

U.S. Department of Labor

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Issue Date: 23 April 2014

Case No. 2011-DBA-00002

In the Matter of:

Disputes concerning payment of prevailing wage rates
fringe benefits and overtime pay and recordkeeping violations by:

ENVIRO & DEMO MASTERS, INC.
Subcontractor/Respondent

JOVER NARANJO, as President and Owner
Respondent

LUPERIO NARANJO, SR.
Respondent

GLADIATORS CONTRACTING CORP.
Subcontractor/Respondent

Proposed debarment for labor standards
violations by:

ENVIRO & DEMO MASTERS, INC.
Subcontractor/Respondent

GLADIATORS CONTRACTING CORP.
Subcontractor/Respondent

JOVER NARANJO, as President and Owner
Respondent

LUPERIO NARANJO, SR.
Respondent

With respect to laborers employed by the
Subcontractors on: Contract TCAP Number 20090723
State of New York, Division of Housing and Community Renewal
Jobsite: Ciena Project (New York, New York)

DECISION AND ORDER

This matter arises under the labor standards and prevailing wage provisions of the Davis-Bacon Act (“DBA”), as amended, 40 U.S.C. §§ 276 *et seq.*; Section 1606 of the American Recovery and Reinvestment Act of 2009 (“ARRA”), Public Law 111-5; Title II of the Cranston-Gonzalez National Affordable Housing Act (“NAHA”) as amended, 42 U.S.C. § 12701, *et seq.*; the Contract Work Hours and Safety Standards Act (“CWHSSA”), 40 U.S.C. §§ 327 *et seq.*, all of which require that workers on government construction projects be paid no less than the minimum wages determined by the Secretary of Labor to be prevailing for corresponding work on similar projects in the area.¹ Regulations which implement the labor standards and prevailing wage provisions of the DBA are found at 29 C.F.R. Parts 5 and 6.

Procedural history

The Regional Administrator, Wage and Hour Division (“Administrator”) of the United States Department of Labor (“DOL”) filed an Order of Reference on December 1, 2010, asserting failure to pay prevailing wage rates and fringe benefits by, as well as seeking debarment of, Enviro & Demo Masters, Inc. (“Enviro”), Gladiators Contracting Corp. (“Gladiators”), Jover Naranjo, and Luperio Naranjo, Sr. (collectively “Respondents”). The Order of Reference alleges that, during the Metro North Rehab Redevelopment Project located at 306-324 East 100th Street in New York, New York, alternatively referred to as the “Hobbs-Ciena Project,” “Ciena Project,” or “East 100th Street,” Enviro & Demo Masters, Inc. and Gladiators Contracting Corp. and owners Jover Naranjo and Luperio Naranjo, Sr., disregarded their obligations to their employees under the Davis-Bacon Act (“DBA”), as amended, 40 U.S.C. §§ 276 *et seq.*; the Davis-Bacon and Related Acts (“DBRA”), 40 U.S.C. 276(a) *et seq.*, the American Recovery and Reinvestment Act of 2009 (“ARRA”), Public Law 111-5; the Contract Work Hours and Safety Standards Act (“CWHSSA”), 40 U.S.C. §§ 327 *et seq.*; and the applicable regulations at 29 C.F.R. Parts 5 and 6.

The Administrator maintained that debarment is appropriate because he found reasonable cause to believe Respondents were in aggravated or willful violation of the ARRA and the CWHSSA.

Respondents denied the Administrator’s allegations and requested a hearing. I held that hearing on June 18-22, and June 25, 2012 in New York, NY.² At that hearing, the Administrator was represented by the Office of the Solicitor for the Department of Labor (“DOL”); Respondents were self-represented. At that time, the parties were given an opportunity to present and examine witnesses, as well as to submit other evidence.

Received into evidence at the hearing were Administrator’s Exhibits (“AX”) 1 – 71; 1A; 14A; Respondents’ Exhibits (“RX”) 1, 4 – 8; 8A – 8F; 9 – 10; 14; Administrative Law Judge’s

¹ ARRA, NAHA and CWHSSA constitute Davis-Bacon Related Acts. *See* 40 U.S.C. § 3141 *et seq.* The NAHA provides in part that “[a]ny contract for the construction of affordable housing with 12 or more units assisted with funds made available under this subtitle shall contain a provision requiring that not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 3141, *et seq.*) shall be paid to all laborers and mechanics employed in the development of affordable housing involved, and participating jurisdictions shall require certification as to compliance with the provisions of this section prior to making any payment under such contract.”

² The transcript of the hearing will be cited herein as “Tr.”

Exhibits (“ALJX”) 1 – 2³; Joint Exhibits (“JX”) A – I were identified on the record.⁴ In addition, the following exhibits were offered but excluded: RX 11 – 13; 15 – 16.

The following witnesses testified at the hearing for the Administrator: Ines Orbe, Procopio Pereda Morales, Gerald Kraft, Joaquin Pablo, Juan Carlos Rodriguez, Manuel Pereda, Angel Lojano, Rodolfo Pereda, Blanca Lopez, Clever Pauta, Richard Campoverde, Luis Bermudez, Jose Delarosa, Camilla Coppola, Geoffrey LaCroix, Fausto Rolando Criollo Lojano, Antonio Torres Romero and Pedro Pablo Coyotl.

The following witnesses testified at the hearing for the Respondents: Custodio Pomaquisa, Jose Rodrigo Canndo and Jose Citeros.

After the formal hearing, I left the record open after receipt of the hearing transcript for the parties’ submission of written closing briefs.⁵ Respondents submitted post-hearing briefs⁶ on October 10, 2012, and the Administrator submitted a post-hearing brief on October 11, 2012.

This Decision is based upon an analysis of the record, the arguments of the parties, as well as the applicable law and regulations.

Issues presented

The issues for resolution:

- a. Whether Respondents failed to pay named employees the prevailing wage rate and fringe benefits required under the provisions of the DBA, the ARRA.
- b. Whether Respondents failed to pay named employees for all hours worked under the provisions of the DBA and the DBRA.
- c. Whether Respondents failed to make overtime payments in violation of the provisions of the CWHSSA.
- d. Whether Respondents violated the ARRA and 29 C.F.R. 5.5(a)(3)(ii) by failing to submit complete and accurate certified payrolls.
- e. Whether the circumstances warrant the requested relief of debarment of Respondents, pursuant to 29 C.F.R. § 5.12(a)(1).

³ Administrator’s Prehearing Statement dated June 12, 2012 was received into evidence as ALJX 1; Respondents’ Prehearing Statement also dated June 12, 2012 was received into evidence as ALJX 2.

⁴ I will allow JX A through I into evidence, noting Respondents offered no objection to these exhibits at the formal hearing. *See* Tr. at 27.

⁵ On October 11, 2012, I issued an Order partially granting the Administrator’s unopposed motion to correct the official hearing transcript as per an Errata Sheet the Administrator submitted on September 24, 2012, finding many of the errors noted by the Administrator not be of substance. *See* 29 C.F.R. §18.52(b).

⁶ Respondents submitted two documents post-hearing, both dated October 9, 2012 and received October 10, 2012: one states that it is the post-hearing argument for Respondent Enviro & Demo Masters and the other states that is the post-hearing argument for Respondent Jover Naranjo.

Summary of the evidence and factual findings

Background

Hobbs Ciena Associates, L.P., Hobbs Ciena Housing Development Fund Corporation (“Hobbs Ciena”) as the prime contractor of the Ciena project entered into a federally-funded contract (“Contract”) with the New York City Department of Housing Preservation and Development (“HPD”) on June 30, 2009 to renovate, upgrade and combine five vacant six-story buildings located on East 100th Street in New York City. AX-7; Tr. 49, 92, 321, 381, 425, 560, 581, 733, 842. Section 20(A) of the Contract stated that the project was funded by ARRA and that compliance with all applicable requirements of ARRA was a condition of receiving such funds. (AX-7).

Section 20(B) of the Contract also provided the following:

Laborers and mechanics . . . shall be paid wages at rates no less than those prevailing-on-projects of a character-similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code, referencing [Davis-Bacon Related Acts].
(AX-7 at 13).

Section 9(C) of the Contract was amended on March 10, 2010 to incorporate the prevailing wage requirements of DBA (40 U.S.C. § 3141 and 42 U.S.C. § 5310), CWHSSA (40 U.S.C. § 3701), and with the other federal laws and regulations pertaining to labor standards and HUD Handbook 1344.1. (AX-7 at 46).

Respondent, Enviro & Demo Masters (“Enviro”) was hired as a second-tier subcontractor by Lettire Construction Corporation, the general contractor/first-tier subcontractor, to demolish the existing buildings and infrastructure for the Ciena project.⁷ (Joint Stipulated Facts⁸; JX-C; JX-E at 86-87). The subcontract for complete interior demolition work at the Ciena project was valued at \$795,000 and was subject to the prevailing wage requirements of the DBA by application of the ARRA. (Joint Stipulated Facts; JX-C, JX-C-1, JX-E at 89-90; JX-G at 21; AX-24 at 76; Tr. at 139, 209-210, 211, 213-214, 495, 514, 564-566). Section 8 of the subcontract stated that Enviro must provide certified payrolls with each requisition. (JX-C at 33). Section 14.2 of the subcontract indicated that it was a prevailing wage project. (JX-C at 38).

Respondent Jover Naranjo, as president and owner of Enviro, and Nicholas Lettire, as president of Lettire, signed the subcontract. (Joint Stipulated Facts; JX-C at 39; JX-G at 7-8; AX-8; AX-24 at 75). That subcontract included and incorporated a Wage Determination. (JX-C; JX-C-1).

⁷ Lettire Corporation filed a motion to intervene in the instant matter which I denied by Order dated October 28, 2011.

⁸ These Joint Stipulated Facts referred to herein are included in the parties’ Prehearing Statements which constitute ALJX 1 and ALJX 2.

The Wage Determination required payment of the following prevailing wage rates and fringe benefits on the Contract:

<u>Demolition Laborers Tier A</u>		<u>Demolition Laborers Tier B</u>	
Basic hourly rate	\$30.38	Basic hourly rate	\$20.74
Hourly fringe benefits	\$18.91	Hourly fringe benefits	\$12.41
Total hourly rate	<u>\$49.29</u>	Total hourly rate	<u>\$33.15</u>

In addition to the subcontract, Respondent Jover Naranjo also signed a prevailing wage form stating the required hourly rate and fringe benefit rate to be paid to Demolition Tier A and Tier B laborers. (JX-C at 88).

East 100th Street

All employee witnesses who testified at the hearing for the Administrator, i.e., Ines Orbe, Procopio Pereda, Joaquin Pablo, Juan Carlos Rodriguez, Manuel Pereda, Angel Lojano, Rodolfo Pereda, Blanca Lopez, Clever Pauta, Richard Campoverde, Fausto Rolando Criollo Lojano, Antonio Torres Romero, and Pedro Pablo Coyotl, provided testimony that they had worked at a project located on East 100th Street between First and Second Avenues in Manhattan at various times during the period from August 2009 through February 2010. Photographs and video recordings taken by Gerard Kraft, a union representative, corroborate that testimony.⁹

Administrator's witness testimony

Ines Orbe

Ines Orbe testified that she started working at East 100th Street for Enviro on August 4, 2009, and worked on the project for approximately two months. She further testified that she was hired by Luperio Naranjo, Sr., and did demolition work on the site. She worked Monday through Saturday, 7 a.m. to 5 p.m., and never started earlier or stayed later. She never worked on Sundays, although she was asked to do so. She stated that she received one hour for lunch at 12 p.m. Her job duties at East 100th Street included filling wheelbarrows with dirt; softening dirt with a pick axe and shovel; carrying wood outside; cleaning the street; and buying water for the workers. (Tr. at 48-52).

Further, Ms. Orbe stated that her schedule never changed, and that she kept her own records of the hours that she worked. (Binder¹⁰ A11, AX-60). The last day that she worked at East 100th Street was October 24, 2009. She testified that she was paid \$13.00 per hour, and was paid every three weeks. She averred that she was paid mostly in cash, but was paid by check

⁹ Mr. Kraft, a union representative with the Market Development Department for Laborers' Local 79, along with Juan Carlos Rodriguez, a member of that Local, visited East 100th Street about 30 to 40 times during the period from August 2009 to September 2009. Tr. at 138-140; 209-212. While onsite on August 12, August 20, and September 12, 2009, Mr. Kraft videotaped the work being done at East 100th Street and Mr. Rodriguez distributed flyers to workers indicating that it was a government project requiring payment of prevailing wage rates. AX-39, AX-40(a), AX-68 through AX-71; Tr. 211, 213-214.

¹⁰ The Administrator has included his admitted exhibits, as well as the parties' admitted joint exhibits into Binders. Those Binders have been lettered and numbered for identification purposes.

approximately three to four times. While working at East 100th Street, she was not provided health insurance or given pension benefits. (Tr. at 52-60).

She testified that the following people worked with her at East 100th Street: Edgar Avila; Milton Barahona (took out wheelbarrow and cut met with a torch); Felipe Bareno (demolition); Luis Marca (used wheelbarrow); Richard Campoverde (does not remember his job duties); Sergio Campoverde (used wheelbarrow); Rodrigo Canndo; Darwin Celi (carried garbage to the container); Sergio Celi (used wheelbarrow); Pedro Pablo (demolition); Rolando Criollo (demolition); Imelda Gomez (used wheelbarrow); Hector Jiminez (does not remember his job duties); Angel Lojano (demolition); Blanca Lopez (used wheelbarrow); Pedro Bolivar Orellana (demolition); Joaquin Pablo (demolition); Clever Pauta (does not remember his job duties); Manuel Pereda (demolition); Procopio Pereda (demolition); Rodolfo Pereda (demolition); Custodio Pomaquisa (demolition); Hugo Pomaquisa (used wheelbarrow); Mauricio Sapeta (used wheelbarrow); and Antonio Torres (used wheelbarrow). (Tr. at 60-68).

Ms. Orbe testified that she did not know, or did not remember the following people or whether they worked at East 100th Street: Luis Canndo; Felix Matute; Fausto Tigre; Angel Oswaldo Torres; Sergio Celi; Franklyn Chiriboga; Fabian Avila; Gilberto Pauta; Marcia Gonzalez; Janet Feijo; and Maria Paola Feijo. She also indicated the following people did not work at Ciena: Christian Godoy and Ines Pesantes. (Tr. at 60-82).

In addition, Ms. Orbe noted that she did not sign in and out of work each day, and that she never spoke with a government inspector or investigator. She also stated that she would sometimes hide when inspectors arrived, on the direction of Luperio Naranjo, Sr. Finally, she indicated that all employees worked the same hours at East 100th Street. (Tr. at 80-83).

Procopio Pereda Morales

Procopio Pereda Morales testified that he worked at East 100th Street removing garbage. He stated that his first day on the job was the first day of the project. He arrived at the site at 7 a.m., and stopped work at either 5 p.m. or 6 p.m., but never earlier than 5 p.m. Employees were given one hour for lunch. (Tr. at 91-93).

Mr. Morales noted that he took out garbage in a wheelbarrow and threw it in a container. He only did an hour or two of demolition per week. He used the following tools: axes, long bar, long metal scraper, and a small iron. He used the bar to lift floors from the basement, and used the scraper to lift the ceiling and take out the sheet rock from the sides. Luperio Naranjo, Sr. told him what to do each day. He testified that he typically worked Monday through Saturday, and worked on Sunday twice. Saturday hours were 7 a.m. to 5 p.m. or 6 p.m., with a one hour lunch break, and Sunday hours were 9 a.m. to 3 p.m. with no lunch break. (Tr. at 93-100).

Mr. Morales testified that Luperio Naranjo, Sr. asked him to work on Sundays, and that he did both demolition and garbage removal on Sundays. He also indicated that he was paid \$13.00 per hour, and that Sundays were paid at the same rate. He maintained that he never received overtime pay, health insurance, or pension benefits while working at East 100th Street and that he was always paid in cash. In order to collect his pay, he had to go to the office of Luperio Naranjo, Sr. (Tr. at 100-111).

He testified that the following people worked with him at Ciena: Edgar Avila (told people what to do); Milton Barahona (cut pipes with torch); Luis Marca (removed garbage); Richard Campoverde (demolition and removed garbage); Sergio Campoverde (demolition); Sergio Celi (demolition); Pedro Pablo (demolition); Imelda Gomez (filled wheelbarrows and removed garbage); Hector Jimenez (removed garbage, little bit of demolition); Angel Lojano (demolition); Blanca Lopez (filled wheelbarrows and removed garbage); Ines Orbe (filled wheelbarrows and removed garbage); Pedro Orellana (demolition); Joaquin Pablo (removed garbage); Clever Pauta (demolition); Manuel Pereda (demolition); Rodolfo Pereda (demolition); Luis Pileo (demolition and garbage removal); Custodio Pomaquisa (demolition); Hugo Pomaquisa (demolition and garbage removal); Jacinto Pomaquisa (demolition and garbage removal); Mauricio Sapeta (demolition and garbage removal); Antonio Torres (helped cut pipes); and Sergio Valera (garbage removal). (Tr. at 111-121).

Mr. Morales testified that he did not know, or did not remember the following people or whether they worked at East 100th Street: Felipe Barena; Luis Canndo; Felix Matute; Fausto Tigre; Angel Oswaldo Torres; Fernando Valdez; Marcia Gonzalez; Janet Feijo; Maria Paola Feijo; Fabian Avila; Franklyn Chiriboga; and Gilberto Pauta. He also testified that the following people did not work at East 100th Street: Rodrigo Canndo and Darwin Celi. (Tr. at 111-124).

Mr. Morales averred that the only women that worked at East 100th Street were Ines Orbe, Blanca Lopez, and Imelda Gomez. He noted that Luperio Naranjo, Sr. was responsible for telling people what to do at East 100th Street, and Luperio Naranjo Sr. was present at the site every day. Mr. Morales also stated that Jover Naranjo and Luperio Naranjo, Jr. did not work at the site. He did not sign in and out of work each day. He stated that Luperio Naranjo, Sr. kept a record of who worked each day. Also, Luperio Naranjo, Sr. would tell them to hide when government inspectors visited, or to tell those inspectors that he was paid \$33.33 per hour. (Tr. at 124-128).

In addition, Mr. Morales noted that he did not recall working anywhere other than East 100th Street for Respondents during August 2009. He did observe that some employees who worked at East 100th Street went with Luperio Naranjo, Jr. to other jobs during the months of August, September, and October 2009. (Tr. at 128-131).

Joaquin Pablo Carlos

Joaquin Pablo Carlos testified that he started working as a garbage remover at East 100th Street on August 5, 2009. Upon arrival to work, he would get gloves and filters for the masks and change his clothing. He indicated that he would get the gloves from the white van that Luperio Naranjo, Sr. drove. Luperio Naranjo, Sr.'s white van had a "Gladiator" logo on the side. (Tr. at 155-57).

Mr. Carlos testified that work started at 7 a.m., and that they received a one hour break for lunch at noon. All workers took lunch at the same time. The work day typically ended at 6 p.m., but workers left at 5 p.m. on pay day. All workers stopped work each day at the same time. Mr. Carlos noted that his job responsibilities included taking out the garbage with a wheelbarrow. He also demolished certain parts of the building that others weren't able to. When

he did demolition, he used an axe, hammer, small bar and scraper. He used the scraper to open sheet rock, the axe to knock down bars, the hammer to break concrete, and the little bar to turn heavy objects. He usually spent half of the day taking out garbage, and the rest of the day cleaning and demolishing. (Tr. at 157-160).

Additionally, Mr. Carlos indicated that the following employees were dedicated solely to demolition: Angel Lojano; Pedro Pablo (his brother); Rodolfo (no last name given); Manuel (no last name given); Mauricio Sapeta (nicknamed "Guatemala"); and Chanchito Resiplano. Edgar Avila worked at the site and told people what to do. Again, he noted that his typical schedule was Monday through Friday, 7 a.m. to 6 p.m., and sometimes Saturday from 7 a.m. to 5 p.m. Mr. Carlos stated he worked one Sunday, and got a 10 to 15 minute lunch break that day. Mr. Carlos left work at East 100th Street on October 2, 2009 and started working for Respondents at another project in Brooklyn. Mr. Carlos maintained that he returned to East 100th Street after October 2, 2009 for two or three Saturdays. (Tr. at 160-176).

Mr. Carlos kept his own records of the hours that he worked. (Binder A11, AX-65). He testified that he was paid \$13.00 per hour, and did not receive extra compensation for overtime work. He also noted that he did not receive health insurance or pension benefits. He was mostly paid in cash, but recalled receiving a check on one occasion. To receive his pay, he went to an office in Queens. Mr. Carlos indicated that certain employees had to return money from their paychecks. These employees included: Joaquin Pablo; Pedro Pablo; Tio Manuel; and a "Tonio." (Tr. at 176-181).

Mr. Carlos indicated that he worked with three women at East 100th Street: Ines Orbe; Mrs. Gloria; and "Laflaca." He further stated that Edgar Avila was in charge, and that Luperio Naranjo, Sr. was in charge of Edgar Avila. Luperio Naranjo, Sr., Luperio Naranjo, Jr., and Jover Naranjo did not do any demolition work or take out garbage. Mr. Carlos stated that workers initially had to sign one notebook when collecting their pay, but later had to sign additional papers. He also noted employees did not sign in and out of work, and did not sign in and out for lunch. Mr. Carlos testified that he did not write his name on various documents in the record. (Binder A7, AX-21 at 11-14; Tr. at 181-188).

When government inspectors visited the site, Mr. Carlos gave a false name and said that he worked eight hours per day at either \$23.00 or \$33.00 per hour, per Luperio Naranjo, Sr.'s instructions. He testified that Luperio Naranjo Sr. told other employees to hide when government inspectors visited East 100th Street. Additionally, Mr. Carlos reiterated that he worked August 5, 2009 to October 2, 2009, and that all workers at East 100th Street worked the same schedule. He averred that approximately 12 to 15 employees took out garbage exclusively. (Tr. at 188-199).

Mr. Carlos testified that he worked with the following individuals: Edgar Avila; Milton Barahona; Richard Campoverde (nickname "Campucho"); Sergio Campoverde; and Jose Rodrigo Canndo. He also noted that Luperio Naranjo, Jr. always had another crew working demolition at another site. This crew included: Pedro Pablo; Mauricio Sapeta ("Guatemala"); Chanchito, Luis Caramarca ("Mama Senora"); Donna Blanca (not sure of her last name); Rodolfo Pereda; Tio Manuel, Manuel Pereda, Rodrigo Canndo, and "Tortua." This group worked with Luperio Naranjo, Jr. in Brooklyn after October 2009. (Tr. at 199-207).

Manuel Pereda

Manuel Pereda testified that he worked at East 100th Street doing demolition and garbage removal. He noted that he started work the first day of the project. He arrived for work each day at 6:45 a.m. and got masks from Luperio Naranjo, Sr.'s van before starting work at 7 a.m. A typical day at work was from 7 a.m. to 6 p.m., with a one hour break for lunch. Mr. Pereda also noted that he never stopped later than 6 p.m., and some days left at 5 p.m. Edgar Avila informed them when the day was over. Luperio Naranjo, Sr. gave him the nickname "Toviego," while others on the site called him "Tio." (Tr. at 230-234).

Mr. Pereda testified that he used a bar, scraper, and axe to demolish. He removed sheet rock with the bar, used the axe to knock down wood, and used the scraper to remove plaster or sheet rock. When he worked demolition, the only time he left the building was for lunch. Mr. Pereda testified that he worked Monday through Friday, 7 a.m. to 6 p.m., and Saturdays from 7 a.m. to 5 p.m. He was also asked to work on Sundays but declined. He testified that Procopio Pereda kept records of the hours they worked, and that they worked the same hours except for Sundays. (Tr. at 234-240).

At some point during the East 100th Street project, Mr. Pereda left to work at another project, but eventually returned. He stated that he was paid \$13.00 per hour for the work he performed at East 100th Street, and was not paid more for working more than 40 hours per week. He also testified that he did not receive health insurance or pension benefits while working at East 100th Street. He collected his pay at an office in Queens. He also stated that he received a check from the employer on one occasion, and had to return some of the money from the check at a later date. (Tr. at 240-245).

Mr. Pereda testified that he worked with the following individuals at East 100th Street: Edgar Avila (managed employees); Milton Barahona (demolition and garbage removal); Felipe Bareno (removed garbage); Richard Campoverde (removed garbage); Sergio Campoverde (removed garbage); Darwin Celi (removed garbage); Pedro Pablo (demolition and removed garbage); Rolando Criollo (demolition); Tortuga (might be named Manuel, removed garbage); Imelda Gomez (filled wheelbarrows); Hector Jimenez (removed sheet rock with wheelbarrows); Angel Lojano (demolition and removed garbage); Blanca Lopez (filled wheelbarrows); Ines Orbe (removed garbage); Joaquin Pablo (removed garbage); Clever Pauta (removed garbage when there was no demolition); Procopio Pereda (removed garbage); Rodolfo Pereda (demolition); Luis Pileo (removed garbage); Custodio Pomaquisa (demolition); Hugo Pomaquisa (removed garbage); Jacinto Pomaquisa (removed sheet rock); Mauricio Sapeta (removed garbage); Fausto Tigre (retired after working for a while); Antonio Torres (demolition and garbage removal); and Sergio Valera (removed garbage). (Tr. at 245-257).

