

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 May 2013

Case No.: 2012-DBA-00005

In the Matter of:

Disputes concerning the payment of
prevailing wage rates:

ROGERS GROUP, INC.,
Prime Contractor/Respondent

and

JOHN C. HAYDON,
Subcontractor/Respondent

and

ROSE TRANSPORT, INC.,
Subcontractor/Respondent

With respect to laborers and mechanics employed on
Contract Nos. 07-9022 and 07-1131 with the U.S. Department
of Transportation and Contract No. W91248-08-D-0001 with
the U.S. Department of the Army, in Kentucky.

**ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND
ORDER CANCELLING THE HEARING**

This case arises pursuant to Reorganization Plan No. 14 of 1950, 64 Stat. 1267, (1950 U.S. Code Cong. Serv. 1435-1436); the Davis-Bacon Act (40 U.S.C. § 3141, *et. seq.*); the American Recovery and Reinvestment Act, Pub. L. 111-5, 123 Stat. 115 (Feb. 17, 2009) (a Davis-Bacon Related Act);¹ the Contract Work Hours and Safety Standards Act

¹ On June 22, 2011, the U.S. Department of Labor, Wage and Hour Division, sent a letter to Respondents notifying them that the Department found “reasonable cause to believe that the violations of section 1606 under Division A of the American Recovery and Reinvestment Act of 2009 (ARRA) Public Law 111-5 [and] the Contract Work Hours and Safety Standards Act . . . constitute aggravated or willful violations. . . .” (Letter from the Acting Regional Director of the U.S. Department of Labor Wage and Hour Division to Respondents). On April 23, 2012, the Office of Administrative Law Judges received a letter from the Administrator of the Wage and

(40 U.S.C. § 3701, *et. seq.*) (a Davis-Bacon Related Act); the applicable regulations at 29 C.F.R. Part 5, § 5.11; and, pertinent delegations of authority. *See* 29 C.F.R. § 5.1(a). In accordance with the Order of Reference issued April 17, 2012, this matter was referred to the Office of Administrative Law Judges for a hearing pursuant to 29 C.F.R. § 5.11(b), 5.12(a), 6.30, and/or 6.33. By Order, this case is currently set for hearing on June 4, 2013, in Bowling Green, Kentucky.

On February 19, 2013, the Department of Labor (“the Department”) filed “Secretary’s Motion for Partial Summary Judgment and Memorandum of Law in Support” (“Department’s Motion”).² By Motion for Extension filed February 28, 2013, Rogers Group requested an extension of time to respond to the Department’s Motion and discovery requests by the Department. By Order issued March 15, 2013, I granted Respondent Rogers Group’s Motion for Extension of Time to respond to the Department’s Motion.³ On April 1, 2013, Rogers Group

Hour Division referring this case to the Office of Administrative Law Judges “pursuant to Reorganization Plan No. 14 of 1950, 64 Stat. 1267, (1950 U.S. Code Cong. Serv. 1435-1436); the Contract Work Hours and Safety Standards Act (40 U.S.C. § 3701 *et. seq.*); regulations found at 29 C.F.R. Part 5, § 5.11; and pertinent delegations of authority, for resolution of disputes concerning the payment of prevailing wage rates” for a hearing. (Order of Reference). On July 17 and 19, 2012, Respondents filed answers to the Department’s response to a prehearing order issued by the Office of Administrative Law Judges dated May 8, 2012, in which Respondents denied that the employees for whom back wages are sought were underpaid in violation of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, or the American Recovery and Reinvestment Act. (Rogers Group, Inc.’s, Answer to the Secretary’s Prehearing Order Response, July 16, 2012; Answer of Rose Transport, Inc., and John C. Haydon to the Secretary’s Prehearing Order Response, July 12, 2012). Therefore, **IT IS HEREBY ORDERED** that the first paragraph of the Notice of Hearing and Pre-hearing Order, dated January 10, 2013, is amended to read:

