. 801(d)(2)(D), governing the federal district courts, is identical to § 18.801(d)(2)(iv), which governs administrative hearings.

The Respondent correctly noted that the presumption underlying the business records exception fails where “any of the participants is outside the pattern of regularity of activity.” Id. quoting J. Weinstein & M. Berger, Weinstein's Evidence, at 803-186 (1985). As the Advisory Committee's note to Rule 803(6) provides:

If however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police record containing information by the bystander; the officer qualifies as acting in the regular course but the informant does not.

For this reason, the Administrator's argument fails. The Employee Personnel Interview Statements were not made by individuals acting in the regular course of business, but by the former employees themselves. Thus, the statements cannot be given the presumption of reliability accorded a business record.

Public Records

Lastly, Administrator argues that the remaining statements are admissible under the public records exception at 29 C.F.R. § 18.803(a)(8). This Section provides an exception to the hearsay rule for statements by public agencies setting forth “factual findings resulting from an investigation made pursuant to authority granted by law.” 29 C.F.R. § 18.803(a)(8)(iii). The basis underlying the presumption of accuracy for public records is similar to that of business records: “it is presumed that public officials perform their tasks carefully and fairly, without bias or corruption, and this notion finds support in the scrutiny and risk of exposure that surround most government functions.” Boim v. Holy Land Foundation for Relief and Dev., 511 F.3d 707 (7th Cir. 2007) citing 4 Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence § 8:86, at 770-71 (3d ed. 2007). Thus, the public records exception does not apply to the Employee Personnel Interview Statements because they are not the statements of a public official.

Conclusion

Based upon the foregoing, the Employee Personnel Interview Statements of Larry Evans, Michael Fricke, Coy Polston, Richard Sellman, and the Affirmation of Coy Polston have been excluded from my consideration. (CX 3 at pp. 8-9, 10-12, 17, 21; CX 7.) The statements made by Larry Campbell, Terry Howell, William H. Johnston, Jr. and Coy Polston during the scope of their employment are admitted. (CX 3 at pp. 5-6, 13-14, 15 and 16.) All other exhibits are admitted.

III. TESTIMONY

At the hearing, the Administrator presented the testimony of employee Terry Howell, union business agent Scott Winter and Wage Hour investigator Camille Coppola. Respondent presented the testimony of Noel Ramos, Human Resources director from Weeks Marine.

A. Terry Howell

Terry Howell testified that he worked for Weeks Marine at Fire Island in 2007 and 2008. (Tr. 52). Mr. Howell has worked in the dredging industry for forty-three years. He has worked as a shoreman, a deck hand, a boatman, a mate, an oiler, and an assistant foreman. (Id.) He has been a member of International Operating Engineers, Local 25 for forty-three years. (Id. 53.) His work in the dredging industry requires him to travel and live away from home for most of the time. Mr. Howell's permanent residence for thirty years has been a house he owns in Tampa, Florida, where he lives with his wife. (Id. 52, 79.) There are few dredging jobs near his home; most of his jobs are up and down the eastern seaboard. Dredging jobs typically last anywhere from three to six months. The length of a project is not always predictable because the work can be affected by major breakdowns and the weather. (Id. 53.) The prevailing wage rate for the Fire Island project was much higher than the prevailing wage rate for jobs he has worked in Florida. (Id. 85.)

Typically, Mr. Howell does not return home while working on dredging projects, unless they have a major breakdown and the workers are given some time off. (Tr. 94.) He stays wherever he can, in motels or rented rooms. He usually stays by himself but will share lodging if it is too expensive. He finds lodging near the jobs through newspapers, or by just looking around. He pays for his own lodging. (Id. 58.) While working at Fire Island, he was still responsible for basic household expenses in Tampa such as electric, water, garbage, and food for his wife. (Id. 52.)

He first learned about the Fire Island job when Mr. Nobles from Weeks Marine called him at his home in Tampa, Florida and asked if he was available. Mr. Nobles got his number from the union. At the time, Mr. Nobles told him that Weeks Marine needed a dozer operator. Mr. Nobles then sent Mr. Howell the job application and set up a medical examination in Tampa. Mr. Nobles did not discuss lodging with Mr. Howell. (Tr. 59; RX-1.)

Mr. Howell got to the Fire Island project by driving from Florida. He paid the transportation costs, but was reimbursed. As specified in the union contract, Weeks Marine pays \$250.00 each way or \$500.00 for roundtrip travel. He did not consider relocating to New York permanently for the job because the job was only for a short term. Before the Fire Island project, Mr. Howell had never worked or lived in Long Island. (Tr. 62.) Prior to going to Fire Island, he did not investigate lodging options there. He did not receive any information about lodging from Local 25. (Id. 86.)

The first month he was at Fire Island, he was a dozer operator, and the rest of the time he was a shoreman. (Tr. 52). He worked on the beach, out in the cold weather. For the first month, he worked from 6:00 in the morning until 2:00 in the afternoon. As a dozer operator, he pushed dikes with a bulldozer. Later, as a shoreman, he worked from 2:00 in the afternoon until 10:00 at

night, seven days a week. His shoreman duties included changing valves and shingling on the line to stop leaks. (Id.)

Typically, his work schedule is eight hours a day, seven days a week with no days off. (Tr. 53.) The Fire Island project operated twenty-four hours a day and Mr. Howell did not get any days off. (Id. 52, 77.) He did have the opportunity to travel home for a week between the Fire Island and Philadelphia jobs, while Weeks Marine got the dredge down and set up. (Id. 78.)

The night he arrived to begin the Fire Island job, he stayed at the Radisson Hotel. (Tr. 62.) One of the workers from Local 138 showed him where the motel was. The room at the Radisson Hotel cost \$568.00 a week. (JX-5, pp. 596-599.) He shared the room with Coy Polston, an assistant foreman/dozer operator on the third shift, whom he met in the parking lot. (Tr. 63-64.) They decided to share the room because it was too expensive for one person. (Id. 64.) Mr. Howell did not previously know Mr. Polston. (Id. 93-94.) They split the cost of the room. Mr. Howell paid using his credit card and Mr. Polston reimbursed him after he got his first check. The room at the Radisson did not have a kitchen. They ate meals at restaurants or picked up sandwiches from stores. He spent close to \$20.00 a day on food. (Id. 65.)

He later relocated to the Marina Motel. Mr. Howell and Mr. Polston found the Marina Motel after driving around, looking for a place less expensive than the Radisson. (Tr. 66.) The Marina Motel was also closer to the job. The room cost \$400.00 a week. (JX-5, pp. 600-602). At the Marina, he continued to share a room with Mr. Polston. (Tr. 67.) He stayed at the Marina for about one month. (Id. 68.) Leon Evans and Larry Campbell, also employees from the Fire Island project, stayed at the Marina during the same time period, sharing a room together. (Id. 75.)

Mr. Howell described the Marina as “not that great” because it was run down and there was constant noise all day and night. He heard people talking about drugs a couple of times, and decided it was time to leave that motel. (Tr. 68.) There were no laundry facilities at the Marina so he did laundry once a week at a laundromat a half mile away. He spent between ten to eleven dollars a week on laundry. He also did not have a kitchen at the Marina. (Id. 69.)

He left the Fire Island project for eight to ten days to do an emergency job for Weeks Marine in Philadelphia. He returned for the remainder of the Fire Island project. (Tr. 52.) Weeks Marine paid for him to travel to and from Philadelphia, but he paid for his own lodging in Philadelphia. (Id. 98.) Weeks Marine continued to pay the thirty-five dollar per diem during his time in Philadelphia. (Id. 99.) On his return to Fire Island from Philadelphia, he stayed at the Marina for another week or two, until he found another place. (Id. 69.)

Mr. Howell found the South Bay Motel while out driving around. He moved there because it was cleaner, nicer and quieter than the Marina Motel. A room at South Bay cost about \$410.00 a week. (JX-5, p. 604). He continued to share a room with Mr. Polston. (Tr. 70; JX-5, pp. 607-08.) Mr. Howell stayed at South Bay for about a month and a half, until the end of the Fire Island project. (Id. 71.) Mr. Polston did not stay until the end of the Fire Island project. He left two to three weeks before the job was over. Mr. Howell was unable to find another roommate after Mr. Polston left so he switched from the double room, which was \$410.00, to a

single room for \$385.00.(Id. 72.) The room at South Bay did not have a kitchen or laundry facilities.

Mr. Howell did try to find cheaper lodging during the Fire Island project by driving around and looking in newspapers but everything else was higher than what he could afford. (Tr. 73.) Best Western cost \$700.00 a week. (Id. 74.)

