

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 21 August 2014**

**Case No.: 2013-DBA-00004**

*In the Matter of:*

**Disputes concerning the payment of prevailing wage rates, fringe benefits and overtime compensation and improper classification by and proposed debarment for labor standards violations of:**

***COLEMAN CONSTRUCTION COMPANY,***  
**(First-tier Subcontractor), and**  
***FREEMAN COLEMAN, SR.***  
**Owner, President, Secretary, Treasurer and**  
**Registered Agent of Coleman Construction Company**  
**Respondents**

With respect to laborers and mechanics employed  
by First-tier Subcontractor Coleman Construction  
Company on Contract No. HUD # 103-35154-PM-FAM  
At Lakeview Apartments, Ralston, Nebraska  
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Appearances:

Dana M. Shannon, Esq.,  
Megan McGinnis, Esq., and  
Andrea Luby, Esq.  
U.S. Department of Labor, Office of the Solicitor  
Kansas City, Missouri  
For the Wage and Hour Division

Greg Thomas, Esq., Taylor, High & Younes  
Omaha, Nebraska  
For the Respondents

Before: Stephen R. Henley  
Administrative Law Judge

## DECISION AND ORDER

This proceeding was initiated by the issuance of an Order of Reference, dated January 10, 2013, by the Administrator, Wage and Hour Division, United States Department of Labor (“Administrator”), asserting the failure to pay prevailing wage rates, fringe benefits, and overtime compensation and improper timekeeping and worker classification by Coleman Construction Company and Freeman Coleman, Sr. (“Respondents”). (ALJX 1).<sup>1</sup> The Order of Reference alleges that Respondents disregarded their obligations to their employees under the Davis Bacon Act (“DBA”) and Davis-Bacon Related Acts (“DBRA” or “the Act”), 40 U.S.C. 276(a) *et seq.*, and committed violations of the labor standards provisions of the Contract Work Hours and Safety Standards Act (“CWHSSA”), 40 U.S.C. 327 *et seq.*, during the construction of the Lakeview Apartments in Ralston, Nebraska.

### **Statement of the Case**

The Wage and Hour Division, U.S. Department of Labor originally alleged that Dicon Corporation (“Dicon”) and Coleman Construction Company (“Coleman”), a first-tier subcontractor of Dicon, committed violations of the labor standards provisions of the DBA and the CWHSSA. Dicon and Coleman separately requested hearings before the Office of Administrative Law Judges.<sup>2</sup> Given that the issues to be resolved and evidence to be presented in each case appeared substantially similar, I determined a consolidated hearing was appropriate under the circumstances and issued an applicable order on April 23, 2013. (ALJX 7). In a request filed on August 18, 2013, Dicon moved to withdraw its appeal. (ALJX 9). Counsel for the Administrator did not oppose. On August 22, 2013, I issued an order granting Respondent Dicon’s motion to withdraw its appeal, dismissing case number 2013-DBA-00003 and granting Respondent Coleman’s *Joint Motion to Continue* the hearing.

On December 24, 2013, counsel for the Administrator moved for summary decision entering judgment against Coleman Construction Company and Freeman Coleman, Sr. for: \$101,677.21 in back wages owed to 41 workers; violating the recordkeeping provisions of the applicable labor standards; and debarring Coleman Construction and Freeman Coleman, Sr., for a three year period. (ALJX 15). On the evidence then before me, I determined that factual disputes existed and denied the motion in a January 8, 2014 Order. (ALJX 17).

On January 9, 2014 the Administrator filed *Motion and Memorandum in Support of Motion in Limine to Bar Evidence of Alleged Embezzlement by Ramel Thompson; Motion in Limine to Bar Evidence and Argument Concerning Prime Contractor Dicon Corporations’ Withdraw of its Appeal; Motion in Limine to Bar Respondents’ Proposed Expert Witness Wallace Stokes; and Motion and Memorandum in Support of Motion in Limine to Bar Evidence of Witness’ Immigration Status*. (ALJX 18). All four motions were addressed at the January 14-15, 2014 hearing in Omaha, Nebraska. (Tr. 19-26). Claimant did not oppose and the court

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<sup>1</sup> As used in this decision, “JX” refers to the Joint Exhibits in this case; “ALJX” refers to Administrative Law Judge’s Exhibits; “CX” refers to Respondent’s Exhibits; and “AX” refers to Administrator’s Exhibits. “Tr.” followed by a page number refers to the transcript of the hearing in this case.

<sup>2</sup> Case numbers 2013-DBA-00003 and 2013-DBA-00004, respectively.

granted the *Motion in Limine to Bar Evidence of Witnesses' Immigration Status*. (Tr. 19). After brief argument, the court denied the three remaining motions. (Tr. 21-26).

A *de novo* hearing was then heard before the undersigned judge.<sup>3</sup> Both parties submitted pre-hearing statements. At the hearing, Joint Exhibits A to R; Administrative Law Judge's Exhibits 1 to 20; Respondent's Exhibits 1 and 3; and Administrator's Exhibits 1-2, 4<sup>4</sup>-7, and 10-11 were admitted. (Tr. 9-18; 57-77; 109-110; 127-128; 154; 371; 425; 434-439; 441; 528). Eight witnesses testified. (Tr. 36-528). Twenty-eight stipulated facts were admitted. (Tr. 6-9). At the conclusion of the hearing, I indicated that that post-hearing briefs would be due 60 days after receipt of the trial transcript. (Tr. 532). I subsequently granted the parties joint motion to extend the due date for closing briefs.

The Administrator's post-hearing brief was received on June 17, 2014. Though filed on June 16, 2014, Respondent's post-hearing brief was received on July 29, 2014.<sup>5</sup> No further briefing was filed, and this case is now ready for decision.

### ISSUES

As clarified at the hearing and in the parties' respective briefs, the following issues are before me:

1. Whether Respondent is bound by the DBA prevailing wage provisions.
2. Whether the employees in question were misclassified as laborers verses finishers and paid a wage rate other than the prevailing wage rate required under the Act.
3. Whether Respondents improperly lowered the amount of hours worked by employees shown on the certified payroll from what was actually worked, falsifying payroll;
4. Whether Respondents failed to make overtime payments, in violation of the Act;
5. Whether Respondent committed recordkeeping violations of the labor standards provisions;
6. Whether Respondent made unauthorized deductions from employee wages to recoup redone work; and
7. Whether Respondent's actions warrant the requested relief of debarment, pursuant to 29 C.F.R. § 5.12(a).

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<sup>3</sup> A hearing was previously scheduled before the under signed judge on September 24-26, 2013 in Omaha, Nebraska. Pursuant to a Joint Motion for Continuance filed on August 22, 2013, the hearing was cancelled and rescheduled for January 14-15, 2014.

<sup>4</sup> In Exhibit AX-4 pages 56-59; 65-66 were admitted (Tr. 433) no other pages in AX -4 are admitted for the truth of the matter asserted, but only for limited purposes of explaining how the investigator arrived at his wage calculations. (Tr. 438-39); and in AX 5 only pages 74-77 were admitted for their truth and the remaining pages only for the same limited purpose of AX 4.. (Tr. 426; 440).

<sup>5</sup> My law clerk inquired by phone about the submission of Respondent's closing brief on July 29, 2014. Counsel indicated the brief was faxed to this office on June 16, 2014 and e-mailed its brief with a June 16, 2014 facsimile results printout. I find Respondent's brief was timely filed.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### *Stipulated Facts*<sup>6</sup>

1. In October 2010, general contractor Dicon entered into contract HUD # 103-35144 (sic) - PM-FAM with Lakeview Residential, LLC (“Prime Contract”).
2. The Prime Contract was for the construction of eight three-story apartment buildings known as the Lakeview Apartments, in Ralston, Nebraska (the “Project”).
3. The Project was funded under the National Housing Act, 12 U.S.C. § 1701, et seq., (“NHA”) and the U.S. Department of Housing and Urban Development (“HUD”) was the funding agency.
4. The Prime Contract was subject to the labor standard provisions of the DBA and the CWHSSA and provisions regarding same were incorporated therein.
5. In January 2011, Dicon subcontracted with Coleman Construction Company under contract number HUD #103-35154-PM-FAM for concrete flatwork on the Project.
6. Freeman Coleman, Sr. (“Mr. Coleman”) is the President and founder of Coleman Construction, and he has held this position since May 1980 when he formed the corporation.
7. Mr. Coleman is in charge of the day-to-day operations of Coleman Construction, as well as disciplining, hiring, and firing employees.
8. Mr. Coleman signed the subcontract on behalf of Coleman Construction.
9. The value of Colman Construction’s Subcontract was \$880,000.
10. Pursuant to a Joint Venture Agreement dated December 6, 2010, Mr. Coleman joint ventured with John Main of Main Construction.
11. Coleman Construction paid Mr. Main as a worker on the Project.
12. Coleman’s Construction’s concrete flatwork for the Project included the streets, sidewalks, patios, steps, parking lots, and the first 1-2 floors of each apartment building.
13. Wage Decision Number NE20100009 with modification 2 dated 06/25/10 (“Wage Decision”) applied to the Prime Contract and the Coleman Construction Subcontract. (AX 1).
14. The Wage Decision specified the prevailing rates and fringe benefits to be paid to the Project workers
15. The Wage Decision specified that workers performing cement mason/concrete finisher (“finisher” or “concrete finisher”) work must be compensated at a rate of \$24.31 per hour, plus \$8.60 per hour in fringe benefits, for a total of \$ 32.91 per hour.
16. The Wage Decision specified that workers performing general laborer work (“laborer”) must be compensated at a rate of \$10.41 per hour, plus \$1.80 per hour in fringe benefits, for a total of \$12.21 per hour.
17. Mr. Coleman solely determined whether a worker should be classified as a laborer or as a concrete finishers on the Coleman Construction payroll for the Project.
18. Coleman Construction kept track of hours worked by having a foreman record by hand the daily hours of each employee on the Project.
19. The foreman then submitted the handwritten time records to Mr. Colman, who in turn provided them to his accountant.

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<sup>6</sup> The stipulated facts are set forth in the Administrator’s Amended January 9, 2014 Pre-Hearing Statement at pages 2-4.

20. After payroll was created the handwritten time records were destroyed.
21. Kenny Ingram worked on the Project from roughly December 2010 through December 2011, with time off for the weeks that Coleman did not work on the Project due to inclement weather.
22. While foreman for Coleman Construction, per Mr. Coleman's request, Mr. Ingram kept handwritten time records at the jobsite.
23. By letter dated July 1, 2011, Dicon informed Mr. Coleman that it was aware of a possible discrepancy in Coleman Construction's certified payrolls, told Mr. Coleman to ensure "that all employees are paid the minimum amount per Davis Bacon General Decision Number NE20100009 with modification 2 dated 6/15/10," and told Mr. Coleman that it was his "responsibility to make sure you adhere to these standards as well as making sure your employees are classified correctly per their scope and responsibility of work."
24. Mr. Coleman signed and dated the face of Dicon's July 1, 2011 letter, indicating that he received it on July 1, 2011.
25. On August 23, 2011, Wage and Hour Investigator Wesley Hays opened an investigation into Coleman Construction under the DBRA for its subcontract work on the Project.
26. The only time-related records that Coleman Construction made available or submitted to Wage and Hour were certified payroll records and regular payroll records; no time cards, time sheets, or other records of start and stop times of workers were produced.
27. The certified payroll records submitted by Coleman Construction to Wage and Hour cover 47 weekly pay periods, from the week ending December 11, 2010 through and including the week ending November 12, 2011.
28. In addition to the Lakeview Apartments construction project, Coleman Construction has been a contractor or subcontractor on a number of other federally-funded construction projects.

#### *Testimonial Evidence*

*Mr. Wesley Hays (Tr. 35-155; 429-442)*

Mr. Hays is employed as an investigator by the U.S. Department of Labor, Wage and Hour Division, enforcing federal labor statutes such as the DBA and CWHSSA. (Tr. 36-37). Mr. Hays investigated Coleman and Dicon for violations under the DBA. *Id.* He testified that the Prime Contract included the wage decision on pages 34-37 of the contract. *Id.* at 40. He explained that fringe benefits can either be paid in cash by the employer or as health and life insurance benefits. *Id.* at 41. Mr. Hays also testified that the subcontract between Coleman Construction Company and Dicon was subject to the DBA. *Id.* at 42.

Mr. Hays opened the investigation into Coleman for DBA violations in November 2011 and closed it in February 2012. *Id.* at 43. During the investigation, Mr. Hays, obtained records and other documentation from Coleman Construction and interviewed employees, union representatives, Mr. Coleman, and Mr. John Parson, a Dicon representative. *Id.* at 43-44. Mr. Hays explained that Ms. Meghan Vesper also assisted with the investigation because she spoke Spanish and could communicate with the Hispanic workers whom she interviewed. *Id.*

Mr. Coleman met with Mr. Hays on more than one occasion and provided him with contract documents and payroll records. *Id.* at 46. Mr. Coleman did not provide requested time records, or any documentation concerning the start and end times of employees. *Id.* at 47, 50-52. Mr. Hays testified Mr. Coleman told him that time records were thrown away after payroll was entered. *Id.* at 52. The certified payroll records Mr. Coleman provided were from the weeks ending in December 11, 2010 and November 12, 2011. *Id.* See also (JX F). Mr. Hays explained that these records were contained in U.S. Department of Labor Form WH-347, which are mandatory for DBA projects, but optional otherwise. *Id.* at 48, 136.

Mr. Hays further testified that he interviewed Greg Rhoades of the Cement Finishers Union, Ron Kaminski of the Laborers Union, and a “gentleman from the Carpenters Union.” *Id.* at 52-53. Mr. Hays explained he spoke with the union representatives to find out what the local practice was in regards to collective bargaining rates, the types of work claimed, and division of job duties. *Id.* The wage determinations for finishers contained in the contracts are union negotiated rates. *Id.* Mr. Hays learned what duties fell under finishers and laborers and used this information to determine if the current employees of Coleman were being paid properly. Mr. Hays conducted fourteen employee interviews. *Id.* at 60. After Mr. Hays conducted his interviews, he had the interviewee review a statement of what was said in the interview and sign if it was correct. These forms are now contained in the investigation file. *Id.* at 63. See AX 4,5. Mr. Hays testified that many of the workers he interviewed who performed finisher work were being paid between \$12.21 and \$16.00 an hour. *Id.* at 78.

Mssrs. Coleman and Main were listed on the certified payroll as finishers, making \$32.91 per hours. *Id.* at 80; JX-F. Mr. Hays testified that, according to the workers he interviewed, Mr. Main did “very little work” and provided seven workers for the Project. *Id.* at 81. The seven workers are not included on the certified payroll. *Id.* Mr. Hays testified that some workers did finisher and laborer work, and were being paid between \$12.21 and \$16.00 an hour instead of \$32.91. *Id.* at 82. Mr. Hays named Jerome Ingram, Archie Flemmings, DeRoyce Wright, William Jenkins, Kenny Ingram, Willie McLucas, Martin Portillo, and Antonio Portillo as workers who performed mostly finisher work but were paid at the lower rate of pay. *Id.* at 83. Mr. Hays further testified that he learned that six men in Mr. Main’s worker group were paid at the lower rate of pay, but worked as finishers. Mr. Hays testified that he received time records from a confidential informant that included the seven Hispanic workers as workers on the Coleman Project job site. *Id.* at 90; see also AX 6.