Mr. Pereda testified that he did not know, or did not remember the following people or whether they worked at East 100th Street: Luis Canndo; Sergio Celi; Copiloto; Felix Matute; Pedro Bolivar Orellana; Angel Oswaldo Torres; and Fernando Valdez. *Id.* He further stated that it was not his job to tell others what to do at East 100th Street. He also noted that Luperio Naranjo, Sr. was in charge, was at the site every day, and never did any demolition or garbage removal. Further, Luperio Naranjo, Jr. (nicknamed "Chico Luperio") never did demolition or garbage removal, nor did Jover Naranjo, who is the boss. He testified that Marcia Gonzalez

never did any manual labor at the East 100th Street project, and Janet Feijo may have been the secretary.

Mr. Pereda further testified that he did not sign in and out of work each day. In order to receive his pay, he had to sign a piece of paper, and on one occasion signed approximately four papers. Mr. Pereda noted that he was told by Luperio Naranjo, Sr. to give false names to investigators. He was also instructed to report that he was paid \$33.00 per hour. (Tr. at 257-265).

Angel Lojano

Angel Lojano testified that he worked at East 100th Street from July 2009 to February 2010 doing demolition. Demolition consisted of knocking down walls and breaking concrete. He used the following tools: axe to break walls; sawzall to cut wood; jackhammer to break concrete; and bar to raise planks. Mr. Lojano averred that he saw Jover Naranjo at East 100th Street twice, but Mr. Naranjo did not do any demolition work on those occasions. Mr. Lojano also noted that he did not work anywhere else for Respondents from July 2009 to February 2010. (Tr. at 274-277).

Mr. Lojano testified that he worked Monday through Saturday, 7 a.m. to 6 p.m. for four months. One week he worked Monday through Sunday. After four months, he worked Monday through Friday, 7:30 a.m. to 3:30 p.m. He noted that he received one hour for lunch. Also, he stated he was paid \$15.00 per hour, and did not receive health benefits or pension benefits. In addition, he noted that he hid when inspectors visited the site in order to avoid giving statements. Luperio Naranjo, Sr. directed him to lie to investigators and say that he worked less hours. Mr. Lojano maintained that he was fired by Luperio Naranjo, Sr. for “opening [his] mouth too much,” after he gave a statement to an investigator. His brother, Rolando Criollo, was also fired that day. (Tr. at 270-285).

Mr. Lojano also testified that he used an identification card in order to enter the work site at East 100th Street, and that that card had the name “Franklyn Chiriboga.” According to Mr. Lojano, Luperio Naranjo, Sr. assigned him that name, telling him that the name was “legal.” Mr. Lojano testified that he kept his own records of the hours he worked. (Binder A11, AX-63). He also noted that he had worked with Jover Naranjo for seven or eight years. According to Mr. Lojano, all the employees at East 100th Street worked the same schedule. He was paid by check, but noted that the addresses on the checks do not accurately reflect where he worked for a particular week. (Tr. at 285-293).

Mr. Lojano testified that he worked with the following individuals at East 100th Street: Mauricio Sapeta (demolition); Oswaldo Lojano (removed garbage); Luperio Naranjo, Jr. (worked with them but did not do demolition work); Milton Barahona (cut metal and removed garbage); Felipe Bareno (removed garbage); Luis Cajamarca (removed garbage); Sergio Campoverde (demolition and removed garbage); Rodrigo Canndo (demolition); Luis Canndo (removed garbage); Darwin Celi (demolition); Sergio Celi (demolition); Hector Jimenez (demolition); Felix Matute (removed garbage); Luis Pileo (demolition); Custodio Pomaquiza (demolition); Hugo Pomaquiza (removed garbage); and Fausto Tigre (removed garbage, only worked two weeks before getting injured). (Tr. at 293-303).

Mr. Lojano testified that he did not remember whether Maria Paola Feijo or Fabian Avila worked at East 100th Street. Mr. Lojano also testified that a majority of people working at East 100th Street made \$13.00 per hour, and only those who had worked for the company for a long time made \$15.00 per hour. He noted that he used a broom and shovel to clean, but mostly did demolition. (Tr. at 303-306).

Rodolfo Pereda

Rodolfo Pereda testified that he worked at East 100th Street from the first day of the project doing demolition, which involved breaking the walls and destroying everything. He stated that he was hired by Luperio Naranjo, Sr. He also stated that he typically worked from Monday through Friday, 7 a.m. to 5 p.m., with a one hour break for lunch. His Saturday hours were 8 a.m. to 5 p.m. with a one hour break for lunch. Sunday hours were 8 a.m. to 2 p.m., with a break long enough to eat a sandwich. Mr. Pereda did not wear protective clothing, and used an axe, scraper, and bar during the demolition work. He considered Luperio Naranjo, Sr. his boss. Mr. Pereda stated that he did not know the name of the company that he worked for at East 100th Street. He also stated that he did not have any nicknames at work. (Tr. at 320-324).

Mr. Pereda noted that the following people worked on Sundays: Luis Pileo; Jacinto Pomaquisa; and Angel Lojano, among others. He also testified that he stopped working at East 100th Street in the beginning of November 2009. Mr. Pereda was paid \$15.00 per hour. He sometimes worked more than 40 hours per week, but was not paid extra for overtime. In order to collect his pay, he went by train to the company office in Queens. Mr. Pereda testified that for the East 100th Street project he was initially paid in cash, but then later by check. He also stated that he did not receive health insurance or pension benefits. (Tr. at 324-330).

Mr. Pereda testified that he worked with the following individuals at East 100th Street: Edgar Avila (was in charge); Milton Barahona (in charge of cutting metal); Luis Marca (removed garbage); Sergio Campoverde (did not remember what he did); Pedro Pablo (removed garbage); Rolando Criollo (demolition); Imelda Gomez (shoveled garbage); Hector Jimenez (removed garbage); Blanca Lopez (shoveled garbage); Ines Orbe (shoveled garbage); Bolivar Orellana (did not remember what he did); Clever Pauta (did not remember what he did); Manuel Pereda (removed garbage); Procopio Pereda (removed garbage); Custodio Pomaquisa (demolition); Hugo Pomaquisa (removed garbage); Mauricio Sapeta (did not remember what he did); and Antonio Torres (removed garbage). (Tr. at 330-339).

Mr. Pereda testified that he did not know, or did not remember the following people or whether they worked at East 100th Street: Richard Campoverde; Darwin Celi; Sergio Celi; Felix Matute; Angel Oswaldo Torres; Fernando Valdes; Sergio Valera; Gilberto Pauta; Franklyn Chiriboga; Gloria Sasquisila; Fabian Avila; Marcia Gonzalez; Janet Feijo; and Maria Paola Feijo. He also testified that Rodrigo Canndo did not work at East 100th Street. (Tr. at 330-339).

In addition, Mr. Pereda indicated that Luperio Naranjo, Sr., Luperio Naranjo, Jr., and Jover Naranjo never took out garbage or did demolition at East 100th Street. He also noted that he would sign a list of names when he went to collect his pay, but he did not sign in and out of

work each day. Mr. Pereda noted that he was instructed by Luperio Naranjo, Sr. to lie if ever questioned by government inspectors, but that he never spoke with them. (Tr. at 339-342).

Mr. Pereda testified that he went to a job in Brooklyn for one week between August and November 2009. He also stated that he did not remember working at the following jobs: Gates Avenue in Brooklyn; 300 Putnam in Manhattan; 529 Mercy Avenue; 260 Marcus Garvey; or “Northstrand”¹¹ Avenue. (Tr. at 253-255).

Blanca Lopez

Blanca Lopez testified that she worked at East 100th Street shoveling and sometimes doing demolition. She stated she was hired by Luperio Naranjo, Sr., who was her boss. She started work approximately two days after the project had begun. Initially, she arrived at 7 a.m., but later at 7:30 a.m. and 8 a.m. as the project continued. She testified that she arrived for work an hour early to change her clothes. She would get gloves and filters from Luperio Naranjo, Sr.’s van, which said “Gladiators” on the side. (Tr. at 350-354).

Ms. Lopez further testified that she typically worked Monday through Saturday and some Sundays. Monday through Friday hours were 7 a.m. to 6 p.m. Saturday hours were 8 a.m. to 4 p.m. or 5 p.m. Sunday hours were 8 a.m. until the work was completed, but never a full day. They received a one hour break for lunch Monday through Saturday. They did not always receive a lunch break on Sunday. During her last week at East 100th Street, the schedule changed and they worked from 8 a.m. to 5 or 6 p.m. (Tr. at 354-357).

Ms. Lopez testified that there was a security guard on-site toward the end of her tenure at East 100th Street. Further, she stated that she and other employees were instructed to hide from the security guard on their way into the work site at East 100th Street. She was paid \$15.00 per hour, and was initially paid every Friday, but then later, every two or three weeks. She would go to the Naranjo office in Queens to collect her pay. She was initially paid in cash, then later by check. She also testified that she did not receive health insurance or pension benefits while working at East 100th Street. (Tr. at 357-360).

Additionally, Ms. Lopez indicated that Luis Pileo worked at East 100th Street. She also stated that Luperio Naranjo, Sr., Luperio Naranjo, Jr., Jover Naranjo, Marcia Gonzalez, and Gloria Feijo never did demolition work or garbage removal at East 100th Street. Mr. Lopez testified that Luperio Naranjo, Sr., instructed her to use Gloria Feijo’s name on occasion. She also testified that she does not know or remember the following individuals working at East 100th Street: Maria Feijo; Franklyn Chiriboga; Fabian Avila; Fernando Panafiel; and Gloria Sasquisila. (Tr. at 360-366).

Ms. Lopez testified that she had to sign a notebook when collecting her pay. She also noted that she was required to start signing in to work approximately one month into the job. Ms. Lopez never left East 100th Street to work at another job site for Respondents during her time at East 100th Street. When government inspectors visited the job site, Edgar Avila instructed her to hide. In total, Ms. Lopez worked at East 100th Street for approximately eight or nine weeks. She also worked four or five Sundays during those weeks. (Tr. at 366-374).

¹¹ I believe this a reference to Nostrand Avenue in Brooklyn, NY.

Clever Pauta

Clever Pauta testified that he worked at East 100th Street doing demolition work. Demolition work consisted of knocking down the walls and bringing down the ceilings. He also stated that he cut metal in the emergency stairs with a torch. He started work the first day of the project. He also stated that he worked for Enviro at East 100th Street. The site consisted of four or five buildings, five floors each. He usually arrived at East 100th Street around 6:30 a.m. to eat his breakfast and change clothes. He worked from 7 a.m. to 6 p.m., with a one hour lunch break. On four or five occasions he worked until 7 or 7:30 p.m. He also stated that all workers started work at the same time, and that they left work earlier than 6 p.m. on days they were paid. (Tr. at 380-84).

Mr. Pauta testified that his nickname at work was “Tanga.” He stated that he used an axe, bar, scraper, scissors, and sawzall to perform demolition. He used the axe to knock down walls, the bar to raise floors, the scraper to take out sheet rock, scissors to cut cables in the walls and ceiling, sawzall to cut the floor, and torch to cut metal. Luperio Naranjo, Sr. and Edgar Avila told him what to do each day. He reiterated that he worked Monday through Saturday, 7 a.m. to 6 p.m., with a one hour lunch break. He also worked two Sundays, 8 a.m. to 3 p.m., with no lunch break. (Tr. at 384-391).

Mr. Pauta stated that he was paid \$13.00 per hour. He also noted that he did not receive overtime pay for working more than 40 hours. In order to collect his pay, he went to an office in Queens. Initially, he was paid in cash, and later by check. He indicated that he did not receive health insurance or pension benefits while working at East 100th Street. Mr. Pauta further testified that he worked at another job for one day during his time at East 100th Street. (Tr. at 391-393).

Mr. Pauta testified that he worked with the following individuals at East 100th Street: Milton Barahona (demolition); Felipe Bareno (demolition); Sergio Campoverde (removed garbage); Rodrigo Canndo (worked for one day at Ciena); Darwin Celi (demolition and garbage removal); Sergio Celi (removed garbage); Imelda Gomez (removed garbage); Hector Jimenez (demolition and garbage removal); Manuel Pareda (demolition); Luis Pileo (demolition); Custodio Pomaquisa (demolition); Hugo Pomaquisa (removed garbage); Mauricio Sapeta (demolition and garbage removal); Fausto Tigre (removed garbage, broke his leg shortly after starting work at Ciena); Oswaldo Torres (demolition and garbage removal); and Sergio Valera (demolition and garbage removal). (Tr. at 393-400).

Mr. Pauta testified that he did not know, or did not remember the following people or whether they worked at Ciena: Luis Marca; Luis Cajamarca; Luis Canndo; Ines Orbe; Jacinto Pomaquisa; Fernando Valdez; Gloria Sasquisila; and Fabian Avila. He also testified that the following individuals did not work at East 100th Street: Felix Matute; Gilberto Pauta; Franklyn Chiriboga; Christian Godoy; and Ines Pesantes. (Tr. at 393-400, 409).

Additionally, Mr. Pauta stated that Luperio Naranjo, Sr., Luperio Naranjo, Jr., and Jover Naranjo did not do any demolition work or remove garbage at East 100th Street. Further, he stated that Marcia Gonzalez is the secretary of the company and did not do any manual labor at

East 100th Street. When collecting his pay, he signed a paper with the employees' names on it. He did not have to sign in upon arrival to work. At one point, the method for checking in to work changed, and identification cards were used to "swipe in." Mr. Pauta noted that he used Luperio Naranjo, Jr.'s identification card to swipe in. When he used his own card, he was fired by Jover Naranjo. (Tr. at 400-404).

According to Mr. Pauta, government inspectors visited the site approximately three times, and each time Luperio Naranjo, Sr. told him to hide. Mr. Pauta also stated that he was fired for refusing to sign paperwork. He noted that he worked at East 100th Street for approximately three months. Further, Mr. Pauta testified that he worked one day for Respondents at another site while he was working at East 100th Street, but he did not work at 300 Putman Avenue. Mr. Pauta clarified that he mostly did demolition at East 100th Street, but also spent three or four days removing garbage. Finally, Mr. Pauta testified that the signatures on the back of certain checks written out to him were not his. (Binder A3, AX-12 at 326-20; Tr. at 404-415).

Richard Campoverde

Richard Campoverde testified that he worked at East 100th Street doing demolition. He stated that demolition involved breaking down walls and taking out the garbage. The site consisted of five buildings, with six floors in each building. He testified that he started work on the first day of the project. Mr. Campoverde arrived at work between 6:30 and 7 a.m. to get coffee and change. He stated that he worked Monday through Friday, 7 a.m. to 6 p.m. Work ended at 5 p.m. on Fridays when it was payday. Saturday hours were from 7 a.m. to 6 p.m. All workers took lunch from noon to 1 p.m. Further, all workers began work at the same time each day. Mr. Campoverde also noted that he worked for Gladiators at Ciena, and that Luperio Naranjo, Sr. was his boss. Mr. Campoverde stated that he was paid \$13.00 per hour and he went to an office in Queens to collect his pay. Initially, he was paid in cash, but later was paid by check. He also stated that he did not receive health insurance or pension benefits from the employer. (Tr. at 425-440).

Mr. Campoverde testified that he worked with the following individuals at East 100th Street: Edgar Avila; Milton Barahona; Felipe Barena; Rodrigo Canndo; Luis Canndo; Darwin Celi; Sergio Celi; Pedro Pablo; Rolando Criollo; Imelda Gomez; Hector Jimenez; Angel Lojano; Blanca Lopez; Ines Orbe; Pedro Bolivar Orellana (removed garbage); Joaquin Pablo; Clever Pauta; Procopio Pereda; Rodolfo Pereda; Luis Pileo; Custodio Pomaquisa; Hugo Pomaquisa; Jacinto Pomaquisa; Mauricio Sapeta; Angel Oswaldo Torres; Antonio Torres; and Sergio Valera. (Tr. at 440-45).

Mr. Campoverde testified that he did not know, or did not remember the following people or whether they worked at Ciena: Segundo; Felix Matute; Manuel Pereda; Fausto Tigre; Fernando Valdez; Fabian Avila; Gilberto Pauta; and Gloria Sasquisila. He also indicated that Luperio Naranjo, Sr., Luperio Naranjo, Jr., Jover Naranjo, Marcia Gonzalez, Janet Feijo, and Franklyn Chiriboga did not do any manual labor at East 100th Street. (Tr. at 445-448).

Additionally, Mr. Campoverde stated that he signed a document that everyone had to sign when collecting his pay, however, he did not sign in and out of work or in and out for lunch. Mr. Campoverde then noted that he did not put his name or signature on a multitude of documents

that bore his name. (Binder A6, AX-19 at 55-58; Binder A7, AX-21 at 17-20). He also stated that various statements he made to investigators were false, and that he gave the false statements for fear of losing his job. (Binder A10, AX-43 at 9). Such false statements included the following: “I start at 7 a.m. to 5 p.m.,” “I have not worked on Saturday or Sunday,” “I work 45 hours per week,” “I am paid \$15 per hour with a check,” “I am paid my overtime hours of \$30.00 per hour.” (Tr. at 448-460).

Fausto Rolando Criollo Lojano

Fausto Rolando Criollo Lojano (referred to herein as Mr. Criollo) testified that he worked at East 100th Street doing demolition. He stated that the job site consisted of five building that were approximately six stories tall. He stated that he was hired by Luperio Naranjo, Sr. He did not recall the first day he started work. He stopped working at East 100th Street around February or March 2010 when Luperio Naranjo, Sr. fired him. Mr. Criollo testified that he was fired because his brother, Angel Lojano, spoke with Department of Labor investigators. (Tr. at 580-583).

During his time at East 100th Street, Mr. Criollo went to work at another site for Respondents in Yonkers for two days. At East 100th Street, Mr. Criollo arrived to work around 6:30 a.m. to change clothing, and worked 7 a.m. to 6 p.m. with a one hour lunch break. He also stated that all workers stopped work at the same time. Mr. Criollo testified that he mainly worked from Monday to Saturday, but also worked four Sundays. He was paid \$13.00 per hour, and never received more. To collect his pay, Mr. Criollo went to an office in Queens. He was initially paid in cash, but later received two or three checks. He stated that he did not receive health insurance or pension benefits. (Tr. at 583-589).

Mr. Criollo testified that he worked with the following individuals at Ciena: Angel Oswaldo Torres; Edgar Avila; Milton Barahona; Felipe Bareno; Luis Marca; Luis Pileo; Sergio Campoverde; Sergio Celi; Custodio Pomaquisa; Hugo Pomaquisa; Mauricio Sapeta; Fausto Tigre; Antonio Torres; Sergio Valera; and Imelda Gomez. (Tr. at 589-594).

Mr. Criollo testified that he did not know, or did not remember the following people or whether they worked at East 100th Street: Felix Matute; Richard Campoverde; Darwin Celi; Jacinto Pomaquisa; Hector Jimenez; and Marcia Gonzalez. Additionally, Mr. Criollo stated that he was not responsible for telling others what to do. He also stated that Luperio Naranjo, Sr., Luperio Naranjo, Jr., Jover Naranjo, and Marcia Naranjo did not do demolition or take out the garbage at East 100th Street. (Tr. at 589-96).

Mr. Criollo indicated that he had to sign a document when collecting his pay. He did not sign in and out of work, but at the end of his time at East 100th Street he had to swipe in and out on a machine each day. On occasion, government inspectors visited the site; however, he never spoke with them because he was sent to hide. If asked, Luperio Naranjo, Sr. instructed him to say that he was paid \$35.00 or \$40.00 per hour, and that he worked 8 hours daily, 40 hours per week. Further, Luperio Naranjo, Sr. instructed Mr. Criollo to use the name “Fabian Avila.” (Tr. at 595-600).

In January 2010, the crew was demolishing and cleaning garbage. Mr. Criollo testified that he spent most of his time demolishing but sometimes took out garbage. Once he started receiving checks, he did not receive cash again. He received approximately three or four checks. Also, Mr. Criollo noted that he was paid \$40.00 per hour once he started to receive checks. (Tr. at 600-613).

Antonio Torres Romero

Antonio Torres Romero testified that he started working at East 100th Street doing demolition in the beginning of August 2009. He noted that his first day was the first day of the project. Demolition work involved taking out all of the sheet rock, plaster, bars, and wood. He arrived to work each day at 6:45 a.m. and changed his clothes. All workers started work at 7 a.m. and had one hour lunch breaks. Further, all workers stopped work regularly at 6 p.m. (Tr. 732-735).

According to Mr. Torres Romero, Luperio Naranjo, Sr. assigned job duties at East 100th Street. Mr. Torres worked Monday to Saturday and his Saturday hours were 7 a.m. to 5 p.m. In addition, Mr. Torres kept a record of the hours he worked. (Binder A11, AX 62). Mr. Torres stated that he never received more than \$13.00 per hour. He was initially paid in cash, but midway through the project he was paid by check. To receive his pay, he went to an office in Luperio Naranjo, Sr.'s house. He indicated that he did not receive health insurance or pension benefits while working at East 100th Street. (Tr. at 735-756).

Mr. Torres Romero testified that he worked with the following individuals at East 100th Street: Sergio Valera; Rolando Criollo; Ines Orbe; Edgar Avila; Joaquin Pablo; Segundo (no last name given, took out garbage); Mauricio Sapeta; Hector Jimenez; Felipe Barenos; Richard Campoverde; Rodrigo Canndo; Angel Lojano; Blanca Lopez; Pedro Bolivar Orellana; Manuel Pereda; Procopio Pereda; Rodolfo Pereda; Luis Pileo (demolition); Custodio Pomaquiza; Hugo Pomaquiza; and Imelda Gomez. (Tr. at 759-767).

Mr. Torres Romero also averred that he did not know, or did not remember the following people or whether they worked at East 100th Street: Sergio Campoverde; Luis Canndo; Jacinto Pomaquiza; Fausto Tigre; Franklyn Chiriboga; and Fernando Panafiel. He maintained that Luperio Naranjo, Sr., Luperio Naranjo, Jr., Jover Naranjo, and Marcia Gonzalez did not do any manual labor at East 100th Street. Additionally, he noted that Christian Godoy and Ines Pesantes did not work at East 100th Street. (Tr. at 782).

Mr. Torres Romero recalled that, when he first began working at East 100th Street, there was no requirement to sign in and out of work each day. At some point, according to him, a security guard was hired and workers had to sign a notebook when arriving to work. Mr. Torres Romero stated that he never used an identification card to check in. Luperio Naranjo, Sr. instructed Mr. Torres Romero to use Luperio Naranjo, Jr.'s name when signing in with the security guard; when government inspectors visited East 100th Street, Edgar Avila told them to hide. (Tr. at 767-771).

Mr. Torres Romero stated that he could not recall how many individuals continued to work at East 100th Street after October 14, 2009. He noted that from August to October 2009,

certain workers went to other jobs. These workers included: Custodio Pomaquisa; Rodrigo Canndo; and Richard Campoverde. Finally, he stated that the last day he worked at East 100th Street was October 14, 2009. (Tr. at 771-782).

Pedro Pablo Coyotl

Pedro Pablo Coyotl testified that he performed demolition work at East 100th Street in 2009. Such demolition work consisted of knocking down the walls, bringing down the ceiling, and breaking cement. He stated that he worked for Luperio Naranjo, Sr. and Jover Naranjo at East 100th Street. He was known on the site as either Pedro Pablo or El toro Torito. He started work at East 100th Street on August 4, 2009 and worked at the site until October 2009. Mr. Coyotl noted that he did not work at any other jobs during his time at East 100th Street. (Tr. at 784-786).

Mr. Coyotl arrived for work at 6:45 a.m. to change his clothing and pick up filters and gloves. He then worked 7 a.m. to 6 p.m., with a one hour break for lunch. All employees worked 7 a.m. to 6 p.m. He used an axe, scraper, jackhammer and combo to do the demolition work. While he spent a majority of his time demolishing, he occasionally took out trash when containers needed to be filled, which took him 15 to 20 minutes. He noted that Edgar Avila was in charge of keeping track of the workers. (Tr. at 786-789).

Additionally, Mr. Coyotl testified that he was paid \$13.00 per hour, and that he was not paid a higher rate for working more than 40 hours per week. He was mostly paid in cash, but received a check on one occasion. He was paid every three weeks, and went to the office at Luperio Naranjo, Sr.'s house to collect his pay. Mr. Coyotl stated that he did not receive health insurance or pension benefits while working at East 100th Street. (Tr. at 789-792).