No one from Weeks Marine gave Mr. Howell any information about lodging in the area for the Fire Island project, or any instructions or guidance about lodging. (Tr. 76.) As a member of Local 25, the terms and conditions of employment are subject to a collective bargaining agreement negotiated on his behalf by Local 25 with the various dredging companies. The collective bargaining agreement provides for a thirty-five dollar per day payment from the company for each day spent on the job. (Id. 84.) Mr. Howell usually used the subsistence payment to pay for food or gasoline. It was not sufficient for his living expenses. (Id. 77, 96.)

At the time of the hearing, Mr. Howell was working for Great Lakes Dredge and Dock in Ocean City, New Jersey. (Tr. 79.) Great Lakes Dredge and Dock was not paying his lodging costs for that project. At all times during his forty-three years of working in the dredging industry, he has been a member of Local 25. (Id. 80-81.) All of his jobs have required him to work away from his home, outside commuting distance. On no occasion has an employer paid his lodging costs. (Id. 82.)

When he first spoke to Mr. Noble, he was aware that the Fire Island project was going to require him to work away from his home and, based on his past experience in the dredging industry, he had no expectation that the company was going to pay his lodging costs. (Tr. 83.)

B. Camille Coppola

Since August 2001, Ms. Coppola has worked for the U.S. Department of Labor, Wage and Hour Division. She is a senior investigator advisor and government contracts team leader for the Wage Hour Division for the New York City office and the Westbury office. She conducts investigations or audits with employers in the Nassau/Suffolk area and the five boroughs of Manhattan for compliance with laws including the Fair Labor Standards Act, the Davis-Bacon Act, the Service Contract Act, the Family Medical Leave Act, and other acts that come under the jurisdiction of the Wage Hour Division. (Tr. 172-173.) Ms. Coppola has conducted more than sixty Davis-Bacon Act compliance investigations, including one other involving the dredging industry. (Id. 247-248.)

She began her investigation of the Weeks Marine project at the Fire Island Inlet in Suffolk County, New York in January of 2008. The work was specifically located at Gilgo Beach. She reviewed the contract documents with the Corps of Engineers, verified payment of fringe benefits with the unions, conducted employee interviews, viewed what the employer had paid against the wage determinations, and then presented the employer or his representative with the Wage and Hour Division's findings. (Tr. 174.)

She reviewed all of the certified payrolls submitted by Weeks Marine to the Army Corps of Engineers for the Fire Island project. (Tr. 178, 249; JX-2.) Employee addresses were listed on the certified payrolls. (Id. 178.) The certified payroll records do not indicate that the employer made any deductions from the Davis-Bacon wage and fringe benefit amounts paid to the employees other than the lawful, statutory deductions. There were no kickbacks made by employees to Weeks Marine. The payroll records were maintained in good order. (Id. 250.)

She also reviewed parts of the contract between Weeks Marine and the U.S. Army Corps of Engineers, including the wage determinations. (Tr. 248; JX-1.) The terms and conditions of employment were subject to collective bargaining agreements for Local 25 and Local 138. (Id. 257.) Ms. Coppola did not look at the collective bargaining agreements. (Id. 248.)

In the course of conducting her investigation Ms. Coppola primarily dealt with Noel Ramos and Karen Wilson in the payroll department at Weeks Marine. Ms. Wilson was the payroll manager. (Tr. 252.) Noel Ramos who was the director of human resources for the dredging division. (Id. 183.) The dredging division is located in Louisiana. She asked him for clarification on job titles on the certified payrolls. She asked him whether the company had paid the cost of lodging for some employees. She also asked him about a job classification of a swimmer. (Id. 184.) Ms. Coppola exchanged e-mails with Mr. Ramos concerning certain lodging cost payments made by the company. She also spoke with Mr. Ramos several times on the phone, but does not remember if the phone calls addressed these lodging costs. (CX-2; Tr. 281.) She exchanged e-mails with Mr. Ramos concerning dates that the employer paid for lodging for one employee, Mr. Fricke, and clarification on job titles and where they would fall on the wage determination. (CX-2, pp. 3, 4; 184.) Mr. Ramos was cooperative in responding to her requests during the course of the investigation, as was Ms. Wilson. (Tr. 252.)

Mr. Ramos told Ms. Coppola that the company paid the cost of lodging for some employees and not for others. (Tr. 188; CX-2, p.4.) Weeks Marine did not pay for lodging for all of its hourly employees who worked on Fire Island project. (Tr. 192.)

Ms. Coppola obtained interview statements from the Weeks Marine workers. (Tr. 194.) She typically obtains interview statements to verify or supplement the information given to Wage Hour by the employer and to assist in making estimates of back wages for any potential violations that may exist. Generally, she is unable to obtain complete records from employers and employees. (Id. 195.) She calculates back wages by combining credible information from the employer with documentation from the employees give us and their statements. Employee statements can also corroborate names and factual information from other employees who worked at a job site. Ms. Coppola asked the employees to provide her with actual receipts for the lodging costs they claimed to have incurred and some of them did. (JX-5; Tr. 286.) Ms. Coppola used documentation as to the lodging costs provided by employees to extrapolate the back wage findings. (Tr. 196.)

The employees told Ms. Coppola the names of the motels that they stayed at, whether they stayed in a room by themselves or with someone else. They told her the dates that they came to Long Island and when they left and the rates that they paid for these rooms. When

making her back wage calculations she took into account any information she had about employees sharing rooms. (Tr. 198.)

Ms. Coppola obtained cash receipts from certain motels based on an individual's name indicating a certain period of time that they stayed. She also got computer-generated printouts from other hotels, also listing the employee name and the dates that they stayed and the amounts of money paid. (JX-5; Tr. 192.) Ms. Coppola obtained some of the receipts after her initial interviews with the employees between January and June of 2008. (Tr. 193.)

Weeks Marine was the prime contractor and the U.S. Army Corps of Engineers, New York District was the federal contracting agency involved in this project for the dredging and replenishment of the beach area at Fire Island. Marine's work on the Fire Island project was covered by the Davis-Bacon Act. Weeks Marine's work on the Fire Island project began around November of 2007 and ended in April of 2008. The Fire Island project occurred during winter months because Long Island has a peak tourist period which ends shortly after Labor Day. Projects generally begin after that peak tourist season and must be completed before the piping plovers nest, which is approximately April of each year. (Tr. 176.) Investigator Coppola visited the worksite three times, experiencing typical winter weather; cold, blustery, with temperatures in the teens, sands blowing, and rough seas. (Id. 177.)

Typically, the Weeks Marine employees worked seven days a week on the Fire Island project. The project ran twenty-four hours a day. All workers worked seven days a week but some workers had eight-hour shifts, and some had twelve-hour shifts. (Tr. 176.) There were three eight-hour shifts and two twelve-hour shifts. (Id. 177.)

If the nine members of Local 25 working on the Fire Island project wanted to work, they had to travel away from their community. (Tr. 255-256.) The Local 25 members were from Louisiana, Mississippi, Georgia, Alabama, Massachusetts, and New Jersey. (Id. 178.) These nine employees stayed at four hotels in Suffolk County while they worked on the Fire Island project. They stayed at a Radisson Hotel, a Hampton Inn, South Bay Motel, and Marina Motel. They stayed at motels or hotels because they were not residents of the area, and they had to stay someplace to conduct the work at the work site. (Id. 178.)

The employees paid for their lodging expenses at the South Bay and Marina motels out of pocket. (Tr. 179.) A receipt from the Marina Motel shows that employee Larry Campbell stayed from February 28, 2008 to March 6, 2008 at a cost of \$400.00. (JX-5, p. 594; Tr. 193.) Receipts for Mr. Terry Howell show that on March 23, 2008 he rented a single room at \$385.00. The receipt from March 15, 2008 for \$410.00 indicates rental of a double room. (JX-5, p. 603; Tr. 194.)

Some of the nine employees shared rooms to defray the cost of the lodging during the Fire Island project. (Tr. 181-182.) Several of the nine employees did have their own rooms for some or all of the time that they worked on the Fire Island project. They roomed alone because there was no one else available that they knew that they could share a room with, or they had attempted to share a room with another employee but it did not work out, either because of scheduling or some incidents that occurred at the room. For example, one of the employees

attempted to share a room with another worker, and during the course of one evening, the other employee came into the room late somewhat disoriented and attempted to urinate on the employee who was already asleep in one of the beds. (Id. 182.)

Some Weeks Marine employees stayed at the Hampton Inn and the Radisson Hotel. The employer put some employees up at the Hampton Inn at the company's expense, and other employees stayed there because it was familiar to them. The Radisson was the first location that the employees were able to identify on Long Island, so they stayed there initially until they became more familiar with Nassau/Suffolk Counties. (Tr. 183.)

