



**Issue Date: 11 June 2013**

Case No.: **2012-DBA-00006**

In the Matter of:

Proposed debarment for labor standards violations by:

**NCC ELECTRICAL SERVICES, INC.,**  
*Subcontractor/Respondent,*

and

**JERRY NAPIE,**  
*Individually/Respondent,*

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

**ORDER GRANTING THE ACTING DEPUTY ADMINISTRATOR'S MOTION  
FOR RECONSIDERATION AND FOR SUMMARY DECISION**

This matter arises under the Reorganization Plan No. 14 of 1950, 64 Stat. 1267, the Davis-Bacon Act ("DBA"), as amended, 40 U.S.C. § 3141, *et seq.*, and the applicable regulations issued thereunder at 29 C.F.R. Parts 5 and 6.

On May 16, 2013, I issued an Order Granting in Part and Denying in Part the Acting Deputy Administrator's Motion for Summary Decision. On May 28, 2013, the Acting Deputy Administrator ("Administrator") filed a Motion to Reconsider and Supplement Her Motion for Summary Decision ("Recon. Mot."). Any answer from Respondents to the motion was due on or before June 10, 2013.<sup>1</sup> No timely answer in support of, or in opposition to, the motion has been received. After reviewing the Administrator's motion, and the exhibit attached thereto, I find the motion should be granted for the reasons set forth below.

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<sup>1</sup> OALJ's rules provide that answers in support of, or in opposition to, motions may be filed within ten (10) days after a motion is served. 29 C.F.R. § 18.6(b). The certificate of service attached to the Administrator's motion states that a copy of the motion was served on Respondents by mail on May 24, 2013. OALJ's rules further provide that, in computing any period of time under the rules, five (5) days are added to the prescribed period whenever a party has the right to take action after a pleading has been filed by mail. 29 C.F.R. § 18.4(c)(3). Fifteen days from May 24 is Sunday, June 9, 2013. Since the due date falls on a Sunday, it carries over to the next business day, 29 C.F.R. § 18.4(a), which was Monday, June 10, 2013.

## I. ARGUMENT IN SUPPORT OF RECONSIDERATION

According to the Administrator, reconsideration of my finding that the Davis-Bacon Act violations by Respondents NCC Electrical Services, Inc. and Jerry Napie did not rise to a level of culpability beyond mere negligence is warranted because the deposition testimony of Tom Tapaha, which was not submitted in support of the previously-filed motion for summary judgment, establishes that Respondents failed to pay the prevailing wage for electricians to workers classified as “apprentices” or “laborers” despite the fact that those employees were performing electrical work during the course of their employment by Respondents. Recon. Mot. at 2-3. The Administrator further states that Respondents knowingly misclassified these employees to avoid paying them at the higher prevailing wage rate and their submission of falsified certified payroll records to cover up these underpayments demonstrates a level of culpability beyond mere negligence which supports the Administrator’s motion for summary judgment on the issue of debarment. *Id.* at 3.

In the deposition testimony of Tom Tapaha attached to the motion for reconsideration, Tapaha testified that he worked for Respondents as a foreman and field supervisor on the Ojo Encino project from May 2009 until around January 2010. Administrator’s Exhibit (“AX”) 161. His duties included laying out the jobs for Respondents’ journeymen electricians and “helpers” and coordinating with the other sub-contractors on the project. *Ibid.* Tapaha was a licensed journeyman electrician, and during the course of the project he demonstrated certain tasks performed by electricians, such as bending conduit, mounting boxes, running short pieces of conduit, and making short box offsets, to Respondents’ “helpers” who were neither journeyman electricians nor enrolled in an approved apprenticeship program to become journeyman electricians. AX 162-64.

Tapaha started working in an approved union apprenticeship program in Albuquerque, New Mexico around 1992 and continued in that program for four years before he took the test to become a licensed journeyman electrician. AX 164-65. He currently holds a journeyman electrician’s license, is required to take 16 hours of training every three years to stay current on building and electrical code requirements, and must renew his journeyman electrician’s license every three years. AX 165.

When Tapaha first discussed working on the Ojo Encino project with Jerry Napie, Napie suggested that Tapaha could “save him some money since [he] lived in Pueblo Pintado, which is only 26 miles away from Ojo Encino.” AX 166. Napie offered to pay Tapaha \$26 per hour to work on the project, but Tapaha told Napie he had to pay the higher applicable wage rate for electricians under the Davis-Bacon Act. *Ibid.* During their discussions, Tapaha also informed Napie that he was required to have an approved apprenticeship program or he would have to pay his “so-called helpers journeyman wages.” AX 167-68. Tapaha was paid the applicable Davis-Bacon wage rate while working for Respondents. AX 168.

