

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 May 2014

Case Nos. 2013-DBA-6
2013-DBA-7

In the matter of:
Disputes concerning the payment of
Prevailing-wage rates by:

Lakeshore Plaza Holding, LLC.,
Prime Contractor,
J.J.O. Construction, Inc.,
1st Tier Subcontractor, and
Monaco Electrical Contracting, Inc.,
2nd Tier Subcontractor,
Respondents,

With respect to laborers and mechanics employed by Monaco
Electrical Contracting, Inc., on storefront renovations and improvements at
Shore Center Shopping Plaza, 22800-22840 Lakeshore Blvd., Euclid, Ohio,
and

In the matter of:
Disputes concerning the payment of
Prevailing-wage rates by:

22300 Lake Shore Boulevard, LLC.,
Prime Contractor
J.J.O. Construction, Inc.,
1st Tier Subcontractor, and
Monaco Electrical Contracting, Inc.,
2nd Tier Subcontractor,
Respondents,

With respect to laborers and mechanics employed by Monaco
Electrical Contracting, Inc., on storefront renovations and improvements
at the Lakeshore Plaza, 22300 Lakeshore Blvd., Euclid, Ohio.

DECISION AND ORDER

This proceeding was initiated by the issuance of two separate Orders of Reference by the Administrator, Wage and Hour Division, United States Department of Labor. The first Order of Reference, dated January 21, 2013, associated with case number 2013-DBA-6, asserted the failure to pay prevailing-wage rates and fringe benefits by the named respondents, Lakeshore Plaza Holding, LLC. (Prime Contractor), J.J.O. Construction, Inc. (First-Tier Subcontractor), and Monaco Electrical Contracting, Inc. (Second-Tier Subcontractor), with respect to laborers and mechanics employed by Monaco Electrical Contracting Inc., on storefront renovations and improvements at the Shore Center Shopping Plaza in Euclid, Ohio. The second Order of Reference, also dated January 21, 2013, associated with case number 2013-DBA-7, asserted the failure to pay prevailing-wage rates and fringe benefits by the named respondents, Lake Shore Boulevard, LLC. (Prime Contractor), J.J.O. Construction, Inc. (First-Tier Subcontractor), and Monaco Electrical Contracting, Inc. (Second-Tier Subcontractor), with regard to renovations and improvements at the Lakeshore Plaza in Euclid, Ohio. In both cases, the Administrator alleged that the Respondents disregarded their obligations to their employees under the Davis-Bacon Act (DBA), 40 U.S.C.276(a) *et seq.*, and committed violations of the labor-standards provisions of the American Recovery and Reinvestment Act of 2009 and Department of Labor regulations found at 29 C.F.R. Part 5.

Procedural History

Following an investigation by the Wage and Hour Division, the Administrator issued its findings in these two cases on December 20, 2012. (ALJXs 2-3). On both projects, the Administrator found that the same five employees of the second-tier subcontractor Monaco Electrical Contracting, Inc., all of whom were covered by the prevailing-wage provisions of the Davis-Bacon Act, had been misclassified as laborers when their proper classification should have been as electricians. Although Monaco Electrical Contracting, Inc., had paid the five employees a higher base-rate per hour than that required for an electrician, it did not pay a fringe-benefit rate commensurate with that of an electrician, thus creating a wage deficiency, according to the Administrator. (*Id.*).

Monaco Electrical Contracting, Inc., (hereafter “Respondent”), through counsel, requested a formal hearing in both cases.¹ (ALJXs 4,6). The Respondent took the position that the classification of workers in question as laborers was correct given the nature of their work. The Respondent also asserted that the classification of the workers as laborers was made “after consultation with the Federal recipient, the City of Euclid, and with the owner of the project.” Finally, the Respondent averred that it had received no guidance on the matter after it had requested help in the classification process from the Department of Labor. (*Id.*).

The two cases were referred to the Chief Administrative Law Judge on January 21, 2013. (ALJXs 5,7). By letter dated January 28, 2013, the Administrator, through counsel, requested that the two cases be consolidated for hearing on the basis that, although they involved separate contracts and two different prime contractors, the employees allegedly owed back wages were the same for both projects. (ALJX 8). On February 4, 2013, Chief Administrative Law Judge

¹ At hearing, counsel for the Administrator confirmed that the only one of the named respondents to request a hearing in this matter was Monaco Electrical Contracting, Inc. (Tr. 8-9).

Stephen Purcell issued a Pre-Hearing Order in which the two cases were consolidated. (ALJX 9).

The two matters were heard before the undersigned on June 24, 2013, in Cleveland, Ohio. At the hearing, the Administrator presented the testimony of Richard J. Drenski, one of the five named employees; Dennis Meaney, a representative of the International Brotherhood of Electrical Workers Local Union No. 38; and Stephen Banig, an investigator with the United States Department of Labor, Wage and Hour Division. The Respondent presented the testimony of Michael J. Monaco, its titular head, and Diane Monaco, its President. This decision is based upon the testimony presented and the evidence submitted² at the hearing.

ISSUES

The parties agreed at the hearing that this case presents a single primary issue: whether the five employees in question were properly classified as laborers or electricians. (Tr. 21-22).

Secondarily, Monaco argued at the hearing that the Department of Labor, through an intermediary attached to Euclid, verbally approved the laborer classification, and therefore that the agency should be estopped from bringing this action. (Tr. 22-23).

EVIDENTIARY RULINGS

At the hearing, counsel for the Respondent objected to the admission of Administrator's Exhibit Number Twelve, which is a document entitled "Employee Personal Interview Statement," Form WH-31. This document is a summary, prepared by Banig, the Wage and Hour Investigator, of a statement allegedly made to him by Jeremy Jaycox, one of the five named employees, on December 22, 2010. Although worded in the first-person and purporting to be the employee's statement, Banig testified that the handwritten portion of the form was not written by Jaycox, but himself. Banig testified that, pursuant to agency practice, he first filled out the form, summarizing what Jaycox had told him in a first-person narrative form, and then, after reading it aloud to him, had Jaycox sign the bottom in order to signal his acceptance, or ratification, of the statement attributed to him. (Tr. 99-100).

Jaycox did not testify at the hearing and counsel for the Respondent objected to the admission of the written statements attributed to him as inadmissible hearsay. (Tr. 100). In response, counsel for the Administrator argued that the statement was admissible as a party admission pursuant to 29 C.F.R. § 18.801(d)(2)(iv). (Tr. 99). That section provides that a statement is not hearsay if it is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

The Administrator's argument for the admission of the hearsay statement by Jaycox, as a vicarious statement by Monaco by one of its agents, suffers from several analytical flaws. First, it ignores the double and even triple hearsay nature of the statement. The "statement" is hearsay

² At the hearing, the following exhibits were introduced: Administrative Law Judge Exhibits ("ALJX") 1-15; Joint Exhibits ("JX") 1-4; Administrator's Exhibits ("AX") 1-13; and Respondent's Exhibits ("RX") 1-2.

upon hearsay by virtue of the fact that it was not written by Jaycox. Despite its use of the first person, the statement is an out-of-court statement by Banig purporting to describe what Jaycox told him. The only way the statement becomes a statement by Jaycox is to accept the fact that Jaycox meant to signal his adoption of the statement by signing the statement at the bottom. The problem with this, of course, is that Jaycox's act of signing then becomes nonverbal conduct which falls under the definition of a hearsay statement since its apparent purpose was to assert the truth of what Banig had written.

In sum, the statement is an out-of-court statement by Banig of an out-of-court statement by Jaycox, and allegedly adopted by Jaycox at the time by yet another out-of-court statement.

Furthermore, it is not clear in what respect the exception urged by the Administrator offers any of its usual guarantee of trustworthiness. The exception to the hearsay rule for party admissions is founded upon the belief that inculpatory statements are inherently trustworthy as they are against a party's interest and thus unlikely to be false. By extension, inculpatory statements by an employee are considered sufficiently trustworthy, when used against the employer, because it is presumed that the employee would not make false inculpatory declarations or statements which would jeopardize his or her employment. *McCormick's Handbook of the Law of Evidence*, § 267 at 641 (2nd Ed. Cleary 1972); *Lempert & Saltzburg, A Modern Approach to Evidence*, 373 (1977). But this principle certainly would not apply when the employee takes a position which is by nature adversarial to the employer and serves the employee's own self-interest—an interest which is, in fact, in opposition to that of the employer. The statement by Jaycox was made as part of an investigation *against* his employer through which he could benefit in the form of back wages. In this regard, his statement, whether true or not, is self-serving and therefore lacks the usual indicia of trustworthiness which forms the basis of the exception.

Furthermore, it should be noted that the business-records exception to the hearsay rule, which is found at 29 C.F.R. §18.803(a)(6), does not provide for the statement's admissibility. The rule provides an exception to the hearsay bar for statements made "in the course of a regularly conducted business activity" by a "person with knowledge." The rule is generally construed to require that both the person supplying the information from personal knowledge (i.e., Jaycox) and the entrant recorder (i.e., Banig), act in the regular course of business.³ Banig was acting in the regular course of his "business"—a term which by the language of the rule expressly includes any profession or occupation—when preparing the statement in his role as the Wage and Hour Investigator. Jaycox was not, however, engaged in the regular course of his business or occupation when he put aside his duties and spoke to Banig.