Ms. Coppola routinely tries to visit the homes of the workers whenever she is doing an investigation. In this particular case, the employees were living at motels. (Tr. 269.) The Marina Motel and the South Bay Motel were about thirteen miles away from the worksite. Depending on the traffic, on Long Island it could take from twenty to thirty minutes to travel between the motels and the worksite. (Id. 179).

Ms. Coppola visited both motels. The Marina Motel was a two-story frame building with walk-up stairs in the back. There was no lobby area. She saw no kitchenettes and no laundry facilities. The motel was old construction and not in good repair. She observed basic rooms, with fairly small bedrooms containing one or two double beds, a bathroom, a television, and some closet space to hang clothing. The door to the registration area of the hotel was locked and she had to be buzzed in for admission. (Tr. 180.) Rooms cost about sixty dollars a night or \$400.00 to \$410.00 a week for a double room. A single room cost \$375.00 or \$385.00 a week. (Id. 191.)

The South Bay Motel was in Copiague, New York. The rooms were of similar construction, although they appeared to be a little bigger and cleaner. Rooms contained one or two double beds, a bathroom, television, and closet space. The rooms were all either on the first floor adjacent to the parking lot, or upstairs through a flight of stairs on either side. She did not see any kitchens. There were no hotel elevators or any amenities at the facility at all. To enter the registration area, she had to be buzzed in by the desk clerk. The motel was located on a main east-west two lane highway. The hotel was on the sidewalk with no landscaping in front, and a macadam parking area in the back that was adjacent to all the rooms. (Tr. 181.) South Bay Motel charged approximately \$400.00 a week for a double room and either \$375.00 or \$385.00 a week for a single room. (Id. 191.)

Ms. Coppola also visited the Pines Motor Lodge, in Lindenhurst. Employees had told her that the employees who were not at the South Bay Motel or at the Marina Motel were staying at the Pines Motor Lodge. Pines Motor Lodge is a one-story roadside facility, older in appearance than either the Marina Motel or the South Bay Motel, with no landscaping in the front. To gain admission to the registration area, one had to be buzzed in by the desk clerk, who was encased behind what appeared to be quite thick bulletproof glass. The Pines Motor Lodge was approximately fifteen or sixteen miles from the work site, slightly further away than the other two. The rooms were dark with worn out carpeting; they were small rooms with a single or a double bed, a bathroom and a television. Rooms at the Pines Motor Lodge cost about sixty to sixty-five dollars a night. (Tr. 189-190.) Ms. Coppola was not able to find any less expensive lodging in the general vicinity of the work site. (Id. 191.)

Coy Polston completed a survey on February 14, 2008. (CX-3, pp. 16, 18-20; Tr. 285.) In answer to the question "Have you incurred any temporary housing costs for the time that you have worked on the project?" Mr. Polston responded "No". (CX-3, pp. 16, 18-20; Tr. 286.)

Mr. Fricke provided lodging receipts to Ms. Coppola. (CX-3, pp. 22-38; Tr. 287.) Hotel receipts from the Hampton Inn in Farmingville show that Michael Fricke stayed there during the time that he worked for Weeks Marine on the Fire Island project. (CX-3, pp. 22-38; Tr. 207.) The receipt for November 26, 2007 was directly billed Weeks Marine in the amount of \$75.37. The other receipt was charged to a VISA ending in 3101, not directly billed to Weeks Marine. (CX-3, pp. 23-24.) Mr. Ramos sent an e-mail to Ms. Coppola about the lodging receipts for Michael Fricke. Weeks Marine paid for Mr. Fricke's lodging for certain dates during the Fire Island project. (Tr. 208; CX-2, p. 3.) Mr. Fricke paid for other dates himself.

Local 25 members who worked on the Weeks Marine Fire Island project received payment from Weeks Marine for transportation costs to cover their initial travel from their home residence to the work site on Long Island. Those payments are noted on the certified payrolls. (Tr. 219-22).

Weeks Marine also employed members of Local 138 to work on the Fire Island project as heavy equipment operators on the shore. (Tr. 220). Local 138 members generally lived in Nassau and Suffolk Counties within daily commuting distance of the work site. (Id. 221-222). If employees drive to and from the primary place of work, the company is not required to pay mileage for that travel. (Id. 276.) Local 138 members working on the Fire Island project did not receive any per diem or subsistence payments from Weeks Marine. They also did not incur out-of-pocket lodging costs. (Id. 222.) Ms. Coppola did not review the Local 138 collective bargaining agreement. She did know, however, that there is no provision for a per diem payment. (Id. 274.)

The heavy and highway wage determination covered bulldozer operators who worked on the Fire Island project. The wage determination is based on the union rates in effect on June 1, 2007 for International Operating Engineers Local 138 for heavy and highway work. The wage determination includes both basic hourly wages and fringe benefit rates for employees covered by that wage determination. (Tr. 223-224; JX-1, pp. 144-146.)

The second wage determination in the contract for Fire Island pertains to the workers who worked on the dredge or did other types of dredging work for the Fire Island Inlet dredging project. These rates were based on the rates that were in effect on October 1, 2006 for Local 25 of the Operating Engineers' negotiated collective bargaining agreement. (Tr. 224-225, JX-1, pp. 259-261.)

Weeks Marine paid the fringe benefit rate for Local 25's heavy equipment operators rather than the operators of Local 138 for the heavy and highway. The Local 138 fringe benefit rates were higher. (Tr. 225.)

Wage Hour found about \$75,000.00 in other Davis-Bacon violations, including that the employer failed to pay the dozer operators and the heavy equipment operators on the shore, and failed to pay the appropriate fringe benefits as required by the wage determination. (Tr. 253, 298.) Ms. Coppola found that there were Davis-Bacon violations, but essentially the company's payrolls were in good format, and they appeared to be mostly in compliance. The firm was cooperative and promptly remedied all issues other than the lodging issue. (Id. 254.)

In May or June of 2008, Ms. Coppola presented her estimated lodging back wage computations to counsel for Weeks Marine. (Tr. 196.) After she presented her lodging computations to Weeks Marine, the company did not provide any documents or information that would have resulted in a reduction or revision of the estimated computations for unreimbursed lodging expenses. (Id. 197.)

As a result of her investigation, Ms. Coppola made several findings, including misclassification of some employees, another misclassification where a conformance was denied, a failure to pay the appropriate fringe benefits as required by the wage determination for the shore workers that were using the heavy equipment and a failure to pay the prevailing wages and fringe benefits free and clear because of an illegal deduction to pay due to the cost of lodging which the employees had to bear in this case. (Tr. 226.) Weeks Marine settled all the violations except for the lodging issues through a consent order. (Id. 227, 299.)

According to Ms. Coppola, when the employee had to pay out-of-pocket expenses for the cost of lodging, they did not receive the prevailing wages and fringe benefits free and clear as the wage determination and Davis-Bacon Act required. The cost of the lodging brought them below the prevailing wage and fringe benefits when combined. Therefore, the employees had an out-of-pocket expense which Wage Hour viewed as an illegal deduction to their pay. The unreimbursed lodging violations applied to nine employees. (Tr. 227; CX-1, pp. 1, 2.) Nothing in the contract expressly requires the payment of lodging but Wage Hour considers anything that brings an employee's wages below the stated wage determination rates, such as lodging costs, to be an impermissible deduction. (Tr. 249.) According to Ms. Coppola, the law as set forth at 29 C.F.R. Part 5 requires anything of benefit to the employer to be borne by the employer and if there is anything that an employee earns it must be given to them free and clear. In this case it was not. (Id. 258, 259.) There is a Field Operations Handbook ("FOH") to guide officers which Ms. Coppola reviewed, specifically section 15(f)(18). (Id. 260, 262.)

Ms. Coppola computed estimated back wages due for nine Weeks Marine employees regarding unreimbursed out-of-pocket lodging expenses. (Tr. 177.) To make estimates of back wages due, Wage Hour reviewed the employer's certified payrolls and physically counted the number of nights that each employee was at the job site, then multiplied it by the daily cost of lodging, either as a solo roomer or someone who shared a room, and came up with the total expense for that period of time. (Id. 231.)

Ms. Coppola made original back wage estimates for lodging for the employees between May and June of 2008. The basis for these estimated back wage computations were the statements of employees, the receipts given to her by the employees, the corroboration by other employees as to who stayed where. She also used the dates or the number of days that were

found in these initial computations on the certified payrolls that were provided by the company. (Tr. 233-234. CX-9, pp. 151-165.) Ms. Coppola did not rely on the GSA per diem when she did her calculations. Her calculations were based on what the employees actually spent in lodging, minus the thirty-five dollars. (Tr. 265.) She revised the lodging computations after Wage Hour gathered additional information and noted some errors of omission from the previous computations. (Id. 235.)