Mr. Hays testified that after Dicon sent Mr. Coleman a letter concerning the possible misclassification of employees, the certified payroll began listing payments at finisher rates for a limited amount of hours. *Id.* at 94. However, Mr. Hays explained that, based on employee interviews and the job site time records, these employees still were not fully being paid at finisher rates. *Id.* at 96-97. Mr. Hays testified that Mr. Coleman had a meeting with individual employees in which the employees agreed to the lower rates of pay. *Id.* at 98. Mr. Hays further testified that about fifteen employees were not paid for redoing work, and their hours were deducted in eight hour increments. *Id.* at 100-103. He explained that he drew this conclusion based on the job site time records, which he then confirmed in the employee interviews. *Id.* at 101-102; see also AX 6 at 106. Mr. Hays testified that he also discovered about eight employees who were not paid overtime pay in accordance with DBA and CWHSSA regulations of time and

half. *Id.* at 104-105. Mr. Hays explained that he found the overtime violations on the certified payroll and during interviews. *Id.*; JX F.

Mr. Hays prepared a summary of his investigation, found at AX 2. He also made back wage calculations found at AX 10, and a summary of the same at AX 11. Mr. Hays explained how he calculated the back wages. (Tr. 110- 129). He made estimations based on interviews and records to determine the percent of time workers were working as finishers, but paid as laborers, or not paid at all. *Id.* at 118-20. He explained since he did not have full records of the hours worked, he used percentages, based off the conclusions he made from the information he received in the investigation, specifically from interviews with employees and labor unions concerning the division of work. *Id.* at 122. He explained that the union representatives told him that a typical worker would work 50% of the time as a laborer and 50% as a finisher. *Id.* at 123. Based on back wage rates of .0125 and .67, with a total of 50%, Mr. Hays made his final calculation. Mr. Hays found a total of \$101,677.21 in back wages and overtime pay was owed to forty-one workers. *Id.* at 126; AX 11. Mr. Hays testified that Mr. Coleman informed him that he paid around five employees back wages of less than \$2,000. *Id.* at 128. However, Mr. Hays did not credit Mr. Coleman for these payments because he could not establish that the payments were actually made. *Id.* at 129.

On cross-examination, Mr. Hays testified that he does not know if the pages that pertained to the wage determination were included in Mr. Coleman's copy of the subcontract. *Id.* at 133. He admitted that exhibits E-G were not included in the contract and therefore it was incomplete. *Id.* at 135. He acknowledged that he does not have information about how much the seven workers that were with John Main were possibly paid. *Id.* at 143. However, on redirect, Mr. Hays explained that, based on employee interviews, including an interview of one of the Hispanic workers, they were paid in cash from \$8.00 to \$10.00 an hour. *Id.* at 146. Mr. Hays admits that he was shooting for a total target of 50% when making his calculations. *Id.* at 144.

Mr. Hays answered questions posed by the court, testifying that the work classification pay rates were posted at the work site, but the tasks involved in the work were not posted. *Id.* at 149. He explained that the employees would not necessarily know what the work they were performing would be classified as. *Id.* at 150. Mr. Hays used the area practice he learned from the union representatives regarding the tools used and duties of a finisher in his investigation. *Id.*

*Mr. Steven Murray (Tr. 155 –168)*

Mr. Murray is a retired investigator with the U.S. Department of Labor, Wage and Hour Divisions and assigned to investigate Sadler Electric, Mr. Freeman Coleman and Coleman Construction in 1994 concerning DBA violations. *Id.* at 156-58. Mr. Murray explained that the allegations concerned Mr. Coleman obtaining “kickback[s]” from his employees. He would “write a check for the correct amount, take them to the bank, have them cash the check, and give about half of the money [back] to him.” *Id.* at 159. Mr. Coleman owed around \$3,000 to 4,000 in back wages. *Id.* Mr. Murray testified that during this investigation Mr. Coleman was advised of the requirements of the DBA and given a copy of the regulations. *Id.* at 160. Mr. Murray testified that Mr. Coleman stated he did not owe any money and he did not make the payments.

*Id.* at 160-61. Mr. Murray explained that the case was eventually determined to be unsuitable for litigation.

Mr. Murray testified that Mr. Coleman was a subcontractor on another federally funded project, where the prime contractor, Kiewit, realized a wage mistake and paid the employees directly. Mr. Murray advised the prime contractor to pay the employees directly rather than give the money to Mr. Coleman to distribute. *Id.* at 161. Mr. Coleman called Mr. Murray inquiring if the back pay would be paid to him directly. *Id.*

*Mr. Ronald Kaminski (Tr. 168 – 180).*

Mr. Kaminski is the Business Manager of Laborers International Union of North America, Local 1140. *Id.* at 169. He has held this position since approximately 2006. *Id.* His union covers concrete flatwork workers. *Id.* at 170. Additionally, Mr. Kaminski worked in the field for Kiewit Construction as a laborer. He testified that, through this experience, he has become familiar with the tasks of local laborers perform in flatwork concrete projects. He explained that these tasks include: directing concrete trucks to come in, placing and pouring concrete out of the truck, shoveling the concrete around, vibrating the concrete, removing all the forms, doing cleanup, and back-filling around the area. *Id.* at 171. Mr. Kaminski explained that laborers do not set forms, install keyway rebar, and laborers do not use tools such as trowels, edgers or floaters, but use mainly shovels. *Id.* at 173-74. Mr. Kaminski is not familiar with the specifics of the Lakeview Project but explained that, depending on the size of the project, the division of labor could be 50/50. *Id.* at 175. Mr. Kaminski testified that, to become a laborer, all applicants have to apply to the Department of Labor (“DOL”) registered apprenticeship program. *Id.* at 176.

Mr. Kaminski answered questions posed by the court, testifying that, if a worker is doing finishing work, he would be paid at the finishing rate, and can revert back to laborer duties, and then be paid at the laborer rate. *Id.* at 178-79. Mr. Kaminski explained that there is no standard template to determine the division of labor, and many variables come into play, such as the size of the project, the type of concrete, and the efficiency of the workers. *Id.* at 179-80.

*Mr. Freeman Coleman, Sr. (Tr. 181 – 210; 422-528)*

Mr. Coleman testified that he started Coleman Construction in May of 1980, and has been the president from the beginning. *Id.* at 181. Coleman Construction does general construction and specializes in concrete work. *Id.* at 182. Mr. Coleman testified that Coleman Construction did the streets, sidewalks, parking lots, garages, steps, patios, and the first couple of floors in each apartment building on this project. *Id.* at 183. Mr. Coleman affirmed that he was a general contractor on a federally funded contract, under DBA wage determinations, for Offutt Air Force Base and the Forest Service in the 1980s. *Id.* at 186. He also was a subcontractor to Kiewit under the DBA and again for Sadler Electric in the 1990s. *Id.* Coleman was also the contractor on a lead abatement and federally subsidized projects for the Housing Authority of the City of Omaha in 2002. *Id.* at 187.

Concerning the Lakeview Apartments construction project, Mr. Coleman testified that he kept track of hours worked by having a foreman record, by hand, the daily hours worked for each employee at the job site. *Id.* He confirmed that the foreman would submit the handwritten time records to him and they would be destroyed after payroll was created. *Id.* Mr. Coleman testified that Kenny Ingram was the timekeeper who kept the timecards on a weekly basis. *Id.* at 188-89. Mr. Coleman testified that the time records that are admitted into evidence are not his records, or they would have been turned into his office. *Id.* at 189. Mr. Ausencio “Sammy” Puentes kept time records before Kenny Ingram. Mr. Coleman contends that Mr. Ingram “rigged up his own stuff” and tried to match it up. *Id.* at 205-206.

Mr. Coleman testified that he looked over the contract between Coleman and Dicon and he did not see the wage rate of \$32.00 or that it was a DBA covered job. *Id.* at 192-93. He explained that he was only recently informed of the wage rate and, after doing some research, learned that Nebraska rates are \$19.00, at the most. *Id.* at 194.

On cross-examination, Mr. Coleman explained that he was introduced to the job through John Main, because Mr. Main could not get a bond for Project. *Id.* at 195. Mr. Coleman entered into a joint venture agreement with Mr. Main. *Id.* at 196. Mr. Coleman testified that Dicon had him initial every page of the contract and, while the contract said “Davis Bacon”, when he “thumbed through it” he did not see a wage rate, so he “figured it was just a regular job.” *Id.* at 197. He testified that he “never” saw that last four pages included in the contract, saying “they wasn’t there, the pages that contained that wage forms.” *Id.* at 198. Mr. Coleman explained that, since he did not know if this was a DBA contract, he paid his workers the same wages he paid them on non-DBA jobs. *Id.* at 199. He further explained that he paid Mr. Main and himself \$32.91, because that is the rate Mr. Main stated they could be paid under the contract bid. *Id.*

Mr. Coleman testified that he became aware of the wage rate issue when Dicon sent him the letter in July 2012, five months after the start of the project. *Id.* at 200. He explained that he asked Dicon for the wage rate documents but they could not find them; but he “honored what he said” and began paying the \$32.00. *Id.* Mr. Coleman testified that they calculate the hours for finishing work by starting when the truck arrives: “we know [] that’s when the finishing starts. We let it go for – we gave them an hour for the truck, unloading the truck and two hours for after the truck was gone, so a total of three hours. After that the concrete gets hard, you can’t finish it anyway . . . the rest of it is cleanup.” *Id.* at 201. He explained that, depending on the size of the job, he would use one to two finishers and four to five general laborers. *Id.* at 210. Mr. Coleman testified that he did not consider setting forms as finisher work. *Id.* at 444. He further explained that using a hand saw is work for an experienced laborer, not a finisher. *Id.* at 463. He also explained that installing Kiewit rebar is not finishing work. *Id.* at 468.

Mr. Coleman testified that he had a meeting with his employees after the DBA issues arose and stated he told the employees he would pull his concrete truck receipts and pay them \$32.00 from when the truck came until when the truck left, then an additional two hours until the concrete dried. *Id.* at 447. Mr. Coleman testified that he had the employees sign a lien waiver to show they were paid in full and up to date in their wages. *Id.* at 449. He explained that Mr. Ingram signed the completed document, without blank entries, and he knew exactly what he was signing. *Id.* He explained that he made back pay payments in increments with company checks.

*Id.* at 452. Mr. Coleman explained that, in July, Coleman paid back pay to Kenny Ingram, Jerome Ingram, DeRoyce Wright, and Archie Flemmings. *Id.* at 210; 520. Mr. Coleman testified that he had problems with Mr. Ingram's time keeping, explaining that "[a] lot of times he wasn't on the job and then he was putting people on time, before he even got to the job," and asserting Mr. Ingram would clock people in before they arrived to work, while they were sleeping in their cars, or running errands. *Id.* at 455. Mr. Coleman testified that Mr. Ingram was incorrectly keeping time, the whole time, but since it was just mistakes and because "Ramel [also] dropped the ball . . . I can't just blame him for everything," and he was allowed to continue timekeeping. *Id.* at 492.

Mr. Coleman testified that, in July, he and Dicon came to the conclusion that "somebody must be on drugs" because the employees were "constantly making mistakes." *Id.* at 450. He then decided to have drug testing done, explaining: "[a]nd the ones that knew they was on drugs, they just backed off and said, 'I ain't going to do it.' And you know, they just quit." *Id.* Mr. Coleman testified that he did not fire anyone, but several employees left and went to another construction company. *Id.* at 451. Mr. Coleman testified that he paid the employees who redid work on the Project through normal payroll checks. *Id.* at 455. Mr. Coleman testified that he never adjusted his employee's hours, explaining that the hours were sent to the bank and the bank would generate the checks. *Id.* at 457.

Mr. Coleman testified that John Main's crew did not work for Coleman and that Mr. Main "had his people coming in and out." Mr. Coleman explained that he "had Mexicans on my job that worked for me, under my payroll. . . . Now, the other guys, they didn't work for me." *Id.* at 453. Mr. Coleman testified that he gave Mr. Main checks, which was payment for using his equipment. *Id.* at 454. Mr. Coleman testified that Mr. Ingram worked on other projects with Mr. Main "with the Mexicans, [t]hat's why they know the Mexicans." *Id.* at 490. Mr. Coleman further testified that they did not work on his project. *Id.* at 490; 511. Mr. Coleman testified that Mr. Ingram kept the time of the other seven Hispanic workers because he also worked with Mr. Main. *Id.* at 512. Mr. Coleman testified that the time records, including the ones with the Hispanics time, which are in evidence, were not turned into him, but only scraps of paper were turned in. *Id.* at 514.

Mr. Coleman testified that he specifically informed the workers that "we could not afford to pay overtime and we would not be working overtime." *Id.* at 206. He further testified that he was unaware that the certified payroll records indicating people worked overtime. *Id.* Mr. Coleman testified that he instructed Mr. Ingram that, if work needed to be done in excess of 40 hours, another employee was to be brought into work to relieve the person before they reached overtime hours. *Id.* at 458. He blamed Mr. Ramel for making mistakes on the time calculations, causing unpaid overtime hours. *Id.* at 207, 459. Mr. Coleman further testified that the payroll does not reflect over time, but corrections in straight time: "[a]nd what you see on that pay forms is not overtime, it's my accountant -- and one of the guys has some time, that last week, was straight time, and he end up outing it on the 40 hours, to make up for the different for the guy. He made a mistake and did it . . ." *Id.* at 522.

Mr. Coleman further testified about his work with the Sadler Line Electric "kickback" situation and the Kiewit incident. He explained in the Sadler incident, his employees would ask

to borrow money. He would then take the employees to the bank when they received their checks and ask that they repay his money. *Id.* at 462. He further explained that with Kiewit, Kiewit misclassified employee pay rates, and they corrected the problem without him. *Id.* at 463.

Mr. Coleman indicated that the way the Lakeview Apartments Project was run has caused all the problems. He testified that Dicon has done the same thing in the past and caused other companies to be disbarred. *Id.* at 464. Mr. Coleman argues that Dicon withheld the main documents that he needed to pay the appropriate wages and explained that, if he knew the wages were that high, he would have not taken the job. *Id.* He feels that Dicon “set [him] up” and instead of fixing the problem as Kiewit did, he claims that Dicon waited five months before notifying him there was a problem. *Id.* at 465.