Finally, one could argue that the exception at 29 C.F.R. §18.803(a)(8) should apply. This section provides an exception to the hearsay rule for statements by public agencies setting forth

³ See *Petrocelli v. Gallison*, 679 F.2d 286, 289 (1st Cir. 1982); *United States v. Bortnovsky*, 879 N.2d 30, 34 (2d Cir. 1989); *United States v. Console*, 13 F.3d 641, 656-658 (3rd Cir. 1993); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1257, 1269-1271 (N.D. Ohio 1980); *Datamatic Services, Inc. v. United States*, 909 F.2d 1029, 1032-1033 (7th Cir. 1990); *Scheerer v. Hardee's Food Sys., Inc.*, 92 F.3d 702, 706 (8th Cir. 1996); *United States v. Childs*, 5 F.3d 1328, 1332-1334 (9th Cir. 1993); *United States v. McIntyre*, 997 F.2d 687, 698-700 (10th Cir. 1993); and *United States v. Garnett*, 122 F.3d 1016, 10118-1019 (11th Cir. 1997).

“factual findings resulting from an investigation made pursuant to authority granted by law.” 29 C.F.R. §18.803(a)(8)(iii). The rationale for the exception is that the force of public duty and systematic, routine practice combine to provide a guarantee of trustworthiness to such statements. *Lilly, An Introduction to the Law of Evidence* §71 at 245. Lilly postulates what he described as a “growing recognition” that factual findings of official investigations “should fall within the exception, despite the awareness that much of the factual information may come from persons with no public or business duty.” *Id.* However, this exception fails to apply to the exhibit as well. First, the statements attributed to Jaycox cannot be fairly characterized as “factual findings” made by Banig, unless every time a government official writes down what another tells him or her constitutes an official finding of fact, which clearly is not the case. As succinctly stated by the Seventh Circuit Court of Appeals, “hearsay statements are not exempted from the hearsay bar simply because they were related to a government officer or investigator.” *Stolarczyk v. Senator Int’l Freight Forwarding, LLC.*, 376 F. Supp.2d 834, 841 (N.D. Ill. 2005)(citing cases). The central principle is that “evidence reported in a government document is only admissible to the extent that the maker of [the] document could testify to that evidence were he present in court.” *Id.* (quoting *In re Air Crash Disaster at Stapleton Int’l Airport, Denver, Colorado*, 720 F.Supp. 1493 (D.Col. 1989) (Finsilver, C.J.)(citing *Denny v. Hutchinson Sales, Corp.*, 649 F.2d 816, 821 (10th Cir. 1981)); accord *Frazier v. Ind. Dept. of Labor*, No. IP01-0198-C-T/G 2003 WL 21254424, at *4 (S.D. Ind. Mar. 17, 2003).

Clearly, if Banig had simply testified as to what Jaycox had told him, his testimony would have been “rank hearsay in the form of out-of-court statements made by an interested party and in reasonable anticipation of ensuing litigation.” *Stolarczyk, supra* at 839. The fact that Banig wrote down the statements on an official form and called it his “Statement” does not elevate it beyond the status of rank hearsay. Indeed, the manner in which it was transcribed only adds another layer of hearsay, rendering it further unreliable.

As the court in *Stolarczyk* reminded, out of court statements are presumed to be unreliable and the burden is on the party wishing to introduce such evidence by supplying proof of its trustworthiness. *Id.* at 841 (citing *United States v. Hall*, 165 F.3d, 1095, 1110 (7th Cir. 1999)). Here, even if considered under the residual exception for hearsay contained in 29 C.F.R. §18.803(a)(24), I do not find there is sufficient indicia of trustworthiness surrounding the making of Jaycox’s statement to allow it to be admitted. The statement attributed to Jaycox was never subjected to cross-examination, it serves his own self-interest, and it was made in anticipation of potential litigation from which he would gain. Moreover, there is no language in the form which advises Jaycox that the provision of any false information would be considered perjurious or subject to penalty. Given all these factors, I find that the Administrator failed to rebut the presumption of inadmissibility which attaches to the statement because of its hearsay-upon-hearsay nature. Put differently, if the Administrator wished to rely upon the statement of Jaycox, then the interests of justice and fairness were best served by the Administrator presenting Jaycox as a witness and subjecting his testimony to cross-examination.

For all these reasons, Administrator’s Exhibit Number Twelve is denied admission.

SUMMARY OF TESTIMONY

1. Richard Drenski

Richard Drenski was called as a witness by the Administrator. He stated that he had been an employee of the Respondent for approximately two years before July 2010, and continued to work for the company between the period of July 2010 to December 2010. (Tr. 36). He testified that he was employed by the Respondent to work on both the Lakeshore Plaza and Shore Center Plaza projects. (*Id.*). He described the work on both projects as follows: “[W]e installed all the outside light fixtures, the wall lights, ran the power to the timers that controlled them and then down into the electrical panels.” (Tr. 37). According to Drenski, he worked with other employees of the Respondent on these projects, and all the employees “pretty much did the same” work. (*Id.*).

Shown a photograph of a building at the Lakeshore Plaza, Drenski identified it as a location where he had performed work as an employee of Monaco. (*Id.*). He testified that he was involved in installing four overhead lights. (Tr. 38). He testified that the building was not a new one, but he could not recall whether there were old light fixtures already existing. (*Id.*). Given his uncertain memory, he testified that there could have been a wire that was already running to the exact spot where the new light fixture needed to be installed; however, he also testified that he had a specific memory of running wires from the fixtures through a crawlspace and to a power box inside the wall. (Tr. 39). He stated that connecting the wires to the power box involved “tying all the wires together and then leaving some out to hook the light up to.” (*Id.*). Additionally, he identified other aspects of the work he performed as “[r]unning the power feeds” to the lights. (Tr. 39-40). He testified that other employees of Monaco also were involved in wiring a timer for the lights to the electrical source panel, although he did not recall personally performing such work. (Tr. 40).

Shown a photograph of a building at the Shore Center Shopping Center, Drenski testified that he had installed the lights on this building as well. (Tr. 41). According to Drenski, installation of these lights involved “more or less the same process” as installing the lights at the Lakeshore Plaza. (*Id.*). Again, Drenski testified that he was not sure if the building already had lights that needed replacing, or whether the lights were an initial installation. (*Id.*). Drenski also identified photographs of other buildings on this project to which he had installed lighting fixtures. (Tr. 42). He testified that although it was not the Respondent’s responsibility to install the lighted signs shown in the photographs, Monaco employees were responsible for the “power whips that were coming out.” He explained that the “power whips” were metallic cables that contained wiring which was necessary to run power to the lighted signs. (Tr. 43). Shown other photographs of storefronts at the project, Drenski testified that he was involved in the installation of either the lights shown or similar lights. (Tr. 44).

Drenski testified that he worked with four other employees of the Respondent, and that each employee did basically the same kind of work. He stated, “It depended on what we had that day that had to be done but yeah, we all did the same things.” (Tr. 45). He specifically identified the installation of lights as the work shared by all the Respondent’s employees with whom he

worked. (*Id.*). He further identified Michael (“Mike”) and Joseph (“Joe”)⁴ Monaco as his former employers and bosses. (Tr. 45-46). He stated that they were periodically on the worksite, which he explained to mean one day a week for approximately an hour or an hour-and-a-half. (Tr. 46).

On cross-examination, Drenski stated that he was not an electrician licensed by the state of Ohio. (*Id.*). He testified that he had never been a licensed electrician. (*Id.*). Conversely, he stated that he was aware that Mike and Joe Monaco were licensed electricians, and that they told the Respondent’s employees what needed to be done on the project worksite. (*Id.* at 46-47). He testified that he had never represented himself as an electrician. (Tr. 49). He testified that before the Lakeshore Plaza and Shore Center Shopping Center projects, he had done similar work for the Respondent. (Tr. 52). Specifically, he stated that he had pulled wire for the installation of lights, and mounted lights, for the Respondent before the two projects in question. (*Id.*). However, he stated that he had never done such work for the Respondent on the same “scale” as the work he performed on the two projects. (Tr. 52).

On redirect examination, Drenski testified that neither Mike nor Joe Monaco reserved any of the work on the two projects in question exclusively for themselves. (Tr. 53). According to Drenski, he was able to install the lights as shown in the photographs from start to finish without any help from the Monacos. (Tr. 54). He stated, however, that he had never completed a light installation from start to finish by himself, but he clarified this to mean that the help he received came from other co-workers, not the Monacos. (*Id.*). He stated that, if he had any question about the work, he would ask Mike or Joe Monaco if they were present, but otherwise he would consult with Mike Joyner and Jeremy Jaycox, whom he identified as “veteran guys” who had been working for the Respondent the longest. (Tr. 55)

On questioning from the undersigned, Drenski testified that installing the light fixtures on the two projects constituted 100 percent of the work he performed on the two projects “because it was all lighting that we did.” (Tr. 56). Asked by the undersigned if any of his work had to do with removal as opposed to installation, Drenski replied affirmatively, stating that part of his job was taking down “the under-canopy lights.” (Tr. 57). He stated that this work involved “taking the lights down and tearing out whatever boxes we needed to tear out.” He estimated that 20 percent of his work was involved in removal and that roughly 80 percent was involved in installation. (Tr. 57). Asked if he had any background as an electrician, he testified that he had gone to trade school before working for the Respondent. (Tr. 58). He testified that with his trade-school background in electrical work, when he was told to install the lighting fixtures he knew what to do, with only occasional questions arising. (*Id.*). He testified that “very little” of his work involved actual problem solving. (*Id.*).

On re-cross examination, Drenski acknowledged that certain problems arose on the worksite that required solving by the Monacos, and that they had the ultimate authority on the job. (Tr. 61). Asked if it was true that a significant amount of the project work involved removal, Drenski responded affirmatively, but clarified that he was not present for all of the work done on the project. (Tr. 62). He agreed that “a good chunk” of his work involved pulling wires through to the fixtures. (*Id.*).