According to Tapaha, he and other journeymen working for Respondents told the “helpers” that they should be getting journeyman wages because they were not in an apprenticeship program. AX 169. The “helpers” were performing electrical work, such as

“bending ridged conduit with a hydraulic bender, cutting ridged conduit, threading conduit, gluing PVC in the trench, stubbing them up where they need to go inside the rooms and bending [EMT] conduit as well,” from the time that Tapaha first arrived on the job site. *Ibid.* They were also “[pulling wires], installing fixtures, trimming out, which includes the wall receptacles, light switches, installing panels, gutters, everything that – as far as the electrical work what an electrician does.” AX 170, 176. Tapaha testified that laborers should not be allowed to perform any of these duties. AX 171. During the course of the Ojo Encino project, Respondents’ “helpers” performed the duties of both an electrician and a laborer under the supervision of a journeyman. AX 172, 176.

While Tapaha worked for Respondents on the Ojo Encino project, he periodically spoke to Jerry Napie about Davis-Bacon wage requirements. AX 172. Tapaha could tell Napie did not like to discuss the subject. AX 173. Jerry Napie knew that he was supposed to pay Davis-Bacon wages to his employees on the Ojo Encino project because Tapaha and other journeymen, including Napie’s nephew, told him so. AX 178. Tapaha had specific conversations with Napie about “paying laborers as electrician[s] if they were performing electrical work.” *Ibid.*

## II. DISCUSSION

### A. LAW

#### 1. Reconsideration

Neither the DBA regulations nor the OALJ’s rules of practice and procedure provide for reconsideration. In such instances, the Federal Rules of Civil Procedure must be applied. 29 C.F.R. § 18.1(b). Although the Federal Rules of Civil Procedure do not expressly recognize motions for reconsideration, they state in relevant part that:

[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.

Fed. R. Civ. Pro. 54(b).

My May 16, 2013 order granted in part, and denied in part, the Administrator’s motion for summary judgment seeking debarment of Respondents. The order granting partial summary judgment was thus an interlocutory order, *American Canoe Ass’n, Inc. v. Murphy Farms, Inc.*, 326 F.3d 505, 514 (4<sup>th</sup> Cir. 2003), which is subject to revision within my discretion. *See Fayette Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469 (4<sup>th</sup> Cir. 1991) (“An interlocutory order is subject to reconsideration at any time prior to the entry of a final judgment.”); *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 185 (5<sup>th</sup> Cir. 1990) (“[B]ecause the denial of a motion for summary judgment is an interlocutory order, the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law.”).

Inasmuch as it is within my discretion to do so, and the evidence now proffered by the Administrator is directly relevant to my determination to partially deny summary judgment, I will grant the motion for reconsideration and decide whether this evidence justifies summary judgment on the issue of debarment.

## 2. Summary Judgment

As noted in my prior order, OALJ's rules provide that an Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d). This section is modeled on Rule 56 of the Federal Rules of Civil Procedure which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A "material" fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). All evidence and factual inferences are viewed in the light most favorable to the non-moving party. *Stauffer v. Wal-Mart Stores, Inc.*, USDOL/OALJ Reporter (HTML), ARB No. 99-107, ALJ No. 99-STA-21 at 6 (ARB Nov. 30, 1999) (citing *Anderson Liberty Lobby, Inc.*, *supra.*). Whether a "genuine" issue can be said to exist with respect to a material fact is often a close question, but clearly the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder. *Anderson v. Liberty Lobby, Inc.*, *supra*, 477 U.S. at 255; *Betaco, Inc. v. Cessna Aircraft Co.*, 32 F.3d 1126, 1138 (7th Cir.1994).

## 3. Davis-Bacon Requirements.

Although the relevant requirements of the Davis-Bacon Act and regulations are set forth in my May 16, 2013 Order, they are repeated here for convenience.

The DBA requires that any contractor or subcontractor entering into a construction contract with the federal government valued in excess of \$2,000 must pay a "minimum wage" to the various classes of mechanics or laborers they employ. 40 U.S.C. § 3142(a). The Administrator determines these minimum wages based on the "rates prevailing in the area where the work is to be performed or from rates applicable under collective bargaining agreements." 40 U.S.C. § 3142(b); 29 C.F.R. Part 1; *Wicke*, ARB No. 06-124, at 2 (Sept. 30, 2008). The rate for each class of worker is set forth in a "wage determination," and each contract subject to the DBA must contain a provision which states the minimum wages to be paid to the various classes of workers. 40 U.S.C. § 3142(a).