Mr. Coleman testified on reexamination that he did not have any idea that the Project was a DBA project. *Id.* at 478. Mr. Coleman admitted that the subcontract referenced and incorporated the prime contract, DBA general requirements and wage determination, and HUD Form conditions, on the pages he initialed. *Id.* at 469-76. However, he testified that those requirements were “as they pertain” to the contract, and he did not believe they pertained, because he did not think the DBA applied, and the wage guidelines were not attached. *Id.* at 507-09. He further explained that Mr. Main recommended he pay Ausencio Puentes \$32.91 and William Hodge \$12.21 because he did the bidding on the job, and he knew what to pay. *Id.* at 479-80. Mr. Coleman testified that he was paid \$32.91 because he was an owner and would get the same as Mr. Main and the topnotch guys *Id.* at 480-81. He explained that the first payroll listed him as the supervisor with wages of \$25.00, but once he realized finishers were being paid \$32.91, he exclaimed ““Hold on, I’m not going to be paid under my workers,”” and began to be listed as a finisher making \$32.91 around March . *Id.* at 482-83. Mr. Coleman testified that he was paid \$32.91 for 40 hours a week. *Id.* at 526-27. Mr. Coleman certified compliance with labor standards on his DOL wage and hour form, which he testified he does not think of as a federal government contract. *Id.* at 484.

Upon questioning by the court, Mr. Coleman agreed that, prior to July 2011, he was not paying his workers properly. *Id.* at 485. He explained that he made corrective payments, but is unaware of the total amount of the payments made and he did not obtain proof that these checks were cashed. *Id.* at 485-87. Mr. Coleman testified that he does not know why the time started being recorded in hundredths of a decimal. *Id.* at 494.

*Mr. Gregg Rhoades (Tr. 211 -238)*

Mr. Rhoades has been the Business Manager for Operative Plasterers and Cement Masons, Local 538, since 1999. *Id.* at 211-12. This union represents cement masons/finishers throughout the area. *Id.* Mr. Rhoades has also done field work in the industry as a foreman and is familiar with the duties of a concrete finisher in the Omaha area. *Id.* at 213, 234. He explained that laborers guide the cement trucks, knock down the concrete, back-fill dirt, remove forms, and use tools like a “come-along.” *Id.* at 218, 225. He further explained that finishers: “strike-off the concrete, set forms, “bull float”, and use hand trowels, edgers, joiners, “mag float,” modernized saw, and darby. *Id.* at 218-226. Mr. Rhoades explained that for a job like the Lakeview

Apartments Project possibly measuring around 10,000 feet he would have 10 laborers and 10 finishers, for sidewalks he would have two laborers and two finishers, depending on the size. *Id.* at 230-32. He testified that 50/50 shared work distribution is a “fair analogy.” *Id.* at 233. Mr. Rhoades testified that in his opinion: “it’s not to your advantage to cut the corners” and that if the numbers differ, it “had better be slightly” more or it won’t work. *Id.* at 237. Mr. Rhoades lastly testified that the total package his union offers for finishers, including health insurance, retirement pension, training, and education, is \$35.49 per hour. *Id.* at 238.

*Mr. William Jenkins (Tr. 238 – 288)*

Mr. Jenkins testified that he worked on the Lakeview Apartments Projects for Coleman Construction beginning around December 2010 until July 2011, working roughly seven months on the project. *Id.* at 239-40. Mr. Jenkins explained that he did it all. He supervised the setting of the forms to get ready to pour the concrete, and he had “five guys under” him. *Id.* at 241. He testified that sometimes he was setting forms all day, sometimes 12-hour days, but not every day. *Id.* at 242-43. He also was an operator of bobcats and skid loaders, depending on what needed to be done, and he would do finishing with the other guys. *Id.* He explained that he used edgers, trowels, floats, and other machines to grind and level the concrete, and at times the work needed to be redone. *Id.* at 242-43. Mr. Jenkins testified that sometimes they did not have enough guys or the proper tools and had to use two by fours or sixes to do the finishing work. *Id.*

Mr. Jenkins testified that Mr. Coleman was the boss and Mr. Main was his partner, he named Archie Flemmings as the foreman/lead guy of the finishing crew. *Id.* at 245. He explained that Sammie Puentes worked for Mr. Main, and he was “in and out” on the Project. *Id.* He testified that Mr. Puentes would sometimes bring a crew of Hispanic guys to come and work on the Project, all of whom worked for Mr. Main. *Id.* He explained that the Hispanic workers worked alongside the other finishing workers, working full days. *Id.* at 248-50. He testified that every time Mr. Coleman would come to the job site, the Hispanic workers would be present at the job and Mr. Coleman would interact with these workers. *Id.* at 254. He testified that he witnessed Mr. Main paying the Hispanic workers in cash. *Id.* at 256.

Mr. Jenkins testified that towards the end of his stay with Coleman, Mr. Ingram began keeping track of the time, but before that Mr. Puentes and Mr. Flemmings kept the time records. *Id.* at 247-48. Mr. Jenkins testified that he worked anywhere from eight to fourteen hours a day. He began making \$13.00 an hour, and got a raise to \$16.00 when he worked on a federal job. *Id.* at 253. He testified that he worked overtime “all the time” and was not paid time and a half. *Id.* He explained that he was paid by check, but that other workers were paid in cash. *Id.* Mr. Jenkins testified that Mr. Main would do physical work on the Project, but Mr. Coleman never did any physical work, he just supervised. *Id.* at 255.

Mr. Jenkins testified “I know I wasn’t paid” for all the hours I worked. *Id.* at 256. He explained that he knew it was a federal job from word of mouth, and he saw the federal job poster on the bulletin board on the Dicon trailer, stating what the workers were supposed to be getting paid. *Id.* He explained that he called the number on the poster, and the person who answered confirmed the job was a federal job and “a couple days later they sent someone out to talk to me.” *Id.* at 257. Mr. Jenkins explained that an investigator came to the work site, around

March 2011, and asked him about the wages he was being paid. He further indicated that the investigator spoke to other workers, including Mr. Flemmings. *Id.* at 259. Mr. Jenkins testified that Mr. Coleman saw him speaking with the investigator and Mr. Coleman informed him that \$16.00 was what he was supposed to be making according to the contract. *Id.* Mr. Jenkins testified that he later had a conversation with Mr. Coleman in which he agreed to be paid \$20.00. *Id.* at 261. He explained that Mr. Coleman had separate meetings with himself, Mr. Flemmings, Mr. Ingram and “Bill”, around June 2011, where Mr. Coleman acknowledged that he was not paying them correctly, and agreed to pay them more. *Id.* at 264-265. However, Mr. Jenkins testified that he was never paid \$20.00 an hour. *Id.* at 265. He testified that Mr. Coleman originally paid the workers with payroll checks, and later he also paid them with personal checks. *Id.* at 276.

Mr. Jenkins further testified that child support payments were supposed to be taken out of his check, and these deductions were indicated on his check. However he received a letter from the state indicating he was in arrears. Mr. Jenkins testified that he believes Mr. Coleman was not sending the child support payments directly from his check, as indicated. *Id.* In July 2011, Mr. Jenkins and Mr. Flemmings were terminated, shortly after they received letters concerning drug testing. While Mr. Jenkins agreed to undergo drug testing, he refused to pay to have done. *Id.* at 272. He testified that he confronted Mr. Coleman about not being paid overtime and they had a heated conversation. *Id.* at 285. Mr. Jenkins lastly testified that he would write down his own time records, because the records Mr. Ingram took were inaccurate, and the hours would be shorter than what he actually worked. *Id.* at 287.

*Mr. Kenny Ingram (Tr. 293 - 407)*

Mr. Ingram worked on the Lakeview Apartment Project with Coleman Construction from December 2010 until December 2011. *Id.* at 294. He testified that he began working as a finisher and then started working as a foreman and timekeeper. *Id.* He started keeping time records around May or June 2011, and became the foreman in July 2011. *Id.* at 295. He testified that he would do finishing work such as setting forms, and performed other finishing duties and used the finishing tools. *Id.* at 295-300.

Mr. Ingram testified that Mr. Coleman directed him to do timekeeping. *Id.* at 300. He described the process as: “I would make sure that I’d make a note of everybody and what time that they were coming in,” and when they left for the day. *Id.* He explained he kept weekly sheets, which also included the time taken for lunch breaks. *Id.* at 301. Mr. Ingram testified that at the end of the week, he turned the sheets into Mr. Coleman. *Id.* He testified that he made a copy for Mr. Coleman and kept a copy so that if employees came to review their time, they could. *Id.* at 302. He made the photocopy at his house, and did not inform Mr. Coleman he was making these copies. *Id.* at 303-04. Mr. Ingram testified that AX-6 is a copy of the time sheets he was keeping for Coleman’s workers on the project. *Id.* at 305.

Mr. Ingram testified that he was instructed to make a separate time sheet for laborers and finishers, “when it actually became an issue.” *Id.* at 310. He explained this change was after a superintendent from Dicon informed the employees that they were supposed to being paid a different rate. *Id.* at 311. Mr. Ingram testified that, in July 2011, Mr. Coleman instructed him to

keep separate time records, and informed him that employees were to be paid DBA rates “only [when] pouring concrete and finishing concrete.” *Id.* at 312. He described this separation of time, which is reflected in AX-6. Mr. Ingram testified that DBA hours were recorded when the truck pulled up and these hours did not include setting the forms. He explained only Mr. Jenkins was paid for setting forms, because he was the lead man. *Id.* at 314-15. He testified that Mr. Will Hodges was classified as a laborer but performed finishing work. *Id.* at 320-21. Mr. Ingram explained that he originally placed Mr. Hodges on the list of finishers, but Mr. Coleman instructed him he was supposed to receive regular hours. *Id.* at 322. Mr. Ingram also testified that Carl Tiller performed finishing work. *Id.* at 369.

Mr. Ingram further testified that Mr. Main’s Hispanic workers also did finishing work, but their hours are not reflected under the finishing hours, just the “regular hours.” *Id.* at 317. He explained that these Hispanic worker, “on average, put in a little bit more hours than the Coleman’s regular employees.” *Id.* at 326. He testified that Ausencio Puentes is the father of Jose Sammie Puentes, and that they are two different people. *Id.* at 328. He testified: “once we got to a point where we had to do a lot of work, we would basically, almost use everybody to kind of like help finish. . . . So, you would have quite a bit of guys that are finishing.” *Id.* at 333-34. He testified that Mr. Coleman would visit the work site for a couple hours, during this time the Hispanic workers were working. *Id.* at 336. Mr. Ingram testified that he did not ever see Mr. Coleman do any work on the Project. *Id.* at 337.

Mr. Ingram testified that he came into the Project as a finisher and that he initially was making \$15.00 per hour. *Id.* at 338. He explained that, after July 2011, after there was knowledge that the Project was under DBA, there was a lot of “disgruntled employees” and there was a “sit down.” *Id.* at 340. Mr. Ingram testified that he had a conversation with Mr. Coleman, towards the end of June/beginning of July, about employees being mad about their wages. He explained that Mr. Coleman said “he can’t afford to pay them that, because Dicon was not paying him those wages, . . . that’s not what they agreed on in the contract.” *Id.* at 341. Mr. Ingram testified that a meeting took place on a Sunday, and Mr. Ingram was instructed to send the employees into his office one at a time. *Id.* at 342. Mr. Ingram described what happened in his one on one meeting with Mr. Coleman stating “Well, the job wasn’t really bid like that, I can’t really afford to pay them (sic) wages,” and Mr. Ingram responded “Let’s compromise.” *Id.* Mr. Coleman responded: “What would you accept, but I can’t pay you, you know, what they’re saying I’m supposed to pay you.” Mr. Ingram responded: “meet me somewhere in the middle,” and they reached an agreement to pay him \$24.00 per hour. *Id.* at 343. He explained that he began being paid \$24.00 an hour when concrete was being poured. *Id.*

During the hearing Mr. Ingram testified that Mr. Coleman adjusted the hours worked to make the pay correspond with \$24.00 instead of \$32.91. *Id.* at 347-349. He explained that the payroll stated he was being paid \$32.91 an hour for finishing work but that his work hours would be reduced to equal only \$24. *Id.* He explained that if he worked 6.5 finishing hours: “what he (Mr. Coleman) did was, actually, to [multiply] \$24.00 an hour times 6.5 hours, came up with a sum amount and divided that by \$32.91 and got 4.75 hours” to get to “the same amount you would get for 6.5 hours at \$24.00 an hour.” *Id.* at 349. Mr. Ingram testified that this change in hour computations occurred from July until the end of the Project. *Id.* His hours were adjusted so that he was only paid \$24.00 an hour. *Id.* An example was during the week of July 11th

through July 16, the time records indicated he worked 18.75 hours but the payroll for that week only showed he was paid for 13.68 hours. *Id.* at 350. Mr. Ingram testified that this time adjustment was done for all the finishers. *Id.*

Mr. Ingram testified that, while he worked overtime, he was not paid time and a half. *Id.* at 350-51. Mr. Ingram indicated that there was one time period where work needed to be redone, which spanned a period of five weeks. *Id.* at 352. He explained that it was determined by Chaz of Dicon, that some concrete had to be redone. He indicated that “Freeman Coleman, deemed that, you know, that was a mishap of employees, he shouldn’t have to eat that or pay for that.” *Id.* He further explained that he, Mr. Coleman, Mr. Main, and Jose Puentes, had a meeting where it was determined that the hours spent redoing work needed to be “recouped.” *Id.* at 352-53. Mr. Ingram testified that Mr. Coleman wanted “to take all the employee’s entire paychecks for that.” *Id.* at 354. He explains that the other men the meeting told him none of the people would work if he took the entire check, instead “they came up with a conclusion of just taking the hours back, gradually. So, eight hours per week for a total of 40 hours.” *Id.* This deduction of hours is reflected in AX-6 page 106-08, eight hours every week was taken out for five weeks. *Id.* at 354-57.

Mr. Ingram testified that after the DBA wage issue arose in July, many employees negotiated to receive different wages, but not all employees agreed. He explained:

[t]he drug tests that were put in place was only put in place after . . . it’s essentially, not speculation. I was there with Mr. Coleman, when the discussion took place between me and him. And he needed to -- he needed to get these guys to sign a form, saying that he compensated them for those hours, as far as the wages that were supposed to be paid, that weren’t paid. And the majority of the guys refused to do that. . . . And after all that was said and done, he needed to figure out, well if they’re not going to sign, then, you know, then they don’t need to be working. . . . I think if they’re not going to sign it, then I’m going to, you know, implement a drug test

*Id.* at 359-361. He testified that if you did not sign the document, “we wouldn’t be able to keep our jobs.” He was instructed by Mr. Coleman to sign the document. *Id.* at 364-66. The document stated that he had been paid outstanding money, but he testified that he was never actually paid any money. *Id.* at 365-66. He also testified that he signed an unfinished document that contained blank entries, which were later filled in. *Id.*

On cross examination, Mr. Ingram testified that he now works on a six to seven man crew at Ruper Construction. He also indicated that two of the seven men are finishers and the rest are laborers. *Id.* at 382. He further testified that he has never been a member of a union and he was not told that setting forms was considered a part of finishing, but now he receives finishing wages from the start of the day to the end, with his new company. *Id.* at 396. He testified that Ruper Construction does not separate hours performing laborer tasks from the hours he does finishing tasks. *Id.* at 397. Mr. Ingram testified that he saw Mr. Coleman give Mr. Puentes an office generated check on two occasions to pay the Hispanic workers. *Id.* at 400.