⁴ Joe Monaco is later identified in the record as Mike Monaco’s son. (Tr. 168).

2. Dennis Meaney

Dennis Meaney was the second witness called by the Administrator. Meaney identified himself as the business manager of the International Brotherhood of Electrical Workers, Local Union No. 38. (Tr. 64). He testified that Euclid, Ohio, the site of the projects in question, was within the geographical jurisdiction of Local 38. (*Id.*) He stated that his job duties were to oversee the day-to-day operations of the union members. (Tr. 64-65). According to Meaney, prior to becoming business manager for Local 38, he was the union's business representative. He stated that in this capacity he was assigned to the Euclid area, where he grew up and lived, and it was his responsibility to ensure that the electrical jobs claimed by the union were performed under the terms of the contracts that had been negotiated. He also testified that it had been his duty, with respect to electrical jobs that did not go to union members, to make sure that there were no wage violations, or violations of other labor laws. (Tr. 65). He stated that he did such work until 2005. (Tr. 66). Meaney also identified himself as a certified electrician. (*Id.*) He explained that one did not have to be a licensed electrician to work on an electrical project, and that the "vast majority" of the local's members were not licensed. However, he stated that most of the members were certified electricians, meaning that they obtained certification after completing a period of apprenticeship. (Tr. 66-67).

According to Meaney, Local 38 claimed the exclusive right to perform certain types of electrical work in its geographic jurisdiction. (Tr. 67). He vouchsafed that he was familiar with the type of work the union claimed. Generally, he described the work as "[a]ll facets of electrical work that deal with anything from installing lighting to safety systems, temperature-control systems, fire alarm[s], high-voltage systems, [and] general wiring of houses and commercial/industrial buildings." (Tr. 67-68). He was then asked to read from the Administrator's Exhibit 6, which he identified as the union contract in effect from 2008 through 2011. (Tr. 69). Specifically, he read the following language from § 3.18(a):

Workmen employed under the terms of this agreement shall do all electrical construction, installation or erection work and all electrical maintenance thereon, including the final running tests. This shall include the installation and maintenance of temporary wiring and the installation and maintenance of all electrical lighting, heating and power equipment.

(Tr. 68). He further identified this as the contract in effect for Euclid, Ohio, between July 2010 and December 2010. (*Id.*)

According to Meaney, there was also a laborer's union in Cuyahoga County, Ohio, which he identified as Local 310, which claimed the exclusive right to perform certain kinds of work. (Tr. 67-68). Discussing the work claimed by Local 310, Meaney identified laborers as tending to the other designated trades in the construction industry, such as bricklayers, carpenters, and cement finishers. He explained that laborers performed such ancillary work as bringing block to the bricklayers, mixing cement for bricklayers, mixing cement and pouring concrete for cement finishers, carrying scaffolding and drywall to carpenters, and other "general types of things." In

contrast, he stated that electricians “perform our own work” and “don’t have any agreements with the laborers.” (*Id.*).

Meaney described the situation in which unions claim the same work as “jurisdictional disputes” and stated that he had been involved in such matters. (Tr. 70). He testified that sometime in 2010 he became aware of the work being done on the two projects in question. (Tr. 71). He stated that he visited the jobsites as a business representative of the union “several times.” (*Id.*). He explained that the purpose of the visits was to determine the electrical contractor awarded the work, and to see if any union members working on the site had any questions or if any non-union employees would be interested in joining, as well as to determine if there were any wage-and-hour or safety-code violations. (Tr. 71-71). According to Meaney, he visited the Lakeshore Plaza or the Shore Center Shopping Center site “[a]t least a half a dozen times.” He explained that the sites were close to his house. He stated that his first visit to the sites lasted approximately 20 minutes, and thereafter his visits averaged approximately 5-10 minutes. (Tr. 72).

Meaney testified that he observed workers on the two projects installing the lights on exteriors of buildings, and that Monaco workers were doing similar work each time that he visited one of the sites. (Tr. 72-73). He stated that the work the Monaco employees were doing was the type of work that Local 38 would claim as its exclusive right to perform. (Tr. 73). He stated that he had done similar work “lots of times myself.” (*Id.*). Asked if any other union in Cuyahoga County would claim the exclusive right to perform such work, he replied, “No.” (*Id.*). He made clear that the laborer’s union in Cuyahoga County would not claim such work. (*Id.*). He also stated that there had never been a dispute between Local 38 and any other union because Local 38 claimed jurisdiction over the type of work the Respondent’s employees were performing. (*Id.*).

Meaney then testified that during his visits to the project worksites, he observed Monaco employees installing “gooseneck” and similar light fixtures. (Tr. 76). He stated that he had installed such light fixtures “lots of times.” (*Id.*). He described the work involved as locating the electrical panel, guiding the wires from the electrical panel to a junction box that was mounted flush with the building, creating joints with scotch locks or wire nuts while connecting the correct wires, and then placing the fixtures back onto the building by “screwing it into that junction box that’s mounted flush on the building.” (Tr. 76-77). He stated that he had actually observed the Monaco employees doing such work. (Tr. 77). He affirmed that this was the type of work that Local 38 claimed the exclusive right to perform, and that no other union in Cuyahoga County performed such work. (*Id.*). He explained that the same was true for the installation of exterior lights which he had also seen the Monaco employees installing. (Tr. 77-78).

Meaney testified that while he was on the job sites, he never saw any of the Monaco employees involved in the removal of existing lights. (Tr. 78). However, he stated that, generally speaking, removing existing light fixtures would require that the electrician make sure that the power was off to the light, in other words, killing the power. (Tr. 79). He explained that this would require that the electrician “trace back” by going to the panel and turning off the circuit to it. He further observed that even if the panel board was marked and had a schedule

which included the light to which the electrician was trying to kill power, proper procedure would be for the electrician to come outside with a tester and test to make sure that the proper breaker had been turned off. (Tr. 79). He further explained that “tearing out electrical feeds” involved what was called “disconnect and make safe.” He clarified that this process required that the electrical wiring be disconnected and removed from the property as the old wires could not be left in the building. He stated that Local 38 also claimed exclusive jurisdiction of this type of work, and that no other union in Cuyahoga County claimed that type of work. (Tr. 79-80). According to Meaney, it was not the practice in Cuyahoga County for union laborers to remove existing light fixtures before electricians installed new ones. (Tr. 80).

3. *Stephen Banig*

The final witness called by the Administrator was Stephen Banig. Banig identified himself as a federal investigator with the United States Department of Labor, Wage and Hour Division. (Tr. 87). He testified that he had undertaken an investigation of Monaco with regard to the projects in question, relating to work performed between approximately July 2010 and December 2010. (Tr. 89). As part of that investigation, Banig determined that the federal wage determination contained in Administrator’s Exhibit Number 5 was applicable to the projects in question. (Tr. 90-91). He explained that the wage determination was applicable because it was specific to the state of Ohio, the county of Cuyahoga, and because the “date of the general decision number” corresponded “roughly” with the date that construction began on the projects. He also observed that the wage determination was in regard to building construction of less than four stories. (*Id.*). He asserted that no other federal wage determination could be applicable to the two projects. (Tr. 91).

Noting that the wage determination contained several job classifications, Banig testified that the determination of which classification applied to which worker involved a “common-sense approach.” (*Id.*). He further explained that the payrolls were first consulted to ascertain the classification applied by the contractor, and then the investigator would actually go to the job site to observe the work being done in order to determine if the classification matched the work. (Tr. 92). He stated that the wage determination also contained prefixes which referred to the local unions which were used as a basis for establishing the prevailing wage, and in any case in which an issue arose which was “contentious,” then the union would be consulted on whether the work observed by the investigator matched the type of work claimed by the union. (*Id.*). In this regard, he noted that the wage determination contained at Administrator’s Exhibit 5 contained a reference to Local 38 for the classification of electrician. (Tr. 92-93).

Banig testified that he investigated whether Monaco had correctly classified its employees on the two projects. (Tr. 93). He concluded that the proper classification for the employees was electrician, whereas Monaco had adopted that of laborer. (*Id.*). He stated that the wage for electrician was higher than that for laborer. (*Id.*). Banig then examined the certified payrolls of Monaco, which he obtained as part of his examination, and which are contained in Administrator’s Exhibit 11. (Tr. 94-95). He then performed a back-wage computation for the Lakeshore Plaza Project, which is found at Administrator’s Exhibit 8, and a back-wage computation for the Shore Center Shopping Center, which is found at Administrator’s

Exhibit 9. (Tr. 95-96). He then summarized his findings in a separate document, Administrator's Exhibit Number 7.

Banig was then asked about the written statement he obtained from Jeremy Jaycox, which is found at previously excluded Administrator's Exhibit Number 12. (Tr. 98). As discussed, counsel for Monaco objected to the hearsay nature of the statement and the failure of the Administrator to call Jaycox as a witness and have his testimony subjected to cross-examination. (Tr. 98-99). The Administrator proffered that the written statement, despite its hearsay nature, was admissible under 29 C.F.R. § 18.801(d)(2)(iv) because it was a statement "by an employee during his employment about a matter within the scope of his employment." (Tr. 99). I have determined, however, for reasons already stated, that this exception to the hearsay rule does not offer a guarantee of trustworthiness, and therefore Administrator's Exhibit 12 is inadmissible. Banig's testimony in reference to the statement, both on direct and cross-examination, will therefore not be further summarized.

On cross-examination, Banig at first denied ever telling the Monacos that he had overpaid any of their employees, but then, in the absence of specifics, he added that his denial could not be made "categorically." (Tr. 113-114). He stated that he could not "specifically recall" ever using the word "overpaid" in a conversation with the two brothers. (Tr. 115).