Weeks Marine gave a thirty-five dollar per diem to the employees for each day they worked on the project, which Respondent told her was made pursuant to the Local 25 collective bargaining agreement. (Tr. 250.) Weeks Marine did not take credit for the thirty-five dollar payment as a fringe benefit. (Id. 251.) If there were any credits due to the employer as a result of per diem that was available she gave the employer full credit for any excess payments. (Id. 238.) If the employees had stayed in lodging which was covered by the cost of combined per diem payments (seventy dollars for a shared room), there would have been no Davis-Bacon Act violation on those particular dates. (Id. 271.)

She presented the lodging computations and other computations in exhibit CX-9 to Weeks Marine. Weeks Marine had an opportunity to provide information or documents to contest the amounts in the computations. They did not provide anything. (Tr. 235.)

If an employee was properly classified and was paid the appropriate fringe benefit for the type of work that they did, then the employer received the full credit of thirty-five dollars a day for each day that the employee was employed at the Gilgo Beach Fire Island project against the total amount of lodging costs. If there was no per diem available because the employer failed to pay the appropriate fringe benefits or misclassified employees, then Weeks Marine did not get credit for per diem against the cost of lodging. (Tr. 240.) The back wage calculation for some of the employees does not include the per diem credit. Ms. Coppola calculated that credit as an offset to the other Davis-Bacon issues. (Id. 280.) In the revised calculations, the net amount that Wage Hour claimed against the employer diminished, but the number of employees stayed the same. (Id. 235.)

C. Scott Winter

Scott Winter is employed full-time as the president and business manager for the International Union of Operating Engineers, Local 25, Marine Division (“Local 25”), located in Millstone Township, New Jersey. (Tr. 100.) He became president and business manager in June 2009. Prior to that, he worked as the director of training for approximately twelve years and served as recording/corresponding secretary for approximately four years. The director of training was a full-time position. Recording/corresponding secretary was an officer position. As president and business manager of Local 25, he oversees the daily operations of Local 25, and directs the staff in their daily duties. He represents members in grievances and arbitrations and is involved in negotiating the collective bargaining agreement. (Id. 102.) Before beginning full-time work for Local 25, Mr. Winter worked in the dredging industry as a licensed tugboat captain and licensed crane operator. (Id. 101.) He first began working in the dredging industry as a deck hand on a tugboat in 1985 when he came out of the Navy. (Id. 102.)

Weeks Marine has been a signatory contractor on Local 25's collective bargaining agreement for more than twenty-five years. (Tr. 103, JX-4, p. 555.) Thirty-two signatory contractors are parties to the Local 25 collective bargaining agreement. (Tr. 110.) In terms of contributory hours⁴, Weeks Marine is the second largest of Local 25's signatory contractors. (Id. 105.) The largest contractor is Great Lakes Dredging Dock Company; the third largest is Norfolk Dredging; the fourth largest is Manson Construction; and the fifth largest is Donjon Marine. (Id. 144.)

There is a master agreement that Weeks Marine signed along with northern and southern addendums covering the period from October 1, 2006 through September 30, 2009. (Tr. 103-104; Exhibit JX-4.) The Local 25 collective bargaining agreement covers the territory from the northern tip of Maine to the western panhandle of Florida. The northern addendum covers work done from the southern tip of Maryland to the northern tip of Maine, including New York State. (Tr. 104, JX-4, p. 577, 583.) The southern addendum covers work done from the northern tip of Virginia to the western panhandle of Florida. (Tr. 105.)

Weeks Marine's main customers are federal and state agencies, such as the U.S. Army Corps of Engineers. Dredging work is specialized work which makes up only a small portion of the maritime business. Workers use special equipment unique to the industry, including different types of dredges. Members who fulfill the classifications on those dredges fulfill classifications specific to the industry and do not necessarily cross over to the other segments of the maritime industry. (Tr. 106.)

Dredging projects take place throughout the year. Local 25 members work in all types of weather: rain, sleet, hail, high seas, and heavy winds. (Tr. 107.) The maritime industry as a whole is an inherently dangerous business. The industry self-polices through employer-based and union-based safety training, but it is an inherently dangerous business. (Id. 111.) The dangers stem from working in foul weather with heavy equipment. (Id. 112.)

Typically, dredging projects work twenty-four hours a day, seven days a week. Local 25 members normally work twelve hours a day, seven days a week, with two weeks on and one week off. Sometimes there will be three shifts on a dredge, with each shift working eight hours a day, seven days a week, with no time off. (Tr. 110.) Some of the owners' contracts require that a particular project be completed by a specific time due to issues like fish or bird spawning seasons, and companies can incur liquidated damages when the job exceeds the required time frame. (Id. 112-113.)

Local 25 members have worked for Weeks Marine on federal government contracts, including the Fire Island project. (Tr. 113.) It was a typical beach replenishment project. (Id. 114 - 115.)

The union maintains members' home addresses because they send out dues mailers, voting records for ratification of agreements and general information to members on a continuous basis throughout the year. (Tr. 119.) As president and business agent and over

⁴ The term "contributory hours" refers to Weeks Marine's contributions to the Local 25 benefit plans made for its employees or members. (Tr. 106.)

twenty-five years as a Local 25 member, Mr. Winter has met other members of Local 25; thus he is aware of where members reside. Also, the board of trustees decided to contract out in-facility network health care charges. Mr. Winter had to seek out a company that would provide care at the overwhelming majority of the hospitals within the states that members reside in. So he conducted a study and found that the union had members in thirty-five states; mostly living in most of the port areas along the eastern and gulf states. (Id. 116.) Florida, Maryland and New Jersey have the greatest number of local members. (Id. 117.)

About twenty percent of union members hold post office box numbers. Union members' rate of divorce is higher than the national average. Members may not have anyone at home to collect mail, so they also hold a post office box number to receive their mail. (Tr. 122.)

If a union member is on a long-term job, working a three-shift lot system, they may change their temporary address to where they are staying. But the union discourages that because it requires a change to all the records including medical cards. (Tr. 123.) For example, during a remediation project on the Hudson River, where workers had no time off and no rotation, members stayed at the jobsite from March to December, and many did a temporary address change while they were on the job site. (Id. 124.) On jobs that last three to four months, members typically do not change their address.

Local 25 covers a very large jurisdictional area with members in thirty-five states. Local 25 members are required to travel throughout the territorial zone covered by the Local 25 collective bargaining agreement if they want to remain actively employed. (Tr. 117, 126.) When Local 25 members work on jobs beyond daily commuting distance, they typically stay in hotel rooms. If an assignment is long-term, workers may start out in hotel rooms and end up in apartments. (Id. 127.) It is very rare to have a job close enough to one's home to commute. (Id. 124.) Mr. Winter considers daily commuting distance to be no more than an hour and a half because shifts usually are twelve hours a day, seven days a week, and they have to be there early for the crew boat run. Traveling more than an hour and a half in either direction becomes too onerous to effectively commute. (Id. 144.) If the job is more than an hour and a half away from their home, members travel and stay in hotels or apartments. (Id. 124.)

Members are required to enter their name on the union's out-of-work list and re-register their name every sixty days to remain active on the union's out-of-work list. The business agents in the union hall refer those members for employment opportunities with the signatory contractors. (Tr. 118.) Local 25 receives work orders from the contractor about crewing up a job site and/or vessel. The business agents will confer with the contractor about their crewing needs so they can supply qualified, certified, experienced labor to the contractor. (Id. 114.) The business agent has seventy-two hours, inclusive of the weekends and holidays, to provide qualified labor to the signatory contractor. (Tr. 127, JX-6 p. 559.) If the union is unable or unwilling to provide qualified labor within seventy-two hours, inclusive of the weekends and holidays, the employer can go to outside labor resources to crew up the job. The employer has a right to reject any worker referred to it for active employment. They have the right to consider the members' abilities and qualifications for employment. The union cannot abridge the company's right to do so. (Tr. 128.) At the same time, members can choose whether to accept a particular assignment. (Id. 143.)

The union also encourages portability of the members with any signatory contractor. The members are attached to a vessel or piece of equipment and become acclimated to the piece of equipment that they're working on. If a company is able to keep that vessel or piece of equipment employed from job site to job site the union members will travel with the vessel or piece of equipment. (Tr. 128.) Members also become familiar with company management and the company's dredging operational procedures. The union encourages those members initially referred to active employment to travel with that equipment wherever it goes. Weeks Marine has portability of Local 25 membership. (Id. 129.)

Local 25 members are in demand by dredging contractors. Local 25 is a labor resource allowing employers to hire and lay off people according to their needs. Employers do not have to maintain employees when they do not have work for them. The contractors also become familiar with the union members and can request people by name from the open out-of-work list. (Tr. 130.)