During the first four weeks at East 100th Street, Mr. Coyotl worked Monday through Sunday. After four weeks, Mr. Coyotl worked Monday through Saturday. Monday through Friday hours were 7 a.m. to 6 p.m. Saturday hours were 7 a.m. to 5 p.m. or 6 p.m. Sunday hours were from 8 a.m. to 3 p.m. Mr. Coyotl stated that he received a 10 minute lunch break every day. Mr. Coyotl also stated that he kept a record of the hours that he worked. (Binder A11, AX-67; Tr. at 792-94).

According to Mr. Coyotl, Luperio Naranjo Sr., Luperio Naranjo, Jr., and Jover Naranjo never did manual labor at East 100th Street. When interviewed by government inspectors, Mr. Coyotl stated that he was paid \$33.00 per hour but he maintained that he did so to avoid losing his job. He also gave government inspectors the false name of "Luis Alvarez." Mr. Coyotl clarified that they received a 10 minute break between 7 a.m. and noon, and a one hour lunch break. (Tr. at 794-804).

Respondents' witness testimony at hearing

Custodio Pomaquisa

Custodio Pomaquisa testified that he worked at East 100th Street intermittently for a few weeks in 2009. He stated that the job site consisted of approximately four buildings with five or

six floors each. Mr. Pomaquisa testified that he kept a record of the hours he worked at different job sites. (AX-10: CD Video dated 9/12/09; Tr. at 842).

Mr. Pomaquisa indicated that he went back and forth between East 100th Street and different job sites for Respondents. He recalled that, at one point, he went to work in Brooklyn with Rodolfo Pereda, Blanca Lopez, Mauricio Sapeta, and Oswaldo Torres. He averred that he worked with the following individuals at East 100th Street: Edgar Avila; Milton Barahona (demolition and garbage removal); Luis Caramarca (removed garbage); Richard Campoverde (removed garbage); Sergio Campoverde (removed garbage); and Pedro Pablo Coyotl (removed garbage). (Tr. at 848-852).

Mr. Pomaquisa testified that he did not know, or did not remember the following people or whether they worked at East 100th Street: Darwin Celi; Sergio Celi; and Fernando Valdes. Further, he stated that the following people did not work at East 100th Street: Felipe Barena; Rodrigo Canndo; Jose Citeros; Christian Godoy; Ines Pesantes; and Elba Orbe. (Tr. at 849-853).

Further, Mr. Pomaquisa indicated that he left East 100th Street to work at other projects for Respondents in Brooklyn; he noted that 10 to 12 people from the East 100th project would go with him. This group included: Pedro Pablo Coyotl; Hugo Pomaquisa; Rodolfo Pereda; Blanca Lopez; Jacinto Pomaquisa; and Sergio Valera. (Tr. at 853-854).

Jose Rodrigo Canndo

Jose Rodrigo Canndo testified that he did not work at East 100th Street in 2009. He only went there three or four times to drop off supplies. He stated that he worked with Pedro Pablo Coyotl and Jose Citeros at Hart Street in Brooklyn. He also stated that he worked with Custodio, Bufalito, Guatemala, and Jackie Chan at 300 Putnam Avenue in Brooklyn. Finally, he testified that his brother, Luis Canndo, worked at East 100th Street. (Tr. at 868-872).

Jose Citeros

Jose Citeros testified that he did not work at East 100th Street project. He testified that he remembered that project because he went there to drop off supplies on two occasions. He further testified that he was doing construction at another site in Brooklyn during the time of the East 100th Street project. (Tr. at 874-876).

Deposition testimony

Marcia Gonzalez (Binder A5, AX-16)

Marcia Gonzalez was deposed on December 29, 2011. In her deposition, she stated that she is the daughter of Luperio Naranjo, Sr. and the sister of Jover Naranjo. (Deposition Transcript (“DT”) at 7). She testified that she did not do manual labor at East 100th Street. (DT at 29-30). Ms. Gonzalez indicated that she was the Enviro secretary in 2009, and that she worked at the office in her father’s house in Queens. (DT at 18, 23). She averred that she received checks from Enviro for her pay.

Ms. Gonzalez exercised her Fifth Amendment right and refused to answer any questions regarding payroll records or checks. (DT at 58, 62, 64-65). She also testified that she had heard of numerous names of individuals who worked for Enviro, but did not say whether or not they worked for Enviro at East 100th Street in 2009. (DT at 67).

Edgar Avila (Binder A6, AX 17)

Edgar Avila was deposed on January 11, 2012. He testified that he currently works for Gladiators Contracting Corp. as a carpenter. Jover Naranjo is his cousin and Luperio Naranjo, Sr. is his uncle. Mr. Avila stated that he worked for Enviro at East 100th Street doing demolition, which consisted of taking out the walls and then taking the trash out to the dumpster. Mr. Avila did not recall when the Ciena project began, but stated that he did not work at Ciena in 2011. Further, he could not recall the days he worked at Ciena, but stated that he arrived at the job site before 10 a.m. and left before 8 p.m. (DT at 12-27).

Mr. Avila stated that he received an identification card at the beginning of the Ciena project. He noted that Tier A laborers were those who broke down walls, and Tier B laborers were those that took out the trash. Mr. Avila then stated that he was a Tier B laborer and that he would shovel debris into wheelbarrows and take it out to containers. He also stated that Luperio Naranjo, Sr. was in charge at East 100th Street. (DT at 33-36).

Additionally, Mr. Avila testified that he did not remember any of the names of individuals who worked at Ciena, and that he did not keep track of the time that Enviro employees arrived at the site. (DT at 44-62).

Jover Naranjo (Binder J2: JX E; Binder J4: JX-F)

Jover Naranjo sat for a deposition on behalf of Enviro on November 22 and 23, 2011. Initially, I note that Mr. Naranjo exercised his Fifth Amendment rights and refused to answer most questions posed to him at the deposition.

Mr. Naranjo's deposition testimony, in pertinent part, is as follows:

He currently worked for Gladiators Contracting Corp. and Yankee Carting Corp. He maintained that he closed Enviro in September 2011. He stated the Enviro worked at Ciena from August 4, 2009 to April 10, 2010. At Ciena, Enviro was responsible for interior demolition. He stated that Enviro had 29 different jobs between August 2009 and February 2010, and the company employed around 20 workers from August 2009 to April 2010.

DT at 6-19.

Mr. Naranjo indicated that he did not have records of the daily hours worked by employees at Ciena, and that he was trying to recreate them based on things that he wrote down during the job. With respect to specific individuals, Mr. Naranjo noted the following: Johnny Gueron was a friend that helped the company; Clever Pauta and Gilberto Pauta kept their own records; Angel Lojano worked demolition for Enviro and made \$15.00 per hour; Angel Lojano worked at approximately 10 sites for the company; Sergio Celi did demolition for Enviro; Felix

Matute worked as a Tier B laborer; Marcia Gonzalez is his sister and no longer works for Enviro; Jenny Naranjo (sister) did not work for Enviro; Milton Barahona worked at Ciena until mid-January 2010; Darwin Celi was an employee of Enviro; Sergio Celi was an employee of Enviro at Ciena; Richard Campoverde was an employee of Enviro at Ciena; Pedro Pablo Coyotl was an employee of Enviro at Ciena (he gave the name Luis Nicholas to investigators); Rolando Criollo was an employee of Enviro at Ciena; he did not know Avian Custodio; Christian Godoy was an employee of Enviro, but never worked at Ciena; Ines Pesantes was an employee at Enviro, but never worked at Ciena; Elba Orbe did not work for Enviro at Ciena; Joaquin Pablo worked at Ciena (he also gave the name Luis Nicholas to investigators); Ernesto Saesteros worked at Ciena for two days; Fausto Tigre worked at Ciena for two or three days; and Braulio Torres was not an employee at Ciena. (DT at 31-130).

In addition, Mr. Naranjo indicated that there were three different types of workers at the Ciena site: Tier A laborers were those who break down the walls; Tier B laborers removed garbage; and asbestos workers. Tier A laborers were paid more money. Mr. Naranjo indicated that he first learned about the Tier A and B classifications in 1989, and formed Enviro in 2004 or 2005. He also noted that the prevailing wage for each tier is provided for in the contract. (DT at 68-70).

In the beginning at the Ciena site, workers did not need to sign in and out of work. Later, a guard was put in place and workers were required to sign in. At the end, a swipe card system was installed which required workers to swipe a card when they signed in and out of work. Mr. Naranjo stated that he spent most of his time looking for other projects while not at Ciena. (DT at 75-80).

Mr. Naranjo further testified that only four or five Enviro employees worked at Ciena in January 2010 and that those employees worked approximately three days per week at the time. In December 2009, approximately four or five workers worked an average of four days per week at Ciena. In February 2010, approximately 15 or 16 workers worked five days per week at Ciena. Further, some employees worked Saturdays. He also stated that he was the one who generated the paychecks for Enviro. (DT at 117-120).

Employees at Ciena were given a 15 minute break in the morning, 15 minute break in the afternoon, and 30 minutes to an hour to eat lunch. Mr. Naranjo also indicated that he initially filed certified payroll records monthly, and then weekly after the Department of Labor started its investigation. He stated he was responsible for creating the weekly payroll records. He also stated that he paid benefits to his employees or gave them cash in lieu of benefits. The three methods of time-keeping at Ciena included sign-in sheets, swipe cards, and certified payroll records. Finally, he noted that the project began on August 4, 2009, and that employees worked from 7 a.m. to 4 p.m. (DT at 146-203).

Jover Naranjo (Binder J5, JX-G)

Jover Naranjo was deposed as an individual Respondent on November 23, 2011. Mr. Naranjo exercised his Fifth Amendment rights and refused to answer most questions. Mr. Naranjo's deposition testimony, in pertinent part, is as follows:

He testified that he is the owner of Yankee Contracting Corp. and Gladiators Contracting Corp., and that he was also the owner of Enviro & Demo Masters, Inc., which he began in 2004. Further, he stated that he worked at Ciena. Mr. Naranjo stated that he learned about prevailing wage requirements from a general contractor at another job, and that he has worked on a minimum of 30 prevailing wage jobs. He also stated that he knew Ciena was a prevailing wage job. (DT at 6-15).

Mr. Naranjo indicated that he put aside approximately \$342,000 for payroll costs. He also noted that the estimated amount of man hours was as follows: 1800 hours of demolition, Tier A; 7600 hours of demolition, Tier B; and 700 hours for the asbestos removal. (DT at 20-22).

Jover Naranjo (Binder J7, JX-I)

Jover Naranjo also sat for a deposition on behalf of Gladiators on November 28, 2011. Mr. Naranjo exercised his Fifth Amendment rights and refused to answer many questions regarding specific employees. With respect to Ciena, Mr. Naranjo testified that approximately 10 people worked for Gladiators at Ciena: Alvaro Placencia; Reynaldo Artega; Luperio Naranjo, Sr.; Luperio Naranjo, Jr.; Clever Pauta; Gilberto Pauta; Johnny Guerron; and Edgar Avila. (DT at 79).

DOL investigation

DOL Wage and Hour Division (“WHD”), New York City District Office, began its investigation in August 2009 after receiving a union complaint that employees working at East 100th Street were not being paid properly. (Tr. at 138-139). Luis Bermudez, Lead Investigator, Jose De La Rosa, Peter Stone, David An, Jorge Alvarez, Miriam Knudsen, Saul Roman, as well as Senior Investigator Advisors (“SIA”) Camille Coppola and Geoff LaCroix conducted the investigation on behalf of the WHD. (Tr. at 481, 483, 525, 543, 557).

WHD investigators met with Respondent Jover Naranjo on numerous occasions. (Tr. at 492-493, 526). The investigation showed that Respondent Jover Naranjo is also the President and Owner of Gladiators. (Joint Stipulated Facts; JX-G at 7, 32; JX-1 at 6). The investigation further showed that Respondent Jover Naranjo was the person responsible at both Enviro and Gladiators for finding work, soliciting bids, entering into contracts, managing company funds, generating employee paychecks, as well as signing and maintaining payrolls. (Joint Stipulated Facts; JX-D; JX-E at 107-108, 121; JX-1 at 37, 77; AX-11; AX-12; AX-14; AX-14A).

WHD investigators requested documents from Respondents, Lettire, HPD and Respondents’ bank including certified payroll records, contract documents, bank records, and time records. (JX-C, JX-C-1, JX-D, AX-2, AX-7 through AX-9; AX-11 through AX-14; AX-14A; AX-22, AX-23, AX-25; Tr. at 485, 494, 498). Records of employee cash payments, daily time sheets and photograph identification badges were also requested. (AX-2, AX-19 through AX-22; Tr. at 494, 496, 531, 545-550).

Luis Bermudez

Luis Bermudez is the Assistant District Director in the Arlington, VA office of the DOL, WHD. Before becoming Assistant District Director, Mr. Bermudez was an investigator with the DOL for approximately 11 years. Prior to becoming an investigator, Mr. Bermudez was a claims examiner with the Office of Workers' Compensation Programs for approximately three years. He noted that he has been involved in hundreds investigations during his time at the WHD. He speaks both Spanish and English. (Tr. at 477-481).

Mr. Bermudez testified that he began investigating Enviro, Gladiators, Jover Naranjo, and Luperio Naranjo, Sr. in August 2009. He noted that he held the lead investigative role of the project known as "Ciena East 100." The investigation involved contacting the employer, requesting records, interviewing employees, and conducting surveillance. He noted that he visited the work site three times. On September 9, 2009, he spoke with Luperio Naranjo, Sr. on the job site, who stated that he was supervising the work being done. Mr. Bermudez testified that there were no other subcontractors on the site in addition to the Respondents. (Tr. at 481-484).

Mr. Bermudez reviewed the certified payroll records of Enviro. He noted that Jover Naranjo and Luperio Naranjo, Sr. are listed in the certified payroll records as Tier A laborers on the job; however, neither actually worked as Tier A laborers. Tier A laborers are those who do demolition. He also noted that Jover Naranjo signed the certified payroll records indicating that they were accurate. In addition, Mr. Bermudez found the hours worked were grossly unreported, and that the workers were only being paid \$13.00 or \$15.00 per hour. (Tr. at 484-491).

During the course of the investigation, Mr. Bermudez met with Jover Naranjo in December 2009 and April 2010. At the December 2009 meeting, Mr. Bermudez informed Jover Naranjo of the requirements of the Davis-Bacon Act. Jover Naranjo also informed Mr. Bermudez that the company did not have daily time records, and he confirmed that he was aware that project was subject to federal prevailing wage laws. Mr. Bermudez requested receipts for cash payments made to employees, but did not receive them. (Tr. at 491-497).

Mr. Bermudez indicated that he was suspicious that there were workplace violations on the first day of the investigation. He also stated that he originally thought that the company performing work at the site was Gladiators, based on a visual inspection of a van at the site. Mr. Bermudez stated that he never found certified payroll records under the name of Gladiators. Based on conversations with Enviro employees, Mr. Bermudez learned that Luperio Naranjo, Sr. told workers to hide from government inspectors. (Tr. at 507-517).

Jose De La Rosa

Jose De La Rosa has been an investigator with the DOL, WHD, for three years. During that time, he has worked on approximately 150 investigations. His duties include going out in the field to interview employees and the employer, as well reviewing payroll records and other documentation provided to him. He testified that he had received Davis-Bacon Act training as part of his job. (Tr. at 522-525).

Mr. De La Rosa assisted other investigators working at Ciena by interviewing employees, conducting surveillance, and reviewing documentation that was provided by Luperio Naranjo, Sr. According to Mr. De La Rosa, Luperio Naranjo, Sr. told him that he was a foreman and was paid \$35.00 per hour; that no one worked more than 40 hours per week; that only 14 or 15 people worked on the project; and that they only worked five days per week. (Tr. at 525-528).

In addition, Mr. De La Rosa testified that Jover Naranjo was unable to provide daily sign-in sheets or internal payroll records at their initial conference on December 3, 2009. At that time, Jover Naranjo stated that he was not working on any other projects. Mr. De La Rosa indicated that he did not see anyone from the general contractor at the East 100th Street project. (Tr. at 528-538).

Camilla Coppola

Camilla Coppola has been a Senior Investigator Advisor with the DOL, WHD, for three years. In total, she has worked at the WHD for 11 years. As a Senior Investigator Advisor, Ms. Coppola assists investigators in preparation of their cases, serves as a coordinator between contracting agencies and the investigators, and is a liaison to the Regional Solicitor's office and to the WHD managers. Prior to becoming a Senior Investigator Advisor, Ms. Coppola was an investigator for eight years. She stated that she was involved in more than 150 investigations in 11 years at the WHD. (Tr. at 541-543).

Ms. Coppola was assigned to assist the Ciena investigation in November 2009. In this capacity, she was the primary external contact to collect documents and prepare those documents for investigators. Mr. Coppola indicated that the prime contractor was Hobbs Ciena Associates, LLC; the general contractor/first tier subcontractor was Lettire Construction; and Lettire Construction subcontracted to the Respondents. She testified that the prime contractor receives information concerning the Davis-Bacon Act and prevailing wages from the contracting agency, and that information then flows down to all the subcontractors. (Tr. at 543-552).

Geoffrey LaCroix

Geoffrey LaCroix has worked for the WHD for almost 34 years, and has been a Senior Investigator Advisor for three years. His duties as a Senior Investigative Advisor include acting as a team leader assisting investigators with various aspects of their investigations; acting as a liaison between various contracting agencies; acting as a liaison between the WHD and the Regional Solicitor of Labor; and training for investigators and the public. He stated that he has been involved in more than 200 investigations during his time with the WHD. (Tr. at 554-55).

Mr. LaCroix testified that the Ciena project was subject to the Davis-Bacon Act, which requires the payment of local prevailing wages and fringe benefits to employees. It also requires the contractor to submit weekly certified payroll records which detail the employees working on the project, their classifications, the hours they worked each day, their rate of pay, gross wages, deductions, and net wages. It also requires the contractor to certify that the certified payroll records are correct. (Tr. at 556).

Mr. LaCroix acted as a co-team leader with Camilla Coppola. He indicated that he visited the Ciena project twice. He noted that employees at the Ciena project were classified as Tier A and Tier B laborers. The prevailing wage for Tier A laborers was \$30.38 per hour plus fringe benefits of \$18.91 per hour for a total of \$49.29. The prevailing wage for Tier B laborers was \$20.74 per hour plus fringe benefits of \$12.41 per hour for a total of \$33.15. Mr. LaCroix indicated that the certified payroll records submitted by Enviro showed that Tier A laborers were paid \$49.29 per hour and Tier B laborers were paid \$33.15 per hour, both matching the prevailing wage requirements. He also stated that Respondents never produced any records of any employee splitting between a Tier A and Tier B laborer. (Tr. at 556-67).

Back wage computations in this case were made by Mr. LaCroix. He testified that he computed back wages for the week ending August 9, 2009 through the week ending February 14, 2010. He ended the computation period on February 14, 2010 because substantial noncompliance could not be confirmed after that point. Mr. LaCroix also testified that, based on employee interviews, Enviro's certified payroll records did not list all of the employees who worked at Ciena. Mr. LaCroix stated that he used various sources to come up with a reasonable construction of the hours worked, wages paid, and classification of the workers on the project. The sources he used included: employee interviews, employee personal records, check records provided by the employer, swipe records, and some information from the certified payroll records. (Tr. at 567-69).

Mr. LaCroix testified that revising computations as additional information is received is standard WHD practice. This is especially important in investigations where the employer failed to keep complete and accurate records of the actual hours worked and actual wages paid to employees. (Tr. at 727).

Mr. LaCroix testified that, in general, a subcontractor submits a bid to the upper tier contractors for the work to be performed and the upper tier will agree or disagree on the price. (Tr. at 559-560). The contract price is not determined by the contracting agency. (Tr. at 560). SIA LaCroix explained that ARRA provided, among other things, for a significant amount of federal money to East 100th Street be used for construction projects. (AX-7; Tr. at 556). The ARRA falls under the requirements of the Davis-Bacon Act and requires the payment of local prevailing wages and fringe benefits to the employees who are working as laborers or mechanics on these projects. (Tr. at 556, 562-563). This requires the contractor for which they work to submit weekly certified payroll records which detail the employees working on the project, their classifications, their hours worked each day, their rates of pay, gross wages, deductions, net wages, and it further requires the contractor to certify that information is true and correct. (Tr. at 556). Mr. LaCroix stated that, on the East 100th Street project, overtime also had to be paid when employees worked over forty hours in a week. (Tr. at 556-557).

During the investigation certified payroll records were submitted by Enviro on the 100th Street project from week ending 8/9/09 through week ending 4/18/10. (JX-D; Tr. at 561-562). These records show all employees listed as either Demolition Tier A Laborers or Demolition Tier B Laborers. (JX-D; Tr. at 562). The rates of pay shown on Enviro's certified payrolls match the wage rates in the wage determination, i.e., \$49.29 per hour for Tier A Laborers and \$33.15 per hour for Tier B Laborers. (JX-C; JX-C- 1; JX-D; Tr. at 566).

SIA LaCroix noted that, under the Davis-Bacon regulations, if an employee performs two different types of work that would fall under two different job classifications, the employer can either pay the higher wage rate for all hours worked or if they maintain a complete and accurate record of the employee's work time in the two different classifications, then the employer may pay the different rates for the different hours worked in each classification. (Tr. at 566-567).

The evidence adduced at the hearing indicated that, while certain employees performed mostly Tier B debris removal on the project, they also performed a significant amount of Tier A demolition work. Respondents did not, however, produce any records showing a segregation of time between Tier A and Tier B demolition work. (Tr. at 567). Despite Respondents' failure to segregate hours employees worked doing Tier B vs. Tier A classifications, Mr. LaCroix, on behalf of the Administrator, revised the computations of nine employees to reflect a blended required prevailing wage rate based on 30% of the Tier A rate ($\$49.29 \times .30 = \14.79) plus 70% of the Tier B rate ($\$33.15 \times .70 = \23.21) which results in a blended rate of \$38.00 per hour. A blended rate of 30% of the base rate for Tier A ($\$30.38 \times 0.30 = \9.11) plus 70% of the base rate for Tier B ($\$20.74 \times .30 = \14.52) which results in a blended rate of \$23.63 per hour for CWHSSA overtime hours.¹²

Written employee statements

The record includes interview statements of the following employees recorded on the following dates:

Milton Barahona, November 18, 2010 and January 26, 2012 (AX-42);
Richard Campoverde, September 1, 2009, February 11, 2010, December 20, 2011 (AX-43);
Sergio Campoverde, February 8, 2010 (AX-44);
Pedro Pablo Coyotl, November, 3 2010 (AX-45);
Fausto Rolando Criollo, March 9, 2010, November 3, 2010 (AX-46);
Christian Godoy, November 3, 2010 (AX-47);
Blanca Lopez, November 9, 2011 and December 20, 2011 (AX-48);
Ines Orbe, November 9, 2010 and December 20, 2011 (AX-50);
Joaquin Pablo, November 3, 2010 (AX-51);
Clever Pauta, February 12, 2010 (AX-52);
Manuel Pereda, November 3, 2010 (AX-53);
Procopio Pereda, undated (AX-54);
Rodolfo Pereda, January 10, 2012 (AX-55);
Ines Pesantes, November 3, 2010 (AX-56);
Angel Oswaldo Lojano Torres, November 3, 2010 (AX-57);
Antonio Torres, March 9, 2010, November 3, 2010, January 23, 2012 (AX-58);
Sergio Valera, November 10, 2010 (AX-59).

¹² The following employees' computations were so revised to reflect the blended wage rates: Richard Campoverde, Sergio Campoverde, Darwin Celi, Sergio Celi, Hector Jimenez, Blanca Lopez, Joaquin Pablo, Procopio Pereda and Angel Oswaldo Lojano Tones. (Administrator's Post-Hearing Brief, Supplemental AX-1B).

The interview statements describe the work conditions, hours, and payments for the East 100th Street project. Each exhibit referenced above includes the interviewer's handwritten notes in Spanish, signed by the employee, and a typed translation of the Spanish.

Job classifications at East 100th Street

The project at East 100th Street consisted of demolishing five buildings of six floors. Tr. at 49, 92, 321, 381, 425, 560, 581, 733, 842. As the hearing testimony reflects, Respondents' employees worked in two job classifications, i.e., Demolition Tier A laborers and Demolition Tier B laborers. The Wage Determination states the duties of the two job classifications:

Tier A: Responsible for the removal of all interior partitions and structural partitions that can consist of sheet rock, block or masonry. Also, all structural slab openings for ducts, mechanical, shafts, elevators, slab openings and exterior walls where the building is not being completely demolished.

Tier B: Responsible for shoveling of debris into containers, pushing containers from the inside to the outside of the building.
(JX-C at 58A; JX-C-1 at 2).