Mr. Ingram lastly answered questions posed by the court, testifying that they worked about a week in December and then it snowed so they picked back up work with Lakeview the first week of May. *Id.* at 403. On average, the finishers would pour about 70 yards of concrete a day, for about five to six and half hours a day, about three to four days a week. *Id.* at 404. He reiterated that now, as an employee of Ruper, he is paid finisher wages even when he is performing other duties, and he explained in his personal experience companies do not divide the wage rates under DBA contracts. *Id.* at 406.

*Ms. Meghan Vesper (Tr. 407 -427)*

Ms. Vesper is a Wage and Hour Investigator with DOL and is fluent in writing, reading, and speaking Spanish and English. *Id.* at 408-09. She explained that she uses her Spanish to interview employees of companies under investigation on a weekly basis. *Id.* at 410. She testified that she assisted Mr. Hays with his investigation of Respondent and interviewed about four workers. *Id.* at 414.

### *Summary of Documentary Evidence*

#### *Joint Exhibits*

JX A: Proposal for Subcontract

JX B: Revised Subcontractor/Supplier Bid Form

JX C: Contract between Coleman and Dicon, which incorporated by reference the Prime Contract, general requirements of the DBA wage rates and division, and HUD Form-2554, and was signed by Respondents. Additionally, the table of contents in Exhibit D of the contract listed DBA wage rates and conditions of HUD Form were included.

JX D: Subcontractor's Safety Responsibility

JX E: Joint Venture Agreement between John Main and Respondent

JX F: Respondent's certified payroll records from weeks ending in December 11, 2010 until November 6, 2011, DOL Wage and Hour Division Form 347 (see summary below).

JX G: Blank DOL Wage and Hour Division Form 347.

JX H: Mr. Kenny Ingram's paycheck stubs from May 1, 2011 until December 10, 2011.

JX I: July 1, 2011 Letter from Dicon – Notice of possible misclassification and payroll discrepancies.

JX J: Respondent's response letter to Dicon dated July 5, 2011 – Intent to correct issues.

JX K: July 5, 2010 letter to Mr. Kenny Ingram – back pay satisfied, signed July 5, 2011

JX L: July 5, 2010 letter to Mr. Jerome Ingram – back pay satisfied, signed July 5, 2011

JX M: July 15, 2011 letter to Mr. Archie Flemmings – back pay check

JX N: July 15, 2011 letter to Mr. William Jenkins, concerning pay discrepancies; July 22, 2011 letter – voluntary discontinued working for Respondent because failure to respond to mandatory drug tests notice.

JX O: July 15, 2011 letter to Mr. Wright DeRoyce – back pay check

JX P: July 22, 2011 letter to Archie Flemmings – voluntary discontinued working for Respondent because failure to respond to mandatory drug tests notice.

JX Q: July 22, 2011 letter to Mr. William Jenkins – voluntary discontinued working for Respondent because failure to respond to mandatory drug tests notice.

JX R: List of Employees addresses.

*Administrator Exhibits*

- AX 1: Prime Contract between Dicon and Lakeview Apartments.
- AX 2: DOL Investigator Wesley Hays DBRA-CWHSSA Narrative and recommendations.
- AX 4:<sup>7</sup> Personal Interview Statements taken by Investigator Hays.
- AX 5: Personal Interview Statements taken by Investigator Vesper.
- AX 6: Forman Kenny Ingram’s jobsite time records from May 2, 2011 until December 3, 2011.
- AX 7: Paystubs of Martin and Antonio Portillo
- AX 10: Investigator Hay’s computation of due back wages.
- AX 11: Summary of Unpaid Wages by Investigator Hays.

*Respondent’s Exhibits*

- CX 1: Respondent’s Bank Account Statements from January 1, 2011 until August 13, 2011.
- CX 3: DOL Wage and Hour June 29, 2012 letter - Opportunity to Request a Hearing.

*Summary of Pre- July 2011 Certified Payroll Classification and Time Records – Lakeview Apartments Project, 72nd Q Street (JX F, AX 6)*

Week Ending	Classification (JX F)	Employees Listed	Pay Per Hour	Hours Paid (JX F)	Hours Recorded (AX 6) <sup>8</sup>	Comments
12/12/10	General Laborer	Jerome Ingram	\$13.00	38	-	Mr. Guzman and Mr. Main were paid 8 extra hours that was not reflected as hours worked.
		Archie Flemmings	\$15.00	38		
		DeRoyce Wright	\$15.00	38		
		Williams Jenkins	\$15.00	32.5		
		Richard Barker	\$14.00	29.5		
		Will Hodges	\$12.21 <sup>9</sup>	7.75		
		Joel Peeples Jr	\$12.21	11		
	Finisher	Ausencio Puentes	\$32.91 <sup>10</sup>	32		
		Jose Guzman	\$32.91	32		
		John Main	\$32.91	32		
Supervisor	Freeman Coleman	\$25.00	20			
12/18/10	General Laborer	Jerome Ingram	\$13.00	33.25	-	
		DeRoyce Wright	\$15.00	33.25		
		Williams Jenkins	\$15.00	23.5		
		Richard Barker	\$14.00	8		
		Kenny Ingram	\$15.00	15.25		
	Finisher	Ausencio Puentes	\$32.91	32		
		Jose Guzman	\$32.91	23		
		John Main	\$32.91	32		
	Supervisor	Freeman Coleman	\$25.00	20		

<sup>7</sup> In exhibit AX-4 pages 56-59; 65-66 were admitted (Tr. 433) no other pages in AX -4 are admitted for the truth of the matter asserted, but only for limited purposes of explaining how the investigator arrived at his wage calculations. (Tr. 438-39); and in AX 5 only pages 74-77 were admitted for their truth and the remaining pages only for the same limited purpose of AX 4.. (Tr. 426; 440).

<sup>8</sup> There are many pages in AX 6, where the total hours worked are eligible, in these instances, the total hours were calculated by using the “in and out” daily times, minus the breaks taken.

<sup>9</sup> \$12.21 is the exact amount specified in the DBA wage determination for laborers wages. (JX C).

<sup>10</sup> \$32.91 is the exact amount specified in the DBA wage determination for finisher wages. (JX C).

Week Ending	Classification (JX F)	Employees Listed	Pay Per Hour	Hours Paid (JX F)	Hours Recorded (AX 6) <sup>8</sup>	Comments				
12/25/10 <sup>11</sup>	General Laborer	Jerome Ingram	\$13.00	9.5	-	On Friday, December 24, 2011 all three finishers worked eight hour days, and not one laborer worked, also on the remaining days all three finishers worked with the help of only one laborer. This is the only week with a laborer/ finisher ratio of 50/50, with a more finisher time being compensated.				
		DeRoyce Wright	\$15.00	9.5						
		William Jenkins	\$15.00	8						
	Finisher	Ausencio Puentes	\$32.91	32	-					
		Jose Guzman	\$32.91	32						
		John Main	\$32.91	32						
	Supervisor	Freeman Coleman	\$25.00	20	-					
1/1/11-2/19/2011 No work was performed.										
2/26/11	General Laborer	Jose Rodriguez	\$14.00	24	-	Mr. Coleman was not included in this pay week. Mr. Puentes was paid for 10 extra hours that was not reflected on the hours worked, and Mr. Main was paid for 2 extra hours.				
		Ruben Zarazya	\$14.00	25						
Jose Gonzalez		\$14.00	18							
Antonio Garcia		\$14.00	21							
	Finisher	Ausencio Puentes	\$32.91	38	-					
		John Main	\$32.91	24						
3/5/11	General Laborer	Ruben Zarazya	\$12.21	3	-	Mr. Puentes previously was classified as a finisher; the remaining workers each were previously paid \$14.00. No workers are classified as finishers this week.				
		Jose Gonzalez	\$12.21	16.5						
		Antonio Garcia	\$12.21	5						
		Ausencio Puentes	\$12.21	16.5						
3/12/11	General Laborer	Rick Barker	\$12.21	9.75	-	Ten laborers were paid the rate of \$12.21, including Mr. Puentes, previously classified and paid at the finisher rate; the remaining four laborers were paid from \$14.00 to \$16.00 per hour  Beginning this week, Mr. Coleman began being classified and paid the DBA wage of a finisher.				
		Archie Flemmings	\$16.00	14.5						
		Maurice Davis	\$12.21	9.5						
		Chiwanda Ammons	\$12.21	9.75						
		Sunn Perkins Spurlack	\$12.21	9.5						
		William Jenkins	\$16.00	9.5						
		Will Hodges	\$12.21	14						
		Jerome Harper	\$12.21	9.25						
		Antjuan Webster	\$12.21	9						
		Kenny Ingram	\$15.00	14						
		Jerome Ingram	\$14.00	14						
		Kerry Pope	\$12.21	9.75						
		Ausencio Puentes	\$12.21	40						
		Jose Luis Gonzalez	\$12.21	33						
			Finisher	John Main			\$32.91	14	-	
		Freeman Coleman		\$32.91	14					
3/19/11	General Laborer	Rick Barker	\$12.21	34.5	-	Jerome Ingram's pay was decreased from \$14.00 to \$13.00 and Kenny Ingram's pay was decreased from \$15.00 to \$12.21, with Archie Flemmings and William Jenkins wages remaining at \$16.00 and the other twelve laborers paid at the rate of \$12.21. All but one laborer worked five days that week.  Mr. Main and Mr. Coleman each "worked" five-eight hour days.				
		Archie Flemmings	\$16.00	40						
		Maurice Davis	\$12.21	38						
		Chiwanda Ammons	\$12.21	40						
		Sunn Perkins Spurlack	\$12.21	31						
		William Jenkins	\$16.00	39						
		Will Hodges	\$12.21	40						
		Jerome Harper	\$12.21	40						
		Antjuan Webster	\$12.21	34.9						
		Kenny Ingram	\$12.21	40						
		Jerome Ingram	\$13.00	40						
		Kerry Pope	\$12.21	40						
		Ausencio Puentes	\$12.21	40						
		Jose Luis Gonzalez	\$12.21	40						
		Otis Hopkins	\$12.21	40						
		DeRoyce Wright	\$12.21	40						
			Finisher	John Main			\$32.91	40	-	
				Freeman Coleman			\$32.91	40		

<sup>11</sup> This week end payroll did not include Mr. Coleman's certification or signature. (JX F).

Week Ending	Classification (JX F)	Employees Listed	Pay Per Hour	Hours Paid (JX F)	Hours Recorded (AX 6) <sup>8</sup>	Comments	
3/26/11	General Laborer	Rick Barker	\$14.00	20.25	-	Kenny Ingram's pay was raised to \$15.00 and Jerome Ingram's and Rick Barker's pay were increased to \$14.00.	
		Archie Flemmings	\$16.00	31			
		Maurice Davis	\$12.21	20.75			
		Chiwanda Ammons	\$12.21	20.25			
		Sunn Perkins Spurlack	\$12.21	20.75			
		William Jenkins	\$16.00	21.75			
		Will Hodges	\$12.21	20.75			
		Jerome Harper	\$12.21	20.25			
		Antjuan Webster	\$12.21	20.75			
		Kenny Ingram	\$15.00	22			
		Jerome Ingram	\$14.00	22			
		Kerry Pope	\$12.21	20.75			
		Ausencio Puentes	\$12.21	37.5			
	Jose Luis Gonzalez	\$12.21	36				
Otis Hopkins	\$12.21	12.25					
DeRoyce Wright	\$12.21	29.5					
3/26/11	Finisher	John Main	\$32.91	27	-		
		Freeman Coleman	\$32.91	27			
4/2/11	No work was performed.						
4/9/11	General Laborer	Kenny Ingram	\$15.00	28.5	-		
		Jerome Ingram	\$14.00	28.5			
		DeRoyce Wright	\$15.00	28.5			
		William Jenkins	\$16.00	28.5			
		Richard Barker	\$14.00	8			
		Chiwanda Ammons	\$12.21	20.5			
		Archie Flemmings	\$14.00	28.5			
	4/9/11	Finisher	John Main	\$32.91	28		-
Freeman Coleman			\$32.91	28			
4/16/11	General Laborer	Kenny Ingram	\$15.00	15.75	-	The employees only worked two days this week.	
		Jerome Ingram	\$15.00	15.75			
		DeRoyce Wright	\$15.00	16			
		William Jenkins	\$16.00	16.5			
		Richard Barker	\$14.00	16			
		Chiwanda Ammons	\$12.21	16			
		Archie Flemmings	\$16.00	16.5			
		Will Hodges	\$12.21	15.75			
	4/16/11	Finisher	John Main	\$32.91	17		-
			Freeman Coleman	\$32.91	17		
4/23/11	General Laborer	Chiwanda Ammons	\$12.21	10	-		
		Richard Barker	\$14.00	10			
		William Jenkins	\$16.00	10			
	4/23/11	Finisher	John Main	\$32.91	10		-
Freeman Coleman			\$32.91	10			
4/30/11	No work was performed this week.						

Week Ending	Classification (JX F)	Employees Listed	Pay Per Hour	Hours Paid (JX F)	Hours Recorded (AX 6) <sup>8</sup>	Comments
5/7/11 <sup>12</sup>	General Laborer	Jerome Harper	\$12.21	21	21.5	The certified pay records correspond with the time records, which indicate employees worked on the Project: Monday, Thursday, and Friday of this week. Seven employees are found on the time records at 72nd & Q St, but they are not included in the certified pay records
		Kenny Ingram	\$15.00	29	29	
		Jerome Ingram	\$15.00	21	21	
		DeRoyce Wright	\$15.00	32	32	
		Antjuan Webster	\$12.21	21	21	
		Lee Robinson	\$8.00 <sup>13</sup>	21	20	
		Archie Flemmings	\$16.00	28	31	
		Will Hodges	\$12.21	21	21	
		Chiwanda Ammons	-	-	33	
		Richard Barker	-	-	31	
		Otis Hopkins	-	-	10	
		William Jenkins	-	-	32	
		Pope Kerry	-	-	26	
		Mark Hill	-	-	17	
		Kenneth Cook	-	-	9	
5/14/11	Finisher	John Main	\$32.91	40	-	Two employees are found on the time records and not included in the certified pay records
		Freeman Coleman	\$32.91	40	-	
5/14/11	General Laborer	Archie Flemmings	\$16.00	17	17	Two employees are found on the time records and not included in the certified pay records
		Will Hodges	\$12.21	17	17	
		Jerome Ingram	\$15.00	17	17	
		Kenny Ingram	\$15.00	12	17	
		Antjuan Webster	\$12.21	11	12	
		DeRoyce Wright	\$15.00	17	17	
		Lee Robinson	\$8.00	14	13.5	
		Richard Barker	\$14.00	6	6	
		William Jenkins	\$16.00	6	6	
		Mark Hill	\$8.00	17	17	
		Otis Hopkins	-	-	17	
		Pope Kerry	-	-	22?	
		5/14/11	Finisher	John Main	\$32.91	
Freeman Coleman	\$32.91			21	-	
5/22/11	-	Chiwada Ammons	-	-	30.5	There is no certified payroll for this week
		Richard Barker	-	-	25	
		Lee Robinson	-	-	17.75	
		Archie Flemmings	-	-	39.5	
		Jerome Harper	-	-	30	
		Will Hodges	-	-	15	
		Jose Rivera	-	-	10.5	
		Jerome Ingram	-	-	26	
		Kenny Ingram	-	-	36	
		William Jenkins	-	-	35	
		Antonio Sanchez	-	-	14.5	
		Kerry Pope	-	-	8	
		Ausencio Puentes	-	-	10.5	
		Antjuan Webster	-	-	19.5	
		DeRoyce Wright	-	-	38	
		Thomas Olvera	-	-	38	
		Mark Hill	-	-	22.75	
Sammie Puentes	-	-	10.5			

<sup>12</sup> Kenny Ingram began keeping employee time records. (AX 6).