The collective bargaining agreement ("CBA") provides that "[w]hen meals and sleeping quarters are not available to employees employed to work afloat or onshore, the company will grant each of such employees a subsistence allowance in a minimum amount of \$34.00 per day effective October 1, 2006, \$35.00 per day effective October 1, 2007." (JX-4, p. 566.) Mr. Winter testified that the subsistence allowance is a per diem payment given while a member is working away from his or her home residence, meant to defray expenses for food, phone calls, laundry, work boots, and work clothes. The per diem is also meant to cover part of the travel back and forth to home during time off. (Tr. 131.)

The subsistence amount in the contract is a minimum, allowing contractors to pay additional monies at will but they are not required to pay an amount beyond the stated minimum amount. (Tr. 132, 144.) A contractor might choose to pay more than the subsistence amount a project in an area at the height of the tourist season, where hotel rooms or apartments cost a lot of money. Contractors understand that if members cannot afford to stay in hotels, they will not take the job. The company may then provide room and board or additional amount of monies for certain individuals. The union would not be aware of who gets more money. (Id. 133, 159.) For example, Great Lakes Dredging Dock Company had a company policy where for certain projects, they would provide the actual room for workers. Later, due to a legal issue, they increased the subsistence amount rather than provide rooms. (Id. 146.)

Local 25 members find temporary lodging on their own. (Tr. 133.) Normally, employees share rooms. Sometimes workers on opposite shifts will share. (Id. 147.) Sometimes the union will send out a business agent in advance to try to get discounted deals for group rates at hotels. Sometimes a contractor will do that. (Id. 133.)

If the thirty-five dollar subsistence payment does not cover an employee's lodging expenses, the worker has to take it out of their pocket. Weeks Marine does reimburse some Local 25 members for lodging expenses over thirty-five dollars a day, but Mr. Winter does not know whom. He speculated that Weeks Marine may pay lodging for a high-producing operator, a

knowledgeable engineer, a valued general fill placer, but not necessarily for a shoreman or a deck hand. (Tr. 134.)

At the initial start of a project, section 15 of the collective bargaining agreement requires contractors to pay a transportation allowance. (JX-4 p. 565) The contractor will pay fifty percent of the amounts designated in the contract unless the member is transported at the end of the project to another project. There is no intermediate transportation allowance in the collective bargaining agreement. Mr. Winter believes that the allowances set out in the contract should be sufficient to cover travel regardless of where a member lives. Members should not have to incur additional monies at the onset of the project. The amount of the transportation allowance for the initial travel depends on how far the job site is from the employee's home address. However, if members have time off while the project is going on, travel back and forth to home is on their own dime. (Tr. 135-136.)

The International Union of Operating Engineers, Local 138 collective bargaining agreement covers most of Long Island, New York. Local 25 members are qualified to do some dredge work that Local 138 members cannot do. (Tr. 141.)

Local 25 has never gone on strike against Weeks Marine. The union has been in existence for fifty years without a strike. There is a provision of the collective bargaining agreement that provides for no strikes or no walkouts. (Tr. 141, JX-4, pp. 558-559.) That provision benefits Weeks Marine because the company has a specific amount of time to get a job completed. The equipment that they utilize is very expensive to have onsite. To have a strike or a slowdown would adversely affect the company's ability to be viable and profitable. A strike with Local 25 would also damage the union's partnership with the contractor. (Tr. 142.)

D. Noel Ramos

Noel A. Ramos works for Respondent as the personnel director for the dredging division. He has held that position for about twenty-five years. (Tr. 314.) He is in charge of the personnel department which recruits and manages the dredging staff throughout the United States. Mr. Ramos has worked in the maritime industry for thirty-six years. (Id.)

Mr. Ramos testified that Respondent is very proactive in their safety and quality of life programs for employees. Just recently, the company embarked on a program called incident/injury-free, which is modeled on the Giuliani program in the city of New York. (Tr. 315.) The program empowers employees to speak up and even shut a job down if they think it is unsafe. Respondent wants to provide its employees with the tools and training to better their lives, and has worked hard with the state of Louisiana and other states to come up with job training opportunities for employees during their work with the company, and even after when they leave the industry. The goal is to have a better, more qualified and satisfied employees. The program has also cut down employee turnover. (Id. 317.)

The nine employees at issue here, Larry Campbell, Leon Evans, Michael Fricke, Terry Howell, William H. Johnson, William E. Johnson, Jr., Coy Polston, Richard Sellman and John Tatman worked with the company on the Fire Island project, which involved beach

replenishment for Gilgo Beach in Fire Island, New York. All nine are members of the International Union of Operating Engineers, Local 25. (Tr. 317-318.)

Respondent is a signatory to Local 25's collective bargaining agreement. (Tr. 318; JX-4.) The collective bargaining agreement contains the terms and conditions of employment that pertain to the employment of these nine individuals on the Fire Island project. Respondent and the other signatories to the agreement negotiated the CBA with the employees' collective bargaining representative and the members ratified it. (Id. 319.)

The collective bargaining agreement contains a provision about per diem payments. Under the collective bargaining agreement in effect at the time of the Fire Island project, Respondent was required to pay each employee a per diem payment of thirty-five dollars for every day they worked. Nothing in the collective bargaining agreement requires payment of lodging amounts beyond the thirty-five dollar per diem amount. (Tr. 322; CX-4.) The per diem payment is common practice in the dredging industry. (Id. 323.) All of the subsistence that was paid to Local 25 members at the Fire Island project is detailed on a spread sheet, including the name of the employee and the employee's number. The spreadsheet tells how much each employee was paid, how many days he was paid for, and the operating work week. (Tr. 361-363; JX-8.) The Local 25 collective bargaining agreement has recently been renegotiated and the per diem payments are still set at thirty-five dollars. The union has never pursued a grievance against the company with respect to its per diem payment or payment of lodging expenses. (Tr. 324.)

The contract with the Corps of Engineers for the Fire Island project did not include any provision that obligated Respondent to pay lodging costs to employees. (Tr. 320; JX-1.) Prior to the Fire Island project, Respondent had been a contractor on other dredging contracts with the U.S. Army Corps of Engineers and those contracts were also covered by the Davis-Bacon Act. (Tr. 379.) The Corps of Engineers did not advise Respondent that they would be obligated for additional lodging costs during their review of the contract. (Id. 364.) The company received no notice that they owed the lodging amounts until they received the results of Ms. Coppola's audit. They did not calculate this cost when they bid on the project. The lodging issue was not available in the pre-bid process. Mr. Ramos was not aware of any Department of Labor guidelines advising the company that it was required to pay lodging costs for employees above the per diem. (Id. 365.)

Respondent has performed numerous contracts covered by the Davis-Bacon Act, including contracts that took place prior to the Fire Island project. Mr. Ramos was not directly involved in putting together the bid for the Fire Island project. He is not directly involved in putting together bids for Respondent. He does participate in resolving grievances with Local 25 on behalf of Respondent and he had seen the contract for the Fire Island project. (Tr. 367; JX-1.) On Corps of Engineers' contracts, Mr. Ramos just relies on the Davis-Bacon published wages and reviews the contract for employment issues such as affirmative action, published wages. (Tr. 368.)

Normally, to properly staff a project site, Mr. Ramos or a representative from his staff will give the union a list of openings. If Respondent is aware of employees that have a history with the company, they ask for them first. If there are no prior employees available, Respondent

will take the out-of-work list from the union and work with that list. Respondent will contact individuals on the out-of-work list and go through the hiring procedure. Employees hired through this process are not hired with the expectation that they are going to work for the company in any one location. (Tr. 320-321.) The employees are not hired with the expectation that they are going to be employed by the company primarily in their place of residence. (Id. 321.)

None of the nine employees asked Mr. Ramos any questions at the time of their hire about available lodging in the vicinity of the project or made any requests for assistance with lodging. None of the nine employees ever complained to Mr. Ramos about lodging. (Tr. 323.)

Workers complete applications of employment as new hires, or if they are separated from the company for a more than one year. (Tr. 325.) Larry Campbell provided a mailing address of a post office Box in Meridian, Georgia when he applied for employment with Respondent. (Tr. 325; RX-1.) His initial application shows that Mr. Campbell had prior work experience with other dredging operators including Great Lakes Dredge and Dock, Contrell Dredging and Marinex. Mr. Campbell filled out a second employment application; again listing his residence as the post office box in Meridian, Georgia. (Tr. 326; RX-1.)