The preponderant evidence of record, including the witness testimony, supports finding that at the beginning of each day on the East 100th Street project, Luperio Naranjo Sr., directed work assignments, telling some workers to perform demolition duties and others to remove garbage. (Tr. at 232). The evidence also shows that Edgar Avila also gave employees work assignments based on instruction he received from Luperio. (Tr. at 61, 161, 387).

Tier A demolition work at the East 100th Street included knocking down walls and ceiling; breaking cement and removing wood from the apartments, as well as removal of cabinets and refrigerators. (Tr. at 320, 380, 425, 580-581, 732-733, 784-785, 789; JX-E at 95). Tier A laborers used the following tools: bar, ax, scraper, small bar, combo, sawzall and scissors. (AX-48A at 1; Tr. at 96, 159, 231, 235, 274-275, 322-323, 385, 434, 586, 737, 788). Some employees stated that they also used a jackhammer to break cement, i.e., Pedro Pablo Coytl, Rolando Criollo and Angel Lojano. (AX-46A; Tr. at 274-275, 582, 789). Other employees also used a torch to cut emergency stairs, i.e., Antonio Torres, Milton Barahona, Sergio Valera, and Clever Pauta. (Tr. at 380, 387, 743, 757).

Tier B demolition laborers used the following tools to remove garbage or debris: wheelbarrow, pick ax and shovel. (Tr. at 51, 305, 374, 410, 433-434, 604). Approximately 12 to 15 employees only removed garbage and those workers did very little demolition, but some employees did both types of work assignments. (Tr. at 199, 765). Joaquin Pablo averred that approximately six to eight people did both demolition and garbage. (Tr. at 199). Blanca Lopez testified that Luperio Naranjo Sr. and Edgar Avila assigned her different duties at East 100th Street project, but she primarily did shoveling and piled up garbage; when the dumpsters were full, she would demolish walls two or three times a week for an hour or hour and a half. (Tr. at 356; AX-49 at 6). Angel Lojano averred that the employees mainly did demolition and only removed garbage when there was no demolition work to be done. (Tr. at 305).

Employee work dates and schedules at East 100th Street

Many employees testified that they commenced work at East 100th Street on the first date of the project, i.e., August 4, 2009 based on their observation that nothing had been removed or demolished on the site. (AX-60; AX-62 at 1; AX-65 at 1; AX-66 at 1; Tr. at 48, 91, 157, 231, 426, 583, 733).

The employees who testified at the hearing worked the following dates at East 100th Street:

- Richard Campoverde – from 8/4/09 to date unknown (Tr. at 426)
- Pedro Pablo Coytl – 8/4/09 – 10/5/09 (AX-65; Tr. at 786)
- Rolando Fausto Criollo – 8/4/09 – 2/10 (AX-48 at 4; Tr. at 583-584)
- Angel Lojano – 7/09 – 2/10 (AX-48 at 4; Tr. at 274, 277)
- Blanca Lopez – started a few days after 8/4/09 and was working when Angel Lojano was fired in 2/10 (Tr. at 353, 360-370)
- Ines Orbe – 8/4/09 – 10/5/09 (AX-60; Tr. 48, 56-57)
- Joaquin Pablo – 8/5/09 – 10/2/09 (Tr. at 156, 176, 190, 197); returned for two or three Saturdays after 10/2/09 but did not maintain written records (Tr. at 167-168)
- Clever Pauta – started 8/4/09 and worked for three months (Tr. at 422)
- Manuel Pereda – 8/4/09 – sometime before 10/15/09 (AX-66; Tr. at 241)
- Procopio Pereda – 8/4/09 – 10/15/09 (AX-66)
- Rodolfo Pereda – 8/4/09 – early 11/09 (Tr. 320, 326, 327)
- Custodio Pomaquisa – 8/4/09 – 8/31/09 (AX-10, Tr. 842)
- Antonio Torres – 8/4/09 – 10/14/09 (AX-62 at 3-4; Tr. at 733)

Some of these employees also worked for Respondents at other sites during the period from August 2009 to February 2010. For example, Rodolfo Pereda spent one week working at another site for Respondents in Brooklyn, NY, along with Custodio Pomaquisa and Hector Jimenez, Blanca Lopez. (Tr. at 268, 342-343).

The employees generally testified that they arrived onsite at East 100th Street before 7:00 a.m. and prior to starting work, obtained protective gear (i.e., gloves and filtered masks) from Luperio Naranjo, Sr.'s white "Gladiator" van and changed their clothes inside the building. (AX-49 at 1; Tr. 49-50, 92-93, 99, 157-158, 185, 232, 279, 328, 354-355, 382, 427, 430, 584-585, 734-735, 786-788). The employees' testimony was corroborated by that of the union representative, Mr. Kraft, who averred that he observed employees at East 100th Street project commence work at 7:00 a.m. daily. (Tr. at 140). All employees worked the same schedule 7:00 a.m. to 6:00 p.m. on Monday through Saturday. (AX-43 at 1 and 4; AX-45 at 1; AX-46 at 1 and 4; AX-48 at 4; AX-51 at 1; AX-58 at 3; AX-59 at 1; AX-60 through AX-64; Tr. at 165, 233, 239, 278, 321, 355-357, 382-383, 390, 419, 426, 428, 435-436, 584-585, 742, 786-788, 793). However, Angel Lojano testified that after four months at the East 100th Street site, there was not a lot of work and the employees' work schedule changed. (Tr. at 278). He noted that, for two months, employees at East 100th Street worked 7:30 a.m. to 3:30 p.m., Monday through Friday.

Id. Blanca Lopez also stated that, during the last weeks on the East 100th Street project, work hours changed and employees began work at around 8:00 a.m. (Tr. at 354, 358).

Ines Orbe and Rodolfo Pereda testified that they worked 7:00 a.m. to 5:00 p.m., Monday through Friday, as well as 8:00 a.m. to 5:00 p.m. on Saturday. Tr. at 52, 324. Ms. Orbe's personal records of hours worked at East 100th Street show that she generally worked between nine to eleven hours each day. AX-60; Tr. 52. Blanca Lopez testified that on Saturdays her hours at East 100th Street were from 8:00 a.m. to 4:00 p.m. or 5:00 p.m. – the end time varied. (Tr. at 357, 375).

On Monday through Saturday all employees received a lunch break from 12:00 p.m. to 1:00 p.m. (AX-46 at 1; Tr. at 50, 93, 99, 158, 233, 237, 280, 322, 324, 355, 357, 382-383, 427, 436, 585, 735, 787). Joaquin Pablo, Procopio Pereda and Clever Pauta averred that they occasionally worked beyond 5:00 p.m. (Tr. at 94, 158-159, 383-384). On payday Fridays and some Saturdays, employees were allowed to leave around 5:00 p.m. (AX-43 at 4; Tr. at 158; 233-234, 239, 385, 435, 742, 793).

On Sundays, employees at East 100th Street generally worked from 8:00 a.m. until 2:00 p.m. or 3:00 p.m. with either no lunch break or a ten-minute break. (AX-48 at 4, AX-51 at 1, AX-52 at 1; Tr. at 100, 165, 201, 324, 357, 391, 435, 793). Ms. Lopez averred that she sometimes worked on four or five Sundays, from 8:00 a.m. to 1:00 p.m. or 2:00 p.m. or “whenever they finished filling holes.” (Tr. at 356-357). Pedro Pablo Coytl testified that he worked on Sunday during the first four weeks of the East 100th Street project. (Tr. at 792). Rolando Criollo also worked on Sundays on three or four occasions. (AX-46 at 1; Tr. 587). Angel Lojano worked once on a Sunday. (AX-48 at 4; Tr. at 277). Clever Pauta and Procopio Pereda each averred that they worked twice on Sunday. (AX-52 at 1; Tr. at 98, 390).

The record shows that Custodio Pomaquiza also worked on Sunday. (AX-10; Tr. at 855-859). Joaquin Pablo testified that he worked on Sundays, along with Pedro Pablo, Mauricio Sapeta and Edgar [Avila]. (Tr. at 166). Rodolfo Pereda and others testified that only demolition work was performed on Sundays. (AX-55 at 6; Tr. at 324-325; AX-54 at 1; Tr. at 325). He averred that he worked on Sundays along with Luis Pileo, Jacinto Pomaquiza and Angel Lojano. (AX-55 at 6; Tr. at 324-325). Also, the preponderant testimony of record shows that Luperio Naranjo, Sr. asked employees to work on Sundays. (Tr. at 52, 100, 239-240, 391, 437, 587, 742-743).

In addition to employee witness testimony, the record includes the contemporaneous notations by employees of hours worked at the East 100th Street project during the relevant period. (AX-60 through AX-63; AX-65 through AX-67). Pedro Pablo testified that he kept daily personal records of his hours worked. (AX-67; Tr. at 794-798). These records indicate the dates of the week worked, total hours worked each day, work site location, as well as whether he was paid for the hours worked.¹³ *Id.* The hours listed do not include the one-hour lunch break. (Tr. at 806).

Ines Orbe stated that she kept weekly records of the dates and hours she worked at the East 100th Street project. (AX-60, AX-61; Tr. at 53-54). The notation “314 str” in those records

¹³ According, to Mr. Pablo, sometimes he was not paid for all hours he worked. Tr. at 796.

refers to building number 314 located at East 100th Street. (AX-60 at 1; Tr. at 54). These records show the month, as well as the day of the week and calendar date. For example, Ms. Orbe noted that she worked 9 ½ hours on Tuesday (Martes) August, 4th (M4), 10 hours on Wednesday August 5th (MS) etc.). (AX-60; Tr. at 55). Ms. Orbe's written records stop after October 5, 2009 because that was her last day of work at East 100th Street. (AX-60; Tr. at 57). She also transcribed the hours that she kept in her notebook onto a calendar. (AX-61). The number written in each date box shows the hours she worked on any given day. (AX-61; Tr. at 58).

Joaquin Pablo also kept personal daily records of his hours worked at East 100th Street. (AX-65; Tr. at 168). Mr. Pablo testified that he began keeping records on the first day of the project at the advice of his brother. (Tr. at 169). Mr. Pablo noted his work hours for East 100th Street from Wednesday, August 5, 2009 to October 3, 2009. (AX-65; Tr. at 169, 193, 195, 197). He explained that, during the first week, he worked 39 hours; he multiplied his hours worked by \$13.00 – his hourly rate – for a weekly total of \$507.00. (AX-65; Tr. at 169, 177). Joaquin Pablo also noted the earnings of his brother, Pedro Pablo of \$130.00 for that same week; Pedro Pablo started work on August 4, 2009 at East 100th Street. (AX-65; Tr. at 169). The hours counted are only those hours worked and do not include lunch. (Tr. 170). Joaquin Pablo placed a check mark in the upper right hand side of the document when paid for that week. (AX-65 ; Tr. at 170, 171, 174). For week two, Mr. Pablo did a similar calculation and then added \$504.00, the total from the previous week since at that time he had not received a check for week 1. (AX-65; Tr. at 171). Joaquin Pablo noted that his start and stop times for week 3 at East 100th Street. (AX-65 at 3; Tr. at 172). Mr. Pablo recorded hours for all weeks he worked at East 100th Street. (AX-65).

Procopio Pereda averred that he too kept daily records of his hours while working at East 100th Street for both Manuel Pereda and himself. (AX-66; Tr. at 101-109, 240-241, 267). He stated that he began keeping records because sometimes Luperio Naranjo, Sr. forgot to write down his hours and his pay would be short. (Tr. at 101). Mr. Pereda's written records show the day of the week, date, work location, and hours he and Manuel Pereda worked. (Tr. at 102). He then added up all the hours worked each week (not including lunch) and multiplied it by \$13.00 for a total and put a check mark when paid. (AX-66). Manuel Pereda testified that Procopio Pereda's records of hours worked also reflect the hours he worked at East 100th Street. (Tr. at 240). Manuel Pereda stated that he trusted Procopio Pereda to keep his hours: they are related, live together, and generally worked the same hours at 100th Street except that Procopio worked on Sunday and Manuel was sent to work at the "Nostrand" project for Respondents with "Chico Luperio" while Procopio remained at East 100th Street. (Tr. at 240-241, 267).

Antonio Torres also kept contemporaneous records of the hours that he worked at East 100th Street. (AX-62; Tr. at 745-746, 747, 751-752). He noted that his hours for East 100th Street began on August 4th – the first day of the project. (AX- 62; Tr. at 733, 746). He stated that the numbers on top of the squares indicate the date worked, the letters identify the day of the week (in Spanish) and inside the boxes are the hours worked each day. (AX- 62; Tr. 746, 748). Mr. Torres also testified that, in his written records, the box at the end of each row signifies the total hours and the amount of pay collected. (Tr. at 747, 749). The "X" denoted that he was paid the amount he calculated as due. (AX-62; Tr. at 747). For example, for the week of August 9, 2009, Mr. Torres noted that he worked 60 hours and was paid \$780.00. (AX-62; Tr. at 749).

Angel Lojano testified that he recorded some of the hours that he worked at East 100th Street. (AX-63; Tr. at 287-288). He averred that he did not record his hours very frequently because he had been working for Jover Naranjo for seven or eight years. (Tr. at 290-291). On the written records he did maintain, Mr. Lojano noted his hours for East 100th Street beginning on the middle of the first page, where the number 100 is written about three-quarters of the way down the page on the left side. (AX-63 at 1, Tr. at 288-289). He testified that at the top of the page he wrote the days of the week he worked, i.e., Monday through Saturday. (AX-63; Tr. at 290).

Back wage computations

Mr. LaCroix testified that he computed back wages in this case for the period of week-ending August 9, 2009 through week-ending February 14, 2010. (Tr. at 567). Because Respondents' certified payroll records failed to include all of the employees who worked on the East 100th Street project, as well as all of the hours worked by certain employees who were listed on the certified payroll, Mr. LaCroix had to reconstruct hours and weeks worked using several different sources. (Tr. at 568). These sources included employee interview statements, employees' own personal records, copies of checks paid to employees that were produced by Respondents, swipe card records from the project and the certified payrolls. (AX-12, AX-23, AX-42, AX-43, AX-44, AX-49, AX-52, AX-53, AX-55, AX-57, AX-59, AX-60, AX-61, AX-62, AX-63, AX-6, AX-66, AX-67, JX-D; Tr. 569).

Mr. LaCroix used a color-coding system on the back wage computation sheets to indicate what information came from which source: (1) BLUE for employee check records; (2) YELLOW for the average weekly hours worked derived by an analysis of the checks paid to employees who received \$13.00 or \$15.00 per hour; (3) GREEN for individual employees' own personal records of hours worked on the East 100th Street project; (4) ROSE for the certified payroll records; (5) LAVENDER for swipe card records; (6) ORANGE for Angel Lojano's personal records of hours worked on the project;¹⁴ (7) GRAY for Procopio Pereda's personal records of hours worked on the project. (AX-1A at 2, AX-12, AX-23, AX-60, AX-61, AX-62, AX-63, AX-65, AX-66, AX-67, JX-D; Tr. at 574-575, 828).

A total of \$656,646.93 in back wages has been computed due 37 employees.¹⁵ The Administrator provided an updated summary of back wages due attached to his post-hearing brief as Supplemental AX-1B which I incorporate into this Decision by reference herein.

The back wage computations for those 37 employees were derived by Mr. LaCroix as follows:

¹⁴ Mr. LaCroix used Angel Lojano's personal records to reconstruct employee hours in January 2010 and the first two weeks of February 2010 because they were the only records the WHD obtained of such hours. (Tr. at 575).

¹⁵ The amount of back wages initially sought by the Administrator has been reduced post-hearing. As indicated in his post-hearing brief, the Administrator revised some of back wage computations to reflect a blended wage rate and the Administrator no longer seeks back wages for J. Rodrigo Canndo, Christian Godoy and Ines Pesantez. (Administrator's Post-Hearing Brief at 44; 63, n.39). In its post-hearing brief, Respondent Enviro argued that those employees were not entitled to any back wages because the record failed to support finding that they performed any work at the East 100th Street project during the relevant period. Enviro's Post-Hearing Brief at 5, 20.

1. Edgar Avila

Edgar Avila appears on the certified payrolls submitted by Enviro as a Tier B laborer. (JX-D, AX-17 at 25; Tr. at 676). Mr. LaCroix testified that all the information from employees indicated that all of the employees on the East 100th Street project worked mostly the same numbers of hours each week. (Tr. at 655, 676-677). Back wages were computed for Mr. Avila using the workweeks indicated on the certified payrolls. (JX-D; Tr. at 676). Mr. LaCroix also computed CWHSSA overtime back wages for Mr. Avila, noting that, according to the certified payroll records, Respondent Enviro only paid time-and-one-half the base rate and failed to pay fringe benefits on overtime hours. (Tr. at 678). Angel Lojano's personal records were used to reconstruct hours in January 2010 and the first two weeks of February 2010 as they were the only records that Wage and Hour could obtain of the hours worked by the crew.

A total of \$8,881.57 in back wages is due to Edgar Avila. (AX-1A at 1).

2. Milton Barahona

Milton Barahona gave an interview statement establishing that he worked on the East 100th Street project from August 2009 through January 2010. (AX-42; Tr. at 683). The record includes checks produced by Respondents for Mr. Barahona covering many, but not all, of the weeks he worked at East 100th Street. (AX-12 at 54-81; Tr. at 683). Mr. LaCroix gave Respondents full credit for the payments reflected in those checks. (Tr. at 684, 686). For August 9 - November 1 and November 22 - December 6, 2009, hours worked each week were reconstructed based on an analysis of those checks. (Tr. at 683-685).

The record does not include checks for Mr. Barahona covering the period from November 8 to 15 and December 13 to 27, 2009; Mr. LaCroix reconstructed the hours worked each week based on the analysis of the checks produced by Respondents. (Tr. at 655, 684-685, 686). Mr. LaCroix used Angel Lojano's personal records to reconstruct hours worked for Mr. Barahona because Respondents did not produce checks for the period from January 3 to 10, 2010. (AX-63; Tr. at 686-687).

Both Mr. Barahona's interview statement and his checks indicate that he was paid \$15.00 per hour for his work on the East 100th Street project. (AX-42; Tr. at 685). Based on his statement and information from other employees, the work that he performed fell under the Tier A classification. (Administrator's Post-Hearing Brief, Appendix A at 1-2; AX-10 at 7:50,¹⁶ AX-42, AX-49 at 6; Tr. at 61, 112, 248, 298-9, 306, 330-331, 393, 683, 743).

A total of \$34,207.01 in back wages is due to Milton Barahona. (AX-1A at 4).

3. Felipe Bareno

Mr. LaCroix used information provided by other employees during the Wage and Hour investigation to compute back wages for Felipe Bareno. (Tr. at 654). Mr. Bareno was identified

¹⁶ AX-10 is a Compact Disc video of the East 100th Street project during the relevant period and this denotes the time where Mr. Barahona may be seen on that video.

by other employees as having worked on the East 100th Street project. (Administrator's Post-Hearing Brief, Appendix A at 2; AX- 46 at 1, AX-48 at 4; Tr. at 61-62, 248-249, 299, 306-307, 393-394, 441, 763).

Mr. LaCroix testified that he reconstructed the weeks worked by Mr. Bareno on the project by doing an analysis of the employee interviews because Respondents failed to produce any records or checks for Mr. Bareno. The employee interviews indicated that the work crew was the largest from week-ending August 9, 2009 –the beginning of the project – through the end of October 2009. (Tr. at 655-656, 831). Mr. LaCroix reconstructed hours worked each week for Mr. Bareno by doing an analysis of the checks for employees who were paid \$13.00 or \$15.00 per hour that had been produced by Respondents. Because employees were paid for more hours in some weeks than in other weeks, Mr. LaCroix explained that, to be reasonable, he used an average of hours worked per week from all the employees for whom he had checks. (Tr. at 655).

Mr. LaCroix used \$13.00 as Mr. Bareno's actual hourly rate because the records produced by Respondents and the employee interviews indicated that the majority of employees working on the East 100th Street project were paid \$13.00 per hour. (Tr. at 656). Because employees interviewed indicated that Mr. Bareno performed work that fell under the Tier B classification, Mr. LaCroix used the \$33.15 prevailing wage rate and \$20.74 CWHSSA rate to compute back wages due for Mr. Bareno.

A total of \$14,311.04 in back wages is due to Felipe Bareno. (AX-1A at 5).

4. Luis Cajamarca

Mr. LaCroix testified that because Respondents produced no records or checks for Luis Cajamarca and employees indicated that Mr. Cajamarca did work on the East 100th Street project, he computed back wages for him using the same methodology as he used in computing back wages for Felipe Bareno. (Administrator's Post-Hearing Brief, Appendix A at 2; AX- 53 at 1 , AX-54 at 1 , AX-55 at 1 , AX-68 Video at 16:14, 16:29, 16:49; Tr. at 62, 112-113, 203, 247, 299, 331, 592, 657-658, 740-741, 851).

A total of \$14,311.04 in back wages is due to Luis Cajamarca. (AX-1A at 6).

5. Richard Campoverde

Mr. LaCroix computed back wages for Richard Campoverde using Mr. Campoverde's interview statement, as well as the checks produced for him by Respondents. (AX-12 at 82-93, AX-43; Tr. at 688-689). Furthermore, Mr. Campoverde testified that he was paid \$13.00 per hour for his work on the East 100th Street project. (Tr. at 438). Respondents were given credit for all the amounts reflected in the checks produced for Mr. Campoverde. (Tr. at 690). Based upon Mr. Campoverde's testimony at the hearing as to the type of work he did on the project, his required prevailing wage rate has been revised to a blended rate of \$38.00 per hour for straight-time hours worked and his required CWHSSA rate has been revised to a blended rate of \$23.63 per hour for overtime hours worked.

A total of \$10,773.54 in back wages is now due to Richard Campoverde. (Administrator's Post-Hearing Brief, Appendix A at 2-3 and Supplemental AX-1b at 2).

6. Sergio Campoverde

Mr. LaCroix computed back wages for Sergio Campoverde using his interview statement and the checks produced for him by Respondents. (AX-12 at 94-101, AX-44; Tr. at 691). In his interview statement, Mr. Campoverde indicated that he was paid \$13.00 per hour for his work on the East 100th Street project. (AX-44). In his back wage computation, Mr. LaCroix gave Respondents credit for all the amounts reflected in the checks produced for Mr. Campoverde. (Tr. at 692).

Based upon Mr. Campoverde's statement and the testimony at the hearing as to the type of work he did on the project, his required prevailing wage rate has been revised to a blended rate of \$38.00 per hour for straight-time hours worked and his required CWHSSA rate has been revised to a blended rate of \$23.63 per hour for overtime hours worked. (Administrator's Appendix A at 3; AX-43 at 4, AX-48 at 4, AX-44, AX-52 at 1; Tr. at 62, 113, 203, 249-250, 299, 331, 394 431-432, 592).

A total of \$12,957.61 in back wages is due to Sergio Campoverde. (Administrator's Post-Hearing Brief, Supplemental AX-1B at 3).

7. Luis Canndo

Mr. LaCroix testified that, because Respondents produced no records or checks for Luis Canndo and employees indicated that Mr. Canndo did work on the East 100th Street project, he computed back wages for Mr. Canndo using the same methodology as he used in computing back wages for Felipe Bareno. (AX-43 at 1; Tr. at 300, 441, 659-660). Based on the evidence admitted at the hearing, Mr. Canndo's required hourly wage rates have been revised to the Tier B rate of \$33.15 rate for straight-time hours worked and \$20.74 rate for overtime hours worked.

A total of \$14,311.04 in back wages is due to Luis Canndo. (Administrator's Post-Hearing Brief, Appendix A at 3 and Supplemental AX-1B at 4).

8. Darwin Celi

Back wages for Darwin Celi were computed using the checks produced for him by Respondents. (AX-12 at 123-133; Tr. at 695). Employee statements and testimony establish that he worked on the East 100th Street project. (Administrator's Post-Hearing, Appendix A at 3; AX-41 at 13, 15 (black shirt), 43; Tr. at 72-73, 360-441). Mr. LaCroix determined that Mr. Celi was paid \$13.00 per hour for his work on the East 100th Street project, based upon an analysis of Mr. Celi's checks. (Tr. at 695). Mr. LaCroix gave Respondents credit for all the amounts reflected in the checks produced for Mr. Celi. (Tr. at 695).

Based upon the testimony at the hearing as to the type of work he did on the project, his required prevailing wage rate has been revised to a blended rate of \$38.00 per hour for straight-

time hours worked and his required CWHSSA rate has been revised to a blended rate of \$23.63 per hour for overtime hours worked. (Appendix A p.3; Tr. 63, 250, 300, 394-5, 442).

A total of \$16,548.36 in back wages is due to Darwin Celi. (Administrator's Post-Hearing Brief, Supplemental AX-1B at 5).

9. Sergio Celi

Mr. LaCroix noted that Respondents produced checks for Sergio Celi that covered many, but not all the weeks he worked on the project. (AX-12 at 134-151; Tr. at 696). He gave Respondents full credit for the payments reflected in those checks. (Tr. at 697-698). For August 9 to October 18, November 1, and November 22 - December 27, 2009, hours worked each week were reconstructed based on an analysis of those checks. (Tr. at 696, 697-698).