<sup>13</sup> This is the first employee to be paid less than the required \$12.21 DBA laborer wage.

Week Ending	Classification (JX F)	Employees Listed	Pay Per Hour	Hours Paid (JX F)	Hours Recorded (AX 6) <sup>8</sup>	Comments	
5/28/11	<b>General Laborer</b>	Archie Flemmings	\$16.00	7.5	7.5	William Jenkin's pay was decreased from \$16.00 to \$14.00. Four employees were included on the time records and not the certified payroll.	
		Jerome Harper	\$12.21	1	1		
		Will Hodges	\$12.21	6.5	6.5		
		Jerome Ingram	\$15.00	6.5	6.5		
		Kenny Ingram	\$15.00	6.5	6.5		
		Antjuan Webster	\$12.21	1	1		
		DeRoyce Wright	\$15.00	8.5	8.5		
		Chiwanda Ammons	\$12.21	6.5	6.5		
		Richard Barker	\$14.00	5.5	5.5		
		William Jenkins	\$14.00	6.5	6.5		
		Kirk Lacy	-	-	1		
		Richard Wright	-	-	6		
		Julian Johnson	-	-	6		
		Clarence Tyler	-	-	5		
	<b>Finisher</b>	John Main	\$32.91	10	-		
	Freeman Coleman	\$32.91	10	-			
6/4/11	<b>General Laborer</b>	Jerome Harper	\$12.21	18.75	18.5		
		Kerry Pope	\$12.21	10.75	10.75		
		Jerome Ingram	\$15.00	18.75	18.25		
		Kenny Ingram	\$15.00	25.5	20.7		
		Chiwanda Ammons	\$12.21	17.25	17.25		
		Richard Barker	\$14.00	17.25	16.25		
		William Jenkins	\$16.00-	17.25	17.25		
		Marcellus Spivey	-	-	4.25		
	<b>Finisher</b>	John Main	\$32.91	26	-		
		Freeman Coleman	\$32.91	26	-		
6/11/11	<b>General Laborer</b>	Chiwanda Ammons	\$12.21	19.25	19.25	Seven persons listed on the time records but not included on the payroll.	
		Richard Barker	\$14.00	23.5	23.5		
		Archie Flemmings	\$16.00	28	28		
		Jerome Harper	\$12.21	18	18		
		Will Hodges	\$12.21	16.5	16.5		
		Jerome Ingram	\$15.00	25	25		
		Kenny Ingram	\$15.00	19.5	19.5		
		William Jenkins	\$16.00	26.5	26.5		
		Kerry Pope	\$12.21	15.5	15.5		
		Antjuan Webster	\$12.21	17	17		
		DeRoyce Wright	\$15.00	17.25	17.25		
		Ausencio Puentes	\$12.21	35.5	35.5		
		Marcellus Spivey	-	-	16		
		Thomas Olvera	-	-	30		
		Jose Olvera	-	-	35		
		Edwardo Sanches	-	-	31.5		
		Jose Sammie Puentes	-	-	34.5		
		Shelton Fils	-	-	8		
	Manuel Cobarrubias	-	-	32			
	<b>Finisher</b>	John Main	\$32.91	35.5	-		
	Freeman Coleman	\$32.91	35.5	-			

Week Ending	Classification (JX F)	Employees Listed	Pay Per Hour	Hours Paid (JX F)	Hours Recorded (AX 6) <sup>8</sup>	Comments
6/18/11	General Laborer	Chiwanda Ammons	\$12.21	16.5	16.5	Five workers listed on the time records but not included on the payroll.  Two employees on payroll worked over 40 hours this week and were not paid time and a half.
		William Jenkins	\$16.00	30.5	30.5	
		Archie Flemmings	\$16.00	45.5	45.5	
		Jerome Harper	\$12.21	34.25	34.25	
		Will Hodges	\$12.21	21.75	21.75	
		Jerome Ingram	\$15.00	41	41	
		Kenny Ingram	\$15.00	31.5	31.5	
		Antjuan Webster	\$12.21	21	21	
		DeRoyce Wright	\$15.00	31	31	
		Thomas Olvera	-	-	41	
		Jose Olvera	-	-	43.5	
		Edwardo Sanches	-	-	55	
		Shelton Fils	-	-	37	
		Manuel Cobarrubias	-	-	53.5	
6/18/11	Finisher	John Main	\$32.91	45.5	-	
		Freeman Coleman	\$32.91	45.5	-	
6/25/11	General Laborer	Chiwanda Ammons	\$12.21	15.25	15.25	The time records indicate that these hours are "regular hours."  * Time records note that these hours are in addition to concrete hours, which are not indicated on the payroll.  Finishers were listed on the payroll but were not paid any hours.
		William Jenkins	\$16.00	15	15	
		Archie Flemmings	\$16.00	0	11.5*	
		Jerome Harper	\$12.21	8.25	8.25	
		Will Hodges	\$12.21	8.75	8.75	
		Jerome Ingram	\$15.00	0	8.25*	
		Kenny Ingram	\$15.00	0	8.25*	
		DeRoyce Wright	\$15.00	0	10.5*	
		Richard Barker	\$14.00	8	8	
		Thomas Olvera	-	-	18.75	
		Jose Olvera	-	-	18.75	
		Edwardo Sanches	-	-	17.5	
		Shelton Fils	-	-	10.5	
		Manuel Cobarrubias	-	-	17.5	
6/25/11	Finisher	John Main	\$32.91	0	-	
		Freeman Coleman	\$32.91	0	-	

*Summary of Post-July 2011 Certified Payroll Classifications and Time Records (JX F, AX 6)*

Week Ending	Employee Listed	Pay Per Hour Per Classification (JX F)		Hours Paid (JX F)		Hours Recorded (AX 6) <sup>14</sup>		Comments
		Laborer	Finisher	Laborer	Finisher	Laborer	Finisher	
7/2/11	Chiwanda Ammons	\$12.21	-	19	-	19	-	William Jenkins was paid and classified as a laborer but hours recorded as carpenter hours.
	William Jenkins	\$16.00	-	25.5	-	-	25.5	
	Archie Flemmings	\$16.00	-	15.25	-	15.25	10.75	Archie Flemmings, Will Hodges, Jerome Ingram, Kenny Ingram, DeRoyce Wright and Will McLucas were all listed as working finishers' hours, but were not paid as finishers.
	Jerome Harper	\$12.21	-	13.75	-	13.75	-	
	Will Hodges	\$12.21	-	16.5	-	6.5	10	
	Jerome Ingram	\$15.00	-	14.5	-	4.25	10.25	
	Kenny Ingram	\$15.00	-	24.75	-	14.75	10	
	Richard Barker	\$14.00	-	16.25	-	16.25	-	
	DeRoyce Wright	\$15.00	-	25.5	-	15.25	10.25	
	Thomas Olvera	-	-	-	-	22.75	-	
	Jose Olvera	-	-	-	-	15	-	
	Ausencio Puentes	-	-	-	-	15.75	-	
							Nine workers were listed on the	

<sup>14</sup> See note 7.

Week Ending	Employee Listed	Pay Per Hour Per Classification (JX F)		Hours Paid (JX F)		Hours Recorded (AX 6) <sup>14</sup>		Comments
		Laborer	Finisher	Laborer	Finisher	Laborer	Finisher	
	Antjuan Webster Edwardo Sanches Shelton Fils Manuel Cobarrubias Anthony Fitzgerald Will McLucas John Main	- - - - - -	- - - - - \$32.91	- - - - - -	- - - - - 18	9.75 25.25 21 25.25 22 9.75 -	- - - - - 10.25 -	time records and not on the payroll.
7/9/11	Chiwanda Ammons William Jenkins Archie Flemmings Jerome Ingram Kenny Ingram Richard Barker Thomas Olvera Jose Olvera Ausencio Puentes Edwardo Sanches Kenneth Monroe Manuel Cobarrubias Anthony Fitzgerald Will McLucas Jose Sammie Puentes John Main	\$12.21 \$12.21 \$16.00 \$15.00 \$15.00 \$14.00 - - \$12.21 - - - - - - -	- \$21.10* \$32.91 \$32.91 \$32.91 - - - - - - - - - - -	8.5 12 10.5 3 11.5 9 - - 22.25 - - - - - -	- 6 7 <b>1.52</b> <b>4.74</b> - - - - - - - - - 18	8.25 12 10.5 3 11.5 9 22.25 9.25 22.25 13.25 16.75 13.25 8.5 6 13.75 -	- 6 7 2.5 6.5 - - - - - - - - 2.5 - -	* William Jenkins was classified as a "form setter" on the payroll and paid \$21.10 for these hours; on the time records he was classified as a carpenter.  This pay period the finisher hours stopped being paid on the quarter hour and not were calculated differently, also reflecting time discrepancies on the time records.  Eight workers not included on the payroll.
7/16/11	Chiwanda Ammons William Jenkins Archie Flemmings Jerome Ingram Kenny Ingram Richard Barker DeRoyce Wright Thomas Olvera Jose Olvera Ausencio Puentes Edwardo Sanches Kenneth Monroe Manuel Cobarrubias Anthony Fitzgerald Will McLucas Antjuan Webster Shelton Fils Jose Sammie Puentes John Main	\$12.21 \$12.21 \$16.00 \$15.00 \$15.00 \$14.00 \$15.00 - - \$12.21 - \$12.21 - - - \$12.21 - - - -	- \$21.10 \$32.91 \$32.91 \$32.91 - \$32.91 - - - - - - - - \$32.91 - - -	5.75 3.5 3.75 6.25 11.25 31 3.5 - - 30.5 - 28 - - 8.5 - - - -	- 4 4.75 8.21 13.61 - 2.89 - - - - - - 8.21 - - - 18	5.75 3.5 3.75 6.25 11.25 31 3.5 41.75 30.5 30.5 43.75 28 43.75 6.75 8.5 30 22.5 37.5 -	- 4 4.75 13.5 18.75 - 4.75 - - - - - - 13.5 - - - -	Eight workers not included on the payroll.
7/23/11	Jerome Ingram Kenny Ingram Will McLucas Kenneth Monroe Richard Barker Antjuan Webster Shelton Fils Thomas Olvera Jose Olvera Edwardo Sanches Jose Sammie Puentes Manuel Cobarrubias John Main	\$15.00 \$15.00 \$15.00 \$12.21 \$14.00 \$12.21 \$12.21 - - - - - -	\$32.91 \$32.91 \$32.91 - - - - - - - - - \$32.91/ \$25.35*	11.75 14.5 5.25 13.5 11.5 31.5 21 - - - - - -	10.75 14.40 6.84 - - - - - - - - - 18 / 4	10.75 14.5 6.25 13.5 11.5 31.5 21 31.25 33 32 33 35.25 -	17.75 19.75 11.25 - - - - - - - - - -	Starting this week a significant amount of workers stopped working and were no longer included on the time sheets or payroll.  Five workers listed on time sheet but not included on the payroll.  *Mr. Main was paid for finishers and "carpenter" hours
7/30/11	Jerome Ingram Kenny Ingram	\$15.00 -	\$32.91 \$32.91	16 -	12.12 17.32	16 19.5	20 23.75	

Week Ending	Employee Listed	Pay Per Hour Per Classification (JX F)		Hours Paid (JX F)		Hours Recorded (AX 6) <sup>14</sup>		Comments
		Laborer	Finisher	Laborer	Finisher	Laborer	Finisher	
	Will McLucas	\$15.00	\$32.91	8.25	6.28	8.25	10.5	
	Richard Barker	\$14.00	-	28	-	27.75	-	
	Anthony Fitzgerald	-	-	-	-	28.5	-	
	Antjuan Webster	-	-	-	-	15.5	-	
	Ronnie Houston	-	-	-	-	8.25	-	
	Thomas Olvera	-	-	-	-	~ 49	-	
	Jose Olvera	-	-	-	-	20.25	-	
	Edwardo Sanches	-	-	-	-	21.75	-	
	Jose Sammie Puentes	-	-	-	-	21.25	-	
	Manuel Cobarrubias	-	-	-	-	21.75	-	
	John Main	-	\$32.91	-	18	-	-	
8/6/11	Jerome Ingram	\$15.00	\$32.91	20.25	8.51	-	-	There are no time keeping records for this week.  Will McLucas laborer pay rate was decreased from \$15.00 to \$12.21.
	Kenny Ingram	\$15.00	\$32.91	26	10.21	-	-	
	Will McLucas	\$12.21	\$32.91	17	6.99	-	-	
	Antjuan Webster	\$12.21	-	5.70	-	-	-	
	Anthony Fitzgerald	\$12.21	-	25	-	-	-	
	John Main	-	\$32.91	-	16	-	-	
8/13/11	Jerome Ingram	\$15.00	\$32.91	12.5	4.10	12.5	6.75	
	Kenny Ingram	\$15.00	\$32.91	24.25	6.93	24.25	9.5	
	Will McLucas	\$12.21	\$32.91	18.25	5.77	18.25	9.5	
	Anthony Fitzgerald	\$12.21	-	17.5	-	17.5	-	
	Robert Houston	\$12.21	-	23.75	-	23.75	-	
	Ronnie Houston	\$12.21	-	16.5	-	16.5	-	
	James Minor	\$12.21	-	29	-	29	-	
	Thomas Olvera	-	-	-	-	21.75	-	
	Jose Olvera	-	-	-	-	21.75	-	
John Main	-	\$32.91	-	9.5	-	-		
8/20/11	Jerome Ingram	\$15.00	\$32.91	25.75	9.12	25.75	15	
	Kenny Ingram	\$15.00	\$32.91	25.5	14.95	25.5	20.5	
	Will McLucas	\$12.21	\$32.91	25.75	9.12	25.75	15	
	Antjuan Webster	\$12.21	-	19.25	-	19.25	-	
	Robert Houston	\$12.21	-	7.5	-	7.5	-	
	Ronnie Houston	\$12.21	-	4	-	4	-	
	James Minor	\$12.21	-	41	-	<b>41</b>	-	
	Thomas Olvera	-	-	-	-	14.75	-	
	Jose C. Olvera	-	-	-	-	20.25	-	
	Manuel Cobarrubias	-	-	-	-	6	-	
	Edwardo Sanches	-	-	-	-	6	-	
	Jose Sammie Puentes	-	-	-	-	6	-	
	Dennis Black	-	-	-	-	22	-	
	Jessie Leeper	-	-	-	-	6.5	-	
8/20/11	Manual Olvera	-	-	-	-	6	-	
	Jose G. Olvera	-	-	-	-	6	-	
	John Main	-	\$32.91	-	18	-	-	
8/27/11	Jerome Ingram	\$15.00	\$32.91	25.5	9.88	25.5	16.25	Only five of the fourteen workers are found on the payroll.
	Kenny Ingram	\$15.00	\$32.91	26.75	8.93	26.75	12.5	
	Will McLucas	\$12.21	\$32.91	25.5	9.88	25.5	16.25	
	Anthony Fitzgerald	\$12.21	-	36.25	-	36.25	-	
	James Minor	\$12.21	-	35	-	35	-	
	Thomas Olvera	-	-	-	-	45	-	
	Jose G. Olvera	-	-	-	-	51.5	-	
	Manuel Cobarrubias	-	-	-	-	50.5	-	
	Edwardo Sanches	-	-	-	-	46	-	
	Jose Sammie Puentes	-	-	-	-	47.5	-	
	Manual Olvera	-	-	-	-	51.5	-	
	Anthony Portillo	-	-	-	-	33.75	-	
	Jose C. Olvera	-	-	-	-	45	-	
Martin Portillo	-	-	-	-	33.25	-		