Mr. Evans provided an address in Jacksonville, Florida on both of his employment applications. Mr. Evans had previously worked for Great Lakes, Lake Michigan Contractors, and Palm Beach Aggregates, all competitors of Respondent. (Tr. 327; RX-1.) Michael Fricke listed his address as Durham, North Carolina. Mr. Fricke had prior employment with Great Lakes and Langenfelder Dredging. Terry Howell listed his address as being in Tampa, Florida. All his prior experience is with Great Lakes Dredge and Dock. (Tr. 328; RX-1.) William H. Johnson, Jr. listed his address as Blackwood, New Jersey, Gloucester City, New Jersey and Philadelphia, Pennsylvania on his applications. His application did not list prior dredging experience. (Tr. 329; RX-1.) Coy Polston listed his address as Greenville, Florida. Richard Sellman listed a post office Box in Lecanto, Florida. (Tr. 330; RX-1.) Mr. Sellman had prior experience working in the dredging industry with Great Lakes, Newborn Construction, and Norfolk Dredging. Mr. Tatman provided a P.O. box in Washington, Louisiana. He had prior experience with T.L. James and Company, which used to be engaged in the dredging business. (Tr. 331-332; RX-1.)

The employees listed prior employment experience on the applications but the lists are not necessarily complete lists of all their prior work experience. (Tr. 377; RX-1.) In order to track the movement of its employees, Respondent generates an employment status change form every time that there is any type of change in employment status. (Tr. 332.) These documents show the hire, layoff, and rehire of Respondent employees and changes in the terms and conditions of their employment, such as pay rates. Employment status change authorization forms for Larry Campbell show that in addition to the Fire Island project, he worked for Respondent at the Isle of Palms, North Carolina; Rockaway, New York; APM Terminals in Virginia; Oregon Inlet, North Carolina; Pensacola Beach, Florida; Philadelphia Naval Yard. (Tr. 333-337; JX-6, pp. 629-646.) Employment status change authorization forms for Leon Evans show that in addition to the Fire Island project, he worked for Respondent at Bogue Inlet in the Carolinas; Brevard, Marco Island, Sarasota, Hideaway Beach, Captiva, and Fernandin, Florida; and Brigantine, New Jersey. (Tr. 337-339; JX-6, pp. 647-668.)

In order for employees to perform multiple dredging jobs for Respondent, they are required to travel to the jobs. (Tr. 368.) A question on the employment application asks applicants whether they can travel if the job requires it. Mr. Ramos was involved in hiring the nine employees in question for the Fire Island project and might have spoken to some of them before they went to the project. He knew that these employees were traveling to the Fire Island project from out of town locations. Most of the nine employees had worked for Respondent prior to the Fire Island project. (Tr. 369; RX-1.) Status change forms reflect the jobs that these employees have performed for Respondent. (Tr. 370; JX-6.) For each employee, when there is a form showing that they were hired or assigned to a project, they continued to work on that project until the next form chronologically shows a change in status. Sometimes, Respondent may have various jobs going on at the same time and one project site may borrow somebody for a couple of days. A form would not be generated in that situation. However, if they went from the northern to the southern jurisdiction, Respondent would have to change the form because the employee's pay would change. (Tr. 372.)

All of the employees who were working out of town for Respondent needed lodging within commuting distance of the work site. Respondent pays for that lodging for a few hourly employees but not for others, by direct billing to Respondent. Respondent did pay lodging for some employees who were covered by the Davis-Bacon Act. They were lodged at the Hampton Inn during the Fire Island project and the daily room rate at the Hampton Inn exceeded the thirty-five dollar per day per diem payment. (Tr. 373-374.)

An invoice from the Hampton Inn shows that Respondent paid a bill for lodging for Michael Fricke. (Tr. 342; JX-7; CX 2.) Respondent uses a coding system to charge out the lodging bills. (Tr. 363; JX-7, p. 85.) The charges for Mr. Fricke's stay were processed on April 14th, 2008. (Tr. 363; JX-7, p. 85.) Mr. Ramos approved the bill and charged the stay to a work order unrelated to the Fire Island project. (Tr. 364.) Respondent has a foreman with the same name who regularly works in the Houma facility. If foreman Fricke travels for Respondent, the company authorizes and pays his lodging. (Id. 343.) .) Knowing that foreman Fricke from the Houma yard does travel, Mr. Ramos just charged the bill to whatever work order was on the computer. (Id. 376.)

The Local 25 member named Michael Fricke who worked on the Fire Island project was a licensed boat operator hired through the union. His original assignment was to report to the Respondent's facility in New Jersey. (Tr. 344.) Mr. Fricke drove to the facility in New Jersey, boarded the vessel and took it to Fire Island. Customarily, when employees travel by the Respondent's vessel, arriving at late hours, the company does not let them stay on the boat as it is not designed for resting. One of the field supervisors will pick the employees up and put them up in a hotel. Respondent will pick up the cost of the hotel for that night. According to Mr. Ramos, if the bill for lodging Mr. Fricke in January had gone to the project site, it would not have been paid. (Id. 345.) When Mr. Fricke returned to the project in March, he returned to the Hampton Inn and they again direct billed Respondent for his lodging. (Id. 346.) Originally, Mr. Fricke was moving the equipment from one site to another. However, his second stay at the Hampton Inn was not authorized. However, the bill never went to the job site because it was coded to Respondent's home facility and charged to the Houma repair facility. (Tr. 347-348; JX-

7, pp. 848- 8; CX 2.)⁵ Mr. Ramos testified that he did not know the dates that Michael Fricke worked in New Jersey during the Fire Island project. (Tr. 374-375; JX-7.)

Other than paying for one or two nights if an employee is moving equipment, Respondent may also pay lodging for key employees. (Tr. 353-354.) At Fire Island, Respondent paid for lodging for certain hourly employees. (Tr. 355; CX-2.) This included key members of the staff who have been with Respondent for a long time, and serve as hourly supervisors. (Tr. 356.) These employees are deck captains who act as supervisors, assigning tasks. When the captain is unavailable, the deck captain will have overall responsibility with the whole crew. A deck captain is similar to a working foreman; supervising and performing labor. (Id. 357-359.) He is paid a different wage; but is still paid by the hour. (Id. 360.) Sometimes these positions are used to bring employees up and promote them to a salaried managerial position.

Mr. Ramos reviewed the certified payrolls for the Fire Island project once. He was indirectly responsible for administering the pay requirements of this contract. The certified payroll states that "All persons employed on said project have been paid the full weekly wages earned; that no rebates have been or will be made, either directly or indirectly, to or on behalf of said [employer] from the full weekly wages earned by any person; and that no deduction has been made, either directly or indirectly, from the full wages earned by any person, other than permissible deductions as defined in regulations part 3, 29 C.F.R. subtitle (a), issued by the Secretary of Labor." (Tr. 379; JX-2 p.318.)

IV. FINDINGS OF FACT

- Respondents 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).
- The work to be performed under the contract generally consisted of using heavy equipment to dredge the ocean and replenish the beach. (JX 1).
- The contract was valued at \$8,558,750.00. (JX 3).
- Respondents began dredging in November 2007. (JX 3).
- Incorporated into the contract were the CBA for International Union of Operating Engineers Locals 25 and 138, which required the payment of certain prevailing wage rates and fringe benefits. (JX 4.)
- The Department of Labor's Wage and Hour Division, Westbury, NY District Office, began an investigation in January of 2008. (Tr. 174.)
- Camille Coppola (Investigator Coppola) conducted the investigation; as part of her investigation she received certified payroll records and contract documents from Respondents' employees Noel Ramos and Karen Wilson. (JX 1, 2; Tr. 174.)

⁵ Mr. Ramos' explanation does not line up with the Administrator's calculations as set forth at CX-1. The Administrator calculated that Mr. Fricke paid for his own lodging at the Hampton Inn from November 26 through January 25. On January 26, the Respondent began paying for Mr. Fricke's lodging. If Mr. Fricke was working at Fire Island through January 25, there would have been no reason for him to drive his car to New Jersey, park it and travel back to Fire Island on the vessel.