This case arises pursuant to Reorganization Plan No. 14 of 1950, 64 Stat. 1267, (1950 U.S. Code Cong. Serv. 1435-1436); the Davis Bacon Act (40 U.S.C. § 3141, *et. seq.*); the American Recovery and Reinvestment Act, Pub. L. 111-5, 123 Stat. 115 (Feb. 17, 2009) (a Davis Bacon Related Act); the Contract Work Hours and Safety Standards Act (40 U.S.C. § 3701, *et. seq.*) (a Davis Bacon Related Act); the applicable regulations at 29 C.F.R. Part 5, § 5.11; and, pertinent delegations of authority. *See* 29 C.F.R. 5.1(a). In accordance with the Order of Reference issued on April 17, 2012, this matter has been referred to the Office of Administrative Law Judges for a hearing pursuant to 29 C.F.R. §§ 5.11(b), 5.12(a), 6.30, and/or 6.33. Procedurally, this hearing will be conducted based upon the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges. 29 C.F.R. Part 18.

² Because I am granting Respondents’ request for summary judgment, the Secretary’s Motion for Partial Summary Judgment is now moot.

³ On April 18, 2013, the Department filed a Motion for Clarification seeking clarification of the undersigned’s Order Granting Respondent’s Motion for Extension of Time issued

filed Rogers Group's Motion for Summary Judgment and Response to the Secretary's Motion for Partial Summary Judgment ("Rogers Group's Motion"). On April 4, 2013, by Motion for Summary Judgment and Response to the Secretary's Motion for Partial Summary Judgment by Rose Transports, John C. Haydon and Haydon Brothers Contracting, Inc., the remaining Respondents joined in Respondent Rogers Group's Motion and also seek summary judgment in their favor. On April 12, 2013, the Department filed Secretary's Response to Rogers Group's Motion for Summary Judgment and Reply to Rogers Group Response to Secretary's Motion for Partial Summary Judgment ("Department's Response"). On May 6, 2013, Rogers Group filed Rogers Group's Reply to the Secretary's Response to Motion for Summary Judgment ("Rogers Group's Reply").

Background

In this matter, the Department of Labor, Wage and Hour Division, seeks the payment of back wages based on the alleged failure of Rogers Group and two subcontractors, John C. Haydon and Rose Transport, Inc., (collectively, "Respondents") to pay prevailing wages and overtime to sixty-nine truck drivers employed by Respondents. (Department's Response at 1). Rose Transport employed the truck drivers to "furnish materials such as asphalt, shot rock, gravel, stone, and dirt to three federally-funded worksites" for the widening of a highway in the Commonwealth of Kentucky, and paving, asphalt overlays, and surface treatment at Fort Campbell Army Base. (Department's Motion at 1-2).

According to the Department, the drivers' usual workday was as follows:

The drivers travelled between the federal worksites and other off-site locations, such as gravel yards and asphalt plants, during the course of their workday. The drivers would thus be both off, and on, the federal worksite as required to furnish necessary materials. The drivers furnished materials to the worksites from one to 52 times a day and spent between ten minutes and seven and a half hours on the federal worksites.

(Department's Motion at 2) (internal citations omitted).⁴

The Department seeks back wages only for "the time the drivers spent directly upon the physical site of the work."⁵ (Department's Motion at 2). The Department is not seeking wages

March 4, 2013. According to the Department, Respondent Rose Transport asserts that it currently has a motion for extension pending with the undersigned because my Order did not specifically address Rose Transport's concurrent request for an extension. Because I am granting Respondents' request for summary judgment and dismissing this matter, this issue is moot.

⁴ On February 26, 2013, Rogers Group filed a Motion to Compel Discovery. The Department filed a response to Rogers Group's Motion to Compel on March 11, 2013. Rogers Group then filed a Reply in Support of its Motion to Compel Discovery on March 18, 2013. I need not address the merits of Rogers Group's Motion to Compel Discovery because this Order makes the issues raised therein moot.

for the “time [the drivers] spent travelling state roads and county highways” or “spent picking up the materials from sites off of the ‘site of work’ such as gravel quarries or asphalt plants.” *Id.* The Department argues that Respondents are required to pay the truck drivers the prevailing wage during the time they spend unloading their trucks while on the site of the work. (Department’s Motion at 2). According to the Department, unless the time spent on the site of the work is *de minimis*, the truck drivers are entitled to the prevailing wage for the time they spent working on the site of the work. (Department’s Motion at 5; Department’s Response at 3).