On redirect examination, Banig explained that there were two components to the applicable prevailing wage: the hourly rate, and the acquired fringe benefit. (Tr. 127). He further clarified that an employer had to pay at least the combined amount of the hourly rate and the fringe-benefit rate in order to be in compliance under the Davis-Bacon Act. He stated that it was possible that he may have told Monaco that the company was paying more than the required hourly rate, but that would not necessarily equate to full compliance with the prevailing-wage requirement. (*Id.*). He stated that in the case of Monaco, the company was paying an hourly wage that was sufficient to satisfy the hourly wage requirement; however, the company was not paying a wage sufficient to satisfy the total wage required on an hourly basis factoring in the fringe-benefit requirement. (Tr. 128).

On questioning from the undersigned, Banig stated that the wage determination is normally incorporated into the prime contract before it is open for bid. (Tr. 128-129). According to Banig, bid packages for federal contracts normally will include the wage determination. (Tr. 129). When asked if he knew whether the wage determination found at Administrator's Exhibit 5 was integrated into the prime contract, Banig responded, "There was a wage determination included, yes." (*Id.*). He explained that the "initial contract had a wage determination in it." (Tr. 130). He stated that a previous investigator had noticed that the wage determination included in the initial contract "should have been updated," but he stated that the updated wage rate was identical to the previous determination. (*Id.*).

The undersigned then asked Banig how the subcontractor was supposed to be aware of the wage determination contained in the prime contract. (*Id.*). Banig responded that the law required that the prime contractor include in any subcontract the wage determination and labor stipulations. (*Id.*). He stated that absent a printing of the entire wage determination, the wage determination should be specifically referenced. (Tr. 131). Banig testified that if the

subcontractor had any questions regarding the wage determination, the subcontractor “should be able to consult with the general contractor, the contracting agency.” He stated that the regulations require that “all the provisions” of the contract be handed down to the subcontractor, and that the prime contractor remains responsible for compliance. (Tr. 131-132).

Upon further questioning from the undersigned, Banig clarified that he had been to the two worksites “at least twice.” He clarified that he did not see all the employees in question during his visits. (*Id.*). He estimated that he interviewed three of the five employees on the job site, and the other two off the job site. (*Id.*). He made clear that all five employees were interviewed. (*Id.*). He testified that his determination that all five employees were involved in electrical work was based “[m]ostly on what they told me, frankly.” (*Id.*). He explained that he also met with “Mr. Monaco and his son,” and that during the conference with these two he asked specifically what kind of work the employees were doing. According to Banig, the work of the employees, as described to him during this conference “all...fell into the classification of that of an electrician.” (Tr. 133).

Asked by the undersigned if he had personally observed any employee performing work that fell into the category of laborer, Banig responded, “No, I didn’t.” (*Id.*). Asked if any of the employees described work to him that they had performed that he thought fell into the category of laborer, Banig replied, “Frankly, no.” (*Id.*).

Upon recross-examination, Banig stated that although the wage determination should have been included in the bid specifications that were published by the City of Euclid, he did not personally examine the bid specifications to be able to say personally that this was the case. (Tr. 136). He stated that it would surprise him if the wage determination had not been in the bid specifications. (Tr. 136-137). He emphasized that the wage determination also needed to be included in the contract signed by the prime contractor. (Tr. 137). He stated that he would be surprised again if the wage determinations in this case had not been included in the contracts signed by the prime contractors. (Tr. 138).

Asked specifically about Administrator’s Exhibit 1, which was the prime contract for the Lakeshore Plaza project, Banig stated that he did not see any wage determination attached to the exhibit. (*Id.*). He also stated that he did not find any wage determination attached to the prime contract for the Shore Center Shopping Center project, which is found at Administrator’s Exhibit 4. (Tr. 145). However, the undersigned pointed out to the parties that in both subcontracts there was language on the final page indicating that a CD was enclosed that included the wage determination. (Tr. 149-150). That language appears in both subcontracts signed by Joe Monaco under “Description of Work.” (AX2, p. 9; AX 4, p. 12). The language states that a CD was enclosed with the contracts that contained a full set of drawings, including a “Subcontractor Information Folder” which included subfolder called a “Billing Folder.” (*Id.*). The “Billing Folder,” in turn, is described as containing, among other things, the “Prevailing Wage Payroll Form, Prevailing Wage rate, Davis[-]Bacon Poster.” (*Id.*).

Banig then testified that he recalled that he received a copy of the CD “and it had all the attachments.” (Tr. 149). Banig testified, though, that he had no knowledge of when Monaco might have received the CD. (Tr. 154). He stated that if Monaco had not received the CD, then

Monaco should have requested information regarding the wage determination from the general contractor, J.J.O. Construction. He also indicated that Monaco could have contacted the Department of Labor and the city of Euclid to inquire. (Tr. 154). Asked hypothetically if Monaco had inquired of the Department of Labor and the city of Euclid and been told to pay the laborer rate, if it would therefore have been “reasonable” for Monaco to have done so, Banig replied “sure” but emphasized that the government’s concern was still whether the employees had been properly compensated. (Tr. 155).

On redirect examination, Banig stated that he recalled Monaco informing him at some point in his investigation that the company was not given a wage determination in the subcontract. (Tr. 157). Asked what would a person or company do if they wanted to view a wage determination for a particular county during a particular period of time, Banig stated that the easiest way was to go to the government website www.DOL.gov. (Tr. 158). He stated that the website contained archived wage determinations for earlier periods of time. (*Id.*).

4. *Mike Monaco*

Michael Monaco was the first witness called by the Respondent. (Tr. 161). He testified that the company bid on the two projects in question in February 2010. (Tr. 162). He stated that the two bids were submitted to J.J.O. Construction. (Tr. 163). He stated that, at the time of the bids, J.J.O. Construction had not yet been awarded the contracts, but appeared to be the favorite to get them. (*Id.*). He stated that the company submitted two bids for each project because at the time of the bid it was not certain whether the jobs were to be subject to the prevailing wage. He explained that the first bid was based upon the company’s own regular wages, and that the second bid was based upon the assumption that the projects would be subject to the prevailing wage. (*Id.*). He testified that the second bid for each project employed the prevailing-wage rate for laborers. (Tr. 164). He further testified that after he was told that the Respondent would be awarded the two projects, the Respondent was allowed to rebid on the two projects, and that was when the Respondent’s search for appropriate prevailing-wage rate began in earnest. (Tr. 176).

Monaco explained that the company chose to rebid on each project based upon the prevailing-wage rate for laborers because it did not have a definite statement of what the job classification would be. (Tr. 164-167, 173-182). He testified that that he was unsuccessful finding out such information on the internet, and that when the company called the Department of Labor, the woman who was spoken to professed to have no knowledge of how to obtain the wage determination. (Tr. 165). He further testified that the company had spoken to “multiple general contractors” who advised that the Respondent should employ the “journeyman wage...so that’s what we set out to find.” He testified that in this effort the Respondent called the city of Euclid and was given “suggestions” by “a fellow named Bob Gliha.” (*Id.*). He also stated that he spoke to Joe Orel from J.J.O. Construction who told the company that he thought the journeyman rate was \$29.00 an hour. He also stated that the company had spoken to different general contractors who advised the company that it would be “fine” if it added 10% to the second bid on the chance that the projects were subject to the prevailing wage. He stated that another general contractor advised to raise the bid 15% if the projects were subject to the prevailing wage. (*Id.*)

Monaco testified that the company's search never discovered the prevailing wage for either a journeyman or apprentice electrician. (Tr. 167). He stated that he was focusing on the apprentice electrician rate because none of his employees were "schooled or trained." (*Id.*). He stated that the projects in question were "a little different than our normal scope of work." (*Id.*). He stated that the company normally did "lighting maintenance in parking lots and commercial buildings," and that the work "fit into our regular type of work" because "there wasn't a lot of rewiring to do." He stated that his employees were accustomed to "swapping out light fixtures." He stated that on the projects in question, "[m]ost of the home runs were in, the panels were in, the timers were in" and therefore "basically it was a fairly easy electrical job because we were reusing old circuitry to go to new locations." (*Id.*). He stated that another reason the company focused on the apprentice electrician rate, as opposed to an electrician rate, was the degree of supervision his employees needed to perform the work. He added, "They have no idea. We had no electrical blueprints for this job." (Tr. 168). He identified both he and his son, Joe, as licensed electrical contractors. (Tr. 169). He stated that none of the five Monaco employees who worked on the projects were either licensed or certified electricians. (*Id.*).

Asked to describe the nature of the work performed by his employees on the projects in question, Monaco replied, "They installed electrical boxes in the locations that were marked out by myself or Joe." (Tr. 169-170). He explained that installing the boxes required that the box be screwed or clamped to an iron beam with "the proper connectors." He stated that the only skill required for performing such work involved use of a power screwdriver. (Tr. 170). He stated that the employees also ran an MCX cable, which he described as a premade conduit and wire system with iron sheathing on it. According to Monaco, he and his son indicated on the blueprints what size wire was required, which locations to go to, and whether "to terminate a circuit and take it to the existing home run." He stated that he and his son would "pop in on the guys" and "might not spend more than 15, 20 minutes some days because they had a good handle on where they were going." He emphasized that the work done by the company's employees did not involve any design work. He described it as all "front work." (Tr. 170-171). He stated that his son visited the projects every day, and he visited them "at least every other day." (Tr. 171). He described their supervisory activity as making sure that the employees had the materials that they needed, as well as making sure that they knew which project they were working on. He stated that he and his son also wanted to make sure that fixtures for each project did not get mixed up. (Tr. 171-172).