- Investigator Coppola interviewed approximately nine employees in person, over the phone, or by mail-in questionnaire and visited the construction site. (Tr. 177, 194).
- The investigation resulted in a determination that Respondents violated the Davis-Bacon Act. (JX 3; Tr. 226.)
- The alleged violation includes the failure to pay \$21,831.25 in prevailing wages, as the wage rate was reduced by the lodging costs incurred by the out-of-town Local 25 employees. (JX 3, ¶10.)
- Nine employees from Local 25 incurred lodging costs while working on the Fire Island dredging project. These employees are Larry Campbell, Leon Evans, Michael Fricke, Terry Howell, William H. Johnson, William E. Johnson, Jr., Coy Polston, Richard Sellman and John Tatman. (CX 1; Tr. 317-318.)
- All of the named employees paid for hotel lodgings during the duration of their work assignment; and Respondent did not reimburse them for the actual lodging costs. (Tr. 179, 227; CX-1, pp. 1, 2.)
- Some employees chose to share rooms and undertook searches to find the least costly lodgings near the worksite. (Tr. 181-182.)
- Pursuant to the Local 25 CBA, each employee received a thirty-five dollar per diem payment, intended to defray the cost of lodging, meals and other incidental living expenses. (JX 4.)
- The actual lodging costs alone exceeded the thirty-five dollars per diem. (Tr. 238, 250-251, 271.)
- Nothing in the CBA obligates Respondent to pay more than the thirty-five dollars per diem. (Tr. 322; CX-4.)
- Local 138 employees did not incur lodging costs while working at Fire Island because they all resided within reasonable commuting distance to the worksite. (Tr. 221-222.)
- Local 138 employees are paid a different wage rate pursuant to their CBA. (Tr. 225.)
- There was some contract work that Local 138 members were not allowed to do, which could only be done by Local 25 members. (Tr. 141.)
- Weeks Marine did reimburse certain employees for the cost of their lodging, but not the nine at issue in this case. (Tr. 373-374.)
- The contract with the Corps of Engineers for the Fire Island project did not include any provision that obligated Respondent to pay lodging costs to employees. (Tr. 320; JX-1.)
- The Corps of Engineers did not advise Respondent that they would be obligated for additional lodging costs during their review of the contract. (Tr. 364.)

IV. DISCUSSION

The Administrative Review Board (ARB or the Board) discussed the parties' burdens in a case involving unpaid wages under the Davis Bacon Act in Thomas & Sons Building Contractors, Inc., 1996-DBA-37, ARB Case No. 00-050 (ARB August 27, 2001). The ARB referred to the United States Supreme Court's decision in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) as delineating the parties' respective burdens of proof. The ARB reasoned

that, under Mt. Clemens, the Administrator has the initial burden of establishing that the employees performed work for which they were improperly compensated. The ARB quoted Mt. Clemens in holding that

[t]he Administrator has carried his burden if he proves that the employees have in fact performed work for which they were improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. Ray Wilson Co., ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004) (Respondent has the burden to rebut Department's proof of extent and amount of violations). If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result is only approximate.

Thomas & Sons Building Contractors, *supra*, at 6.

Prevailing Wage and the Nine Local 25 Employees

The Administrator and Respondents dispute whether the workers from Local 25 were paid the prevailing wage. The Administrator argues that as the Local 25 workers were working outside their home territory, Respondent should have paid their lodging costs while they were working at the Fire Island jobsite. Administrator further argues that by failing to pay lodging costs, the wages of the workers from Local 25 were reduced below the prevailing wage.

Respondent, on the other hand, argues that the DBA does not require employers to pay lodging costs and that payment of lodging costs would benefit non-local workers, in contravention of the established purpose of the Act.

There is little direct guidance on this issue, and this is a close case, with persuasive arguments made on both sides.

The purpose of the Act was to ensure that contractors bidding on public works projects would not lower wages so as to be sure to make the lowest bid, while permitting government agencies to contract with those who paid a fair wage, rather than the lowest wage. See "Reconsideration of the Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities," May 23, 1994 <http://www.justice.gov/olc/davbac.htm>. Enacted during the Depression, one of the goals was to assist local communities in regaining prosperity. *Id.* Davis-Bacon is designed to protect workers, not contractors, by setting a floor for wages, not a ceiling. *Id.*, citing Walsh v. Schlecht, 429 U.S. 401, 411 (1977). The contractor's obligation to pay not less than the minimum is not a representation by the Government that the contractor will not have to pay more. U.S. v. Binghamton Constr. Co., Inc., 347 U.S. 171, 178 (1954). However, the Act is a "remedial statute that should be 'liberally construed to effectuate its beneficent purposes.'" *Id.*, citing Drivers Local Union No. 695 v. NLRB, 361 F.2d 547, 553 n. 23 (D.C. Cir. 1966).

Although the statute is remedial, as Respondent points out, the purpose of the Act is also to protect local wage standards, giving local wage earners and contractors a fair shot at receiving government contracts. L.P. Cavett Co. v. U.S. Department of Labor, 101 F.3d 1111, 1113 (6th Cir. 1996); Universities Research Ass'n, Inc. v. Cotutu, 101 S.Ct. 1451 (1981). Respondent argues that payment of lodging costs to subsidize nonlocal workers, like the members of Local 25, is not within the ambit of the Act. Local 25 workers could choose to live closer to the location of their work, but instead choose to live in distant locations with lower housing costs and taxes. Meanwhile, local workers, like the members of Local 138, bear the burden of higher housing costs.

The Act requires contractors to pay wages “unconditionally.” The Administrator argues that Respondent failed to pay wages unconditionally, because the Local 25 workers were not fully reimbursed for their temporary lodging expenses. The Administrator relies primarily on KP&L Electrical Contractors, Inc., 1996-DBA-34 (December 31, 1998). In that case, KP&L sent its employees, who usually worked in Lexington Kentucky, to renovate and expand a waste water treatment plant in Bowling Green, Kentucky. The KP&L employees traveled from Lexington, Kentucky on Monday mornings and stayed nights in Bowling Green, returning to Lexington on Friday afternoon. Initially KP&L paid the employees’ hotel bills. However, about two weeks into the job, the employer informed the employees that they would have to pick up the cost of the hotel stays. Employees agreed to shift to four ten-hour days as opposed to five eight-hour days to eliminate one overnight stay in Bowling Green. Yet, pursuant to KP&L's instructions the employees continued to mark their timecards as five eight-hour days. The Administrator argued that the employees remained in Bowling Green overnight for the benefit of KP&L. As such, the Administrator contended that KP&L should have reimbursed its employees for this expense. KP&L argued that the overnight stays were for the benefit of its employees and that Davis-Bacon and the related Acts do not require payment of employee's hotel bills regardless of who benefits from the stay. The ALJ characterized the issue as being whether the hotel bills were incurred for the benefit of the employees or of the employer.

The ALJ wrote:

The Administrator cites Section 5.5(a)(1) of the implementing regulations under the Davis-Bacon Act as the primary justification for its position on this issue. This section provides:

All laborers and mechanics employed or working upon the site of the work . . . will be paid unconditionally and . . . without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 C.F.R. part 3)), the full amount of wages and bona fide fringe benefits . . . due at time of payment . . .

29 C.F.R. 5.5(a)(1). The Administrator submits that this regulation has been violated by KPL as wages were not paid unconditionally as a portion of these wages were used to pay the employee's hotel expenses by the employees themselves. A review of case law found no guidance as to

whether or not "unconditional" is to have such a connotation in the Davis-Bacon context. A common sense approach seems to dictate that it does. Further, the Administrator cites the implementing regulations of the Fair Labor Standards Act which treat this type of situation as a conditional payment of wages. 29 C.F.R. 531.35. This regulation finds payment conditional if employees kick-back a portion of their wages to another party for the employer's benefits. Id. Although not the controlling law, I find it illustrative of the concept of whether these wages have been paid unconditionally. Consequently, if KPL employees paid for their hotel stays for KPL's benefit, they were paid unconditionally the full amount of wages owed them as required.

KP & L Electrical Contractors, Inc., 1996-DBA-34 (December 31, 1998). The ALJ concluded that the hotel bills were paid for KP&L's benefit. Id. He further found that Section 15f18 of the Field Operations Handbook (FOH) of Wage and Hour supported his conclusion.

When an employer sends employees who are regularly employed in their home community 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 . . . 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 employee's wages, and do not constitute board, lodging, or other facilities customarily furnished which are deductible from the predetermined wage pursuant to Regs 3.5(j).

Id. The ALJ required KP&L to reimburse its employees for the money expended on hotel bills while in Bowling Green.

Similarly, in William J. Lang Land Clearing, Inc., 2004 WL 2205226 (ARB, Sept. 28, 2004), *aff'd.*, William J. Lang Land Clearing, Inc. v. Administrator, Wage and Hour Div., 520 F. Supp.2d 870 (E.D. MI. 2007), *aff'd.*, Case No. 07-2423, 2008 WL 3287097 (6th Cir. Aug. 6, 2008)(unpub.), the Board found that lodging costs were for the benefit of the employer. The ARB noted that the provisions at 40 U.S.C. § 276(b)(2)(B) provide for a number of fringe benefits which may be credited towards the prevailing wage rate, but the provisions do not specifically mention meals and lodging. The ARB further concluded that meals and lodging do not constitute "other *bona fide* fringe benefits" creditable against the prevailing wage rate. In disallowing meals and lodging paid by the employer for long-distance Davis-Bacon contracts, the Board reasoned:

The employee lodging and food expenses in this case were clearly undertaken for Lang's primary benefit. Lang could only perform its far distant DBA contracts (and benefit thereby) if its employees incurred the substantial detriment of traveling to locales far from their homes for most of every work week. Lang's employees' travel to the 'special' out-of-area jobs served the primary purpose and benefit of the employer. Lang required employees to travel to the 'special' jobs as a condition of their employment. The employees had no choice but to travel on Lang's business in order to get and keep their jobs. (citations omitted). We accordingly conclude Lang's subsistence payments for its employees' meals and

lodging were for the primary purpose of furthering the employer's business and not for the primary benefit of the employees. These subsistence payments cannot be credited as acceptable DBA cash payments in lieu of fringe benefits.