In defense, Respondents argue that the truck drivers are not entitled to the prevailing wage because “the prevailing wage laws at issue here do not apply to truck drivers who simply deliver materials to and from federally funded worksites.” (Rogers Group’s Motion at 1). Respondents further argue that, even if the applicable statutes apply to the truck drivers, the time the drivers spent directly on the work site was *de minimis*. *Id.* at 1-2. Thus, according to Respondents, the statutes do not mandate payment of the prevailing wage to the drivers for the time spent on the site of the work while unloading construction materials from their trucks. *Id.* at 1, 3-7.

Applicable Standard

Summary Judgment

Summary judgment is appropriate if “the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact and that a party is entitled to summary decision.” 29 C.F.R. § 18.40(d). A party opposing a motion for summary judgment “may not rest upon the mere allegations or denials of such pleading.” 29 C.F.R. § 18.40(c). Rather, the party opposing summary judgment must “set forth specific facts showing that there is a genuine issue of fact for the hearing.” *Id.* Where no genuine issue of material fact has been raised, an administrative law judge may issue a final decision. 29 C.F.R. § 18.41.

⁵ The Director argues that the “site of the work” is defined by the boundaries set forth in the contracts between the United States and Respondents. (Department’s Motion at 2). Respondents disagree. (Rogers Group’s Motion at 8; Rogers Group’s Reply at 6). However, I need not resolve this issue, as it is unnecessary to reach a decision in this case.

*The Davis-Bacon Act*⁶

The Davis-Bacon Act, 40 U.S.C. § 3141, *et. seq.*, applies to every contract of the United States in excess of \$2,000 for construction, alteration, and/or repair of public buildings or public works in the United States. 40 U.S.C. § 3142(a). In pertinent part, the Davis-Bacon Act requires contractors and subcontractor to “pay all mechanics and laborers employed directly on the site of the work” the prevailing wage. 40 U.S.C. § 3142(c). The prevailing wage is a minimum wage “determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed. . . .” 40 U.S.C. § 3142(b).

Employed upon the Site of the Work

Only “mechanics and laborers employed directly on the site of the work” are entitled to prevailing wages under the Davis-Bacon Act. 40 U.S.C. § 3142(c); 29 C.F.R. 5.5(a). The parties dispute whether truck drivers who deliver materials from offsite locations to the work site are entitled to the prevailing wage for the time they spend on the site of the work while unloading their trucks.

In *Building and Const. Trades Dep’t, AFL-CIO v. United States Dep’t of Labor Wage Appeals Board*, 932 F.2d 985 (D.C. Cir. 1991) (“*Midway*”), the issue was “whether material delivery truckdrivers, who are employees of the contractor, but who work off-site most of the time and come on-site only to drop off a delivery, are ‘mechanics and laborers employed directly upon the site of the work.’” *Id.* at 989. In *Midway*, the Department sought to recoup unpaid prevailing wage rates for truck drivers who “transported off-site materials to the site of a