According to Monaco, the five employees on the two sites never held themselves out as electricians and were told to tell people that they were "electricians' helpers." (Tr. 172). He described Roland White as being "[p]retty much in the construction field most of his life, but in the maintenance end." He described Jeremy Jaycox as being hired in response to a job advertisement for a "lighting tech and an electricians' helper." He stated that Jaycox had "some schooling" which was not particularly helpful in his work. (*Id.*). He stated that Drenski was hired after working at "Murray's Auto Parts" and possessed "some type of certificate from a school that he went to for a year, part time." (Tr. 173). He described Frank Kaczmarczyk as a "laid-off steel worker" who was a good mechanic and later was recalled to work at the steel mill. (*Id.*). Finally, he stated that Mike Joyner was primarily used on "lighting maintenance" and that he knew how to operate "the bullet truck," as well as how to "change out ballast and light bulbs." (*Id.*).

Asked how the company finally decided to classify the five employees as laborers when it had first considered classifying them as apprentice electricians, Monaco stated that Gliha had advised the company that the two rates were the same. (Tr. 175). Monaco testified that he considered Gliha as the program coordinator or “the liaison between the general contractors and the city and the department—whoever was funding the project.” (Tr. 178). He testified that Gliha told the company to “just use this laborer rate because you’ll be okay because it’s the same rate as an apprentice [electrician].” (Tr. 175; *see also* Tr. 179). He also stated that Joseph Orel, the owner of J.J.O. Construction, advised the company that the two rates were only pennies apart. (*Id.*).

According to Monaco, the first time he actually viewed the wage determination for the two projects was when he received the information on CD from J.J.O. Construction. (Tr. 180). He testified that he believed that the Respondent received the CD from J.J.O. Construction “sometime between 6/18 and 6/25” of 2010. (*Id.*). He then stated that the Respondent’s contract had been signed in “[e]arly May.”⁵ (*Id.*). He testified that by the time the company received the CD on June 18, 2010, the project was underway, although he did not specify whether he was referring to one or both projects. (*Id.*). Earlier he had testified that work on “this job” had begun around June 12, 2010, but again he did not identify to which of the two projects he was referring.⁶ (Tr. 175). Subsequently, he testified that when he first received the CD from J.J.O. Construction the Respondent “already had the contract awarded and we already had the pricing in on that...” (Tr. 190). He added that “the job was already half done, the first one,” by the time the Respondent had received the CD, which would have been the third week in June according to his earlier testimony.

Later during his testimony, the undersigned asked regarding the information Monaco received when it was sent the CD by J.J.O. Construction. (Tr. 190). Monaco testified that when he finally received the CD containing the wage determination from J.J.O. Construction, he printed it out. (Tr. 205). He reaffirmed that when he did so, he realized that only two job classifications were arguably applicable, laborer and electrician, and that there was no classification for a journeyman or apprentice electrician. (*Id.*). Asked if he did not think to himself “oh, no,” Monaco responded, “I did.” (Tr. 190). He testified that he then began making telephone calls and was “assured, again, that the rate we were using was comparable to a[n] apprentice [electrician] rate.” (Tr. 206). He affirmed that he did believe that the work involved was electrical in nature. (*Id.*). Asked how he would classify the work of his employees if given only the choice between laborer and electrician, Monaco responded, frankly: “I would not have taken the job.” (*Id.*). He explained that the payroll would have been too high. (Tr. 207-208). He also stated that J.J.O. Construction cut off payments to the subcontractors, citing poor workmanship on work done by other subcontractors but not on the work performed by the Respondent, which passed all inspections. (Tr. 208).

⁵ The subcontracts show that the subcontract for the Shore Center Shopping Center was signed on June 3, 2010, by Joseph Monaco, and on June 11, 2010, by J.J.O. Construction, Inc. (AX 4, p. 11). In contrast, the subcontract for the Lakeshore Plaza project was signed on August 18, 2010, by Joseph Monaco, and by J.J.O. Construction, Inc., on September 15, 2010. (AX 2, at p. 8). The contract to which Mike Monaco was referring, therefore, as being signed in May of 2010 was most likely that pertaining to the Shore Center Shopping Center signed the following month.

⁶ Presumably, however, since it was the first subcontract signed, Mike Monaco was referring to the Shore Center Shopping Center.

Upon further questioning, Monaco agreed that he felt like both J.J.O. Construction and the city of Euclid had left him hanging in the wind by not giving him correct information regarding the wage determination beforehand. (Tr. 191). He testified that the handling of the two projects in question was in sharp contrast to an earlier federally-funded project with which he had been involved. He testified that the earlier project, with the city of Glenwillow, provided him with all the information he needed, including the prevailing wage rates. (Tr. 192). He agreed that by going forward on the two projects in question without initial certainty regarding the prevailing-wage determination, the company had taken a sizeable risk. (Tr. 192). He testified also that he had been operating under the assumption, because he was sending in payroll reports weekly, “that if there was a mistake the government would come back to us and say hey, Mike, you messed up.” (Tr. 194). However, he testified, that it was not until Banig called him to arrange an interview (which Banig’s testimony established was on December 7, 2010⁷), that he had an inkling that there had been a problem. (*Id.*). He stated that by that time the Shore Center Shopping Center project was 99% complete and the Lakeshore Plaza project was 70-80% complete. (Tr. 195).

Asked why he had not earlier thought to contact the Local 38 to determine the rates for electricians in Cuyahoga County, Monaco testified that the company did not think to call the union directly. (Tr. 181). He stated that he did go to the union website and view the rates “that were good up until ’08.” (Tr. 181-182). He testified that he did understand, however, that the prevailing wage rate was based upon local practice, and that local union rates were a reflection of local pay requirements. (Tr. 182).

Monaco testified that in his view the most appropriate classification for his workers would have been apprentice electricians. (Tr. 182-188). He stated that he was concerned throughout this period with paying the proper prevailing wage under the Davis-Bacon Act. (Tr. 188). He testified that he made telephone calls to the Department of Labor in an attempt to resolve the issue, but received no help. (*Id.*). He stated that he asked the people he spoke to with the Department of Labor “if they could point me towards the prevailing wage rate for Local 38 in Cuyahoga County” and “got no information from anyone....” (Tr. 189). He stated that he also could not find the information he sought online. (*Id.*).

Asked by his own counsel whether he would classify his employees as laborers rather than electricians after listening to the testimony of Meany, the union representative, Monaco testified that his employees were not electricians. (Tr. 198). He explained that they could not be given a job which involved carrying out the tasks of an electrician. He stated that he believed he could have found other unskilled labor to perform the type of work his employees did on the projects in question. (*Id.*). He restated that his company was a “lighting company,” which he explained to mean “lighting maintenance and...changing of light fixtures.” According to Monaco, if the projects had involved “a new shopping center, starting from the ground up, we would have never touched it.” (*Id.*). He reaffirmed his view that none of his employees could have performed the work on the two projects without the supervision of him and his son. (Tr. 199). He clarified: “Joe and I, before the guys ever got on-site, went through these buildings, went through all the crawl spaces, went through everything, identified all the existing circuits we

⁷ Tr. 121.

were going to reuse, what circuits were going to be reused and capped off, and what locations were going to be reused and which locations need to be extended, especially the part about tenant signs.” (Tr. 199). He further explained that on both projects sites, the company had performed lighting maintenance for several customers previously, over a span of years, so both he and his son were familiar with the locations and what needed to be done. (Tr. 200). He stated that he and his son inspected all the work that the employees performed on the project sites. (Tr. 201).

On cross-examination, Monaco clarified his view that the proper classification for his employees was electrician apprentices. (Tr. 203). He testified that he believed that this classification was among the classifications that would appear on the wage determination for the two projects. (*Id.*). He indicated that although he paid his workers the rate for laborers, he did not contend that the workers were laborers or performed work which would have been claimed by the laborers’ union for Cuyahoga County. (Tr. 204).

5. *Diane Monaco*

Diane Monaco was the second witness called by the Respondent. (Tr. 210). She identified herself as the wife of Mike Monaco and the president of the company. (Tr. 211). She testified that she became aware of the underpayment issue when Banig came to their home, which also served as the company’s office, and asked to see their records. (Tr. 212). She stated that, like her husband and son, she also tried to contact the Department of Labor “to get some rates.” She recounted going online, but she stated that she could not find any specific rates. (Tr. 213). She stated that the original wage determination was not attached to the contract with J.J.O. Construction. (*Id.*). She agreed with her husband that the CD was received after the project had begun. (Tr. 214). She testified that when she spoke to Banig she attempted to disabuse him of any notion that they had the correct prevailing-wage determination, along with the applicable classifications, from the beginning of the project. She stated, “[W]e tried but they just said that we used the wrong rate and that’s all they could tell us.” (Tr. 15). She affirmed that J.J.O. Construction was withholding money due to the Respondent under the terms of the contract although all the work performed by the company had passed inspection. (Tr. 216). She stated that on both projects the money was being held up by Fields Investments and Carter Properties⁸ until certain “shoddy work” was remediated and this matter with the Department of Labor was resolved. (*Id.*).

According to Mrs. Monaco, the effect of the disputed funds has “strapped” the company. She stated, “I mean, when you do a job of this magnitude for a small company it really affects everything. We have people suing us because we haven’t paid the bills for the shopping center that they haven’t paid for.” (Tr. 217).

⁸ At the beginning of the hearing, counsel for the Respondent identified Field Investments as “the owner” of the Lakeshore Plaza project and Carter Properties as the company that “owned” the Shore Center Shopping Center project. (Tr. 8).