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

Respondent distinguishes its situation from KP&L's based on its reading of the FOH. From Respondent's perspective, the operative phrase is "employees who are **regularly employed** in their home community away from home." FOH Section 15f18 (Emphasis added). It is undisputed that the nine Local 25 members at issue in this case rarely, if ever, are employed in their home community. The nature of the dredging industry is such that most travel for work. (Tr. 117, 124, 126.) However, Respondent places too much emphasis on the phrase "regularly employed." First, while the FOH provides guidance and are due some degree of deference, the degree of deference is dependent upon the power of the FOH to persuade. See Lang, 2004 WL 2205226, at *10; Reich v. Miss Paula's Day Care Ctr., Inc., 37 F.3d 1191, 1194 (6th Cir. 1994). I find that the critical guidance from the FOH is that "[w]hen an employer sends employees ... to perform a special job at a location outside daily commuting distances from their homes..., the assumption by the employer of the cost of the board and lodging at the distant location . . . [is] considered as payment of travel expenses properly reimbursable by the employer and incurred for its benefit." This reading is consistent with the overall purpose of the Act, which is to protect workers, not contractors, by setting a floor for wages.

Although Respondent tries to argue that the decision to accept remote employment (or to live in a location distant from the location of the work) redounds to the benefit of the employees, see Respondent's Post Hearing Brief, discussion at pp. 20-22, the case law clearly directs my finding that the employees' expenditures for temporary residences near Fire Island were incurred for the benefit of Respondent. See KP & L Electrical Contractors, Inc., 1996-DBA-34 (December 31, 1998); William J. Lang Land Clearing, Inc., 2004 WL 2205226 (ARB, Sept. 28, 2004); Matter of Calculus, Inc., 1993 WL 537381 (WAB, Oct. 29, 1993).

The fact that Respondent was obligated to pay employees thirty-five dollars per diem for food and lodging expenses under the CBA does not affect the employees' right to reimbursement. The Act requires unconditional wage payment "regardless of any contractual relationship which may be alleged to exist between the contractor... and ... laborers and mechanics." 40 U.S.C. § 3142(c)(1); 29 C.F.R. § 5.5(a)(1)(i). The negotiated amount of \$35.00 was not enough to cover the actual expenses of the employees for lodging and food, even when the employees shared in rooms and stayed in the least costly lodgings available within a reasonable commuting distance to the worksite. (Tr. 238, 250-251, 271.)

Respondent also argues that the employees had no expectation of reimbursement for lodging expenses over and above the negotiated amount of thirty-five dollars and that they understood that paying for their own lodging was an express condition of their regular employment. Respondent looked to the decision of the Court of Appeals for the Second Circuit in Soler, et al. v. G & U, Inc., 833 F.2d 1104; 28 WH Cases 593 (2nd Cir. 1987), *cert. den.*, 488 U.S. 832, 109 S.Ct. 88, 1 W & H Cases 2d 168 (1988). Soler is not a Davis-Bacon Act case, but

instead involves seasonal farm workers whose employer provided lodging when employees were required to work on farms away from their homes. In Soler, the court was asked to consider §3(m) of the Fair Labor Standards Act, which defines “wage” to include “the reasonable cost, as determined by the Administrator, to the employer of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by [an] employer to his employees.” Id. at 1108, quoting 29 U.S.C. §203(m). Although §203(m) makes the cost of lodging presumptively compensation, the court in Soler still found that a balancing test must be done to determine whether the lodging provided was a benefit for the employees or for the employer. Id., at 1110. Soler, moreover, is not applicable. In Soler, the court was dealing with whether on-site housing provided to employees, who were not required to live on the farm as a condition of their employment, was for the benefit of the employees or the employer. In the instant case, we have employees who must furnish their own offsite housing, remote from their primary residences, in order to work.

As in Lang and KP&L, I find that the hotel lodgings were for the benefit of Respondent and the failure to reimburse employees for the cost of such lodging did impermissibly reduce the Local 25 employees’ wages below the prevailing wage rate, in violation of the Act.

Back Wage Calculations

Investigator Coppola calculated the back wages for nine employees. To calculate the back wages, Investigator Coppola multiplied the total number of nights spent working on Fire Island, as shown on the certified payroll records, by the actual cost of the employees’ lodging, based on her review of actual receipts, interviews with employees and with motel operators. Investigator Coppola then subtracted the amount each employee received in subsistence pay (or per diem) under the CBA. I find that the investigator’s calculations were supported by the underlying documentary and testimonial evidence. The amounts the Investigator found to be due are set out in detail in CX 2.

EMPLOYEE	TOTAL NIGHTS	DAILY EXPENSES	TOTAL EXPENSES	PER DIEM CREDIT ⁶	REIMBURSEMENT DUE
Larry Campbell	59	28.58	4028.96	(1155.00)	2873.96
	41	57.14			
Leon Evans	17	58.57	3167.67		3167.67
	59	28.58			
	8	57.14			
	1	28.58			
Michael Fricke	60	75.47 ⁷	4528.20	(3150.00)	1378.20

⁶ The back wage calculation for some of the employees (Evans, Johnson, Jr., Polston, and Tatman) does not include the per diem credit. Ms. Coppola testified that for some employees that credit had already been calculated as an offset to the other Davis-Bacon issues. (Id. 280.)

⁷ Michael Fricke chose to stay at the Hampton Inn, a more expensive option. For reasons that remain unclear, Respondent paid for Mr. Fricke’s stay at the Hampton Inn on two occasions: the night of November 25, 2007 and then from January 26, 2008 through February 2, 2008.

EMPLOYEE	TOTAL NIGHTS	DAILY EXPENSES	TOTAL EXPENSES	PER DIEM CREDIT ⁶	REIMBURSEMENT DUE
Terry Howell	28	40.62	4208.45	(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	(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	(2765.00)	3197.13
John Tatman	17	55.00	935.00		935.00
			30,711.03	(10,920.00)	\$19,791.03

However, the Administrator based her computations on a reconstruction of the employees' actual lodging costs. Testimony established that the practice of employees was to share rooms while working in remote locations. The record also established that lodging costs ranged from a high of \$75.47 per night for a single room at the Hampton Inn to a low of \$28.58 for a shared room at the Marina Motel. I find that although the provision of remote lodging was for the benefit of the employer, Respondent is not responsible for paying for single rooms at the Hampton Inn. I find that employees should be reimbursed at the rate of the lowest cost, shared room (\$28.58). Any expenses above that would be incurred for the convenience and benefit of the employee, not the employer.

The Respondent argues that as employees received thirty-five dollars per diem, they are not due additional reimbursement for lodging, as lodging was available for employees at a rate below the per diem. Respondent does not take into account, though, that the per diem credit was intended to be used for meals and lodging and other incidental expenses. If an employee spent \$28.58 on a shared motel room, they would be left with only \$6.42 per day for meals and other expenses. I find that amount is not adequate. Below are my findings of the amounts due each employee, based on the total number of nights multiplied by the reasonable lodging cost of \$28.58 per night, less credit for any per diem received (and not credited against other violations in the earlier related settlement). In cases where the per diem credit exceeds the reasonable lodging cost, the employee is due nothing.

EMPLOYEE	TOTAL NIGHTS	REAS. LODGING COST	TOTAL EXPENSES	PER DIEM CREDIT	REIMBURSEMENT DUE
Larry Campbell	100	28.58	2858.00	(1,155.00)	1703.00
Leon Evans	85	28.58	2429.30		2429.30
Michael Fricke	60	28.58	1714.80	(3150.00)	0.00
Terry Howell	112	28.58	3200.96	(2590.00)	610.96
William H. Johnson, Jr.	42	28.58	1200.36		1200.36
William Johnson	36	28.58	1028.88	(1260.00)	0.00
Coy Polston	92	28.58	2629.36		2629.36
Richard Sellman	79	28.58	2257.82	(2765.00)	0.00
John Tatman	17	28.58	485.86		485.86
			\$17,805.34		\$9,058.84

CONCLUSION

Thus, the Administrator has shown that Respondents committed a violation of the DBA when they failed to reimburse the nine Local 25 employees for their lodging costs above the thirty-five dollars per diem specified in the CBA.

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 \$9,058.84 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.

A

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 Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. The Petition must refer to the specific findings of fact, conclusions of law, or order at issue. *See* 29 C.F.R. § 6.34. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

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.