Mr. LaCroix reconstructed hours Mr. Celi worked each week based on his analysis of the checks for employees that were produced by Respondents for other employees at East 100th Street because Respondents did not produce checks for Mr. Celi for October 25, November 8 and 15, 2009. (Tr. at 655, 697). In addition, Mr. LaCroix used Angel Lojano's personal records to reconstruct hours worked for Mr. Celi from January 3 to February 24, 2010 because there had not been sufficient information produced by Respondents to determine a weekly average of hours worked after 2009 (AX-63; Tr. at 698-699).

An analysis of Mr. Celi's checks indicated that he was paid \$13.00 per hour for his work on the East 100th Street project. (Tr. at 697). Based upon the testimony at the hearing as to the type of work Mr. Celi did on the project, Mr. LaCroix revised Mr. Celi's required prevailing wage rate to a blended rate of \$38.00 per hour for straight-time hours worked and his required CWHSSA rate to a blended rate of \$23.63 per hour for overtime hours worked. (Administrator's Post-Hearing Brief, Appendix A at 3; Tr. at 63, 114, 300-301, 395).

A total of \$27,370.37 in back wages is due to Sergio Celi. (Administrator's Post-Hearing Brief, Supplemental AX-1B at 6).

10. Pedro Pablo Coytl

Mr. LaCroix computed back wages for Pedro Pablo Coytl using Mr. Coytl's own personal records of hours and weeks worked on the East 100th Street project. (AX-67; Tr. at 640-642). Mr. Coytl testified that he was paid \$13.00 per hour. (Tr. at 790). According to Mr. LaCroix, Respondents did not produce any checks or other records for Mr. Coytl and Mr. Coytl was not listed on the certified payrolls for the project. (JX-D; Tr. at 640-641). Mr. Coytl however testified at the hearing as to the type of work he performed on the East 100th Street project. (Tr. at 784-785, 788, 789, 805). Based on his testimony, the work that he performed fell under the Demolition Laborer Tier A classification. (Administrator's Post-Hearing Brief, Appendix A at 4).

A total of \$22,237.56 in back wages is due to Pedro Pablo Coytl. (AX-1A at 13).

11. Fausto Rolando Criollo

Mr. LaCroix noted that Respondents produced checks for Fausto Rolando Criollo that covered many, but not all the weeks he worked on the project. (AX-12 at 152-173; Tr. at 700). He gave full credit for the payments reflected in those checks. (Tr. at 701). For August 9 to December 27, 2009, Mr. LaCroix reconstructed the hours Mr. Criollo worked each week based on his analysis of those checks. (Tr. at 700).

Because Respondents failed to produce checks for Mr. Criollo for week-ending January 3, 2010, Mr. LaCroix used the hours reflected on the certified payroll for Mr. Criollo. (JX-D; Tr. at 701). For the weeks of January 10 and 17, 2010, Mr. LaCroix used the hours indicated on the swipe card records for Mr. Criollo. (AX-23; Tr. 701-702).

Mr. Criollo testified that he was paid \$13.00 per hour for his work on the project. (Tr. 587, 612). He also testified at the hearing as to the period of time he worked on the project and the type of work he performed on the East 100th Street project. (AX-46, AX-46A at 1, 2; Tr. at 580-582, 586, 604-605). Based on his testimony, the work that he performed fell under the Tier A classification.

A total of \$35,015.84 in back wages is due to Fausto Rolando Criollo. (Administrator's Post-Hearing Brief, Appendix A at 4; AX-1A at 14).

12. Jane Doe ("Maria Paola Feijo")

Mr. La Croix testified that there was an employee who used a swipe card issued under the name of "Maria Paola Feijo" during two work weeks on the East 100th Street project. (AX23; Tr. at 703). It is undisputed that no one named Maria Paola Feijo worked on the project. (Joint Stipulated Facts¹⁷). There is also evidence that employees used swipe cards under other employees' names. (AX-64; Tr. at 285-286, 403, 770-771). "Maria Feijo" appears on the certified payroll records as a Tier B laborer. (JX-D; Tr. at 703).

Because Mr. LaCroix determined that a female employee did work on the project for the hours reflected on the swipe cards and that no one on the project was paid the proper prevailing rate, he computed back wages for "Jane Doe." (Tr. at 703). Back wages for "Jane Doe" were computed by using the hours indicated on the swipe card records multiplied by the prevailing rate for a Tier B laborer, minus \$13.00 per hour. (Tr. at 704-705).

A total of \$478.56 is due to "Jane Doe." (AX-1A at 15).

13. José Doe ("Copolito")

During the course of the investigation, Mr. LaCroix learned that an employee with the nickname "Copolito" worked on the East 100th Street project. (Tr. at 660). He further testified that he used "José Doe" as an identifier for the employee nicknamed "Copolito" because no one knew that employee's actual name and but there was knowledge that he was Hispanic. *Id.*

¹⁷ Respondents stipulated that a "Gloria Janeth Feijo" was Respondent Jover Naranjo's girlfriend between August 2009 and February 2010 and that Maria Paola Feijo is Gloria Feijo's sister. (Joint Stipulated Facts).

Because employees interviewed indicated that “Copolito” performed work under the Tier B classification, Mr. La Croix computed back wages for him using the same methodology as he used in computing back wages for Felipe Bareno. (Tr. at 660-661).

A total of \$14,311.04 in back wages is due to Copolito. (AX-1A at 16).

14. José Doe II (“Fabian Avila”)

Mr. La Croix testified that there was an employee who used a swipe card issued under the name of “Fabian Avila” during several work weeks on the East 100th Street project. (Tr. at 705; AX-23). The record, including the employee witness testimony, shows that no one actually named “Fabian Avila” worked on the project. (Tr. at 78, 124, 301, 336, 365, 399, 447, 600). Employee witness testimony at the hearing supports finding that employees used swipe cards under other employees’ names. (AX-64; Tr. at 285-286, 403, 770-771).

The name “Fabian Avila” appears on the certified payroll records provided by Respondents as a Tier A laborer. (JX-D; Tr. at 705). Because it was determined that a Hispanic male employee did work on the project for the hours reflected on the swipe cards and that no one on the project was paid the proper prevailing rate, Mr. LaCroix computed back wages for a “José Doe II.” (Tr. at 705). Specifically, he computed those back wages for “José Doe II” by using the hours indicated on the swipe card records multiplied by the prevailing rate for a Tier A laborer, minus \$13.00 per hour. (Tr. at 705-706).

A total of \$3,910.25 is due to “José Doe II.” (AX-1A at 18).

15. Manuel “Doe”

Some employees indicated in their interviews that an employee with the name of “Manuel” worked on the East 100th Street project. (Tr. at 251-252, 396, 661). The workers also stated that this Manuel was different from Manuel Pereda. Mr. LaCroix used “Manuel Doe” as an identifier for this Manuel because none of the employees interviewed knew his last name. (Tr. at 661).

Because employees interviewed indicated that Manuel Doe performed work under the Tier B classification, Mr. La Croix computed back wages for him using the same methodology as he used in computing back wages for Felipe Bareno. (Administrator’s Post-Hearing Brief, Appendix A at 4; Tr. at 661-662).

A total of \$14,311.04 in back wages is due to “Manuel Doe.” (AX-1A at 17).

16. Imelda Gomez

Mr. LaCroix computed back wages for Imelda Gomez using the checks produced for her by Respondents. (AX-12 at 213-232, 289; Tr. at 708). Employee interview statements and testimony establish that Ms. Gomez worked on the East 100th Street project performing work under the Tier B classification. (Administrator’s Post-Hearing Brief, Appendix A at 5; Tr. at 64-65, 252, 295-296, 333, 395, 442, 594, 708). Based upon an analysis of her checks, Mr. LaCroix

determined that Ms. Gomez was paid \$13.00 per hour for her work on the project. He gave Respondents credit for all the amounts reflected in the checks paid to Ms. Gomez. (Tr. at 709).

A total of \$17,493.86 in back wages is due to Imelda Gomez. (AX-1A at 20).

17. Hector Jimenez

Mr. LaCroix testified that, because Respondents produced no records or checks for Hector Jimenez and employees indicated that Mr. Jimenez did work on the East 100th Street project, he computed back wages for Mr. Jimenez using the same methodology as he used in computing back wages for Felipe Barena. (AX-41 at 30, 37, AX-43 at 1, AX-46 at 1, AX-48 at 4, AX-49 at 2, AX-50 at 3, AX-58 at 4; Tr. at 65, 115, 252, 301, 333, 346, 395, 442, 662-663, 762-763). Based on the evidence admitted at the hearing, Mr. LaCroix revised Mr. Jimenez's required prevailing wage rate to a blended rate of \$38.00 per hour for straight-time hours worked and Mr. Jimenez's required CWHSSA rate to a blended rate of \$23.63 per hour for overtime hours worked.

A total of \$17,595.88 in back wages is now due to Hector Jimenez. (Administrator's Post-Hearing Brief, Appendix A at 5 and Supplemental AX-1B at 7).

18. Angel Lojano

Mr. LaCroix computed the back wages for Angel Lojano using Mr. Lojano's own personal records of hours and weeks worked on the East 100th Street project. (AX-63; Tr. at 643). Mr. LaCroix gave Respondents credit for all payments reflected in the checks produced for Mr. Lojano. (Tr. at 644). Mr. Lojano testified that he was paid \$15 .00 per hour for the project. (Tr. 279-80, 303). I find, as did Mr. LaCroix, that Mr. Lojano was only listed on the certified payrolls for a portion of the time he worked on the project. (JX-D; Tr. at 643). Mr. Lojano testified at the hearing as to the type of work he performed on the East 100th Street project. (Tr. at 274-275, 277, 294, 305). Based on his testimony, Mr. Lojanoperformed work within the Tier A classification. (Administrator's Post-Hearing Brief, Appendix A at 5-6).

A total of \$38,365.75 in back wages is due to Angel Lojano. (AX-1A at 22).

19. Blanca Lopez

Blanca Lopez gave an interview statement which showed that she worked on the East 100th Street project. (AX-49; Tr. at 709). Respondents produced checks for Ms. Lopez that covered many, but not all of the weeks she worked on the project. (AX-12 at 255-269; Tr. at 710). Mr. LaCroix gave Respondents full credit for the payments reflected in those checks. (Tr. at 710). For the period from August 9 to December 6, 2009, Mr. LaCroix reconstructed the hours Mr. Lopez worked each week based on his analysis of those checks. (Tr. at 710).

Because Respondents failed to produce checks for Ms. Lopez for the period from December 13 to 27, 2009, Mr. LaCroix reconstructed hours Ms. Lopez worked during that period based on the analysis he did of the checks for employees which Respondents did produce. (Tr. at 655, 710-711). In addition, Mr. LaCroix used Angel Lojano's personal records to reconstruct weekly hours worked for Ms. Lopez because, as he noted, Respondents did not produce checks

for the period from January 3 to February 14, 2010 and Respondents produced insufficient information to determine a weekly average of hours worked by employees at the East 100th Street project after 2009. (AX-63; Tr. at 711).

Both Ms. Lopez's interview statement and her checks indicate that she was paid \$15.00 per hour for her work on the project. (AX-49; Tr. at 711). Based on the evidence admitted at the hearing that she performed Tier A and B work, Mr. LaCroix revised Ms. Lopez's required prevailing wage rate to a blended rate of \$38.00 per hour for straight-time hours worked and her required CWHSSA rate to a blended rate of \$23.63 per hour for overtime hours worked.

A total of \$21,595.02 in back wages is due to Blanca Lopez. (Administrator's Post-Hearing Brief, Appendix A at 6 and Supplemental AX-1B at 8).

20. Felix Matute Cordero

Mr. LaCroix testified that Felix Matute Cordero appeared on the certified payrolls as a Tier B laborer. (JX-D; Tr. at 678). Mr. LaCroix computed back wages for Mr. Matute because the certified payrolls indicated fewer weekly hours worked than the average amount of hours Mr. LaCroix had determined were actually worked on the project after doing an analysis of the checks which Respondents did produce. (Tr. at 655, 679). Back wages were computed for Mr. Matute for two workweeks indicated on the certified payrolls. (JX-D; Tr. at 678-679).

A total of \$265.20 in back wages is due to Felix Matute Cordero. (AX-1A at 24).

21. Ines Orbe

Mr. LaCroix computed back wages for Ines Orbe using Ms. Orbe's own personal records of hours and weeks worked on the East 100th Street project. (AX-60, AX-61; Tr. at 645-646). Mr. LaCroix gave credit to Respondents for all payments reflected in the checks produced for Ms. Orbe. (AX-12 at 282-288, 290-292; Tr. at 646). The checks produced, as well as Ms. Orbe's hearing testimony, confirm that Ms. Orbe was paid \$13.00 per hour. (Tr. at 58). Ms. Orbe was not listed on the certified payrolls provided by Respondents for the East 100th Street project. (JX-D; Tr. at 647). Ms. Orbe, however, testified at the hearing about the type of work she performed on the East 100th Street project. (Tr. at 51). Based on her hearing testimony, I find Ms. Orbe performed work under the Tier B classification. (Administrator's Post-Hearing Brief, Appendix A at 6).

A total of \$12,149.58 in back wages is due to Ines Orbe. (AX-1A at 25).

22. Pedro Bollivar Orellana

Mr. LaCroix testified that Pedro Bollivar Orellana appeared on the certified payrolls as a Tier A laborer. (JX-D; Tr. at 680). He computed back wages for Mr. Orellana because the certified payrolls indicated fewer weekly hours worked than the average amount of hours Mr. LaCroix had determined were actually worked on the project after doing an analysis of the checks which Respondents did produce for employees at East 100th Street. All the information

from employees indicated that all of the employees on the East 100th Street project mostly worked the same numbers of hours each week. (Tr. at 655, 676-677, 681).

Back wages were computed for Mr. Orellana using the workweeks indicated on the certified payrolls. (JX-D; Tr. at 681). Mr. LaCroix also computed CWHSSA overtime back wages for Mr. Orellana because according to the certified payrolls, Respondent only paid time-and-one-half the base rate and failed to pay fringe benefits on the overtime hours. (Tr. at 682-683).

A total of \$13,616.91 in back wages is due to Pedro Bollivar Orellana. (AX-1A at 26).

23. Joaquin Pablo

Mr. LaCroix computed back wages for Joaquin Pablo using Mr. Pablo's own personal records of hours and weeks worked on the East 100th Street project. (AX-65; Tr. at 648-650). Mr. Pablo testified that he was paid \$13.00 per hour. (Tr. at 173, 177, 190). Mr. LaCroix noted that Respondents did not produce any checks or other records for Mr. Pablo and Mr. Pablo was not listed on the certified payrolls Respondents did provide. (JX-D; Tr. at 649-50).

Based upon Mr. Pablo's testimony at the hearing as to the type of work he did on the project, Mr. LaCroix revised Mr. Pablo's required prevailing wage rate to a blended rate of \$38.00 per hour for straight-time hours worked and Mr. Pablo's required CWHSSA rate to a blended rate of \$23 .63 per hour for overtime hours worked.

A total of \$14,257.95 in back wages is due to Joaquin Pablo. (Administrator's Post-Hearing Brief, Appendix A at 6-7 and Supplemental AX-1B at 9).

24. Clever Pauta

Mr. LaCroix computed back wages for Clever Pauta using Mr. Pauta's interview statement and the checks provided by Respondents. (AX-12 at 320-39, AX-52; Tr. at 712-713). He gave Respondents credit for all payments reflected in the checks produced for Mr. Pauta. (Tr. at 714). The checks which Respondents produced, as well Mr. Pauta's hearing testimony, confirm Mr. Pauta was paid \$13.00 per hour. (Tr. at 391, 714). Mr. Pauta testified at the hearing as to the type of work he performed on the East 100th Street project. (Tr. at 380, 385-387).

Based on his testimony, I find Mr. Pauta performed work under the Tier A classification. Mr. LaCroix revised Mr. Pauta's back wage computations to reflect that Mr. Pauta did not work at the East 100th Street project after the week-ending November 8, 2009. (Administrator's Post-Hearing Brief, Appendix A at 7; Tr. at 422).

A total of \$29,911.16 in back wages is due to Clever Pauta. (Administrator's Post-Hearing Brief, Supplemental AX-1B at 10).

25. Manuel Pereda

Mr. LaCroix computed back wages for Manuel Pereda using Mr. Pereda's interview statement, as well as Procopio Pereda's own personal records of hours and weeks worked on the East 100th Street project. (AX-53, AX-66; Tr. at 717). Mr. LaCroix used Procopio Pereda's personal records of hours worked on Monday through Saturday to reconstruct the hours worked by Manuel Pereda. Both Manuel and Procopio Pereda indicated that they worked the same hours, except Manuel Pereda did not work Sundays. (Tr. at 717-718).

Mr. LaCroix noted that Respondents did not produce any checks or records for Manuel Pereda and Manuel Pereda was not listed on the certified payrolls Respondents did provide. (JX-D; Tr. at 718). Mr. Manuel Pereda testified that he was paid \$13.00 per hour. (Tr. at 241-242). In his hearing testimony, Mr. Manuel Pereda described the type of work he performed on the East 100th Street project. (Tr. at 231, 235-238). Based on his testimony, I find Mr. Pereda performed work under the Tier A classification. (Administrator's Post-Hearing Brief, Appendix A at 7-8).

A total of \$27,177.23 in back wages is due to Manuel Pereda. (AX-1A at 29).

26. Procopio Pereda

Mr. LaCroix computed back wages for Procopio Pereda using Mr. Pereda's own personal records of hours and weeks worked on the East 100th Street project. (AX-66; Tr. at 649-650). Mr. Pereda testified that he was paid \$13.00 per hour. (Tr. at 102, 110). Respondents did not produce any checks or other records for Mr. Procopio Pereda; he was not listed on the certified payrolls provided by Respondents. (JX-D; Tr. at 650).

Based upon Mr. Pereda's testimony at the hearing as to the work he performed on the East 100th Street project, Mr. LaCroix revised Mr. Pereda's required prevailing wage rate to a blended rate of \$38.00 per hour for straight-time hours worked and his required CWHSSA rate to a blended rate of \$23.63 per hour for overtime hours worked. (Administrator's Post-Hearing Brief, Appendix A at 8).

A total of \$19,528.76 in back wages is due to Procopio Pereda. (Administrator's Post-Hearing Brief, Supplemental AX-1B at 12; Tr. at 91, 95, 97, 113, 121).

27. Rodolfo Pereda

Mr. LaCroix computed back wages for Rodolfo Pereda using Mr. Pereda's interview statement and the checks produced for him by Respondents. (AX-12 at 355-371; AX-55; Tr. at 719). Mr. Pereda testified that he was paid \$15.00 per hour for his work on the East 100th Street project. (Tr. at 329). Mr. LaCroix gave Respondents credit for all the amounts reflected in the checks paid to Mr. Rodolfo Pereda for his work on the project. (Tr. at 720).

Mr. Pereda testified at the hearing as to the type of work he performed on the East 100th Street project. (Tr. at 320, 322-323). Based on his testimony, I find the work that Mr. Pereda performed fell under the Tier A classification. (Administrator's Post-Hearing Brief, Appendix A at 8). Mr. LaCroix revised Mr. Pereda's back wage computations to reflect that Mr. Rodolfo

Pereda did not work at the East 100th Street project after week-ending November 8, 2009. (Tr. at 326).

A total of \$26,321.81 in back wages is due to Rodolfo Pereda. (Administrator's Post-Hearing Brief, Supplemental AX-1B at 11).

28. Luis Pileno

Mr. LaCroix testified that, because Respondents produced no records or checks for Luis Pileno and employees indicated that Mr. Pileno did work on the East 100th Street project, he computed back wages for him using the same methodology as he used in computing back wages for Felipe Barena. (AX-41 at 23 (blue hat), at 24 (blue hat), AX-45A (bicycle), AX-46 at 1, AX-55 at 1; Tr. at 118, 163, 247, 255, 301, 324-325, 338, 765, 362-363, 397, 444, 592, 664-665). The evidence admitted at the hearing supports my finding that Mr. Pileno performed work at the East 100th that fell under the Tier A classification. (Administrator's Post-Hearing Brief, Appendix A at 8; Tr. at 118, 161, 301, 397, 664, 765).

A total of \$25,244.16 in back wages is due to Luis Pileno. (AX-1A at 33).

29. Custodio Pomaquisa

Mr. LaCroix computed back wages for Custodio Pomaquisa using the checks produced for him by Respondents. (Tr. at 721-722). He noted that Mr. Pomaquisa was paid \$15.00 per hour for his work on the East 100th Street project. (Tr. at 722). Mr. LaCroix gave Respondents credit for all the amounts reflected in the checks paid to Mr. Pomaquisa for his work on the project. (Tr. 723).

At the hearing, employees testified about the type of work Custodio Pomaquisa performed on the East 100th Street project. (Administrator's Post-Hearing Brief, Appendix A at 9; AX-42 at 3, AX-58 at 4; Tr. at 67, 118, 255, 301-302, 334-335, 397). Based on that testimony, I find the work Mr. Pomaquisa performed fell under the Tier A classification. Mr. LaCroix revised Mr. Pomaquisa's back wage computations to reflect that Mr. Pomaquisa did not work at the East 100th Street project after week-ending August 30, 2009. (Tr. at 842).

A total of \$9,815.90 in back wages is due to Custodio Pomaquisa. (Administrator's Post-Hearing Brief, Supplemental AX-1B at 13).

30. Hugo Pomaquisa

Mr. LaCroix testified that because Respondents produced no records or checks for Hugo Pomaquisa and employees indicated that he did work on the East 100th Street project, he computed back wages for him using the same methodology as he used in computing back wages for Felipe Barena. (Administrator's Post-Hearing Brief, Appendix A at 9; AX-41 at 46, AX-49 at 2; Tr. at 67-68, 119, 166, 255, 302, 335, 397, 444, 593, 665-666).

A total of \$ 14,311.04 in back wages is due to Hugo Pomaquisa. (AX- 1 A at 35).

31. Jacinto Pomaquisa

Mr. LaCroix testified that, because Respondents produced no records or checks for Jacinto Pomaquisa and employees indicated that Mr. Jacinto Pomaquisa did work on the East 100th Street project, he computed back wages for him using the same methodology as he used in computing back wages for Felipe Bareno. (Administrator's Post-Hearing Brief, Appendix A at 9; AX-41 at 35 (white hat) and 41, AX-49 at 2; Tr. at 119, 257-258, 256, 297, 324-325, 361, 444, 666-668).

A total of \$14,311.04 in back wages is due to Jacinto Pomaquisa. (AX-1A at 36).

32. Mauricio Sapeta

Mr. LaCroix testified that, because there were no records or checks for Mauricio Sapeta provided by Respondents, but employees indicated that Mr. Sapeta did work on the East 100th Street project, he computed back wages for Mr. Sapeta using the same methodology as he used in computing back wages for Felipe Bareno. (AX-41 at 17 (black hat), AX-45A at 4 (hard hat), AX-48 at 4, AX-58 at 4; Tr. at 68, 74, 119, 161, 166, 256, 296, 335, 397-398, 444-445, 593, 668-669, 762). The evidence of record supports my finding that Mr. Sapeta performed work at the East 100th Street project under the Tier A classification. (Administrator's Post-Hearing Brief, Appendix A at 9-10; Tr. at 119, 166, 256, 296 397-398, 668).

A total of \$25,244.16 in back wages is due to Mauricio Sapeta. (AX-1A at 37).

33. Fausto Tigre

Mr. LaCroix testified that, because there were no records or checks for Fausto Tigre provided by Respondents and employees indicated that Mr. Tigre did work on the East 100th Street project for two weeks before being injured on the job, he computed back wages for Mr. Tigre at the Tier B rate. (Administrator's Post-Hearing Brief, Appendix A at 10; AX-48 at 4; Tr. at 120, 256-257, 302, 398, 593-594, 723-724, 767). Employees also indicated that Mr. Tigre received no wages for the time he worked on the project. (Tr. at 724).

A total of \$2,453.70 in back wages is due to Fausto Tigre. (AX-1A at 38).

34. Angel Oswaldo Lojano Torres

Angel Oswaldo Lojano Torres gave an interview statement in which he indicated that he worked on the East 100th Street project. (AX-57; Tr. at 670). In addition, employee testimony and other evidence of record supports finding that Mr. Lojano Torres did work on the East 100th Street project. (Administrator's Post-Hearing Brief, Appendix A at 10; AX-57A at 1 (red); Tr. at 297-298, 398, 445, 589-591).

Because there were no records or checks for Mr. Lojano Torres provided by Respondents, Mr. LaCroix computed back wages for him using the same methodology as he used in computing back wages for Felipe Bareno, except he computed work period of time based on Mr. Lojano Torres' interview statement. (AX-57; Tr. at 670-671).