⁶ Although the complaint in this case was filed under the Davis-Bacon Act, Contract Work Hours and Safety Standards Act (“CWHSSA”), and the American Recovery and Reinvestment Act (“ARRA”), the undersigned need only analyze the issue presented under the relevant Davis-Bacon jurisprudence. In *L.P. Cavett*, the Sixth Circuit held that when the plain language of a Davis-Bacon Related Act “specifically notes that the prevailing wage determination shall be ‘in accordance with’ the Davis-Bacon Act,” the related Act “incorporates from the Davis-Bacon Act not only its method of determining prevailing wage rates but also its method of determining prevailing wage coverage.” *L.P. Cavett Co. v. United States Dep’t of Labor*, 101 F.3d 1111, 1116 (6th Cir. 1996). The ARRA provides for the payment of prevailing wages to laborers and mechanics “in accordance with subchapter IV of chapter 31 of title 40, United States Code [the Davis-Bacon Act, as codified].” Pub. L. 111-5, 123 Stat. 115 (Feb. 17, 2009). Further, where a Davis-Bacon Related Act does not expressly reference the Davis-Bacon Act, and in the absence of clear congressional intent that a different coverage standard be applied, the Davis-Bacon Act’s prevailing wage coverage applies to all Davis-Bacon Related Acts. *See L.P. Cavett*, at 1116-17; 65 Fed. Reg. 80275 (Dec. 20, 2000). The ARRA and the CWHSSA are Davis-Bacon Related Acts. 29 C.F.R. §§ 5.1(a) and 5.1(a)(3); *Pythagoras General Contracting Corp. v. Administrator, Wage and Hour Division, U.S. Dep’t of Labor*, ARB Nos. 08-107 and 09-007 slip op. at 5 (Feb. 10, 2011) (unpub.). Accordingly, the provisions of the Davis-Bacon Act pertaining to prevailing wage coverage also apply to the ARRA and the CWHSSA. Thus, the undersigned’s analysis applies to the Department’s allegations against Respondents under the Davis-Bacon Act, the ARRA, and the CWHSSA.

federally-funded construction project.” *Id.* at 985. The drivers were on the site of the work for only ten-minute intervals, long enough to drop off their deliveries. *Id.* at 990 n. 5. Their total time spent “directly on the site of the work” totaled only ten percent of their workday. *Id.* The Department took the position that “on the site of the work” was an inherently ambiguous and imprecisely defined phrase which could permissibly be interpreted to include all deliveries from off-site locations to the site of the work. *Id.*

The *Midway* Court held that the phrase “site of the work” is not ambiguous and “clearly connotes . . . a geographic limitation. Thus, the ordinary meaning of the statutory language is that the Act applies only to employees working directly on the physical site of the public building or public work under construction.” *Id.* at 990. The *Midway* Court cited favorably to *H.B. Zachry Co. v. United States*, 344 F.2d 352 (Ct. Cl. 1965), in which the Court of Claims analogized material delivery truck drivers to materialmen, who are not covered by the Davis-Bacon Act’s prevailing wage provision. *Id.* at 992. The *H.B. Zachry* Court’s rationale for why truck drivers are not covered by the Act was “the *nature of the function [they] performed, namely, the delivery of standard materials to the site* – a function which is performed independently of the contract construction activities.” *Id.* (emphasis added). According to the Court in *H.B. Zachry*, “because material delivery truckdrivers serve the same function as materialmen, and materialmen are excluded from the Act, the truckdrivers who deliver supplies from the materialmen to the construction site must likewise be excluded.” *Id.* Thus, the Court stated its holding, as follows:

[T]he [Davis-Bacon] Act covers only mechanics and laborers who work *on the site* of the federally-funded public building or public work, not mechanics and laborers employed *off-site*, such as suppliers, materialmen, and material delivery truckdrivers, regardless of their employer.

[W]e find, not surprisingly, that Congress intended the ordinary meaning of its words; the phrase “mechanics and laborers employed directly upon the site of the work” restricts coverage of the Act to employees who are working directly on the physical site of the public building or public work being constructed. Material delivery truckdrivers who come onto the site of the work merely to drop off construction materials are not covered by the Act even if they are employed by the government contractor. We hold that 29 C.F.R. § 5.2 (j), insofar as it includes off-site material delivery truckdrivers in the Act’s coverage, is invalid.