FINDINGS OF FACT

Based upon the testimony summarized above, as well as the written exhibits, I make the following findings of fact:

1. The Shore Center Shopping Center project involved storefront renovations and improvements at the Shore Center Shopping Center, 22300 Lakeshore Blvd., Euclid, Ohio.
2. The Lakeshore Plaza project involved storefront renovations and improvements at Lakeshore Plaza, 22800-22840, Lakeshore Blvd., Euclid Ohio.
3. 22300 Lake Shore Boulevard, LLC, J.J.O. Construction, Inc., and Monaco Electrical Contracting, Inc., were the prime contractor, general contractor, and subcontractor, respectively, on the Shore Center Shopping Center project.
4. Lakeshore Plaza Holding Co., J.J.O. Construction, Inc., and Monaco Electrical Contracting, Inc., were the prime contractor, general contractor, and subcontractor, respectively, on the Lakeshore Plaza project.
5. The Respondent submitted bids to J.J.O. Construction, Inc., on the two subcontracts in February 2010, prior to J.J.O. Construction, Inc., having been awarded the general contracts, but at a time that the Respondent perceived J.J.O. Construction, Inc., as the favorite to be awarded the general contracts.
6. At the time the Respondent bid on the two subcontracts, it was not clear if J.J.O. Construction, Inc., would accept federal funds, and therefore the Respondent submitted two bids on each project, one assuming that the Davis-Bacon Act prevailing-wage provisions applied, and one that assumed that it did not.
7. After the Respondent was told that it would be awarded the two projects, the Respondent rebid the jobs.
8. At that time the Respondent submitted its rebids, it was of the opinion that the electrical work on the two projects was that of an apprentice electrician, and therefore attempted unsuccessfully to find out the local prevailing wage for that job classification by contacting the Department of Labor, the city of Euclid through the person of Robert Gliha, Joseph Orel from J.J.O. Construction, Inc., and other contractors experienced in federally-funded projects.
9. Unable to find out the local prevailing wage for an apprentice electrician, the Respondent submitted its rebids using the prevailing wage for a laborer on the advice of Robert Gliha and Joseph Orel that the rate was similar to that of an apprentice electrician.
10. The prime contract for the Shore Center Shopping Center project was signed on June 10, 2010. (AX 3, at p. 3).
11. The subcontract for the Shore Center Shopping center project was signed on June 3, 2010, by Joseph Monaco, and by J.J.O. Construction, Inc., on June 11, 2010. (AX 4, at p. 11).
12. The prime contract for the Lakeshore Plaza project was signed on July 14, 2010. (AX 1).
13. The subcontract for the Lake Shore Plaza project was signed on August 18, 2010, by Joseph Monaco, and on September 15, 2010, by J.J.O. Construction, Inc..

14. The language of the prime contracts for the two projects stated that the applicant for the contract must comply with provisions of the Davis-Bacon Act as it related to the payment of prevailing wages. (AX 1, at ¶ 8; AX 3, at ¶ 11).
15. The language of the subcontracts for the two projects required the subcontractor to be bound by the terms of the general contractor. (AX 2, at ¶ 9.2; AX 4, at ¶ 9.2).
16. Each of the two subcontracts contained a “Description of Work” which described the work as electrical and then stated that a CD was enclosed which included a subfolder containing the “Prevailing Wage Payroll Form, Prevailing Wage Rate, Davis[-]Bacon Poster.” (AX 2, at p. 12; AX 4, at p. 12).
17. The subcontracts were entered into by both parties, with the contemplation that he parties would perform Davis-Bacon Act work subject to the prevailing-wage determination contained in the referenced CD.
18. According to the testimony of Mike Monaco, the wage determination was not in the bid specifications for the two projects and the Respondent did not receive the CD containing the wage determination (AX 5) from J.J.O. Construction, Inc., until the week of June 18-25, 2010, or approximately one week to ten days after the signing of the subcontract for the Shore Center Shopping Center.
19. At least by the week of June 18-25, 2010, the Respondent was aware that the wage determination contained only two applicable classifications for its workers on the projects: laborer or electrician.
20. Notwithstanding being in receipt of the CD referenced in the two subcontracts which made clear that the only available job classifications were laborer and electrician, the Respondent continued to pay its employees on the two projects the wage rate for the classification of laborer.
21. The work performed by the Respondent’s employees Richard Drenski, Jeremy Jaycox, Michael Joyner, Frank Kaczmarczyk, and Roland White on both the Lakeshore Plaza project and the Shore Center Shopping Center project were subject to the prevailing-wage requirements of the Davis-Bacon and Related Acts.
22. Administrator’s Exhibit 5 is the wage determination applicable to both projects.
23. Administrator’s Exhibit 5 contains only the classification “electrician” for those workers doing electrical work.
24. According to area practice in Cuyahoga County, the work performed by the five employees of the Respondent of removing and installing lighting fixtures would be claimed exclusively by the International Brotherhood of Electrical Workers, Local Union No. 38.
25. According to area practice in Cuyahoga County, the work performed by the five employees of the Respondent would not be claimed by the laborers’ union.
26. Applying area practice, the proper classification of the work performed by the five employees of Respondent, under the applicable wage determination, was that of electrician, not laborer.
27. As a result of misclassifying its employees as laborers, the Respondent failed to pay its five employees the full amount of the hourly wage plus fringe benefits for the work they performed as electricians, and therefore violated the Davis-Bacon and Related Acts.
28. As a consequence of the misclassification, the five employees are owed the following amounts in back wages:

Employee	Back Wages Owed for Lakeshore Plaza Project	Back Wages Owed for Shore Center Plaza
Richard Drenski	\$1,822.21	\$1,919.58
Jeremy Jaycox	\$1,568.35	\$2,469.03
Michael Joyner	\$1,877.85	\$ 900.67
Frank Kaczmarczyk	\$1,318.81	\$ 48.69
Roland White	\$2,201.26	\$ 570.31

ANALYSIS

As the party challenging the classification of laborer given to its employees by Monaco, the Administrator bore the initial burden of proof. Specifically, the Administrator was required to present a *prima facie case* that the Respondent was bound by the Davis-Bacon prevailing-wage provisions and that the five employees were misclassified as laborers and underpaid. Assuming the Administrator satisfied its burden, the burden then shifted to the Respondent to rebut the presumption by a preponderance of the evidence. *See Cody Zeigler, Inc.*, 1997-DBA-17 (ALJ, Apr. 7, 2000), *aff'd in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003); *see also Pythagoras General Contracting Corp.*, 2005-DBA-14 (ALJ, June 4, 2008), *aff'd.*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011)(*errata* issued Mar. 3, 2011); *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004); *Thomas & Sons Building Contractors, Inc.*, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001).

1. Bound by the Davis-Bacon Act Prevailing-Wage Provisions

As a starting point, the parties stipulated at the hearing that the two projects involved were subject to the prevailing-wage provisions of the Davis-Bacon Act. (Tr. 20). However, I do not consider such a stipulation as synonymous with a stipulation that the Respondent was bound by prevailing-wage provisions. Indeed, the Respondent argues in its post-hearing brief that justice would dictate that it not. Accordingly, I will address first whether the Respondent was contractually bound to pay prevailing wages under the Davis-Bacon Act.

This case arose in the jurisdiction of the United States Court of Appeals for the Sixth Circuit. In an unpublished decision, *U.S. v. Ken's Carpets Unlimited, Inc.*, Nos. 92-6571, 92-6631, 1994 U.S. App. LEXIS 24419 (6th Cir. Sept. 6, 1994), the Court considered a case in which the subcontract did not contain any reference to the Davis-Bacon Act or provide the "wage scale," and the only direct reference to the Davis-Bacon Act did not come until three months after the execution of the contract. Under such circumstances, the Court held that general language in the subcontract purporting to bind the subcontractor to all obligations of the

general contractor was not specific enough to result in incorporation by reference of the Davis-Bacon Act prevailing wage-provisions. The Court noted that this was especially true considering the command to insert in the subcontract certain critical clauses under 29 C.F.R. § 5.5(a)(1) through (10). In this regard, the Court stated that the Davis-Bacon Act constituted an exception to the general rule that statutory provisions were deemed incorporated into contracts. LEXIS 22419 at *4 (citing *Universities Research Assoc., Inc. v. Coutu*, 450 U.S. 754, (1981)). Accordingly, the Court held in *Ken's Carpets* that the subcontractor had no contractual duty to pay the prevailing wage “since Interstate failed to disclose the wage scale in the contract.” *Id.* at *5. Indeed, the Court even refused to give any weight to the fact that the subcontractor had signed a modification three months after entering the contract, which included the prevailing wage, on the basis that there was a want of consideration. (*Id.*).

The Court’s reasoning in *Ken's Carpets* warrants consideration here because, as noted, the Respondent claimed at hearing that it did not receive the CD referenced in the subcontracts, and containing the prevailing wage determination, until after work had advanced on the projects and after the subcontracts were signed. However, this case is distinguishable from *Ken's Carpets* in many respects. First, it is undeniable that the Respondent knew it was entering into contracts covered by the Davis-Bacon Act. Mike Monaco testified that the Respondent originally did not know, and therefore submitted two bids prior to J.J.O. being awarded the general contract, one for if the Davis-Bacon Act prevailing wage-provisions applied, and another if they did not. (Tr. 162-164). However, after it was told it would be awarded the subcontracts, the Respondent submitted rebids based upon the prevailing-wage rate for laborers, which it assumed was the same as that of an apprentice electrician—the job classification felt by the Respondents to be the most appropriate. (Tr. 163-168, 172-180).