Based on the evidence admitted at the hearing, Mr. LaCroix revised Mr. Lojano Torres' required prevailing wage rate to a blended rate of \$38.00 per hour for straight-time hours worked and his required CWHSSA rate to a blended rate of \$23 .63 per hour for overtime hours worked.

A total of \$20,729.27 in back wages is due to Angel Oswaldo Lojano Torres. (Administrator's Post-Hearing Brief, Supplemental AX-1B at 14).

35. Antonio Torres

Mr. LaCroix computed back wages for Antonio Torres using Mr. Torres' own personal records of hours and weeks worked on the East 100th Street project. (AX-62; Tr. at 651). He gave Respondents credit for all payments reflected in the checks produced for Mr. Torres. (AX-12 at 406-421; Tr. at 651, 653). At hearing, Mr. Torres testified that he was paid \$13.00 per hour. (AX-62; Tr. at 753). Mr. Torres further testified about the type of work he performed on the East 100th Street project. (Tr. at 732-733, 737-738). Based on his testimony, I find the work Mr. Torres performed fell under the Tier A classification. (Administrator's Post-Hearing Brief, Appendix A at 10).

A total of \$27,122.91 in back wages is due to Antonio Torres. (AX-1A at 40).

36. Fernando Valdez

Mr. LaCroix testified that because there were no records or checks for Fernando Valdez provided by Respondents and employees indicated that Mr. Valdez did work on the East 100th Street project, he computed back wages for Mr. Valdez using the same methodology as he used in computing back wages for Felipe Bareno. (Administrator's Post-Hearing Brief, Appendix A at 10; AX-41 at 8 (hat and mask); Tr. at 337, 671-673).

A total of \$ 14,311.04 in back wages is due to Fernando Valdez. (AX-1A at 41).

37. Sergio Valera

Sergio Valera gave an interview statement establishing that he worked on the East 100th Street project. (AX-59; Tr. at 674). In addition, employees indicated that he did work on the East 100th Street project. (Administrator's Post-Hearing Brief, Appendix A at 11; Video AX-10 8:35, 9:00, AX-58 at 4; Tr. at 121, 257, 398-389, 445, 594, 744, 745, 757).

Because Respondents produced no records or checks for Mr. Valera, Mr. LaCroix computed back wages for him using the same methodology as he used in computing back wages for Felipe Bareno, except he used the rate for a Tier A laborer and computed a shorter period of time on the project based on Mr. Valera's interview statement. (AX-59; Tr. at 674-675). Some employees testified that Mr. Valera performed Tier A work. (Tr. at 398-399, 744-745).

A total of \$20,889.36 in back wages is due to Sergio Valera. (AX-1A at 42).

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.*, ARB Case No. 00-050, 1996-DBA-37 (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 the following:

[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 be only approximate.

Thomas & Sons Building Contractors, supra, at 6.

The Davis-Bacon Related Acts ("DBRA") applies the prevailing wage requirements of the Davis-Bacon Act to contracts between a non-federal entity, such as a state or local government, and a contractor where the federal government provides funding indirectly. 40 U.S.C.A. § 3141-3148 (formerly 40 U.S.C. §276(a) *et seq.*).¹⁸ The DBRA requires that contractors pay no less than the prevailing wage to the various classifications of mechanics or laborers they employ under the contract. 40 U.S.C.A. § 3142(a).

The Administrator of the Wage and Hour Division is responsible for issuing minimum wage determinations under the DBA's implementing regulations. 29 C.F.R. § 1.1(a). The minimum wage rates contained in the wage determinations derive from rates prevailing in the geographic locality where the work is to be performed or from rates applicable under collective bargaining agreements. 29 C.F.R. § 1.3.

The ARRA, the Cranston-Gonzalez National Affordable Housing Act, and the CWHSSA are DBRA requiring contractors on federal construction projects to pay laborers and mechanics wage rates as "the Secretary of Labor determines to be prevailing." 40 U.S.C. § 3142 *et seq.*; 29 C.F.R Part 5; *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052 (D.C. Cir. 2007). Specifically, pursuant to 29 C.F.R. § 5.5(a)(1)(ii)(D), "[t]he wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii) (B) or (C) of this section, shall be paid

¹⁸ The Davis-Bacon Act applies to every contract of the United States in excess of \$2,000 for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works in the United States. 40 U.S.C.A. § 3142(a); 29 C.F.R. § 5.1(a).

to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.”

Similarly, the Tax Credit Assistance Program (“TCAP”) and HOME Investment Partnerships Program, i.e., 24 C.F.R. Part 92, are federal assistance programs that require compliance with Davis Bacon prevailing wage requirements under Section 1606 of ARRA.

In addition to the wage requirements, under DBRA, contractors are required to keep accurate payroll records that sufficiently and correctly demonstrate that workers were paid prevailing wages for all compensable work and all fringe benefits. 29 C.F.R. § 5.5(a)(3)(i). These certified payroll records must be accompanied by a signed statement of compliance certifying the DBRA wage requirements. *See* Section 1606 of ARRA, the Copeland Act, 40 U.S.C. § 3145, 29 C.F.R. Part 3 and 29 C.F.R. § 5.6(a)(3)(i).

The Administrator has persuasively established through the presentation of evidence at hearing that Respondents’ Enviro, Gladiators, Jover Naranjo and Luperio Naranjo, Sr., never paid employees working at East 100th Street prevailing wage rates and fringe benefits as required, even though the prevailing wage rates are listed on the certified payroll reports submitted to the contracting agency. (JX-C, JX-C-1, JX-D).

The hourly prevailing wage rates in Wage Determination NYS 080003, incorporated into the subcontract, were \$49.29 for Tier A Demolition Laborers (\$30.38 base + \$18.91 fringe benefits) and \$33.15 for Tier B Demolition Laborers (\$20.74 base + \$12.41 fringe). (JX-C, JX-C-1). Each of the Administrator’s employee witnesses testified that all employees were paid at a fraction of the wage determination pay rates listed on the certified payroll records, receiving either \$13.00 or \$15.00 an hour for all hours worked. (JX-C, JX-C-1, JX-D, AX-63, AX-65, AX-66; Tr. at 102, 110, 173, 175, 177, 190, 241-2, 303, 329, 359, 391, 438, 459, 587, 753, 790). *See, for e.g., Sundex, Ltd.*, 1999 W.L. 127745 (DOL Adm.Rev.Bd. December 30, 1999) (ARB Case No. 98-130) (debarment justified where documentary evidence and employee testimony showed that employees were paid straight \$10 or \$12 per hour without deductions for taxes or payments for benefits, and without payment for overtime for work in excess of 40 hours per week.).

The hearing testimony on wages paid was corroborated by the interview statements of 15 former employees. (AX-42 at 3, AX-43 at 1, 4, 8, AX-44 at 1, AX-45 at 1, AX-46 at 1, 4, AX-48 at 4, 9, AX-49 at 7, 8, AX-50 at 4, AX-51 at 1, AX-52 at 1, AX-54 at 1, AX-55 at 1, 6, AX-57 at 2, AX-58 at 4, 9, AX-59 at 1-2). The hearing testimony further established that the hourly rates actually paid correlated to the number of years that the employees worked for Respondents, rather than job classification. Employees that worked for Respondents for many years were paid \$15.00 an hour and all other employees were paid \$13.00 an hour. (AX-43 at 4; Tr. at 102-103, 302-303).

For example, Blanca Lopez testified that she worked for Respondents since 1997. (Tr. at 351) She averred that she generally hauled debris and sometimes did Tier A demolition work at East 100th Street and was paid \$15.00 an hour – the same hourly wage as full time Tier A Demolition Laborer Angel Lojano. (Tr. at 280, 359). Rolando Criollo and Pedro Pablo Coytl were Tier A Demolition Laborers and were both paid \$13.00 an hour – the same rate as Ines Orbe who removed garbage. (Tr. at 58, 587, 790). The employees testified that Luperio Naranjo, Sr. set their pay rate and stated that “he could not pay more.” (Tr. at 58, 242, 329, 359). The

testimony also clearly showed that employees did not receive required payment for health insurance or pension benefits from their employer. (Joint Stipulated Facts; AX-49 at 7, AX-55 at 7, AX-58 at 4; Tr. at 58, 60, 111, 177, 243, 280, 330, 360, 392-393, 440, 589, 756, 792).

SIA LaCroix testified that, in the process of reconstructing hours, he determined that Respondents did not pay employees time and one half their base Wage Determination rates for hours worked in excess of 40 hours in a work week as required by CWHSSA (40 U.S.C. § 3701 *et seq.*). Instead, the preponderant evidence of record (i.e., employee testimony, interview statements and employee personal records) show Respondents paid employees the same rate for all hours worked. (AX-63, AX-65, AX-66; Tr. at 102, 110, 173, 175, 177, 190, 241-242, 303, 329, 359, 391, 438, 459, 587, 753, 790). The hearing testimony, employee statements and employees personal records of hourly worked clearly indicated that no one was paid at a higher rate when working over forty hours in a given work week. (AX-46 at 1, AX-55 at 6, AX-58 at 4, AX-62; Tr. at 58, 100, 102, 110, 173, 177, 189, 241-242, 279-280, 329, 359, 391, 438, 612, 753, 790). SIA LaCroix testified that for many employees who received checks, the total amount paid when compared to hours worked was divisible exactly by the 13 or 15 dollar amount that the employees stated they were paid. (Tr. at 644, 646, 685, 689, 691-692, 693-694, 695, 697, 701, 709, 710, 714, 719-720, 722). It must be concluded therefore that employees at the East 100th Street project were paid at a flat rate with no overtime being paid and no legal deductions made.

The evidence also established that all employees worked a six-day week at East 100th Street. (AX-43 at 4, AX-45 at 1, AX-46 at 1, 4, AX-48 at 1, 4, AX-50 at 3, AX-51 at 1, AX-52 at 1, AX-54 at 1, AX-55 at 1, 6, AX-58 at 1, 3, AX-59 at 1, AX-60 through AX-64; Tr. at 165, 233, 239, 278, 321, 355-357, 382-383, 390, 419, 426, 428, 435, 436, 584, 585, 742, 786-788, 793). The evidence also showed that some employees even worked seven days. (AX-44 at 1, AX-45 at 1, AX-46 at 1, 4, AX-48 at 1, 4, AX-51 at 1, AX-52 at 1, AX-54 at 1, AX-55 at 6, AX-59 at 1, AX-60, AX-62, AX-63; Tr. at 98, 100, 165-166, 201, 277, 324, 356-357, 390-391, 435, 587, 792-793).

I note that even Respondents' employee witness, Custodio Pomaquisa, corroborated the testimony of Administrator's employee witness, Joaquin Pablo, in testifying that, because there was no permit to work on Saturdays, employees were required to work inside the building so no one could see. (Tr. at 167, 860). Other employee witnesses also testified that, on Sundays at the East 100th Street project, demolition work was performed inside the building. (AX-46 at 1, AX-54 at 1, AX-55 at 6; Tr. at 98, 166, 277, 325, 356, 390, 587, 792). Even though the preponderant evidence supports finding that employees worked more than 40 hours for most weeks on the East 100th Street project, Respondents reported no overtime hours on the certified payroll reports submitted to the contracting agency. (JX-D).

Finally, several employees testified that on certain occasions when paid by check, they were paid at rates higher than their normal hourly wage, but were required to return or "kickback" the rest to their employer. (AX-42 at 3, AX-45 at 2, AX-48 at 1, AX-50 at 4, AX-51 at 1). Because Respondents required employees to give back any excess pay over the \$13.00 to \$15.00 hourly rate, ultimately they did not pay the statutorily required prevailing wage. Under the "anti-kickback" section of Copeland Act, a contractor or subcontract is precluded from in any way inducing an employee to give up any part of the compensation to which he or she is entitled

under his or her contract of employment.¹⁹ (18 U.S.C. § 874, 40 U.S.C. § 3145, 29 C.F.R. Part 3). *Marques Enterprises, Inc.*, 1992 W.L. 515945, (DOL W.A.B., Sept. 29, 1992) (WAB Case No. 91-34); *Kileen Electric Company, Inc.*, 1991 W.L. 494685, (DOL W.A.B., March 21, 1991) (WAB Case No. 87-49).

I find that Respondents' certified payroll records are wholly inaccurate even though they appear to include the information required by 29 C.F.R. § 5.5(a)(3)(i) and are certified as accurate by Jover Naranjo. (JX-D). *See e.g., Energy Engineering and Controls*, 1993 W.L. 306707, (DOL W.A.B. March 31, 1993) (WAB Case No. 92-19), (where the company and its president were debarred for a three-year period for deliberately falsifying certified payrolls to simulate compliance with the requirements of the DBA).

Ten employees at issue in this case are identified on the certified payrolls for certain weeks (they were also left off the payroll for many weeks actually worked) but are misclassified as Tier B laborers for all hours worked. (JX-D). The evidence presented at the hearing clearly indicated that these ten employees did mostly Tier A Demolition work or at least split time between Tier A and Tier B work: none of those employees was strictly a Tier B laborer. In addition, at least 20 of Respondents' employees were not identified on the certified payrolls even though they clearly worked at East 100th Street. (JX-D). Specifically, the hearing testimony of ten employee witnesses, as well as those employees' written statements or photos and video taken at the worksite identified that Hector Jiminez worked at East 100th Street even though his name never appears on Respondents' certified payroll reports. (Administrator's that Luis Pileo worked at East 100th Street despite his name not appearing in Respondents' submitted payroll records. (Administrator's Post-Hearing Brief, Appendix A; AX-41 p. 23, 24, AX-45A at 3, AX-46 at 1, AX-55 at 1; Tr. at 118, 161, 163, 203, 247, 255, 301, 324-325, 338, 362, 397, 445, 592, 765).

The certified payroll records provided by Respondents also do not show employees working more than eight hours each day or more than 40 hours per week which directly contradicts witness testimony and employee interview statements. (JX-D, AX-43 at 1, 4, AX-44 at 1, AX-45 at 1, AX-46 at 1, 4, AX-48 at 1, 4, AX-51 at 1, AX-52 at 1, AX-54 at 1, AX-55 at 6, AX-58 at 3, AX-59 at 1, AX-60 through AX-64; Tr. at 165, 233, 239, 278, 321, 355-357, 382-383, 390, 419, 426, 428, 435, 436, 584, 585, 742, 786-788, 793). Every employee testified that they usually worked between nine or ten hours a day on Monday through Saturday. (AX-43 at 1, 4, AX-45 at 1, AX-46 at 1, 4, AX-48 at 4, AX-51 at 1, AX-58 at 3, AX-59 at 1, AX-60 through AX-64; Tr. at 52, 165, 233, 239, 278, 321, 324, 355-357, 382-383, 390, 419, 426, 428, 435, 436, 584, 585, 742, 786-788, 793).

¹⁹ The Copeland (Anti-Kickback) Act makes it unlawful to induce, by force, intimidation, threat of procuring dismissal from employment, or otherwise, any person employed in the construction or repair of public buildings or public works, financed in whole or in part by the United States, to give up any part of the compensation to which that person is entitled under a contract of employment. The Copeland Act also requires each contractor and subcontractor to furnish weekly a statement of compliance with respect to the wages paid each employee during the preceding week. Contracts subject to the Copeland Act shall contain a clause (see 52.22210) requiring contractors and subcontractors to comply with the regulations issued by the Secretary of Labor under the Copeland Act. 18 U.S.C. § 874 and 40 U.S.C. § 3145.

Even the record of hours for Respondents' witness, Custodio Pomaquisa, shows longer hours than recorded by Respondents' certified payroll records. (JX-D; EX-10). For instance, Mr. Pomaquisa worked 10 hours each day on August 4th through August 8th and eight hours on Sunday, August 9, 2009. (EX-10; Tr. at 855-859). The record also supports finding that other employees also worked seven days a week. (AX-44 at 1, AX-45 at 1, AX-46 at 1, 4, AX-48 at 1, 4, AX-51 at 1, AX-52 at 1, AX-54 at 1, AX-55 at 6, AX-59 at 1; Tr. at 98, 166, 277, 325, 356, 390, 587, 792). Employees sometimes worked even longer hours. Joaquin Pablo, Clever Pauta and Procopio Pereda all testified that on certain occasions they worked past 6:00 p.m. (Tr. 94, 158-9, 383-384).

The certified payrolls provided by Respondents also erroneously list that Jover and Luperio Naranjo's close friends and family members worked at East 100th Street. (JX-D). Despite never being seen at East 100th Street, Franklyn Chiriboga, Fernando Penafiel, Fabian Avila, Gilberto Pauta, Gloria Feijo, Maria Paolo Feijo, and Gloria Sasquisila are regularly identified on Enviro's certified payrolls as "Laborers." (JX-D; Tr. at 336, 339, 364-365, 366, 399, 447, 448, 703, 705, 769). Luperio Naranjo, Jr. is also consistently shown on the certified payroll records, but never worked at East 100th Street. (JX-D, AX-54 at 1, AX-58 at 3, 9; Tr. at 78, 122-123, 183, 258, 298, 338, 363-364, 400, 446, 595, 768, 800-801).

Marcia Gonzalez, Jover Naranjo's sister and Luperio Naranjo Sr.'s daughter, is listed on the certified payroll records as a Demolition Tier B Laborer. (JX-D). In addition to employees testifying that Marcia Gonzalez did not do manual labor at the worksite, Ms. Gonzalez herself stated in her deposition testimony that she only worked in the office. (AX-16 at 22, AX-54 at 1; Tr. at 124, 259, 364, 401, 447, 596, 768).

Post-Hearing Brief, Appendix A; AX-41 at 30, 37, AX-46 at 1, AX-48 at 4, AX-49 at 2, AX-50 at 3, AX-58 at 4; Tr. at 65, 115, 252, 301, 333, 346, 395, 442, 762-3.). Likewise, ten employees acknowledged

All witnesses who worked at or visited the project site testified that Luperio Naranjo, Sr. oversaw the work of the crew, but he himself did not do laborer's work. (Tr. at 77, 122, 183, 258, 276, 338, 363, 400, 446, 595, 768, 787, 800). Luperio however, is shown on the payroll as a Demolition Tier A laborer for all hours worked. (JX-D). It is doubtful that Luperio Naranjo, Sr. worked as a Demolition Tier A laborer simply because Tier A work occurred inside the building and every employee, union official and investigator at the worksite indicated that Luperio Naranjo Sr. was always outside supervising the work of employees or sitting in the van. (JX-E at 68, 94, AX-17 at 51, AX-48 at 4; Tr. at 144, 213, 222, 232, 236-237, 258, 276-277, 363, 489, 526, 738, 800).

The employee hearing testimony revealed that Jover Naranjo was rarely at the worksite even though he is also consistently listed on the certified payroll records as a Demolition Tier A laborer. (JX-D, AX-45 at 1, AX-48 at 4, AX-50 at 3, AX-54 at 1, AX-55 at 6, AX-58 at 9, AX-59 at 1; Tr. at 78, 123, 141, 183, 258-259, 276-277, 364, 338-339, 400-401, 446, 465-466, 486, 488-489, 528, 595-596, 768, 800). When WHD investigators visited East 100th Street on September 1, 2009, Jover Naranjo was not at the worksite. (Tr. at 486). Nevertheless the certified payroll records for September 1, 2009 show Jover Naranjo working onsite for seven hours as a Demolition Tier A laborer. (JX-D at 17; Tr. at 465-466, 488-489). Employee testimony

repeatedly indicated that Jover Naranjo was rarely onsite. (JX-E at 80, 84, AX-42 at 3, AX-50 at 3, AX-54 at 1, AX-59 at 1; Tr. at 78, 94, 123, 486).

It must be concluded that Respondents' certified payroll records do not show the names of all of the employees actually working at East 100th Street. I find further that those records list individuals that never worked on the East 100th Street project, underreport the number of employees performing work at East 100th Street, misidentify the job classifications for those actually working at East 100th Street, identify correct prevailing wage rates and fringe benefits that were never paid to employees, and underreport the daily and weekly hours worked. (JX-D). *Star Brite Construction Co. Inc.*, 2000 W.L. 960260 (DOL Adm.Rev.Bd. June 30, 2000) (ARB Case No. 98-113) (Star Brite and its president were required to pay back wages and received the debarment sanction for a period of three years for falsely certifying and underreporting employee hours on certified payrolls in order to feign compliance with the prevailing wage requirements of the DBA and its implementing regulations).

Respondents failed to produce accurate independent records of hours worked, job classifications and pay rates during the investigation or at the hearing. (JX-D, AX-19 through AX-21; Tr. at 494, 531, 545-551). Investigators Bermudez and De La Rosa testified that Jover Naranjo never produced any sign-in sheets or time records other than the certified payroll records. (Tr. at 494, 531). SIA Coppola averred that she received daily sign-in sheets during the investigation from the general contractor, Lettire, but these records are clearly incorrect because they contain the same information as certified payrolls. (AX- 19, AX-20, AX-21; Tr. at 545-551).

The testimony of the employee witnesses at hearing repeatedly set forth the same account of job duties, wages paid, work conditions and practices at East 100th Street. The majority of employee witnesses and numerous interview statements indicate that Respondents' employees worked from 7:00 a.m. to 6:00 p.m., Monday through Saturday at East 100th Street. (AX-43 at 1, p. 4, AX-45 p. 1, AX-46 p. 1, p. 4, AX-48 at 4, AX-51 at 1, AX-58 at 3, AX-59 at 1, AX-60 through AX-64; Tr. at 165, 233, 239, 278, 321, 355-357, 382-383, 390, 419, 426, 428, 435, 436, 584, 585, 742, 786-788, 793).

The testimony of those witnesses, as well as their witness statements, also demonstrated that on Monday through Saturday employees received a one-hour unpaid lunch break. (AX-46 at 1; Tr. at 50, 93, 99, 158, 233, 237, 280, 322, 324, 355, 357, 382-383, 390, 427, 436, 585, 735, 787). Employees sometimes stopped work one hour early on Saturdays or on the Fridays that they were paid. (AX-51 at 1; Tr. at 158, 233-234, 239, 385, 435, 742, 793).

Respondents did not pay their employees on a weekly basis, but instead paid their employees every 15 days to three weeks.²⁰ (JX-E at 49; Tr. at 58-59, 111, 158, 329, 385, 435, 438, 588, 612, 791). Some, but not all employees also worked at East 100th Street on Sundays doing demolition work. (AX-54 at 1, AX-55 at 6; Tr. at 325).

In addition, every employee testified that they were paid either \$13.00 or \$15.00 an hour for all hours worked. (AX-46 at 1, AX-55 at 6, AX-58 at 4, AX-62; Tr. at 58, 100, 102, 110, 173,

²⁰ Contractors and subcontractors are further required to pay all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week. See 40 U.S.C.A. § 3142(c)(1).

177, 189, 241-242, 279-280, 329, 359, 391, 438, 612, 753, 790). The testimony also established that all employees did Tier A Demolition work, Tier B Demolition work, or a combination of the two. (Administrator's Post-Hearing Brief, Appendix A).

The hearing testimony presented with regard to job classification, pay rates and hours directly contradicts Respondents' certified payroll records. (JX-D). Therefore, I find Respondents' records cannot be relied upon as they are clearly falsified. *Sundex, Ltd.*, *supra* 1999 W.L. 1277545 at 5 (where submitted falsified payroll records to conceal the fact that the prevailing wages were not paid to their employees warranted three year debarment for the firm and its principal). All of the employees were cross-examined by Respondents and their testimony is reliable.

Administrator's evidence of a reasonable inference

In confronting such a situation of inaccurate records of hours worked and wages paid, where the back wage liability has to be computed by piecing together different records and evidence, I must apply the standard set by the Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) in determining how precise a reconstruction of such records must be. In *Mt. Clemens*, the Supreme Court held that where an employer failed to keep proper records in compliance with the Fair Labor Standards Act, an employee satisfies the burden of establishing a violation and back wage amount if he proves "that he in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687. At this point, "the burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence.

If the employer fails to produce such evidence, damages may be awarded the employee, even though the result be only approximate." *Id.* at 687-88. The *Mt. Clemens* standard makes it clear that where an employer's certified payroll records are inaccurate, the Administrator need only present sufficient evidence to allow the finder of fact to make a just and reasonable inference as to the amount of wages and fringe benefits owed. *See, e.g., In the Matter of: Trataros Construction Corporation*, 1993 W.L. 306698 (DOL W.A.B., April 28, 1993) (WAB Case No. 92-03).