Week Ending	Employee Listed	Pay Per Hour Per Classification (JX F)		Hours Paid (JX F)		Hours Recorded (AX 6) <sup>14</sup>		Comments
		Laborer	Finisher	Laborer	Finisher	Laborer	Finisher	
9/3/11	Jerome Ingram	\$15.00	-	13	-	21	3.5	This week time was labeled "amended correct payroll," the total hours does not correlate to the "in and out" times. The workers were all paid eight hours less then what the time records indicate. The nine workers who appear on the time sheets but not on the payroll also had eight hours removed from their total hours worked. <sup>15</sup>  No workers were classified and paid as finishers this week.
	Kenny Ingram	\$15.00	-	27.75	-	35.75	0	
	Will McLucas	\$12.21	-	25	-	33	0	
	Anthony Fitzgerald	\$12.21	-	17	-	25	-	
	Shelton Fils	\$12.21	-	8	-	16	-	
	James Minor	-	-	-	-	10.25	-	
	Thomas Olvera	-	-	-	-	33	-	
	Jose G. Olvera	-	-	-	-	33	-	
	Manuel Cobarrubias	-	-	-	-	33	-	
	Edwardo Sanches	-	-	-	-	33	-	
	Jose Sammie Puentes	-	-	-	-	33	-	
	Anthony Portillo	-	-	-	-	34	-	
	Jose C. Olvera	-	-	-	-	24.5	-	
Martin Portillo	-	-	-	-	34	-		
9/10/11	Jerome Ingram	-	-	-	-	3.75	-	Jerome Ingram is labeled as "Fired" and Will McLucas as "quit" on the time records; they were not paid the hours they worked this week. This week also reflects eight hours being subtracted from the workers time and pay, all workers except Mr. Fils.
	Will McLucas	-	-	-	-	3.75	-	
	Kenny Ingram	\$15.00	\$32.91	7	2.55	15	3.25	
	Anthony Fitzgerald	-	-	-	-	7.25	-	
	Shelton Fils	\$12.21	-	12.75	-	-	-	
	Antonio Portillo	\$12.21	-	7	-	15	-	
	Martin Portillo	\$12.21	-	7	-	15	-	
	Thomas Olvera	-	-	-	-	13	-	
Jose C. Olvera	-	-	-	-	12	-		
9/17/11	Kenny Ingram	\$15.00	\$32.91	23.5	2.55	31.5	-	This week also reflects eight hours being subtracted from the workers time and pay, all workers except Mr. Fils.
	Anthony Fitzgerald	\$12.21	-	18.5	-	26.5	-	
	Shelton Fils	\$12.21	-	18	-	18	-	
	Antonio Portillo	\$12.21	-	25.25	-	33.25	-	
	Martin Portillo	\$12.21	-	25.25	-	33.25	-	
	Manuel Olvera	-	-	-	-	23.25	-	
	Jose G. Olvera	-	-	-	-	19.25	-	
	Manuel Cobarrubias	-	-	-	-	19.25	-	
	Edwardo Sanches	-	-	-	-	19.25	-	
	Jose Sammie Puentes	-	-	-	-	19.25	-	
Jose C. Olvera	-	-	-	-	4	-		
9/24/11	Kenny Ingram	\$15.00	\$32.91	11	17.5	13.5	28	This week reflects four to eight hours being subtracted from the pay and time of the workers, except Mr. Fils and Mr. Cervantes.
	Shelton Fils	\$12.21	-	34.75	-	34.75	-	
	Antonio Portillo	\$12.21	-	32.5	-	40.5	-	
	Martin Portillo	\$12.21	-	32.5	-	40.5	-	
	Thomas Olvera	-	-	-	-	35.75	-	
9/24/11	Manuel Olvera	-	-	-	-	42	-	
	Jose C. Olvera	-	-	-	-	35.5	-	
	Manuel Cobarrubias	-	-	-	-	41	-	
	Edwardo Sanches	-	-	-	-	41	-	
	Jose Sammie Puentes	-	-	-	-	41.25	-	
	Jose G. Olvera	-	-	-	-	36	-	
	Heli Cervantes	-	-	-	-	39.25	-	
10/1/11	Kenny Ingram	-	-	-	-	20.5	19	There is no certified payroll record for this week
	Antjuan Webster	-	-	-	-	37	-	
	Denaris Brown	-	-	-	-	17	-	
	Antonio Portillo	-	-	-	-	45.75	-	
	Martin Portillo	-	-	-	-	45.75	-	
	Thomas Olvera	-	-	-	-	15.3	-	
	Manuel Olvera	-	-	-	-	47.25	-	
Jose G. Olvera	-	-	-	-	48.75	-		

<sup>15</sup> Additionally, "R-Coup of Hours For Re-Work" time record document reflect eight hours being subtracted for the weeks, ending September 3, 10, 17, and 24. (AX at 108, 112,115,118).

Week Ending	Employee Listed	Pay Per Hour Per Classification (JX F)		Hours Paid (JX F)		Hours Recorded (AX 6) <sup>14</sup>		Comments
		Laborer	Finisher	Laborer	Finisher	Laborer	Finisher	
	Manuel Cobarrubias Eduardo Sanches Jose Sammie Puentes Jose C. Olvera Heli Cervantes					46.25 46.25 42.5 29 27.5	- - - - -	
10/8/11	Kenny Ingram Heli Cervantes Antjuan Webster Antonio Portillo Martin Portillo Thomas Olvera Manuel Olvera Jose G. Olvera Manuel Cobarrubias Eduardo Sanches Jose Sammie Puentes Jose C. Olvera Shelton Kenneth	\$15.00 \$12.21 \$12.21 \$12.21 \$12.21 - - - - - - - -	\$32.91 - - - - - - - - - - - -	21.75 20.75 39 40.25 40.25 - - - - - - - -	14.4 - - - - - - - - - - - -	21.75 22.25 39 40.25 40.25 28.25 28.5 37.25 35.75 35.25 3 33 39.25	18.75 - - - - - - - - - - - - -	This week also reflects three to eight hours being subtracted from the time and pay of seven workers
10/15/11	Kenny Ingram Heli Cervantes Antjuan Webster Antonio Portillo Martin Portillo Thomas Olvera Jose G. Olvera Manuel Cobarrubias Eduardo Sanches Jose Sammie Puentes Jose C. Olvera Shelton Kenneth	\$15.00 \$12.21 \$12.21 \$12.21 \$12.21 - - - - - - -	\$32.91 - - - - - - - - - - -	23 16 27.75 39.5 39.5 - - - - - - -	8.39 - - - - - - - - - - -	23 16 27.75 39.5 39.5 16 15 35.5 35.5 14 13.5 36.75	11.5 - - - - - - - - - - -	
10/22/11	Kenny Ingram Antjuan Webster Antonio Portillo Martin Portillo Jose G. Olvera Manuel Cobarrubias Eduardo Sanches Jose Sammie Puentes Jose C. Olvera Shelton Kenneth	\$15.00 \$12.21 \$12.21 \$12.21 - - - - - -	\$32.91 - - - - - - - - -	14.25 18.75 32 32 - - - - - -	4.98 - - - - - - - - -	15.75 18.75 32 32 12.5 16.5 10.25 12.5 13.25 20.75	15 - - - - - - - - -	
10/29/11	Kenny Ingram Antjuan Webster Antonio Portillo Martin Portillo Jose G. Olvera Manuel Cobarrubias Eduardo Sanches Jose Sammie Puentes Jose C. Olvera Shelton Kenneth Johnny Tiller	\$15.00 \$12.21 \$12.21 \$12.21 - - - - - - -	\$32.91 - - - - - - - - - -	18 38.75 40* 40* - - - - - - -	7.69 - - - - - - - - - -	30 38.75 43.5 43.5 11.5 7 11.5 8 8.5 38.75 5.25	22 - - - - - - - - - -	* Antonio and Martin Portillo both were paid 4.5 hours overtime at a rate of \$36.63.  Kenny Ingram was grossly underpaid and worked a total of 52 hours without overtime pay.
11/5/11	Kenny Ingram Antjuan Webster Antonio Portillo Martin Portillo Will McLucas Shelton Kenneth Johnny Tiller	\$15.00 \$12.21 \$12.21 \$12.21 \$12.21 \$12.21 \$16.00	\$32.91 - - - - - -	27.5 17.5 28.75 28.75 8.25 28.75 12	13.37 - - - - - -	13.75 17.5 28.75 28.75 8.25 28.75 12	20.5 - - - - - -	

Week Ending	Employee Listed	Pay Per Hour Per Classification (JX F)		Hours Paid (JX F)		Hours Recorded (AX 6) <sup>14</sup>		Comments
		Laborer	Finisher	Laborer	Finisher	Laborer	Finisher	
	Carl Tiller	-	-	-	-	30	-	
11/12/11	Kenny Ingram	\$15.00	\$32.91	13.75	5.10	13.75	7	This is the last week in which time records and certified payroll were submitted into evidence.
	Antjuan Webster	\$12.21	-	6.5	-	6.5	-	
	Antonio Portillo	\$12.21	-	21.25	-	18.25	-	
	Martin Portillo	\$12.21	-	21.25	-	18.25	-	
	Shelton Kenneth	\$12.21	-	9.5	-	9.5	-	
	Johnny Tiller	\$12.21	-	11.5	-	11.5	-	
	Carl Tiller	-	-	-	-	22.5	-	

## DISCUSSION AND ANALYSIS

The dual purposes of the Davis-Bacon Act are to (1) give local laborers and contractors a fair opportunity to participate in building programs when federal money is involved; and (2) protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the locality. *L.P. Cavett Co. v. U.S. Dep't of Labor*, 101 F.3d 1111 (6th Cir. 1996); *United States v. Binghamton Construction Co.*, 347 U.S. 171, *reh'g. denied*, 347 U.S. 940 (1954). Moreover, a general contractor is responsible for ensuring that all persons engaged in performing the duties of a “laborer” or “mechanic” on the construction site receive the appropriate prevailing wage rate, irrespective of any contractual relationship alleged to exist or not to exist between the contractor and such persons. *Arliss D. Merrell, Inc.*, 1994-DBA-41 (ALJ Oct. 26, 1995), 29 C.F.R. §§ 5.2(o), 5.2(i), 5.5(a)(2), 5.5(a)(6); *Commonwealth of Massachusetts v. U.S. Dep't. of Labor*, Case No. 1998-JTP-6 (ALJ Oct. 29, 2001).

The proponent of the Order of Reference in a Davis-Bacon Act case bears the initial burden of going forward with the evidence and establishing a *prima facie* claim. The burden then shifts to Respondent, who bears the ultimate burden of proof by a preponderance of the evidence. *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) (the Administrator has the initial burden of “establishing that the employees performed work for which they were improperly compensated”; the burden then shifts to Respondent “to come forward with evidence of the precise amount of work performed or with evidence to negate[e] the reasonableness of the inference to be drawn from the employees’ evidence”); *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004) (Respondent has the burden to rebut Department’s proof of extent and amount of violations); *Thomas & Sons Building Contractors, Inc.*, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001) (“the Administrator has the burden of establishing that the employees performed work for which they were improperly compensated”).

### Bound by the Davis-Bacon Act Prevailing -Wage Provisions

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.*

As noted above, Respondent claims that it did not receive the prevailing wage determination and did not know the contract was under the DBA until July 2011, after work had begun on the Project and after the subcontract was signed. However, I find this case is distinguishable from *Ken’s Carpets* and Respondents had knowledge of its DBA requirements. Respondent did not bid on the contract but instead entered into a joint venture with Mr. John Main, who had previously successfully bid on the contract. Later, Respondent entered into a subcontract on January 12, 2011, with Dicon in which the Prime Contract, DBA and HUD provisions, and wages were all referenced and incorporated by reference, but it did not include the DBA wage rate determination. Unlike in *Ken’s Carpet*, Respondent’s subcontract contained references the DBA and HUD specifications on more than one occasion. *See JX C* at 6, 19, 20, 33, 35. Furthermore, Mr. Coleman testified that Mr. Main informed him that he bid a pay rate of \$32.91, the exact amount required by the wage determination, for several finisher employees including himself. Lastly, after Dicon wrote Mr. Coleman a letter on July 1, 2011, informing him that he was not properly paying employees under the DBA wage determination, Mr. Coleman did not dispute being bound by the wage rates but instead indicated: “We have contacted those employees that this situation effects and have corrected those issues going forward, and currently working to adjust the arrearage. It is our intention corrects (sic) this oversight as soon as possible.” *JX J*; *see also JX I*.

The regulations required that the contracting agency—in this case, Dicon and/or Mr. Main, obtain a wage determination prior to soliciting bids. 29 C.F.R. § 4.4(a)(1). 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 post-contract 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. 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).

At the time Mr. Coleman signed the subcontract, there was, without any doubt, language in the text of the document expressly requiring 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 additional exhibits. *See* JX C. Thus, this case is distinguished from *Ken's Carpets*, where there was no language in either the general contract or subcontract referencing the Davis-Bacon Act. Both Dicon and Mr. Main knew that the contracts were subject to the DBA wage determination, specifically the rate of \$32.91 for finishers, and Mr. Coleman conceded that Mr. Main bid on the contract accordingly. Starting with the first week of the Project, Mr. Coleman paid all his listed finishers at the exact wage rate specified in the DBA wage determination, \$32.91, and beginning in March 2011, Mr. Coleman lowered the wage he was paying his laborers, on average \$14.00, to \$12.21, the exact amount specified in the DBA. *See* JX F. The intent of the parties, as evidenced by the language of the subcontract, was that the Respondent would comply with the prevailing-wage provisions of the Davis-Bacon Act and specifically with the wage determination. I find Respondent had sufficient knowledge that he needed to comply with the regulations. This case is, therefore, more similar to *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 Joint Exhibit C. I find further that the Respondent did not successfully rebut the *prima facie* case presented by the Administrator.