Contractors or subcontractors who are found to have "disregarded their obligations to employees" under the DBA are subject to being debarred from any contract or subcontract with

the U.S. government for three years. 40 U.S.C. § 3144(b); 29 C.F.R. § 5.12(a)(2). However, “[v]iolations of the DBA do not *per se* constitute a disregard of an employer’s obligations within the meaning of Section 5.12(a)(2). . . .” *Thermodyn Contr., Inc.*, ARB No. 96-116, ALJ No. 94-DBA-72, at 5 (ARB Oct. 25, 1996) (citing *Framlau Corp.*, WAB No. 70-05, Apr. 19, 1971, slip op. at 4-5). “To support a debarment order, the evidence must establish a level of culpability beyond mere negligence.” *Id.*; see also *Sundex, Ltd.*, ARB No. 98-130, ALJ No. 94-DBA-58, at 6 (ARB Dec. 30, 1999); and *J.B.M. Serv., Inc.*, OALJ Nos. 2001-DBA-13, 2001-SCA-19, at 7 (OALJ Aug. 1, 2003). The Wage and Appeals Board (“WAB”), and its successor the Administrative Review Board (“ARB”), have found an employer’s underpayment of prevailing wages and the submission of falsified certified payrolls to mask the underpayment sufficient evidence of a level of culpability beyond mere negligence. See *Star Brite Constr.*, ARB No. 98-113, ALJ No. 97-DBA-12, at 8 (ARB June 30, 2000); *R.J. Sanders, Inc.*, WAB No. 90-25 (WAB Jan. 31, 1991). Once an employer is determined to have disregarded its obligations to its employees, a three-year debarment period is mandatory, without consideration of mitigating or extraordinary circumstances. *Thomas & Sons Bldg. Contr., Inc.*, ARB No. 00-050, 1996-DBA-33 (ARB Aug. 27, 2001).

## **B. ISSUE**

Based on the evidence then before me, I found in my May 16, 2013 order that there was no genuine issue of material fact regarding whether the subcontract under which Respondents were employed was subject to the provisions of the DBA, Jerry Napie was a “responsible officer” under the DBA, and Respondents falsely certified that nine of their employees were properly classified as “apprentices” during the course of their work on the Ojo Encino Day School Project inasmuch as NCC Electrical Services did not have a bona fide, approved apprentice program during the life of the subcontract. Order Granting in Part and Denying in Part the Administrator’s Motion for Summary Decision (“May 16, 2013 Order”) at 7-8. I further found, however, that the evidence then proffered by the Administrator failed to show: (1) the work performed by employees classified as “laborers” or “apprentices” was work performed by a journeyman electrician, (2) there was conflicting evidence regarding the number of Respondent’s employees working at the Ojo Encino Day School on various days, and (3) the evidence of record failed to establish that employees classified as “laborers” and “apprentices” should have been paid at a higher wage rate. *Id.* at 9-10. I thus determined that viewing the evidence in the light most favorable to Respondents, debarment of Respondents was not warranted inasmuch as the Administrator had failed to show that Respondents were more than merely negligent when they certified that their employees were in a bona fide apprenticeship program. *Id.* at 11.

### **1. DBA Violations Based on Prior and Newly Submitted Evidence.**

In its original motion for summary decision, the Administrator argued that Respondents misclassified 10 of their employees as “laborers,” despite the fact they were performing electrical work, and that Respondents paid these 10 employees at a lower wage than they were entitled to in violation of the DBA. MSD 15-16. However, based on the descriptions of the duties for “Journeyman Electrician” and “Wireman or Technician (inside)” in the New Mexico Administrative Code, I found that “carrying conduit” and “pulling wires,” duties shown to have been performed by employees classified by Respondents as “laborers” and “apprentices,” were not necessarily duties associated with either a “Journeyman Electrician” or a “Wireman or

Technician (inside).” Construing Napie’s deposition testimony that Respondents’ workers “carr[ie]d conduit, pull[ed] wires, and assist[ed] the journeyman” in the light most favorable to Respondents, I therefore found that summary decision was not warranted.

The testimony of Tom Tapaha makes clear that Respondents’ non-journeyman electrician employees, classified variously as “helpers,” “laborers” and “apprentices,” were performing work on the Ojo Encino project which should have been performed only by licensed journeyman electricians or apprentices enrolled in a bona fide, approved apprenticeship program. As noted above, from the time that Tapaha first arrived on the job site these employees were performing electrical work at various times, such as “bending ridged conduit with a hydraulic bender, cutting ridged conduit, threading conduit, gluing PVC in the trench, stubbing them up where they need to go inside the rooms and bending [EMT] conduit as well.” AX 169. They were also “[pulling wires], installing fixtures, trimming out, which includes the wall receptacles, light switches, installing panels, gutters, everything that – as far as the electrical work what an electrician does.” AX 170, 176.