The *Mt. Clemens* standard has been held to apply in Davis-Bacon violation cases. *Pythagoras General Contracting Corp.*, 2011 W.L. 1247207 (DOL Adm.Rev.Bd., March 1, 2011) (ARB Case Nos. 08-107, 09-007); *Thomas & Sons Building Contractors, Inc.*, 2001 W.L. 1031629 (DOL Adm.Rev.Bd., August 27, 2001) (ARB No. 00-050); *Milnor Construction Corp., et al.*, 1991 W.L. 494763 (DOL W.A.B., Sept. 12, 1991) (WAB Case No. 91-21). *Structural Services, a/k/a Unique Services Engineering Co.*, 1983 W.L. 144676 (DOL W.A.B., June 22, 1983) (WAB No. 82-13). Employers may not be rewarded for failing to keep accurate payroll records; rather employers must be prepared to suffer the consequences for such behavior.

In *Joseph Morton Company, Inc.*, 24 WH Cases (BNA) 1113 (March 18, 1980), the Wage Appeals Board held that:

Recordkeeping requirements, as the Fifth Circuit stated in *Wirtz v. Mississippi Publishing Corporation*, 364 F.2d 603, 607, 17 WH Cases 397 (5th Cir. 1966), “are the fundamental underpinnings of the Act, for only by relying on employers’ records can the Secretary of Labor with his limited facilities hope to be able to enforce the substantive provisions. Failure to keep accurate records can obscure a multitude of...violations.”

The employer’s burden, when no record is kept of the actual number of hours worked, is to “disprove” evidence that the Act was violated. *Shultz v. Hinojosa*, 432 F.2d 259, 261, 19 WH Cases 625 (5th Cir. 1970). This rule “cast(s) on the employer the burden of coming forward with evidence of the precise amount of work performed by each employee at the risk of a judgment for the amount shown.” *Wirtz v. Lieb*, 366 F.2d 412, 415, 17 WH Cases 447 (10th Cir. 1966) and the employer must prove his contention as to the number of hours worked by a “preponderance of the evidence.” *Skipper v. Superior Davies, Inc.*, 512 F.2d 409, 420, 22 WH Cases 272 (5th Cir. 1975).

When confronted with a payroll reconstructed by the Department of Labor, an employer is under a duty to prove or contradict that reconstructed payroll. *Joseph Morton Company, Inc.*, 1984 W.L. 161739 (DOL W.A.B., July 23, 1984) (WAB Case No. 80-15); *see also In the Matter of: Groberg Trucking, Inc., et al.*, (DOL Adm.Rev.Bd., November 30, 2004) (ARB Case. No. 03-137).

Here, Respondents have failed to produce precise records to refute the Administrator’s back wage computations. The only independent records of hours worked at East 100th Street are the clearly falsified daily sign-in logs including a double set of sign-ins for the same time period showing very different handwriting. (AX-19, AX-20, AX-21).

Many employee witnesses testified that the signatures that appeared next to their names on the daily sign-in sheets of record were forged. (AX-43 at 1; Tr. at 187-188, 262-263, 450-456). Richard Campoverde testified that the signature next to his name in not his own. (AX-19 at 55, 56, 57, 58, AX-21 at 18, 20; Tr. at 450-456). Manuel Pereda testified that the signatures appearing next to his name on sign in logs for one set of sign in logs dated August 26- 27, 2009 were not his own. (AX-19 at 48-49; Tr. at 262-263).

In absence of accurate time records, Respondents failed to present any witnesses to sufficiently contradict the Administrator’s reconstruction of the payroll records for the East 100th Street project during the relevant period. For example, although Respondents’ employee witness, Custodio Pomaquisa, testified that he worked at East 100th Street for a short time period, he testified that he worked between nine and ten hours each work day. (AX-10; Tr. at 856-859, 863). He also testified that he worked on Saturday. (Tr. at 860-862). Moreover, it should be noted that Mr. Pomaquisa’s name does not appear on the certified payroll records produced by Respondents. (JX-D). Respondents’ two other employee witnesses could not testify about East 100th Street because they never worked at the site. (Tr. at 868, 874).

Respondent Enviro argued in its post-hearing briefs that Administrator's back pay computations which initially included Ines Pesantez, Christian Godoy and Jose Rodrigo Canndo, were erroneous because those individuals did not work at East 100th Street project during the relevant period. *See* Enviro's Post-Hearing Brief at 5, 20. I note, however, that those employees were removed from the Administrator's final post-hearing back computations and Respondents did not present sufficient testimony that the remaining 37 employees discussed above did not work at East 100th Street. (Administrator's Post-Hearing Brief, Supplemental AX-1B; Tr. at 64, 82, 409, 782, 868).

SIA LaCroix had to reconstruct the number of hours worked by employees in each job classification in order to compute the back wages and fringe benefits allegedly owed to each of Respondents' employees because of Respondents' failure to identify all employees working at East 100th Street, list correct job classifications, weeks, days and hours worked and segregate hours worked in different job classifications on the certified payroll. SIA Croix did this by assembling information from different sources together into a single document. (AX-1, AX-1A). SIA LaCroix relied on analysis of check records, employees' personal records, the certified payrolls, employee testimony, interview statements and swipe card records to determine employee job classifications, the hours worked at the site in various job classifications and pay rates. (Tr. at 574-575).

According to *Martin v. Selker Bros., Inc.* 949 F.2d 1286, 1297 (3d Cir. 1991):

In the absence of adequate employer records of employees' wages and hours. . . the solution is not to penalize the employees by denying recovery based on an inability to prove the extent of undercompensated work, but rather to allow the employee or the Secretary to submit sufficient evidence from which violations of the Act and the amount of an award may be reasonably inferred.

Because employee pay rates were based on length of employment rather than job classification, it is evident that Respondents did not segregate hours worked into Tier A versus Tier B job classifications. The Administrative Review Board has held that it is incumbent upon an employer who utilizes employees in more than one job classification to ensure that those employees are properly paid for the various types of work performed and for the hours that such work was performed. *In the Matter of: P & N, Inc./Thermodyn Mechanical Contractors, Inc., et al.*, 1996 W.L. 697838 (DOL Adm.Rev.Bd., October 25, 1996) (ARB Case No. 96-116); *see also In the Matter of: Permis Construction Corp*, 1991 W.L. 494686 (DOL W.A.B., February 26, 1991) (WAB Case Nos. 87-55 and 87-56).

SIA LaCroix's hearing testimony reflected the language of 29 C.F.R. § 5.5(a)(i) which provides that when and if an employee performs work in two different job classifications, the employer can either pay the employee the higher wage rate for all hours worked or the employer must segregate the hours and the different types of work done by the employee and record them on the certified payroll. (Tr. at 566-567). *See also, Fry Brothers Corporation*, (DOL W.A.B., June 14, 1977) (WAB Case No. 76-06) (stating a construction contractor must be bound by classifications).

In the instant matter, the record fails to show that Respondents accurately segregated the hours and different types of work performed by its employees at East 100th Street. Therefore, Respondents were required to pay employees working in a dual role as Tier A and Tier B laborers the higher Tier A laborers rate for all hours worked. It is not required that the Administrator parse out time spent performing work in each classification. 29 C.F. R. § 5.5(a)(1).

Although 29 C.F.R. § 5.5(a)(1) and precedent indicate the higher wage rate should be paid for all hours worked when the employer fails to segregate time, in an effort to be conservative, for those employees that clearly worked as both Demolition Tier A and Tier B laborers, the Administrator recalculated back wages using a 70/30 Tier B to Tier A ratio.²¹ (*See* Administrator's Post-Hearing Brief, Supplemental AX-1B).

I find the final back pay computations proffered by the Administrator are based on reliable and appropriate evidence including employee interview statements, employee testimony, paychecks, as well as employee testimony at the hearing. I, therefore, adopt those back pay computations. Administrator's Post-Hearing Brief, Supplemental AX-1B.

Back wage entitlement of non-testifying employees

It is well established that non-testifying employees may be awarded back wages. *Pythagoras General Contracting Corp.*, 2011 W.L. 1247207 at 6; *Pegasus Consulting Group*, 2005 W.L. 1542545 (DOL Adm.Rev.Bd., June 30, 2005) (ARB Case Nos. 03-032, 03-033); *Cody-Zeigler, Inc.*, 2003 W.L. 231 14278 (DOL Adm.Rev.Bd., December 19, 2003) (ARB Case Nos. 01-014 and 01-015); *Apollo Mechanical, Inc.*, 1991 W.L. 494744 (DOL W.A.B., March 13, 1991) (WAB No. 90-42). In *R.C. Foss & Son, Inc.*, 1990 W.L. 484311 at 2, the Wage Appeals Board noted that “[i]t is permissible to award back pay to non-testifying employees based upon the representative testimony of a small number of employees. *Mt. Clemens Pottery Co.*, 328 U.S. at 687 (8 out of 300 employees testified); *McLaughlin v. Ho Fat Seto*, 850 F.2d. 586 (9th Cir. 1988) (5 out of 28 employees testified); *Donovan v. Williams Oil Co.*, 717 F.2d. 503 (10th Cir. 1983) (19 out of 34 employees testified); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d. 825 (5th Cir. 1973) (16 out of 26 employees testified). As noted in *Pegasus Consulting Group, Inc.*, *supra*, 2005 W.L. 1542545 at 18 (citing *Martin v. Selker Bros., Inc.*, 949 F.2d. at 1298):

²¹I note that the Administrative Review Board (“ARB”) has recently upheld the Administrator’s estimation that employees worked a percentage of their time in the higher paid classification in *Pythagoras General Contracting Corp. v. Administrator, Wage and Hour Division, USDOL*, ARB Nos. 08-107, 09-007, ALJ No. 2005-DBA-14 (ARB Feb. 10, 2011)(as reissued Mar. 1, 2011). In *Pythagoras*, the ARB stated: “If workers perform labor in more than one job classification, they are entitled to compensation at the appropriate wage rate for each classification according to the time spent in that classification, which time the employer’s payroll records must accurately reflect.” *Id.* at 12-13. However, the ARB accepted the Administrator’s back pay calculations which awarded employees percentages for time spent in each classification. For example, the Board affirmed back wages of 70% mason tender and 30% Tier B for specified date ranges and 100% Tier B for other date ranges; 70% mason and 30% Tier B for all hours; and 50% mason tender and 50% Tier B. *Id.* at 13-15. The ARB reiterated that the Respondent misclassified the employees as Tier B laborers without regard to the work performed at the higher mason tender rate and that the Respondent failed to segregate the hours spent performing the different jobs. *Id.* at 15.

It is not necessary for every single affected employee to testify in order to prove violations or recoup back wages. The testimony and evidence of representative employees may establish prima facie proof of a pattern and practice of FLSA violations.

In this case, in addition to other compelling evidence, 12 former Enviro and Gladiators' employees testified on behalf of 37 employees regarding the circumstances of their own employment and the employment of their co-workers at East 100th Street. This 12 out of 37 ratio is significantly higher than the ratio permitted for the above identified cases where the burden of proof was deemed to have been satisfied. Many employees' testimony referenced the job duties and pay of their fellow non-testifying co-workers. (*See* Administrator's Post-Hearing Brief, Appendix A).

Employees testified that Fausto Tigre worked at East 100th Street for a short time before injuring his leg. (AX-48 at 4; Tr. at 120, 256-257, 302, 398, 593-594, 767). Angel Lojano further testified that Fausto Tigre was paid \$13.00 an hour as were most other employees. (Tr. at 302-303). Angel Lojano also testified that Felix Matute removed garbage at East 100th Street. (Tr. at 301). Richard Campoverde and Angel Lojano testified that Luis Canndo did garbage removal at East 100th Street. (Tr. at 300, 441). Sergio Valera did not testify, but Antonio Torres noted that Mr. Valera is shown using the torch to cut metal in video footage. (Video AX-10 8:35, 9:00 (orange shirt)).

It is not required that, to establish a pattern or practice, the hearing testimony must contain references to all non-testifying employees. *Pythagoras, supra*, 2011 W.L. 1247207 at 6; "Such a requirement would thwart the purposes of the sort of representational testimony clearly contemplated by *Mt. Clemens*." *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985).

I find that the evidence presented at the hearing adequately represented the two classifications of work performed at East 100th Street by Respondents' employees. It overwhelmingly established that non-testifying employees were left off of the certified payrolls, paid at rates substantially lower than the prevailing wage rates and were not paid fringe benefits. Further, this evidence demonstrated that Respondents' employees consistently worked overtime but were not paid time and a half when they worked over 40 hours in a given work week. In light of the extensive substantiating evidence presented at the hearing, including employee testimony, statements and paychecks, I credit the representative testimony and find an award back wages to both the testifying and the non-testifying employees warranted.

Prime Contractor is liable for violations of its subcontractors

It is well-settled that a prime contractor is responsible for the back wages due employees of its subcontractor under the Act, and is responsible for ensuring that all persons engaged in performing the duties of laborer or mechanic on the construction site receive the appropriate prevailing wage rate. 29 C.F.R. §§ 5.5(a)(2), 5.5(a)(6); *Kos Kam, Inc.*, WAB Case No. 88-29 (WAB, Mar. 15, 1991); *Northern Colorado Constructors*, WAB Case No. 86-31 (WAB, Dec. 14, 1987); *Tap Electrical Contracting, Inc., & Calcedo Corp. & Expert Electric Inc.*, WAB Case No. 84-1 (WAB, Mar. 4, 1985); *In re Simpson Construction Co.*, 24 WH 484 (1979).

I find that, as the prime contractor, Hobbs-Ciena is also responsible for the wage underpayments by its subcontractors, Respondents Enviro and Gladiators. In *Sheridan Construction, Inc.*, Case No. 86-DBA-18, Decision of Administrative Law Judge, 6 WH Cases (BNA) 1409 (May 5, 1988), the ALJ held that:

The [Davis Bacon] Act imposes liability on the contractor, regardless of its knowledge of or involvement in, the violations. A contractor, on the other hand, should protect itself from a subcontractor's non-compliance either contractually via an appropriate damages clause, through audit, or with a performance bond.

See also Black Shield, Inc., 87-DBA-18 (September 14, 1988) (citing 29 C.F.R. §5.5(a)(6), and *1018 Development Co. Bracdell Associates, Inc.*, 79 DBA 231 (June 6, 1980)).

In *Tap Electrical Contracting, Inc. & Calcedo Corp. & Expert Electric, Inc.*, 1985 W.L. 167221 (DOL W.A.B., March 4, 1985) (WAB Case No. 84-1), the Wage Appeals Board adopted the ALJ's conclusion of law that prime contractors are not relieved of their obligations under the Davis-Bacon and Contract Work Hours and Safety Standards Acts even if they were not fully informed of the violations of the subcontractor until after they occurred. Monies were properly withheld from the prime contractors to satisfy the violations of the subcontractor. *See also Thomas & Sons Building Contractors, Inc., et al.*, 2001 W.L. 1584074, (DOL Adm.Rev.Bd., Aug. 27, 2001) (ARB Case No. 00-050); *Silverton Construction Co.*, (DOL W.A.B., Sept. 30, 1992) (WAB Case No. 92-09); *Kos Kam, Inc.*, (DOL W.A.B., March 15, 1991) (WAB Case No. 88-29); *R.C. Foss & Son, Inc.*, 1990 W.L. 484311 at 2; *Ball, Ball and Brossamer, Inc.*, (DOL W.A.B., Nov. 29, 1990) (WAB Case No. 90-18); *Northern Colorado Constructors, Ltd.*, (DOL W.A.B., Dec. 14, 1987) (WAB Case No. 86-31).

The case law also supports the conclusion that Respondents Enviro and Gladiators, as subcontractors, are also responsible for failing to pay the prevailing wage rate to their employees pursuant to the DBA. *Ray Wilson Co.*, ARB Case No. 02-086 (ARB, Feb. 27, 2004); *Arliss D. Merell, Inc.*, 1994-DBA-000041 (ALJ, Oct. 26, 1995) (subcontractors were found to be jointly and severally liable for the unpaid wages and fringe benefits owed to their former employees).

Debarment

The standard for debarment under the Act is set forth in the regulations at 29 C.F.R. § 5.12(a)(2), which provides in pertinent part:

In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any, who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible persons or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provision of the [Act].

Debarment has consistently been found to be a remedial rather than punitive measure so as to encourage compliance and discourage employers from adopting business practices designed to maximize profits by underpaying employees in violation of the Act. See *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990); *S.A. Healy Co. v. Occupational Safety and Health Review Comm'n*, 96 F.3d 906, 911 (7th Cir. 1996); *Minor Construction Co.*, 1995-DBA-00042 (ALJ, June 12, 1997). Debarment is an appropriate compliance tool because it discourages attitudes that violations of the Act will not be detected, and if they are, that said violations will be lightly treated by requiring only a confession of violation and restitution of back pay. *Phoenix Paint Co.*, WAB Case No. 97-8 (WAB, May 5, 1989).

Violations of the Act do not *per se* constitute a disregard of an employer's obligations within the meaning of Section 5.12(a) so as to result in automatic debarment. *Miller Insulation Co.*, WAB Case No. 91-38 (WAB, Dec. 30, 1992). To support a debarment order, the evidence must establish a level of culpability such as "aggravated or willful" and beyond mere negligence or inadvertent behavior. *A. Vento Construction*, WAB Case No. 87-51 (WAB, Oct. 17, 1990). For example, allowing violations to persist can constitute evidence of intent to evade or a purposeful lack of attention to a statutory responsibility in support of debarment. *P&N Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116 (ARB, Oct. 25, 1996).

In *A. Vento Construction*, the Wage Appeals Board explained that "[a]ctions typically found to be 'aggravated or willful' seem to meet the literal definition of those terms – intentional, deliberate, knowing violations of the Act." Furthermore, in *Hugo Reforestation, Inc.*, ARB Case No. 99-003, the Administrative Review Board adopted the Supreme Court's standard for establishing willful conduct under the Fair Labor Standards Act in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), which requires establishing that the "employer [knew] or showed reckless disregard for the matter of whether its conduct was prohibited by statute."

For reasons outlined in greater detail below, I find that the Administrator has established that Enviro, Gladiators, Jover Naranjo and Luperio Naranjo, Sr. acted in an aggravated or willful manner when they failed to pay the prevailing wages pursuant to the DBRA. First of all, the record supports finding that Respondent Jover Naranjo knew the East 100th Street project was subject to the DBA. Secondly, the clear falsification of Respondents' payroll records combined with the demonstrated underpayment of employees who worked on the East 100th Street project also supports finding aggravated or willful action on the part of Respondents. Finally, evidence showing that the retention of one of Respondents' employees, i.e., Clever Pauta, was conditioned upon his signing a declaration falsely stating he received the required prevailing wage also demonstrates aggravated or willful violations.

The record shows that Jover Naranjo was an experienced government contractor who had been involved in at least 30 prior federally funded projects. (JX-G at 16). Investigator Luis Bermudez averred that, at the initial conference in December 2009, Jover Naranjo admitted that he knew prevailing wage rates applied to East 100th Street. (Tr. at 495). The record also shows that since 1989 Jover Naranjo knew that Tier A and Tier B classifications required different pay rates. (JX-E at 70). In addition, he signed the subcontract which included a wage determination that clearly indicated in multiple locations that prevailing wage rates applied. (JX-C, JX-C1).

I find Jover Naranjo was familiar with that wage determination, as well as that the hourly rate plus fringe benefit equaled the hourly prevailing wage rate. (JX-E at 91). Further, Jover Naranjo was required to submit certified payroll reports on the East 100th Street project, a requirement on federal projects (29 C.F.R. § 5.5(a)(3)(i)). The certified payroll reports prepared and submitted to HPD misleadingly list the accurate wage determination wage rates, making it appear that those were the wages actually paid to employees working on the East 100th Street project. (JX-D, JX-E at 121).

The preponderant evidence of record, including the employee statements and hearing testimony reveal that Luperio Naranjo, Sr. was at the worksite of the East 100th Street project: he was the person in charge in August and September 2009 when union officials visited. (Tr. at 212, 223). Mr. Rodriguez, one of those union officials, handed out flyers to workers at East 100th Street on behalf of union that stated prevailing wages were to be paid on this project. (JXH at 92; Tr. at 211, 213-214). In fact, in video footage filmed on August 17, 2009, Luperio Naranjo, Sr., was identified by a union official, as taking these papers he received from the union with the wage rates and pasting them onto the worksite. (Video AX-68 at 35:23).

If Luperio Naranjo, Sr., did not have knowledge that East 100th Street was a prevailing wage project before the union officials arrived, I find he certainly had such knowledge in mid-August 2009. (JX-H at 92). Nevertheless, sub-standard wages were continuously paid to Respondents' employees from the start of the project in early August through at least February 2010. (AX-1, AX-1A; Administrator's Post-Hearing Brief, Supplemental AX-1B). The record fails to show that during the relevant period, Respondents made changes to correct their pay and recordkeeping practices. (JX-H at 55). Given Jover and Luperio Naranjo's full knowledge of their obligations, and their consistent failure to comply with the prevailing wage provisions, I find their violations of the DBRA requirements were intentional and aggravated or willful.

Deliberate underpayment, falsification of certified payrolls and omissions from the certified payrolls are examples of aggravated and willful conduct. *Stiley Painting Contractors, Inc. et al.*, 1991 W.L. 494717, (DOL W.A.B., March 29, 1991) (WAB Case No. 89-24). The WAB held in *All Sun Solar Energy Co. et al.*, 1990 W.L. 484317, (DOL W.A.B. Dec. 31, 1990) (WAB Case No. 88-20) that submission of falsified certified payrolls to simulate compliance with Davis-Bacon requirements is an action which constitutes "aggravated or willful" behavior under board precedent. Further, underpayment of wages coupled with falsified payrolls warrant debarment under the "aggravated or willful standard." *In the Matter of: Trataros Construction Cort*, 1993 W.L. 306698 at 6.

In the case of deliberate, willful falsification of certified payrolls, an employer should be debarred for three years. *In the Matter of: A. Vento Construction*, 1990 W.L. 484312 (DOL W.A.B., October 17, 1990) (WAB Case No. 87-S1); *In the Matter of: Brite Maintenance Corp.*, 1989 W.L. 407462 (DOL W.A.B., May 12, 1989) (WAB Case No. 87-07). *See also Gaines Electric Service Company, Inc.*, 1991 W.L. 494684 (DOL W.A.B., Feb. 12, 1991) (WAB Case No. 87-48) ("Falsification of certified payrolls is itself deliberate conduct that violates law and regulation; furthermore, submission of falsified payrolls raises a prima facie case that any accompanying underpayment of wages or overtime compensation was deliberately undertaken.").

Falsification of certified payroll in order to conceal that overtime was not being paid as required by CWHSSA constitutes “aggravated and willful” behavior and also warrants a three year debarment. *In the Matter of: Superior Masonry, Inc.*, 1995 W.L. 256782, (DOL W.A.B., April 28, 1995) (WAB Case No. 94-19).

In the instant matter, I find that the certified payrolls submitted by Respondents for East 100th Street were false. (JX-D). As discussed at length above, those payrolls of record identified inaccurate pay rates, underreported daily and weekly hours and misclassified employees. However, this level of falsification is heightened by the fact that about two-thirds of the employees who worked for Jover and Luperio Naranjo at the East 100th Street were not listed on the certified payroll at all as required by 29 C.F.R. § 5.5(a)(3)(i). (JX-D).

Despite being identified by employee witnesses at trial, Felipe Bareno, Luis Cajamarca, Sergio Campoverde, Luis Canndo, Manuel (Doe), Jose (Doe), Imelda Gomez, Hector Jimenez, Blanca Lopez, Ines Orbe , Procopio Pereda, Rodolfo Pereda, Luis Pileo, Custodio Pomaquisa, Hugo Pomaquisa, Jacinto Pomaquisa, Mauricio Sapeta, Fausto Tigre, Angel Oswaldo Lojano Tones, Antonio Tones and Sergio Valera were never listed on the certified payroll records submitted by Respondents. (Administrator’s Post-Hearing Brief, Appendix A; JX-D).

Employees Milton Barahona, Richard Campoverde, Darwin Celi, Sergio Celi, Rolando Fausto Criollo, Angel Lojano, Felix Matute, Pedro Bollivar Orellana, Pedro Pablo, Joaquin Pablo, Clever Pauta, Manuel Pereda, and Fernando Valdez were listed on the certified payrolls, but their weeks and hours worked were grossly underreported. (JX-D). For instance, Richard Campoverde testified that he started work on August 4, 2009, but his name does not appear on the payroll until a month later, week ending September 6, 2009. (JX-D at 19). This is the only week that Richard Campoverde’s name appears on the certified payroll. (JX-D).

Rolando Criollo and Angel Lojano both worked at East 100th Street project – generally as Tier A laborers – during the relevant period for approximately 60 hours per week. (AX-48 at 4; Tr. at 274, 277, 583-584; Administrator’s Post-Hearing Brief, Appendix A). They both were shown on the certified payrolls as Tier B laborers for weeks ending January 3, 2010 for 15 hours, January 10, 2010 for 21 .5 hours, January 17, 2010 for 23.5 hours, January 21, 2010 for 16 hours, February 7, 2010 at 8 hours for Lojano and 16 hours for Criollo, February 14, 2010 at 16 hours for Lojano and 8 hours for Criollo. (JX-D).