### **Classification of Employees**

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. 29 C.F.R. §5.5(a)(1)(ii)(a). Employees are to be classified and paid according to the work they perform, without regard to the level of skill required. 29 C.F.R. §5.5(a)(1); *Pythagoras General Contracting Corp.*, *supra* at 7 (ARB, Mar. 1, 2011)(citing 29 C.F.R. § 5.5(a)(1)(i)); *Fry Brothers Corporation*, WAB<sup>16</sup> Case No. 76-06 (June 14, 1977). In addition, the equipment used in the work that is performed governs rather than the skill or experience required. *Framlau Corp.*, WAB Case No. 70-05 (WAB, April 19, 1975), as cited in, *Batteast Construction Company*, WAB Case No. 83-12 (WAB, June 22, 1984). In order to comply with the Act, workers must be classified according to the classifications used in the locality in which the contract is performed. *Emerald Maintenance, Inc. v. U.S.*, 925 F.2d 1425, 1427 (Fed. Cir. 1991) *citing* *Building & Construction Trades's Dept. AFL-CIO v. Donovan*, 712 F.2d 611, 614 (D.C. Cir. 1983) and *Johnson-Massman, Inc.*, 96- ARB-118 (ARB, 1996). It is incumbent upon the contractor to be certain that its employees were properly classified when performing a job where the Act applies. By misclassifying and underpaying workers, respondents proceed at their own peril. *The Matter of Tele-Sentry Security*, WAB Case No. 87-43 (WAB, June 7, 1989).

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<sup>16</sup> The "Wage Appeal Board" was the predecessor to the Administrative Review Board.

The Administrator has the right to rely upon the statement of employees to determine their proper classification and area collective bargaining agreements are properly considered in determining whether employees have been misclassified. *Actus Corp.*, 1996 DBA-1 (ALJ, Jan. 29, 1999). *Berbice Corp.*, 1998-DBA-9 (ALJ, Apr. 16, 1999) (a company cannot rely on a contracting officer's advice; the Secretary or Secretary's designee determines the classification of employees; reliance on classification of a prior contract is improper). *See also Dumarc Corp.*, Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006) (the ALJ is authorized to determine an employee's classification for purposes of determining the appropriate prevailing wage rate; a "worker's classification depends upon the tasks he performs and the tools he uses"); *Thomas and Sons Building Contractors, Inc.*, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001), *order denying reconsideration* (ARB, Dec. 6, 2001) (Respondent's argument, that the Administrator's prevailing wage determination was incorrectly based on union wages in the area rather than the wage survey, amounted to a request for review of the wage determination which must be made prior to the contract award and must be timely filed directly with the ARB).

An employer who utilizes employees in more than one classification must ensure that those employees are properly paid for the various types of work performed and for the hours such work was performed. *See P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996). In *P&N*, the Board found that the ALJ erred in relying on the sporadic nature of the mechanics' work that was performed by the laborers; that some of employer's laborers were underpaid on an intermittent, rather than a continuous, basis did not negate the finding that they were underpaid because they were misclassified. *Id.*<sup>17</sup> In *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), Respondent had a contract with the New York Housing Authority to renovate interiors and exteriors of residential buildings. Respondent argued that employees should only be compensated for performing actual work on the buildings. The ALJ, on the other hand, held that "the time Pythagoras employees spent gathering tools and supplies and receiving daily instructions is an integral and indispensable part of the principle activity (of renovating the buildings), and, therefore, these actions are compensable" under *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956).

The DOL Wage and Hour Division, Form 347 certified payroll forms are found at Joint Exhibit F, and summarized above, and list the employee classifications and pay rates Mr. Coleman submitted for payroll. (JX F). Prior to July 2011, the forms include changes in classifications and pay rates for different employees from week to week, such as Ausencio

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<sup>17</sup> In *P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, the employer's superintendent testified that the foremen were instructed to tell the laborers not to use sheet metal tools unless instructed by the foreman because he could split the hours. The ARB held that this indicated an improper practice of utilizing employees who are otherwise classified as laborers to perform the work of sheet metal mechanics because it reflected a practice of segregating workers' hours for the different classifications in which work was performed. The ARB further held that "blissful ignorance" is no defense to debarment. Consequently, rather than simply relaying the direction to the sheet metal foreman on site, Respondent's managers should have taken steps such as regularly visiting the site, observing the work being done, and reviewing payroll records, to ensure that the employees, who were actually performing the work of sheet metal mechanics, were being paid the proper hourly rate. *P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996).

Puentes, Jose Guzman, and Kenny Ingram. *Id.* Additionally for many weeks, the only “employees” classified as finishers were the joint partners/supervisors Mr. Main and Mr. Coleman. *Id.* These discrepancies illustrate deliberate misclassification of employees by Respondent.

After July 2011, Respondent began to segregate classifications for several employees but, as discussed below, this segregation was inaccurate. The Administrator provided testimony from local union representatives that laborers and finishers are classified depending on the work they perform and the tools they use. Mr. Rhoades explained that laborers guide the cement trucks, knock down the concrete, back-fill dirt, remove forms, and use tools like a “come-alongs” (Tr. at 218, 225). He further explained that finishers: “strike-off the concrete”, set forms, “bull float”, and use hand trowels, edgers, joiners, “mag float”, modernized saw, and darbys. *Id.* at 218-226. Mr. Kaminski further testified that laborer tasks include directing concrete trucks to come in, placing and pouring concrete out of the truck, shoveling the concrete around, vibrating the concrete, removing all the forms, doing cleanup, and back-filling around the area. *Id.* at 171. Mr. Kaminski explained that laborers do not set forms, install keyway rebar, and laborers do not use tools such as: trowels, edgers or, floaters, but use mainly shovels. *Id.* at 173-74. He further testified, if a worker is doing finishing work, he would be paid at the finishing rate, and can revert back to laborer duties and then paid at the laborer rate. *Id.* at 178-79. In contrast, Mr. Coleman testified that he is of the opinion that finisher work begins when the truck arrives and begins to pour the cement and does not include setting forms or installing rebars. *Id.* at 444, 468. He further explained that using a hand saw is work for an experienced laborer not a finisher. *Id.* at 463.

I find that Respondent inaccurately separated labor and finisher hours of its employees. It was incumbent upon Respondent to properly determine proper classification of its employees to avoid the risk of misclassification and underpayment. In the beginning of the Project, Respondent paid Mr. Main, Mr. Puentes, Mr. Guzman, and Mr. Coleman finisher wages for the entire day and shift they worked without separation. However, once Dicon became aware that other workers were being misclassified, Respondent separated hours paying finishers diminished hours. Employee testimony demonstrates that it would sometimes take full days to perform concrete finishing work. Mr. Jenkins and Mr. Ingram testified that they would spend twelve hours setting forms and performing finishing work. (Tr. 243, 404). Employee witness statements also indicated that finishing work took long hours. (AX 4 at 58).

The Administrator used a 50% division of work analysis to determine how much time each employee should have been paid at the finisher rate. However, I disagree with this computation. As Respondent paid full day wages in the beginning of the Project, it is evident that the finishers should have continued to be paid at the finisher wage the entire time they performed their duties. Respondent did not provide evidence to prove specific times of the day finishers definitively performed solely laborer tasks, and I find the analysis used by Mr. Coleman is flawed and not in line with the duties recognized as finisher duties in the industry.

Additionally, union representatives testified that concrete construction projects will use a 50/50 work division, i.e. 50% laborers and 50% finishers. This appears to be the consensus among the local industry. In this Project, Respondent had only once used a 50/50 division of

labor. In the first three weeks of the Project, Respondent used two finishers, in addition to Mr. Main. These finishers worked with three to seven laborers. As the Project progressed, previous finishers, such as Ausencio Puentes, no longer were classified as finishers. Instead Mr. Main and Mr. Coleman were the only persons classified as finishers. Mr. Ingram credibly testified that Mr. Coleman did not work as a finisher and Mr. Main mainly supervised and scarcely performed the duties of the normal workers. Mr. Coleman additionally testified that he classified himself as a finisher so that he could be paid the highest pay rate allowed, and not because he performed finisher duties. Mr. Main and Mr. Coleman were the only people classified as finishers for a total of fourteen weeks, essentially leaving the division of work classified as 100% laborers to 0% finishers. For these fourteen weeks, it is apparent that other workers were doing the duties of finishers but not classified and paid accordingly.

Beginning in July, Respondent started classifying workers as finishers. Respondent classified three to five workers, in addition to Mr. Main, as finishers, working with, in upwards of eleven laborers, creating around a 70% to 30% ratio. Also beginning in July, Respondent created the classification “Form Setter” and “Carpenter” and paid a wage less than the finisher rate for these duties. I find this an additional misclassification. The classification of three to five finishers stopped in September, afterwards which only Mr. Kenny Ingram was classified as a finisher, working with in upwards of thirteen laborers, creating a ratio greater than 90% laborers. This classification of a sole finisher lasted for eleven weeks. While it may not be necessary to always have a 50/50 ratio, credible local union representatives testified that a 50/50 ratio is what supervisors should strive for. It is apparent that having constant significant deviations in upwards of 100% laborers is due to misclassification of labor and duties.

In sum, I find that the Respondent did not successfully rebut the Administrator’s case of misclassification by a preponderance of the evidence, and it has violated the DBA pursuant to 29 C.F.R. §5.5(a)(1). However, I do not agree with the Administrator’s blanket percent of division of labor, as not all employees were trained or able to perform finisher duties. While Mr. Ingram testified that, at times most of the workers would do “finishing work,” including the “Hispanic” workers, it is not clear if these workers just assisted the finishers and used the appropriate skill set and tools in these duties and paying all employees the higher rate for a percentage of their hours is too speculative. Current employee statements show that there are employees who did not perform any finishing work. *See* (AX 4 at 56, 65). Respondent has not provided an alternative probative computation, and has denied all wrongdoing. Therefore, the only employees who were paid as finishers at some point, and who Mr. Ingram, Mr. Coleman, or Mr. Jenkins identified as finishers, are the only employees I find can be compensated as such.

Accordingly, I find that the following employees should have been classified and compensated as finishers every day they worked: (1) William Hodges, (2) Kenny Ingram, (3) Jerome Ingram, (4) William Jenkins, (5) Ausencio Puentes, (6) Archie Flemmings, (7) DeRoyce Wright, (8) William McLucas, (9) Charles Tiller, (10) Johnny Tiller, (11) Antonio Portillo, and (12) Martin Portillo.<sup>18</sup> In the beginning of the Project, Respondent paid the finishers at the finisher rate the entire time they worked. It was not until the issue of classification arose, and

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<sup>18</sup> Mr. Ingram testified that Mr. Will Hodges worked as a finisher (Tr. 320-22); also current employee testimony taken during Mr. Hay’s investigation indicated that Mr. Carl and Johnny Tiller, and Mr. Antonio and Martin Portillo worked as finishers as well (AX 4 at 59; AX 5 at 74; Tr. 83; 369).

Respondent realized he had to pay the actual finishers the finisher rate, that he began to split the duties. As mentioned above, Respondent inaccurately separated finishing duties from laborer duties and, as discussed below, it purposely manipulated and lowered employee finisher hours. Respondent has failed to show that it used an appropriate calculation of a division of labor. Accordingly, I find the above listed eleven workers should be paid the finishing rate for all hours worked, unless the division of labor ratio is 50/50, to ensure they are fully compensated as required under the DBA.

### **Back Wages Owed and Overtime**

In *Thomas & Sons Building Contractors, Inc.*, 1996-DBA-37 (ALJ, Feb. 17, 2000), *aff'd.*, ARB Case No. 00-050 (ARB, Aug. 27, 2001), *order denying reconsideration* (ARB, Dec. 6, 2001), the ALJ cited to the Fair Labor Standards Act case of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which was applied to Davis-Bacon Act cases by *Trataros Construction Corp.*, WAB Case No. 92-03 (WAB, Apr. 28, 1993), to set forth the parties' burdens in a case involving recovery of unpaid wages. The ALJ determined that the employee has the initial burden "of proving that he performed work for which he was not properly compensated." The ALJ further held, however, that the employee is not required to establish the "the precise extent of uncompensated work." Rather, the employee's burden is met "if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Thomas*, ARB Case No. 00-050. Once the employee's burden is carried, then it is the employer's burden to demonstrate the precise number of hours worked or to present evidence sufficient to negate "the reasonableness of the inference to be drawn from the employee's evidence." *Id.* If the employer fails to carry this burden, then damages may be awarded to the employee, even if the amount of such damages is approximate. Moreover, the ALJ noted that, where the Department of Labor reconstructs an employer's payroll, the burden is on the employer to present evidence, which is sufficiently precise to contradict the reconstructed payroll. *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); *Dumarc Corp.*, Case No. 2005- DBA-7 (ALJ, Apr. 27, 2006) (because accurate payroll records were not maintained by Respondent, an ALJ may properly "rely on the testimony of witnesses to assess and reconstruct the hours worked"); *Northeast Energy Services, Inc. (NORESCO)*, Case No. 2000-DBA-3 (ALJ, Feb. 12, 2002); *Cody Zeigler, Inc.*, 1997-DBA-17 (ALJ, Sept. 18, 2000) (the ALJ concluded that the employer failed to sustain its burden in challenging the Department's calculations of back wages due its employees); *Peabody Construction Co.*, 1996-DBA-20 (ALJ, Apr. 18, 2000); *Arliss D. Merrill, Inc.*, 1994-DBA-41 (ALJ, Oct. 26, 1995); *Superior Masonry, Inc.*, 1994-DBA-19 (ALJ, Oct. 13, 1994) (failure to maintain proper records of overtime wages paid).

Furthermore, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946), the Supreme Court held the following:

When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer

convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. (citation omitted).

In *Star Brite Construction Co.*, ARB Case No. 98-113, 1997-DBA-12 (ARB, June 30, 2000) the Administrative Review Board ("the Board" or "ARB") held, given Respondent's lack of records, it was proper for the ALJ to rely on the testimony of witnesses. Furthermore, in *Pythagoras General Contracting Corp.*, 2005-DBA-14 (ALJ, June 4, 2008), the ALJ cited to *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468 (11th Cir. 1982) and concluded that it "is permissible to award back pay to non-testifying employees based upon the representative testimony of a small number of employees." *Pythagoras General Contracting Corp.*, 2005-DBA-14. See, *In the Matter of Structural Services*, WAB Case No. 82-13 (WAB, June 22, 1983). See also, *Matter of Schnabel Associates, Inc.*, WAB Case No. 89-18 (WAB, June 28, 1991); and, *M.G. Allen and Associates*, 29 WH Cases (BNA) 374 (1988) citing both *Structural Services* and *Anderson v. Mt. Clemens Potter Co.*, 328 U.S. 680, 66 S.Ct. 1187 (1946). Likewise, it is permissible to award back wages where no employees have testified. *B&B Contractors*, WAB Case No. 89-04 (WAB, 1991).