Id. (emphasis in original). In sum, in *Midway*, the Circuit Court for the District of Columbia concluded that laborers and mechanics employed off-site are not covered by Davis-Bacon’s prevailing wage requirement. *Id.* at 990. Material delivery truck drivers who come onto the site of the work only long enough to make their deliveries are not “employed directly upon the site of the work.” *Id.* at 992. Accordingly, they are not entitled to prevailing wages under the Davis-Bacon Act. *Id.*

The D.C. Circuit has since reiterated this interpretation of the “site of the work” language of the Davis-Bacon Act in *Ball, Ball, & Brosamer, Inc. v. Reich*, 24 F.3d 1447, 1452 (D.C. Cir. 1994). In *Ball*, the Court stated, “[t]he statutory phrase ‘employed directly upon the site of the work,’ means ‘employed directly upon the site of the work.’ Laborers and mechanics

who fit that description are covered by the statute. Those who don't are not." *Id.* The Sixth Circuit, in *L.P. Cavett Co. v. United States Dep't of Labor*, relied on the reasoning used by the D.C. Circuit in *Ball* and *Midway* to hold that truck drivers delivering materials from an off-site batch plant to the site of the work were not covered under the Davis-Bacon Act.⁷ *L.P. Cavett*, 101 F.3d 1111, 1114-15 (6th Cir. 1996) ("The statutory phrase 'employed directly upon the site of the work' means that only employees working directly on the physical site of the public work under construction have to be paid prevailing wage rates.").

In response to federal circuit court decisions interpreting the Davis-Bacon Act's "employed directly upon the site of the work" language, the Department published proposed revisions to its position on the Act's applicability to truck drivers. In the preamble to its proposed rule, the Department stated its view that "truck drivers who transport materials to or from the 'site of the work' would not be covered [by the Act] for any time spent off-site, but would remain covered for any time spent directly on the 'site of the work.'" 65 Fed. Reg. 57270, 57272 (Sept. 21, 2000) (quoting 57 Fed. Reg. 19205 (May 4, 1992)). The Department, in its Notice of Proposed Rulemaking, reiterated and elaborated upon its position, as follows:

[T]ruck drivers employed by construction contractors and subcontractors must be paid at least the rate required by the Davis-Bacon Act for any time spent on-site which is more than *de minimis*. In this connection, the Department note[d] that in the *Midway* case, the drivers stayed on-site only long enough to drop off their loads, which was usually not more than ten minutes at a time.

Id.

In its analysis of the principal comments received in response to its Notice of Proposed Rulemaking accompanying its final rule,⁸ the Department further stated, as follows:

⁷ In *L.P. Cavett*, the Department took the position that the batch plant was included within the "site of the work" for the contract at issue. *L.P. Cavett*, 101 F.3d at 1113-14. However, the Sixth Circuit concluded that the batch plant, located three miles away from the public work site, was not "directly upon the site of the work." *Id.* at 1115.

⁸ The Department argues that its "2000 revision to 29 C.F.R. § 5.2(l)" is entitled to deference as a "permissible construction of the statute" under *Chevron, U.S.A. v. Natural Res. Def. Counsel*, 467 U.S. 837, 842 (1983). (Department's Response at 3). The Department's argument, that its interpretation of the Davis-Bacon Act and the regulations promulgated thereunder regarding the Davis-Bacon Act's "site of the work" requirement are entitled to *Chevron* deference, was considered and rejected by the *Midway* Court. *Midway*, 932 F.2d at 989-92. *Chevron* requires a two-prong analysis. *Chevron*, 467 U.S. 837, 842-43 (1983); *Midway*, 932 F.2d at 989. Under the first prong, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Only upon a finding of silence or ambiguity in the plain language of the statute should the Court proceed to the second prong of the *Chevron* test, determining whether the agency has chosen a "permissible construction of the statute." *Id.* The *Midway* Court explained that, because there was no ambiguity in the plain language of the Davis-Bacon Act's

The Department disagrees that *Midway* exempts all material delivery truck drivers regardless of how much time they spend on the site of the work. Clearly, truck drivers who haul materials or supplies from one location on the site of the work to another location on the site of the work are “mechanics and laborers employed directly upon the site of the work,” and therefore, entitled to prevailing wages. Likewise, truck drivers who haul materials or supplies from a dedicated facility that is adjacent or virtually adjacent to the site of the work pursuant to amended section 5.2(l) are employed on the site of the work within the meaning of the Davis-Bacon Act and are entitled to prevailing wages for all of their time spent performing such activities.