Joaquin Pablo worked continuously at East 100th Street between August 5, 2009 and October 10, 2009 but is only listed on the certified payroll for 28 hours for week ending August 30, 2009. (JX-D; Tr. at 156, 176, 190, 197). His brother, Pedro Pablo, worked only at East 100th Street as a Tier A laborer from August 4, 2009 through October 5, 2009, but was listed as working only 28 hours for week ending August 30, 2009 as a Tier B laborer. (JX-D, AX-65; Tr. at 786). Clever Pauta testified that he started working on August 4, 2009 and worked for three months. (Tr. at 422). He never appeared on the payroll when working, but was shown on the payrolls as working 5.5 hours for week ending February 7, 2010, after he left the site (JX-D). Manuel Pereda worked at East 100th Street from August 4, 2009 through early October and returned for about a week. (AX-66; Tr. at 241). The only time he was listed on the payroll was week ending December 6, 2009 for 14 hours. (JX-D).

Respondents' conduct was aggravated or willful and mandates full debarment. *Cody-Zeigler, Inc., supra*, 2003 W.L. 23114278 at 25; *Wayne J.G. Electric, Inc., supra*, 1993 W.L. 537380. Despite being fully aware that work classified as Tier A work would be done by many employees throughout the project, only one employee at issue in this case was classified as a Tier A laborer on the certified payrolls, i.e., Pedro Orellana, Jover Naranjo's uncle. (JX-D, JX-E at 36). All other individuals listed on the certified payrolls as Tier A Demolition Laborers never actually worked on the project. (JX-D). Respondents offered absolutely no explanation as to why these employees were put on the certified payrolls while the employees that actually worked were left off. I find this conduct willful and the sanction of debarment warranted.

Clever Pauta testified that, while employed by Respondents, but after leaving East 100th Street project, he went to the office one Friday to pick up his pay and Jover's secretary gave him a document to sign and notarize. (AX-52B; Tr. at 406, 407). It was an "Official Declaration" which was to "request that my name be removed from Case No. 11-DBA-00002 as an underpaid employee." (AX-52B). Mr. Pauta testified that, soon after receiving this document, he was contacted by Luperio Naranjo, Jr. about signing it, but he refused. (Tr. at 407-408). According to Mr. Pauta, the next day at work, Luperio Naranjo, Jr. told Mr. Pauta that he didn't have work there anymore, but then said, "[w]ell, if you sign the paper, then you have work." (Tr. at 408). Mr. Pauta maintained that he was fired upon his refusal to sign the document. (Tr. at 405).

Board precedent establishes that improper attempts of witness coercion or intimidation warrant debarment. *See Pythagoras General Contracting Corp., supra*, 2011 W.L. 729638 at 13. I find it reasonable to conclude that Luperio Naranjo, Jr. was acting on behalf of Respondents when he fired Clever Pauta. Case law also makes it clear that "aggravated or willful" violations of the DBRA call for a three-year debarment absent "extraordinary circumstances." *Trataros' Construction Corp., supra*, 1993 W.L. 306698 at 7; *A. Vento Construction, supra*, 1990 W.L. 484312 at 8.

I find that the record in this matter presents absolutely no extraordinary circumstances to preclude Respondents' debarment for a three-year period. The totality of circumstances illustrate that Respondents committed aggravated or willful violations of the DBRA and should be debarred from receiving and contracts or subcontracts for a period of three years.

In the Post-Hearing Brief or Argument submitted on behalf of Jover Naranjo, Respondent only addressed the issue of debarment. Jover Naranjo argues that he should not be debarred from federal construction contracts for three years because he has already lost business due to adverse publicity his business has received from this matter. In effect, Jover Naranjo contends he has already been subject to a *de facto* debarment. In addition, Jover Naranjo argues that he lacked the education and training necessary to achieve compliance with the applicable statutory requirements. The Post-Hearing Brief submitted on behalf of Enviro also asserts that debarment is not warranted because Enviro was not afforded such education and training.

I do not find the arguments of adverse publicity, deficient training or education on the applicable statutory requirements to be at all persuasive. It certainly does not explain or justify Respondents' falsification of payroll records to underreport hours employees worked or to misrepresent workers' identities.

Gladiators should also be debarred because it is sufficiently integrated with Enviro

Under the “single employer” or “integrated enterprise” doctrine, two companies may be considered so interrelated that they constitute a single employer subject to liability. *Keona Myers, et al.*, 2012 W.L. 3876171, ARB Case No. 10-144 (Aug. 3, 2012). *See also Armbruster v. Quinn*, 711 F.2d 1332, 1336-1337 (6th Cir. 1983) (Title VII); *York v. Tennessee Crushed Stone Ass’n.*, 684 F.2d 360 (6th Cir. 1982) (ADEA). The integrated employer test focuses on the following four factors to determine if two entities should be treated as a single employer for purposes of liability: (1) interrelation of operations, i.e., common offices, common record keeping, shared bank accounts and equipment; (2) common management, common directors and boards; (3) centralized control of labor relations and personnel; and (4) common ownership and financial control. *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722, 726-727 (N.D. Ala, 1981) (interchange of employees is an example of interrelation of operations). None of these factors is conclusive, and all four do not need to be met in every case. *Armbruster*, 711 F.2d at 1337-1338. *See also Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486 (3d. Cir. 2001).

The evidence of record supports finding that Enviro and Gladiators had interrelated operations: these business entities interchanged employees, shared office space, and shared equipment. Respondents had a number of employees working for them throughout the years and employees were not company specific.²² Jover’s companies were open simultaneously and employees moved between them. This was possible because employees were generally paid in cash and the type of work overlapped for at least three of his companies: Triple N, Enviro and Gladiators. (JX-I p, 12-13; Tr. 59, 111, 178, 243, 330, 360, 411 , 415-417, 439-440, 588, 754, 791). When active, Triple N when active did asbestos and interior demolition.²³ (JX-I at 12). Enviro did the same type of work as Triple N. (JX-I at 12-13).

Gladiators did complete demolition which included interior and exterior demolition. (JX-1 at 13). Enviro’s subcontract at East 100th Street was for interior demolition; because the work of Enviro and Gladiators overlapped, the employees could have worked for either corporation. (JX-E at 17).

Rolando Criollo who worked for Respondents since 2006 did not know which of Respondents’ companies he worked for at East 100th Street because, he stated, the company had “two or three names.” (Tr. at 586, 588). Procopio Pereda, another self-described longtime employee, similarly stated that he was “confused regarding which company was doing the work [at East 100th Street project] as there are 3 names.” (AX-45).

Many employees averred that they assumed Gladiators was their employer at East 100th Street because Luperio Naranjo, Sr., drove the van with the “Gladiators” logo to the worksite each and every day. (Tr. at 50, 74, 144, 157, 245, 328, 382, 429-430, 483-484, 528, 735, 787). Gladiators did do some work at East 100th Street. Documents provided by HPD, the contracting agency, indicate that “Luperio Naranjo Foreman, Enviro & Demo, stated that the prior 3 weeks entailed ‘Gladiator Contracting’ (31-48 82nd St Jackson Heights, NY 11370, Tele. # 718-803-

²² According to the deposition testimony of Jover Naranjo, Triple N was active from 1998 through approximately 2005, Enviro started in 2004 and Gladiators opened in 2005. (JX-G at 10-11, 13).

²³ According to the deposition testimony of Jover Naranjo, Triple N was owned by Jover and Luperio Naranjo Sr. (JX-G at 11).

0219 removing the roof flashing from 306 through 324.” (AX-25 at 3). The employees were not the only ones confused as to what company employed them. Even the general contractor used the company names interchangeably. (JX-I at 40, AX-22, AX-64). Identification badges provided to Respondents’ employees state “Gladiator Demolition.” (JX-I at 40, AX-22, AX-64).

Enviro and Gladiators also shared office space. From August 2009 through February 2010, Gladiators was located at: 31-48 82nd Street, 1st Floor, Jackson Heights, NY 11370 – the location where Luperio Naranjo Sr. lived and all employees working at East 100th Street (who Respondents have identified as having worked for Enviro during the relevant period) collected their pay. (JX-I at 8; Tr. at 59, 78, 111, 123-124, 177-178, 242, 329, 359-360, 376-377, 392, 438, 588, 754, 796-797). Edgar Avila was a foreman at East 100th Street and testified in his deposition that he currently works for Gladiators. (AX-17 at 12). He similarly stated that, when paid by Gladiators, he collected his pay at the office located at 82nd Street and 32nd Avenue in Queens. (AX-17 at 17).

Although Enviro and Gladiators technically did not share a bank account, Jover Naranjo was in charge of both companies and was able to transfer money between the companies “as needed.” (JX-I at 61, JX-F at 52). The record supports finding that the two companies consistently loaned each other large sums of money during the course of the East 100th Street project and there were never any contracts or formalities associated with these back and forth loans. (JX-I at 61, JX-F at 47-48). Enviro paid \$5,000 to Gladiators in August 2009. (AX-11 at 13). In September 2009, Enviro paid a total of \$41,000 to Gladiators. (JX-1 at 59-61, JX-1-1 at 20, 20(c) - 20(e)), AX-11 at 7, 11, 14, 15). Enviro paid \$71,000 to Gladiators in October 2009. (AX-11 at 16, 19, 22, 24). Enviro paid \$5,000 to Gladiators in November 2009. (JX-I at 64-5, JX-I-1 at 24, 24(b)). Gladiators, in return, wrote two checks to Enviro for a total of \$83,000 in November 2009. (JX-I at 61, JX-I-1 at 22, AX-14 at 27, AX-14A). A total of \$123,000 was paid from Gladiators to Enviro in December 2009. (JX-I at 70-72, JX-I-1 at 26-28, 30). Gladiators loaned Enviro \$40,000 in January 2010. (AX-14 at 39-40, AX-14A).

Further, equipment, including gloves and air filters were transported by Luperio Naranjo Sr., in the Gladiators van and used by employees working at East 100th Street. The employee hearing testimony showed that that the Gladiators van was at the worksite each day. (JX-I at 41; Tr. at 275, 355-356, 377, 428-429, 785). The E-Z pass bill, licensing fees and maintenance on Luperio Naranjo Sr.’s van were paid for by Gladiators. (JX-I at 38-39, 46). In addition, Jover averred in his deposition on behalf of Enviro, that, when active, Enviro owned no property. (JX-E at 102).

The factors for common management include common directors and officers. Enviro and Gladiators shared common management in that Jover Naranjo is President of both. *See, e.g., Armbruster*, 711 F. 2d at 1339 (finding common management where president of one company was also director and officer of the other); *McKenzie v. Davenport-Harris Funeral Home*, 834 F. 2d 930, 934 (11th Cir. 1987) (companies shared common president); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. 1977) (evidence of common management where the same person served as president of two corporations, and where family members were shareholders, officers and directors of both corporations).

Although there were no other officers at Enviro and Gladiators, Jover's family members worked at and helped him to run both companies. For example, Luperio Naranjo, Sr., was in charge at East 100th Street, was listed on Enviro's certified payroll as an employee and was identified as an employee of Gladiators on Gladiators tax documents. (AX-9; AX-17 at 35). Luperio Naranjo, Jr. was also shown as an employee of Gladiators on tax forms and also worked for Enviro. (JX-E at 29, AX-9). Edgar Avila, a cousin of Jover Naranjo, currently works for Gladiators and previously worked for Enviro. (AX-17 at 12, 21). In *EEOC v. Dolphin Cruise Line*, 945 F. Supp. 1550, 1554 (S.D.Fla. 1996) the court found common management were companies shared a common president and managers of two companies assisted each other in daily operations.

The third factor of centralized control looks at which company has the power to hire and fire employees and control employment practices. *See, e.g., Swallows v. Barnes & Noble Book Stores*, 128 F.3d 990, 995 (6th Cir.1997). "Courts have found centralized control where entities share policies concerning hiring, firing, and training employees, and in developing and implementing personnel policies and procedures." *Hukill v. Auto Care Inc.*, 192 F.3d 437, 444 (4th Cir. 1999). The employment practices for each company were similar because the preponderant evidence shows that Jover Naranjo ran them. Jover Naranjo signed all the checks for Gladiators and Enviro. (JX-E at 107, JX-I at 37). He also was the only person at both companies with authority to enter into contracts. (JX-I at 37-38). In addition, the by-laws for all of Jover Naranjo's corporations are the same. (JX-I at 36). Jover Naranjo also handled all complaints and grievances for Gladiators. (JX-I at 77).

Jover Naranjo stated that his father, brother, Luperio Jr., and his cousin, Edgar Avila have worked for Enviro and Gladiators. (JX-I at 79-80). Marcia Gonzalez who worked as the secretary in the office for Enviro sometimes did billing for Gladiators. (AX-16 at 34). In his deposition testimony, Edgar Avila stated that pay practices were the same for both Enviro and Gladiators: for example, he was paid at the office in Queens by the Secretary on Fridays when he worked for both companies. (AX-17 at 17). Edgar Avila also stated that Enviro and Gladiators did the same type of work. (AX-17 at 18). Finally, Enviro and Gladiators clearly had common ownership and financial control because Jover Naranjo is the sole owner of both companies. (JX-E at 8, JX-I at 6).

I find that the evidence of record has established that Gladiators was associated with the project at East 100th Street project (AX-25 at 3). In addition, I find further that the management, daily practices and procedures for Enviro and Gladiators were so intertwined that they must be treated as a single employer for debarment purposes.

Luperio Naranjo Sr. should be debarred as a "responsible officer"

Luperio Naranjo, Sr. did not hold an official title at Enviro or Gladiators. (JX-H at 16-17). However, the evidence of record supports my finding that he acted as a responsible officer of the subcontractor, at least with respect to the East 100th Street project.

Although 29 C.F.R. § 5.12 (a)(1) does not explicitly provide for debarment of "responsible officers," the case law and the Secretary's interpretations of his own regulations, to which deference is owed, establish that responsible officers may be debarred under the Davis

Bacon Related Acts. *Facchiano Constr. Co., Inc. v. U.S. Dep't of Labor*, 987 F.2d 206 (3d Cir. 1993); *see also Marques Enterprises, Inc., supra*, 1992 W.L. S 15945 at p. 5, (finding respondent to be a responsible officer for purposes of CWHSSA because he was the vice president of the corporation during the violation period and was in charge of monitoring the construction site), *overturned in part on other grounds*, Nos. Civ. A. 92-5876, 1993 W.L. 259446 (E.D.Pa. 1993). Corporate officers and essential personnel who actively participate in a corporation's daily operations during the violation period are considered to be officers responsible for the corporation's violation. *Padreda*, 1987, W.L. 247050 (DOL W.A.B., August 3, 1987) (WAB Case No. 87-01) (debaring a partner as a responsible officer who took active part in everyday business operations and should have been on notice about the corporation's Davis-Bacon related act violations); *Hugo Reforestation, Inc.*, 2001 W.L. 487727, (DOL Adm.Rev.Bd., April 30, 2001) (ARB Case No. 99-003, ALJ Case No. 97-SCA-20) (finding company's owner and president was a "responsible officer" and the person responsible for the company's day-to-day operations, and therefore debarred for Davis Bacon Related Act violation). Case law has also established that a foreman can be considered a responsible officer, *Trataros Constr. Corp.*, 1993 W.L. 306698 at 3.

Twelve employees, as well as union officials and Wage and Hour Investigators, testified that Luperio Naranjo, Sr. oversaw and directed the day-to-day operations at East 100th Street. (AX-18, AX-48 at 9; Tr. at 48, 51, 94, 96, 122, 161, 212, 223, 232, 275, 295, 322-323, 338, 351, 380-381, 429, 432, 445-446, 484, 526-527, 586-587, 595, 736, 799). He hired all of the employees, disciplined them and terminated employment. (Tr. at 48, 156, 259, 284, 321, 581, 802-803). He was at the worksite every day and gave employees their instructions and job duties. (Tr. at 275, 323, 738). He even gave orders to Edgar Avila. (Tr. at 61, 161, 183). Luperio Naranjo, Sr., provided employees with gloves and masks. (Tr. at 157, 185, 279, 382, 354, 427, 430, 528, 735). He told employees what they would be paid, when they would be paid and they collected their pay at his house. (Tr. at 58-59, 81, 110, 329, 359, 436, 587-588, 751, 754, 792). His daily actions at the worksite for the entire duration of the project clearly indicate that he was the person in charge.

I find Luperio Naranjo, Sr., knew that the employment practices at the East 100th Street were prohibited because, according to the testimony of many employee witnesses, he made numerous efforts to cover them up during the course of the Department of Labor's investigation. He specifically told employees how to lie to investigators about their hourly pay rates. For example, Pedro Pablo averred that Luperio Naranjo Sr. told him to say he was being paid \$33.00 an hour and that Procopio Pereda was being paid \$30.33. (Tr. at 128, 801). That rate is comparable to the required \$33.15 hourly rate to be paid to Tier B Demolition Laborers. (JX-C, JX-C-1).

Rolando Criollo, Ines Orbe, Joaquin Pablo, Manuel Pereda, and Rodolfo Pereda also testified that Luperio Naranjo, Sr. instructed them to lie about their pay rates if ever questioned by investigators. (Tr. at 81-82, 189-90, 265, 270-271, 341-342, 599-600). Employee witnesses also testified that Luperio Naranjo, Sr. also required employees to underreport their work hours and days worked if questioned by investigators. (Tr. at 189-190, 283, 599-600).

According to employee witness testimony, Luperio Naranjo, Sr. also snuck employees without identification into the worksite at East 100th Street when a security guard was placed at the entrance and identification was required to enter. (AX-49 at 1, 7; Tr. at 358, 369).

Luperio Naranjo's level of involvement is evidenced by the testimony of various employee witnesses that he told them to identify themselves as other individuals to DOL investigators and onsite security at East 100th Street: individuals who were not, in fact, working at East 100th Street. The names of those individuals to be provided to DOL investigators and onsite security at East 100th Street were those of Respondents' friends and family members coincidentally listed on the certified payroll records which Respondents submitted. (JX-D; Tr. at 769, 770-771).

For example, Rolando Criollo testified that Luperio Naranjo Sr. told him to use the name "Fabian Avila." (Tr. at 600). Procopio Pereda averred that Luperio Naranjo Sr. told him that that he was "Fernando Penafiel" if ever questioned and wrote the name down in Procopio Pereda's personal records. (AX-66 at 9; Tr. at 109-110). Imelda Gomez, Ines Orbe and Blanca Lopez stated that Luperio Naranjo Sr. told them to give the name "Gloria Feijo," if ever asked. (Tr. at 365, 366). Angel Lojano's original "Gladiator Demolition" ID card had his picture with the name of "Franklyn Chiriboga." (AX-64; Tr. at 285-286). Angel Lojano testified that he was verbally reprimanded and threatened by Luperio Naranjo Sr. for asking to have an identification card in his own name. (AX-65; Tr. at 287).

The preponderant testimony has established that Luperio Naranjo was intricately involved with his son in the aggravated and willful avoidance of paying the required prevailing wages at the East 100th Street project. Luperio Naranjo Sr.'s conduct warrants the imposition of the debarment sanction against him.

An adverse inference will not be drawn from Respondents' failure to testify

In his Post-Hearing Brief, the Administrator argues that an adverse inference should be drawn from Respondents' "failure to call Luperio Naranjo Sr. or Edgar Avila to testify at the hearing." Administrator's Post-Hearing Brief at 100. The Administrator cited the overwhelming evidence of record showing that both Luperio Naranjo, Sr. and Edgar Avila were "bosses [who] worked at East 100th Street." *Id.* (See also JX-E at 117, AX-18; Tr. at 61, 161, 223, 387, 526-527, 789).

The Administrator contends that Respondents' failure to call its own managerial employees as witnesses at the hearing should give rise to an adverse inference against Respondents. I disagree. As the Administrator is well-aware, Respondent Luperio Naranjo Sr. had previously asserted his Fifth Amendment right to avoid self-incrimination during his deposition testimony taken in the instant matter. (Binder J-6, JX-H). Although not expressly raised by Respondents at the hearing, I find it reasonable to conclude the failure to call Luperio Naranjo, Sr. as a witness, more likely than not, related to further invocation of his Fifth Amendment right.

While I may have the discretion in this civil administrative matter to draw the adverse inference, I decline to do so. Given the overwhelming affirmative evidence of record presented

including employee witness testimony, I do not find that the Administrator has been significantly disadvantaged by Respondents' failure to call managerial witnesses such as either Luperio Naranjo, Sr. or Edgar Avila, and due process would be compromised if I were to draw an adverse inference from such failure.

No judicial notice of Respondents' post-hearing criminal convictions and sentencing

By letters dated November 25, 2013 and April 20, 2014, the Administrator submitted requests that I take judicial notice of Jover Naranjo and Luperio Naranjo Sr.'s post-hearing criminal convictions and sentencing.²⁴ Respondents did not submit any response to the Administrator's requests.

29 C.F.R. § 18.54(a) provides that "[w]hen there is a hearing, the record shall be closed at the conclusion of the hearing unless the administrative law judge directs otherwise." The record in the instant matter was deemed closed upon receipt of the post-hearing briefs from Administrator and Respondents. Furthermore, 29 C.F.R. § 18.54(c) restricts the evidence which may be accepted after the close of the record: "Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c).

Newly discovered evidence must have been in existence when the record was open to be admitted. In *Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-22 (ARB Nov. 30, 2009), a party sought reconsideration of an ALJ's decision because a witness had been convicted of crimes after the record closed. *Id.* The ARB relied upon the standard found in 29 C.F.R. § 18.54(c) and held that the evidence of post-hearing conviction "cannot be admitted because it was not only not readily available at the hearing, it did not even exist.

For new evidence to be admitted under 29 C.F.R. § 18.54(c), it is necessary that it was in existence at the time of the hearing." *Shields*, slip op. at 8 (citing *Timmons v. Mattingly Testing Servs.*, ARB No. 97-082, ALJ No. 1995-ERA-040, slip op. at 2 (ARB June 21, 1996); *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363 (5th Cir. 1978); *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1299 (9th Cir. 1991)); *See also Varnadore v. Oak Ridge National Laboratory*, ARB No. 99-121 (ARB July 14, 2000) (to constitute "newly discovered evidence" within the meaning of Rule 60(b)(2), the evidence must have been in existence at the time of trial). Evidence must be in existence at the time of trial, otherwise there could be perpetual continuation of all trials. *N.L.R.B. v. Jacob E. Decker and Sons*, 569 F.2d 357, 364 (1978) (quoting *Prostrollo v. University of South Dakota*, 63 F.R.D. 9, 11 (D.S.D.1974)).

Upon due consideration, I find that the record closed after the hearing upon receipt of the parties' post-hearing briefs. I find further that the proffered evidence which constitutes the Administrator's requests for judicial notice does not comply with the applicable rules for the submission of evidence after the record is closed. Therefore, I must deny Administrator's post-hearing request that judicial notice be taken of the criminal convictions and sentencing of Respondents Jover Naranjo and Luperio Naranjo.

²⁴ Included with these letters were copies of press releases issued by the United States Attorney's office detailing the convictions and sentencing in the United States District Court, Southern District of New York.

CONCLUSION

Respondents are found to have committed violations of the DBRA. These violations include the failure to pay 37 employees identified herein for all the hours they worked and the failure to pay those employees the proper prevailing wage rates and fringe benefits. Enviro and Gladiators owe a total of \$656,646.93 to those employees. Because, the DBRA violations found herein are deemed to have been aggravated or willful, Enviro, Gladiators, Jover Naranjo and Luperio Naranjo, Sr., must be debarred for a period of no more than three years.

ORDER

It is hereby ORDERED:

1. Respondents Enviro & Demo Masters and Gladiators Contracting Corp., Jover Naranjo, and Luperio Naranjo, Sr., are liable for payment of back wage amounts to the employees of Enviro & Demo Masters, herein specified, in the total amount of \$656,646.93.
2. Hobbs Ciena Associates, L.P., Hobbs Ciena Housing Development Fund Corporation as the prime contractor, is jointly and severally liable for payment of back wage amounts to the employees of its subcontractor, Enviro & Demo Masters, herein specified, in the total amount of \$656,646.93.
3. The funds presently withheld by the New York City Housing Preservation Department, as the contracting agency for the construction of the East 100th Street project, shall, to the extent of the Respondents' liability, be released to the United States Department of Labor, to be distributed by the Department of Labor to the specified employees. Such amounts shall be credited against the liabilities of the Respondents specified herein.
4. For aggravated or willful violations of the Davis Bacon and Related Acts, Respondents Enviro and Demo Masters, Inc., Gladiators Contracting Corp., Jover Naranjo and Luperio Naranjo, Sr. be debarred under 29 C.F.R. § 5.12(a)(1) of the regulations implementing the Davis-Bacon Act for a period not to exceed three years and for that period be ineligible to receive any contract or subcontract subject to any of the statutes listed in 29 C.F.R. § 5.1.

LYSTRA A. HARRIS
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.