According to Mike Monaco, the wage determination was not part of the bid specifications, which was the reason that the Respondent acted on its own to arrive at the classification of laborer. In fact, Mike Monaco testified that the person in charge of administering the contract for the city of Euclid, Bob Gliha, advised him to base the bid on the classification of laborer and “you’ll be okay.” (Tr. 163, 175).

If the wage determination was not made available at the time of the bid specifications, clearly it should have been. The regulations required that the contracting agency—in this case, the City of Euclid through the United States Department of Housing and Urban Development—obtain a wage determination prior to soliciting bids on these two projects. 29 C.F.R. § 4.4(a)(1). Banig, in fact, testified that he would have been surprised to discover that the wage determination was not part of the bid specifications. (Tr. 136-137). Clearly, therefore, at the time the Respondent requested information on the wage determination during the bidding process, the City of Euclid should have been in position to provide such information, and should not have advised the Respondent to use the classification of laborer for what was considered at the time to be the work of either a journeyman or apprentice electrician.

As observed by the United States Supreme Court, under the Act as originally drafted, contractors were discontented with the post determination of the prevailing wage, “claiming that they had been put to unexpected expense by postcontract determinations that the prevailing wage was higher than the rate upon which they had based their bids. *Universities Research Assn. v.*

Coutu, 450 U.S. 754, 775 (1981). Consequently, in 1935 Congress added the predetermination provisions. (*Id.*). The Respondent has cited to neither regulation nor case law, however, which would excuse the failure of the subcontractor to pay its employees the prevailing wage based upon the contracting agency's failure to include the wage determination with the bid invitations. The regulations, in fact, allow the DOL to require retroactive application of any wage determination that is discovered by DOL to have been inappropriately excluded in a covered contract. 29 C.F.R. § 4.5(c).

Furthermore, with regard to any errant advice given to the Respondent by the city of Euclid, the Board has held that "[t]he Department of Labor cannot be estopped by the actions of a contracting agency." *Abhe & Svoboda, Inc.*, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27, at 29 (ARB, July 30, 2004), *recon. denied* (ARB, Oct. 15, 2004), *aff'd.*, *Abhe & Svoboda, Inc. v. Chao*, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd.*, 508 F.3d 1052 (D.C. Cir. 2007). Citing to *L.T.G. Construction Co.*, WAB Case No. 93-15 (WAB, Dec. 30, 1994), the Board in *Abhe* noted that "mistakes of one agency cannot be used to estop another agency from carrying out its statutory responsibilities." Therefore, according to the Board, acquiescence or erroneous advice from the state's contract administrator with regard to classification and payment of employees on a Davis-Bacon Related Act job site is not binding on the Department of Labor. *Abhe*, *supra*, at 30.

At the time Joe Monaco signed the subcontracts, there was, without doubt, language in the text which expressly required the subcontractor to comply with the prevailing-wage provisions of the Davis-Bacon Act, which is referred to by name, as well a reference to an attached CD that contained a "Prevailing Wage Payroll Form, Prevailing Wage Rate, [and a] Davis[-]Bacon Poster." (AX 2, at p. 12; AX 4, at p. 12). Thus, this case is vastly different from that in *Ken's Carpets*, where there was no language in either the general contract or subcontract referencing the Davis-Bacon Act.

Concededly, Mike and Diane Monaco testified that the Respondent did not receive the CD until work on the projects had begun and substantially advanced toward completion. However, as noted, it was Joe, not Mike or Diane Monaco who signed the contracts, and he did not testify at the hearing. Neither Mike nor Diane Monaco testified they were at the signing of the subcontracts. Therefore, the record does not contain competent evidence of whether the CD was available at the signing of the subcontracts by Joe Monaco.

Even assuming, however, that the CD was not attached to the first subcontract when it was signed, it is clear that the Respondent came into the possession of the CD shortly thereafter. The chronology of events appears to be as follows: The prime contract for the Shore Center Shopping Center project was signed on June 10, 2010. (AX 3, at p. 3). The subcontract for the Shore Center Shopping center project was signed on June 3, 2010, by Joseph Monaco, and by J.J.O. Construction, Inc., on June 11, 2010. (AX 4, at p. 11). Sometime during the period of June 18-25, 2010, the Respondent received the CD with the wage determination referenced in the subcontract. (Tr. 180). The prime contract for the Lakeshore Plaza project was signed on July 14, 2010. (AX 1). The subcontract for the Lake Shore Plaza project was signed on August 18, 2010, by Joseph Monaco, and on September 15, 2010, by J.J.O. Construction, Inc. (AX 2).

Based upon the above chronology, it would appear that the CD containing the wage determination was forwarded to the Respondent soon after the signing of the subcontract on the Shore Center Shopping Center Project, but before the signing of the subcontract for the Lakeshore Plaza project. Even if the CD with the wage determination was not present at the signing of the first subcontract, it is clear that when Joe Monaco signed both subcontracts on behalf of the Respondent, the intent of the parties, as evidenced by the language of the subcontracts, was that that the Respondent would comply with the prevailing-wage provisions of the Davis-Bacon Act, and specifically with the wage determination as contained in the CD. Indeed, according to the testimony of Mike Monaco, the Respondent after signing the subcontracts knew that its payroll records would be scrutinized for compliance. (Tr. 194). This case is, therefore, factually similar to that confronting the administrative law judge in *General Federal Construction, Inc.*, 1983-DBA-22 (ALJ Jan. 13, 1986), wherein the respondent attempted to argue that it was not bound by the prevailing-wage provisions of the Davis-Bacon Act due to the absence of language in the subcontract as required by the regulations. In *General Federal*, the administrative law judge swept aside this argument by noting that the subcontractor's course of conduct left "no doubt but that it understood and was purporting to comply with the Davis-Bacon requirement." *Id.* at 5.

I find, therefore, that the Administrator presented a *prima facie* case that the Respondent was contractually bound by the provisions of the Davis-Bacon Act, and specifically the wage determination as contained in Administrator's Exhibit 5. I find further that the Respondent did not successfully rebut the *prima facie* case presented by the Administrator.

2. Classification

Turning to the issue of classification, it is important to note that the Davis-Bacon Act does not permit an employer to unilaterally establish a classification based upon its own perception of the work to be performed. Rather, there are certain procedures for adding a classification to a contract under 29 C.F.R. § 5.5(a)(ii)(A),(B),(C). See *Tele-Sentry Security, Inc.*, WAB No. 87-43 (WAB June 7, 1989) slip op. at 4-5; see also, *P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996). Moreover, the case law is clear that the Administrator's prevailing wage determinations, as well as his or her decisions whether to add classifications, must be directly appealed to the ARB. *American Building Automation, Inc.*, ARB Case No. 00-067 (ARB, Mar. 30, 2001). In other words, the undersigned does not have the authority to adjudicate the propriety of a prevailing wage determination. 29 C.F.R. §§ 1.8 and 1.9 (2000). Accordingly, even if the undersigned were to agree with the Respondent that the work of its employees was properly classifiable as that of a journeyman or apprentice electrician, this would not alter the fact that wage determination did not allow for either classification.

The undersigned does have the authority, on the other hand, to determine whether an employee is properly classified for purposes of determining the appropriate prevailing wage rate. *Pythagoras General Contracting Corp.*, *supra*.

I find that the Administrator clearly satisfied its initial burden of presenting a *prima facie* case that the work performed by the five employees was that of an electrician as opposed to that of a laborer, the only two classifications arguably available. Meaney, the representative of IBEW Local 138, testified that during his visits to the project worksites, he observed Monaco employees installing “gooseneck” and similar light fixtures. (Tr. 76). Significantly, he stated that as a licensed union electrician he had installed such light fixtures “lots of times.” (*Id.*). As previously noted, he identified the work as locating the electrical panel, guiding the wires from the electrical panel to a junction box that was mounted flush with the building, creating joints with scotch locks or wire nuts while connecting the correct wires, and then placing the fixtures back onto the building by “screwing it into that junction box that’s mounted flush on the building.” (Tr. 76-77). He made clear that he had personally observed the Monaco employees doing such work. (Tr. 77). Moreover, he identified this work as the type that Local 38 claimed the exclusive right to perform. (*Id.*). He explained that the same was true for the installation of exterior lights which he had also seen the Monaco employees installing. (Tr. 77-78). Further, Meaney made clear that no other union claimed such work, including the laborers’ union. (Tr. 73).

Meaney’s testimony in this regard is essentially uncontradicted. I found Meaney both credible and knowledgeable. Moreover, his testimony regarding the type of work claimed by the union is significant because the Board has held that where wage rates are based upon a collective bargaining agreement, “proper classification of duties under the wage determination must be determined by the area of practice of the unions that are parties to the agreement.” *Abhe, supra*, at 12.

Furthermore, the rule is that employees “must be classified and paid according to the work they perform, without regard to their level of skill.” *Pythagoras General Contracting Corp., supra* at 7 (ARB, Mar. 1, 2011)(citing 29 C.F.R. § 5.5(a)(1)(i)). Therefore, the fact that the five employees were not licensed or certified as electricians does not preclude them from being classified as electricians if they were, in fact, performing the work of electricians. As counsel for the Administrator notes in its closing brief, the Wage Appeals Board, predecessor to the Administrative Review Board, held long ago that:

Under established principles of Davis-Bacon Act administration, when the wage predetermination contains only one wage rate for the carpenter classification without intermediate rates, it is not permissible for contractors who come on the project site, whether organized or unorganized, to divide work customarily considered to be the work of the carpenters’ craft into several parts measured according to the contractor by his assessment of the degree of skill of the employee and to pay for such division of the work at less than the specified rate for the carpenters’ craft.