It is also the Department’s position . . . that truck drivers employed by construction contractors and subcontractors must be paid at least Davis-Bacon rates for any time spent on-site which is more than de minimis.

...

“site of the work” requirement, the Department had not established the first prong of the *Chevron* test. Thus, the Court declined to proceed to the second prong of the *Chevron* test, a determination of whether the agency’s interpretation of the statute, to include truck drivers who remain on the site of the work only long enough to deliver materials, was a “permissible construction.” *Midway* 932 F.2d at 989-90. The Sixth Circuit also disposed of this argument by the Department by finding no ambiguity in the plain language of the statute. *L.P. Cavett v. U.S. Dep’t of Labor*, 101 F.3d 1111, 1114, 1116 (6th Cir. 1996). Thus, I find unpersuasive the Department’s argument that its interpretations of the Davis-Bacon Act, and more specifically the scope of the *Midway* Court’s holding, as set forth in the regulations and explained in the Federal Register, is entitled to deference under *Chevron*.

Additionally, the Department argues that the Field Operations Handbook is entitled to *Chevron* deference. The Department contends that the Field Operations Handbook is entitled to deference because the “well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” (Department’s Response at 3 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Even assuming that the language of the Davis-Bacon Act is ambiguous, thus making analysis under the second prong of *Chevron* necessary, the Field Operations Handbook is contrary to binding Sixth Circuit precedent expressly excluding material delivery truck drivers from the Davis-Bacon Act’s prevailing wage requirement. *L.P. Cavett*, 101 F.3d at 1112, 1115. Moreover, agency interpretations contained in agency manuals and enforcement guidelines, such as the Field Operations Handbook, lack the force of law and “do not warrant *Chevron*-style deference.” *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing *Reno v. Koray*, 515 U.S. 50, 61 (1995); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-258 (1991); *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 157 (1991)). Rather, they are “entitled to respect” but “only to the extent that those interpretations have the ‘power to persuade.’” *Skidmore*, 323 U.S. at 140. Because the Department’s interpretation of the Davis-Bacon Act to include material delivery truck drivers, as contained in the Field Operations Handbook, is inconsistent with the Sixth Circuit’s mandate in *L.P. Cavett*, I do not find it persuasive or entitled to deference.

In the wake of *Midway* and the corresponding change to our regulations, the Department no longer asserts coverage for time spent off-site by material delivery truck drivers. *Midway* determined that material delivery truck drivers are not covered because their work is not performed on the site of the work, not because of the type of work they perform. The court held “that the Act covers only mechanics and laborers who work on the site of the federally-funded public building or public work, not mechanics and laborers employed *off-site*, such as suppliers, materialmen, and material delivery truck drivers, regardless of their employer.” Thus, *Midway* provided material delivery truck drivers no blanket exception to Davis-Bacon coverage, as some commentators seem to suggest.

Giving the Act a literal reading, as the courts have done in *Midway*, *Ball*, and *Cavett*, all laborers and mechanics, including material delivery truck drivers, are entitled to prevailing wages for *any* time spent “directly upon the site of the work.” The *Midway* court noted that the *Midway* truck drivers came on-site for only ten minutes at a time to drop off their deliveries and that the time spent “directly upon the site of the work” constituted only ten percent of their workday, but that no one had argued in the case that the truckdrivers were covered only during that brief time. Our reading of *Midway* does not preclude coverage for time spent on the site of the work no matter how brief. However, as a practical matter, since generally the great bulk of the time spent by material truck drivers is off-site beyond the scope of Davis-Bacon coverage, while the time spent on-site is relatively brief, the Department chooses to use a rule of reason and will not apply the Act’s prevailing wage requirements with respect to the amount of time spent on-site, unless it is more than “de minimis.” Pursuant to this policy, the Department does not assert coverage for material delivery truckdrivers who come onto the site of the work for only a few minutes at a time merely to drop off construction materials.