Contractors performing work under a DBA contract are required to maintain individualized documentation of the time a worker spends in each classification of work when that employee performs work in multiple classifications. *Pythagoras General Contracting, Corp.*, ARB Nos. 08-107, 09-007, ALJ No. 2005-DBA-00014, at 7 (ARB Mar. 1, 2011); 29 C.F.R. § 5.5(a)(1). When a contractor fails to maintain such records, an Administrative Law Judge may find that employees performing work in multiple classifications are entitled to be paid at the higher wage rate classification for whatever period of their employment they worked in the higher classification as established by alternative evidence, such as the testimony of employees or the compliance officer’s reconstruction of time worked. *Trataros Construction Corp*, WAB Nos. 87-55 & 87-56 at 4 (WAB Feb. 26, 1991) citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

Respondents’ payroll records do not document when workers identified as laborers or apprentices performed work as journeyman electricians. Although all workers identified as journeyman electricians on Respondents’ certified payroll records received the correct prevailing wage rate of \$33.14 per hour plus fringe benefits, workers classified by Respondents as apprentices and laborers were paid somewhere between \$20.55 and \$25.00 per hour, which rate included fringe benefits. AX 54-104. Respondents admit that they failed to furnish employees engaged in electrical work the wages and fringe benefits required under the subcontract. AX 25. The undisputed material facts thus establish that Respondents failed to pay non-journeyman electricians the wage rate for journeyman electricians to which they were entitled in violation of the DBA and applicable regulations.

**b) State of Mind.**

As I noted previously, in addition to proving actual violations of the DBA, the Administrator must show that Respondents disregarded their obligations to employees and had “a level of culpability beyond mere negligence” before debarment is warranted. 29 C.F.R. § 5.12(a)(2); *Thermodyn Contr., Inc.*, ARB No. 96-116, at 5; *see also Sundex, Ltd.*, ARB No. 98-130, at 6; *and J.B.M. Serv., Inc.*, OALJ Nos. 2001-DBA-13, 2001-SCA-19, at 7. In my May 16,

2013 Order, I determined that Respondents falsely certified that nine of their employees were in a bona fide apprenticeship program but further found that the Administrator had failed to show Respondents disregarded their obligations to employees and were more than merely negligent when they committed that violation. The newly-submitted evidence offered by the Administrator, coupled with the evidence previously submitted in support of the Administrator's motion for summary judgment, demonstrates that Respondents' violations were the result of more than "mere negligence."

At all times relevant to the Ojo Encino project, Jerry Napie paid or supervised the payment of Respondents' employees and signed or authorized Esther Napie to sign certified payroll records. AX 120, 139-142. From the time Tom Tapaha first began working on the Ojo Encino project in May 2009, AX 161, he and Jerry Napie periodically discussed DBA requirements that workers employed under a DBA-covered contract had to be paid according to the applicable wage determination and that apprentices had to be enrolled in an approved apprenticeship program. *See, e.g.*, AX 166-68, 172. Tapaha and other journeyman electricians specifically told Napie that laborers performing electrical work had to be paid as electricians, AX 178-79, and Tapaha knew Napie did not like to discuss these requirements because of the facial expressions he made when they talked about them. AX 173. Napie was a journeyman electrician and knew that Respondents' non-journeyman employees were performing at least some of the work on the Ojo Encino project which should have been performed by an electrician. AX 150-51. The payroll records submitted by Respondents' certified, *inter alia*, that the wage rates paid to Respondents' employees were not less than the wage rates contained in the applicable wage determination and that the classifications for each employee conformed with the work he or she performed. AX 54-104. Napie clearly knew that the workers classified by Respondents in their certified payroll records as "laborers" and "apprentices" were performing electrical work and were being paid less than the applicable wage rate for journeyman electricians. Respondents' false certification of the submitted payroll records was thus knowing and willful as opposed to "merely negligent." DBA violations which "establish a level of culpability beyond mere negligence" support an order of debarment. *Thermodyn Contr., Inc.*, *supra*, at 5; 40 U.S.C. § 3144(b); 29 C.F.R. § 5.12(a)(2).

### III. CONCLUSION

The undisputed material facts of record, when viewed in the light most favorable to Respondents, clearly establish that Respondents misclassified employees as "laborers" or "apprentices," despite the fact that they were performing the work of journeymen electricians, and Respondents failed to pay those employees the wages to which they were entitled for such work throughout the period of their employment. The undisputed material facts further show that Respondents disregarded their obligations to employees, and their DBA violations were knowing, willful, and the result of a level of culpability beyond mere negligence. The Administrator is thus entitled to judgment as a matter of law.

Based on the foregoing, and pursuant to 29 C.F.R. § 5.12(a)(2), the Administrator is hereby directed to transmit to the Comptroller General the names of Respondents NCC Electrical Services, Inc. and Jerry Napie with a recommendation that they be debarred for a period of three years from entering into any contract or subcontract with the U.S. government and be placed on a

list distributed 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 provisions of the statutes listed in 29 C.F.R. § 5.1.

**SO ORDERED.**

STEPHEN L. PURCELL  
Chief Administrative Law Judge

Washington, D.C.

**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.