Frye Brothers Corp., WAB Case No. 76-06, 1977 WL 24823 at 6 (WAB, June 14, 1977).

In similar vein, the Board has held that, in a Davis-Bacon Related case, “the rate to be paid for particular tasks is the rate found to be prevailing in the locality for that work, regardless of what tools the workers use.” *Abhe & Svoboda, supra*, at 12. Thus, Monaco’s testimony that

the only skill the five employees needed was the ability to operate a power screwdriver does not preclude a finding that they were doing the work of an electrician. *See also William J. Lang Land Clearing, Inc.*, ARB Case Nos. 01-072 to 01-079, 1998-DBA-1 through 6 (ARB, Sept. 28, 2004), *aff'd.*, *William J. Lang Land Clearing, Inc. v. Administrator, Wage and Hour Div.*, 520 F. Supp.2d 870 (E.D. Mich. 2007), *aff'd.*, Case No. 07-2423, 2008 WL 3287097 (6th Cir. Aug. 6, 2008)(unpub.).

The issue of classification in this case is remarkably similar to that in *Tele-Sentry Security, supra*. In that case, the contract was for installation of security system and fire alarm at a Federal Building and U.S. Courthouse. The respondents chose to pay their employees under the classifications of “electrician, laborer” and “laborer” on the two projects, whereas the Wage-and-Hour Investigator determined that the employees should have been classified as electricians. The respondents, very much like the Respondent here, argued that the low-voltage fire and security installations were not electrician’s work because installing conduits, pulling wire, and mounting boxes did not require any electrical skill or knowledge and could have been performed by virtually unskilled laborers. The respondents in *Tele-Sentry Security* also argued, as does the Respondent here, that the contracting agency, the General Services Administration, had approved their choice of classifications. However, as in this case, such arguments were countered by testimony of union representatives that electricians normally performed the work of installing such systems in the applicable geographic area. Resolving these issues, the Wage and Appeals Board first observed that, in light of its failure to follow procedures for adding additional classifications, the respondents had, by misclassifying and underpaying its workers, “proceeded at its own peril.” *Tele-Sentry Security, supra*, slip op. at 4. Furthermore, citing the testimony of the union representative, the Board affirmed the decision of the administrative law judge that the work was properly classified as that of an electrician. (*Id.* at 4-5).⁹

In sum, I find that the Respondent did not successfully rebut the Administrator’s case if misclassification by a preponderance of the evidence.

3. *Equitable Arguments*

In its post-hearing brief, the Respondent concedes that it “did not pay the electricians rate contained in the Administrator’s Exhibit 5 Wage Determination.” Resp. Closing Bf. at 2. However, by way of defense, the Respondent argues that “[n]o one told him [sic] to.” (*Id.*). In this regard, the Respondent again argues that the wage determination was not in the “bid specs” and was not attached to “the contract.” Furthermore, the Respondent argues that it made “valiant efforts” to get the Department of Labor to tell it the proper wage classification. The Respondent argues that it also “pleaded with the prime contractor” for the missing Wage Determination, and that it was given information by the city of Euclid “acting as the Federal Government’s agent” that it “was correct in paying laborers and apprentice rates, not electrician rates.” (*Id.* at 2-3).

⁹ Interestingly, in dissent Member Rothman of the Board argued that the respondents had produced sufficient evidence to at least raise the issue whether in the Atlanta area, where the work was performed, a new practice had evolved which allowed specialty contractors to do such electrical work when it was not an integral part of construction. *Tele-Sentry Security*, cited in text, slip op. at 7-8. In the present case, however, there was no evidence of an emerging practice in Cuyahoga County to allow the work of installing and removing light fixtures to be done by specialty contractors.

The Respondent describes its efforts to obtain the wage determination as “Herculean” and further states that the Department of Labor, J.J.O. Construction, and the city of Euclid were “barraged by Monaco’s desperate effort to know the proper rate and then pay it.”

These arguments, however, do not provide Respondent a defense in law or in equity. In *Frye Brothers, supra*, the Board held that a contractor is on notice under the Davis-Bacon Act that it must pay employees according to locally prevailing practices. The *Frye Brothers* rule has been interpreted to mean that contractors are to be considered on notice that they must “use the job classifications of signatory unions when wage determinations are based on collective bargaining agreements.” *Abhe & Svoboda, Inc., supra*, at 18. As noted by the Board in *Abhe & Svoboda*, the result is that contractors who seek to perform work of federal construction projects are obligated to familiarize themselves with the wage standards contained in the wage determination. (*Id.*).

It does appear that both the contracting agency and the general contractor may have failed the Respondent by failing to make available the wage determination with the invitations to bid, and then later at the signing of the first subcontract. However, as noted, the actions of the contracting agency and the contractors cannot generally evoke estoppel against DOL to defeat a legitimate claim for back wages on behalf of aggrieved employees. *Abhe & Svoboda, Inc., supra* at 29-30. As noted by the Wage and Appeals Board in *L.T.G. Construction Co.*, WAB Case 93-15 (WAB, Dec. 30, 1994), to invoke estoppel against the DOL in such a situation requires “at a minimum a compelling demonstration of conscious and aggravated misconduct on the part of DOL.” *L.T.G.*, *supra*, slip op. at 4. Furthermore, estoppel requires that the person seeking equitable relief have “clean hands,” and in this case it is difficult to state that Respondent’s hands are entirely clean because, whether advertently or inadvertently, the Respondent underpaid its employees by misclassifying them as laborers. In other words, it cannot be said that the equities weigh in favor of the Respondent, even if it tried its best to avoid the situation it fell into, to such a degree that its employees should bear the brunt by receiving less in wages than to which they were entitled.

Banig, the Wage-and-Hour investigator, testified that if a person or company wanted to view a wage determination for a particular county during a particular period of time, such information was available on the government website www.DOL.gov. (Tr. 158). He stated that the website contained archived wage determinations for earlier periods of time. (*Id.*). Regarding the Respondent’s efforts to contact the Department of Labor, the record establishes that several telephone calls were made, but it is unclear from the record to whom, or what agency, Mike and Diane Monaco spoke. Therefore, it is difficult, if not impossible, to determine if these telephone calls were even properly directed. The testimony, furthermore, does not identify which specific web addresses the Respondents visited when attempting to gather the information online. The worse that can be said from this evidence is that the DOL employees to whom the Monacos spoke were not helpful, but this falls far short of conscious or aggravated affirmative misconduct.

Finally, and perhaps most significantly, it bears emphasis that Mike Monaco testified that the Respondent was in receipt of the CD containing the correct wage and classification information by the week of June 18-25, 210. (Tr. 180). Afterward, the Respondent continued to pay its employees the laborer rate rather than adjust its payroll to the electrician rate. Mike

Monaco testified that it did so because the same people who told him to use the laborer rate during the bidding and rebidding process continued to tell him that “we were good, that everything is fine.” (Tr. 194). He admitted also that the Respondent proceeded under the “mistaken impression” that so long as the government did not intercede immediately, the Respondent was not required to change the classification of its workers to that of an electrician. (*Id.*). However much the Respondent may have been the victim of bad advice from others and its own mistaken impressions, and perhaps even its own wishful thinking, the fact is that under the contract the Respondent signed, the company was obligated to pay its employees according to the wage determination contained in the CD. And that wage determination, as Mike Monaco tacitly conceded, left no further doubt that between laborer and electrician, the only appropriate classification was electrician.

It also bears emphasis that the period in which the Administrator is seeking back wages in these two actions begins with the payroll date of July 4, 2010, for the Shore Center Shopping Center, and the payroll date of August 15, 2010, for the Lakeshore Plaza Project. (AX 8-9). In other words, the Administrator is seeking back wages for payroll-periods that occurred *after* the Respondent had in its possession the CD containing the relevant wage determination.

CONCLUSION

In sum, it is apparent from the record that the Respondent contractually obligated itself to pay its employees pursuant to the prevailing-wage provisions of the Davis-Bacon Act, and in conformance with the wage determination contained in a CD referenced in the two subcontracts. The record does not explain why the Respondent would not have been given the CD at the time bids were sought. In any case, the Respondent chose to obligate itself under the terms of the subcontracts to pay the applicable classification of worker contained in the wage determination, not whatever classification the Respondent felt was most apt. The Respondent thus exposed itself to a certain element of business risk. As it turned out, the only classification applicable to its five employees under the wage determination was inarguably that of electrician. Although Mike Monaco testified that had he known this from the start, he would never have bid on the projects, the fact is that the Respondent did successfully bid and then signed the two subcontracts, thus contractually obligating itself to pay the Davis-Bacon prevailing-wage rate for that of electrician.

REMEDIES

Counsel for the Administrator clarified at the hearing that the Administrator was not seeking a specific order from the undersigned, directing that monies be disbursed. (Tr. 24). Rather, counsel stated that the Administrator was requesting only a finding from the undersigned regarding whether there was a violation or violations of the prevailing-wage provisions of the Davis-Bacon and related acts, and that wages were not paid in the amount alleged. According to counsel for the Administrator, “disbursement of the money would follow as a natural consequence [of the undersigned’s findings], as opposed to the Court ordering that money be disburse to a particular person or entity.” (*Id.*).

CONCLUSION

Based upon the above analysis, the Administrator has shown that the five named employees of Monaco Electrical Contracting, Inc., were misclassified as laborers, when they should have been classified as electricians under the applicable wage determination, and that the misclassification resulted in back wages being owed to the employees in the amount specified.

JOHN P. SELLERS, III
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.