65 Fed. Reg. 80268, 80275-76 (Dec. 20, 2000) (internal citations omitted).

Discussion

The parties dispute the scope of the holding in *Midway*. The Department argues that *Midway* “does not hold that truck drivers are categorically excluded from [Davis-Bacon Act] prevailing wage. Instead, *Midway* holds that while site of the work is a geographical term, it has a temporal aspect.” (Department’s Response at 2). Respondents contend that “[f]ederal courts have repeatedly held that Davis-Bacon does not entitle delivery drivers to prevailing wages, regardless of whether they work for federal contractors or deliver materials to federally funded worksites.” (Rogers Group’s Motion at 3; Rogers Group’s Reply at 2-3).

I find that the Court in *Midway* interpreted the plain language of the Davis-Bacon Act to preclude coverage for material delivery truck drivers who come onto the site of the work only long enough to deliver construction materials. The Sixth Circuit has since adopted the rationale of the *Midway* decision in *L.P. Cavett*. Here, the Department seeks the payment of the prevailing wage under the Davis-Bacon Act for the time the truck drivers spent “on the work site as required to furnish necessary materials.” (Department’s Motion at 2). The Department does not

allege that the truck drivers employed by Respondents performed any work while on the site of the work other than unloading the materials they were tasked with delivering from off-site facilities. *Id.* Rather, the Department alleges that, much like the material delivery truck drivers in *Midway*, the truck drivers in this case “furnish[ed] materials such as asphalt, shot rock, gravel, stone, and dirt to the physical places at which the contracts were being performed.” (Department’s Motion at 4).

The Department argues that under *Midway*, a court must consider both the location where the drivers spent the majority of their time and the time spent on the site of the work during each delivery. (Department’s Response at 2). This argument emphasizes the *Midway* Court’s reference, in a footnote, to the length of time the truck drivers in that case spent on the site of the work while unloading their trucks. *Midway*, 932 F.2d at 990 n. 5. The Department thus infers that the *Midway* Court’s conclusion, that the material delivery truck drivers were not entitled to prevailing wages under the Davis-Bacon Act, was based on where the drivers spent most of their time and the amount of time they spent on the site of the work during each trip. (Department’s Response at 2). I disagree. In *Midway*, the Court concluded that material delivery truck drivers who come onto the site of the work merely to drop off deliveries are not covered by the Act because their work serves the same function as materialmen, who are excluded from the Davis-Bacon Act’s protections. *Midway*, 932 F.2d at 992. The *Midway* Court cited favorably to the *H.B. Zachry* Court’s statement that material delivery truck drivers are not entitled to prevailing wages under the Davis-Bacon Act because “of the nature of the function they perform[], namely the delivery of standard materials to the site – a function which is performed independently of the contract construction activities.” *Midway*, 932 F.2d at 992.

Under *Midway* and *L.P. Cavett*, truck drivers who deliver materials from off-site facilities to the site of the work are not covered by the Davis-Bacon Act because they are not “employed directly upon the site of the work.” *Midway*, 832 F.2d at 992; *L.P. Cavett*, 101 F.3d at 1112, 1115; 65 Fed. Reg. 80268, 80276 (Dec. 20, 2000) (“*Midway* determined that material delivery truck drivers are not covered because their work is not performed on the site of the work, not because of the type of work they perform.”). Material delivery truck drivers who enter the site of the work only long enough to deliver construction materials, like those employed by Respondents, are employed off-site and are not entitled to the prevailing wage under the Davis-Bacon Act. Thus, I find that the truck drivers employed by Respondents to transport materials from off-site facilities to the site of the work are not entitled to the prevailing wage rate under the Davis-Bacon Act. Accordingly,

ORDER

IT IS HEREBY ORDERED that the Respondents' Motion for Summary Judgment is **GRANTED** and this matter is **DISMISSED**. **IT IS FURTHER ORDERED** that all monies withheld from Respondents pursuant to this proceeding shall be promptly paid and the hearing scheduled for June 4, 2013, in Bowling Green, Kentucky, is **CANCELLED**.

LARRY S. MERCK
Administrative Law Judge

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.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely

filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).