In this instance Respondent destroyed its time records and it cannot prove that the hours it paid its employees are an accurate reflection of the hours worked. However, Mr. Kenny Ingram, who was in charge of keeping employee records, maintained copies of the hours each employee worked. See AX 6. Respondent has no competent evidence to prove that Mr. Ingram's time records are false, and I accept them as accurate. See *Mt. Clemens Pottery Co.*, 328 U.S. 680; *Star Brite Construction Co.* Furthermore, as summarized above, many of the labor hours worked are identical to the laborer hours compensated by Respondent, which strengthens the accuracy of the records. After review of the time records compared to the certified payroll, it is apparent to this court that Respondent did not accurately compensate his employees. On numerous occasions, the payroll was decreased to short-change employees their appropriate pay. Accordingly, I find that the employees who worked on the Project are entitled to back pay and overtime, for the hours that the time records show are in excess of the hours paid on the certified payroll.

Unfortunately, there were approximately seven workers listed on the time records who never once appeared on the certified payroll - "the [unnamed] Hispanic workers."<sup>19</sup> These employees were potentially paid in cash by Mr. Main and were not a part of Respondent's payroll. Mr. Main and Mr. Coleman entered into a joint business venture to complete the Project and it is possible that Mr. Main solicited and compensated these workers apart from Respondent's workers. As I have no evidence to show how much these workers were paid, and if they were actually paid the appropriate wages by Mr. Main, I cannot include these employees in the award of back pay. Furthermore, as the addresses and detailed information of these persons are not available, it would be impractical to compensate these "possible" employees.

Respondent argues that the general contractor failed to make available the wage determination at the signing of the subcontract. However, the actions of a contracting agency and the general contractors cannot generally evoke estoppel against DOL to defeat a legitimate claim for back wages on behalf of aggrieved employees. *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). 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 I cannot conclude that Respondent's hands are entirely clean because, whether advertently or not, Respondent underpaid its employees by misclassifying them as laborers, and deducting hours worked. In other words, I cannot conclude that the equities weigh in favor of Respondent, to such a degree that its employees should bear the brunt by receiving less in wages than to which they were entitled.

The Board in *P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996), found that respondent's payroll records did not reflect an effort to properly compensate the laborers for the work they had performed and which had been observed by the Wage and Hour investigator. In particular, the ARB noted that, after the meeting with the DOL investigator, Respondent should have ensured that the sheet metal foreman was providing accurate payroll information reflecting the sheet metal mechanics' work being done by employees classified only as laborers. Similarly, even after Dicon alerted Respondent to the issue with pay and classification, Respondent used dishonest tactics to inaccurately pay lower wages to its employees. Mr. Ingram credibly testified, and the records reflect, that Respondent lowered the hours workers worked in order to pay them less than the required \$32.91. Additionally, Respondent purposely deducted hours from each employee to recoup work that needed to be done. (AX 6). This shows that even after Respondent realized it was under investigation and that there were issues with pay, it proceeded to inaccurately report payroll hours.

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<sup>19</sup> There are other names that appear on the time records and not the payroll, which are not included with the seven "Hispanic workers:" Richard Wright, Julian Johnson, Kenneth Cook, Clarence Tyler, Kirk Lacy, Kenneth Monroe, Jessie Leeper, Dennis Black, Denaris Brown, and Marcellus Spivey. These persons do not appear in the Administrator's computation, except Kenneth Monroe, and their personnel information is also not of record. Similarly, these possible employees' pay and hours are too speculative and will not be awarded back pay.

*Regular Time Back Pay Calculations*

I have calculated as follows the employees of Coleman Construction Inc. who should receive back pay for regular hours worked. These calculations include all the employees that should have been paid at finisher rates and all employees who were paid fewer hours than Mr. Kenny Ingram's time records reflect.

<b>Week Ending</b>	<b>Employee Name</b>	<b>Hours Paid (JX F)</b>	<b>Wage Paid (JX F)</b>	<b>Amount Paid (JX F)</b>	<b>Total Hours Worked (AX 6)</b>	<b>DBA Wage</b>	<b>DBA Total Wages</b>	<b>Back Pay Due</b>
<b>12/12/10</b>	Jerome Ingram	38	\$13.00	\$494.00	-	\$32.91	\$1250.58	<b>\$756.58</b>
	Archie Flemmings	38	\$15.00	\$570.00		\$32.91	\$1250.58	<b>\$680.58</b>
	DeRoyce Wright	38	\$15.00	\$570.00		\$32.91	\$1250.58	<b>\$680.58</b>
	Williams Jenkins	32.5	\$15.00	\$487.50		\$32.91	\$1069.57	<b>\$582.07</b>
	Will Hodges	7.75	\$12.21	\$94.63		\$32.91	\$255.05	<b>\$160.42</b>
<b>12/18/10</b>	Jerome Ingram	33.25	\$13.00	\$432.25	-	\$32.91	\$1094.25	<b>\$662.00</b>
	DeRoyce Wright	33.25	\$15.00	\$498.75		\$32.91	\$1094.25	<b>\$595.50</b>
	Williams Jenkins	23.5	\$15.00	\$352.50		\$32.91	\$773.38	<b>\$420.88</b>
	Kenny Ingram	15.25	\$15.00	\$228.75		\$32.91	\$501.87	<b>\$273.12</b>
<b>12/25/10</b>	Mostly finisher hours were paid this week with 3 persons classified as laborers and 3 as finishers.							
<b>1/11/11-2/19/11</b>	No work performed							
<b>2/26/11</b>	No back pay due this week.							
<b>3/5/11</b>	Ausencio Puentes	16.5	\$12.21	\$201.46	-	\$32.91	\$543.01	<b>\$341.55</b>
<b>3/12/11</b>	Archie Flemmings	14.5	\$16.00	\$232.00	-	\$32.91	\$477.19	<b>\$245.19</b>
	William Jenkins	9.5	\$16.00	\$152.00		\$32.91	\$312.64	<b>\$160.64</b>
	Will Hodges	14	\$12.21	\$170.74		\$32.91	\$460.74	<b>\$290.00</b>
	Kenny Ingram	14	\$15.00	\$210.00		\$32.91	\$460.74	<b>\$250.74</b>
	Jerome Ingram	14	\$14.00	\$196.00		\$32.91	\$460.74	<b>\$264.74</b>
	Ausencio Puentes	40	\$12.21	\$488.40		\$32.91	\$1316.40	<b>\$828.00</b>
<b>3/19/11</b>	Archie Flemmings	40	\$16.00	\$640.00	-	\$32.91	\$1316.40	<b>\$676.40</b>
	William Jenkins	39	\$16.00	\$624.00		\$32.91	\$1283.49	<b>\$659.49</b>
	Will Hodges	40	\$12.21	\$488.40		\$32.91	\$1316.40	<b>\$828.00</b>
	Kenny Ingram	40	\$12.21	\$488.40		\$32.91	\$1316.40	<b>\$828.00</b>
	Jerome Ingram	40	\$13.00	\$520.00		\$32.91	\$1316.40	<b>\$796.40</b>
	Ausencio Puentes	40	\$12.21	\$488.40		\$32.91	\$1316.40	<b>\$828.00</b>
	DeRoyce Wright	40	\$12.21	\$488.40		\$32.91	\$1316.40	<b>\$828.00</b>
<b>3/26/11</b>	Archie Flemmings	31	\$16.00	\$496.00	-	\$32.91	\$1020.21	<b>\$524.21</b>
	William Jenkins	21.75	\$16.00	\$348.00		\$32.91	\$715.79	<b>\$367.79</b>
	Will Hodges	20.75	\$12.21	\$253.36		\$32.91	\$682.88	<b>\$429.52</b>
	Kenny Ingram	22	\$15.00	\$330.00		\$32.91	\$724.02	<b>\$394.02</b>
	Jerome Ingram	22	\$14.00	\$308.00		\$32.91	\$724.02	<b>\$416.02</b>
	Ausencio Puentes	37.5	\$12.21	\$457.87		\$32.91	\$1234.12	<b>\$776.25</b>
	DeRoyce Wright	29.5	\$12.21	\$360.19		\$32.91	\$970.84	<b>\$610.65</b>
<b>4/2/11</b>	No work performed							
<b>4/9/11</b>	Kenny Ingram	28.5	\$15.00	\$427.50	-	\$32.91	\$937.93	<b>\$510.43</b>
	Jerome Ingram	28.5	\$14.00	\$399.00		\$32.91	\$937.93	<b>\$538.93</b>
	DeRoyce Wright	28.5	\$15.00	\$427.50		\$32.91	\$937.93	<b>\$510.43</b>
	William Jenkins	28.5	\$16.00	\$456.00		\$32.91	\$937.93	<b>\$481.93</b>
	Archie Flemmings	28.5	\$16.00	\$456.00		\$32.91	\$937.93	<b>\$481.93</b>
<b>4/16/11</b>	Kenny Ingram	15.75	\$15.00	\$236.25	-	\$32.91	\$518.33	<b>\$282.08</b>
	Jerome Ingram	15.75	\$15.00	\$236.25		\$32.91	\$518.33	<b>\$282.08</b>
	DeRoyce Wright	16	\$15.00	\$240.00		\$32.91	\$526.56	<b>\$286.56</b>
	William Jenkins	16.5	\$16.00	\$264.00		\$32.91	\$543.01	<b>\$279.01</b>
	Archie Flemmings	16.5	\$16.00	\$264.00		\$32.91	\$543.01	<b>\$279.01</b>
	Will Hodges	15.75	\$12.21	\$192.31		\$32.91	\$518.33	<b>\$326.02</b>
<b>4/23/11</b>	William Jenkins	10	\$16.00	\$160.00	-	\$32.91	\$329.10	<b>\$169.10</b>
<b>4/30/11</b>	No work performed							
<b>5/7/11</b>	Kenny Ingram	29	\$15.00	\$435.00	29	\$32.91	\$954.39	<b>\$519.39</b>

<b>Week Ending</b>	<b>Employee Name</b>	<b>Hours Paid (JX F)</b>	<b>Wage Paid (JX F)</b>	<b>Amount Paid (JX F)</b>	<b>Total Hours Worked (AX 6)</b>	<b>DBA Wage</b>	<b>DBA Total Wages</b>	<b>Back Pay Due</b>
	Jerome Ingram	21	\$15.00	\$315.00	21	\$32.91	\$691.11	<b>\$376.11</b>
	DeRoyce Wright	32	\$15.00	\$480.00	32	\$32.91	\$1053.12	<b>\$573.12</b>
	Lee Robinson	21	\$8.00	\$168.00	20	\$12.21	\$244.20	<b>\$76.20</b>
	Archie Flemmings	28	\$16.00	\$448.00	31	\$32.91	\$1020.21	<b>\$572.21</b>
	Will Hodges	21	\$12.21	\$256.41	21	\$32.91	\$691.11	<b>\$434.70</b>
	Chiwanda Ammons	-	-	\$0	33	\$12.21	\$402.93	<b>\$402.93</b>
	Richard Barker	-	-	\$0	31	\$12.21	\$378.51	<b>\$378.51</b>
	Otis Hopkins	-	-	\$0	10	\$12.21	\$122.10	<b>\$122.10</b>
	William Jenkins	-	-	\$0	32	\$32.91	\$1053.12	<b>\$1053.12</b>
	Pope Kerry	-	-	\$0	26	\$12.21	\$317.46	<b>\$317.46</b>
	Mark Hill	-	-	\$0	17	\$12.21	\$207.57	<b>\$207.57</b>
<b>5/14/11</b>	Archie Flemmings	17	\$16.00	\$272.00	17	\$32.91	\$559.47	<b>\$287.47</b>
	Will Hodges	17	\$12.21	\$207.57	17	\$32.91	\$559.47	<b>\$351.90</b>
	Jerome Ingram	17	\$15.00	\$255.00	17	\$32.91	\$559.47	<b>\$304.47</b>
	Kenny Ingram	12	\$15.00	\$180.00	17	\$32.91	\$559.47	<b>\$379.47</b>
	Antjuan Webster	11	\$12.21	\$134.31	12	\$12.21	\$146.52	<b>\$12.21</b>
	DeRoyce Wright	17	\$15.00	\$255.00	17	\$32.91	\$559.47	<b>\$304.47</b>
	Lee Robinson	14	\$8.00	\$112.00	13.5	\$12.21	\$164.83	<b>\$52.83</b>
	William Jenkins	6	\$16.00	\$96.00	6	\$32.91	\$197.46	<b>\$101.46</b>
	Mark Hill	17	\$8.00	\$136.00	17	\$12.21	\$207.57	<b>\$71.57</b>
	Otis Hopkins	-	-	\$0	17	\$12.21	\$207.57	<b>\$207.57</b>
Pope Kerry	-	-	\$0	6	\$12.21	\$73.26	<b>\$73.26</b>	
<b>5/22/11</b>	Chiwada Ammons	-	-	-	30.5	\$12.21	\$372.40	<b>372.40</b>
	Richard Barker				25	\$12.21	\$305.25	<b>\$305.25</b>
	Lee Robinson				17.75	\$12.21	\$216.72	<b>\$216.72</b>
	Archie Flemmings				39.5	\$32.91	\$1299.94	<b>\$1299.94</b>
	Jerome Harper				30	\$12.21	\$366.30	<b>\$366.30</b>
	Will Hodges				15	\$32.91	\$493.65	<b>\$493.65</b>
	Jerome Ingram				26	\$32.91	\$855.66	<b>\$855.66</b>
	Kenny Ingram				36	\$32.91	\$1184.76	<b>\$1184.76</b>
	William Jenkins				35	\$32.91	\$1151.85	<b>\$1151.85</b>
	Kerry Pope				8	\$12.21	\$97.68	<b>\$97.68</b>
	Ausencio Puentes				10.5	\$32.91	\$345.55	<b>\$345.55</b>
	Antjuan Webster				19.5	\$12.21	\$238.09	<b>\$238.09</b>
	DeRoyce Wright				38	\$32.91	\$1250.58	<b>\$1250.58</b>
Mark Hill				22.75	\$12.21	\$277.77	<b>\$277.77</b>	
<b>5/28/11</b>	Archie Flemmings	7.5	\$16.00	\$120.00	7.5	\$32.91	\$246.82	<b>\$126.82</b>
	Will Hodges	6.5	\$12.21	\$79.37	6.5	\$32.91	\$213.91	<b>\$134.54</b>
	Jerome Ingram	6.5	\$15.00	\$97.50	6.5	\$32.91	\$213.91	<b>\$116.41</b>
	Kenny Ingram	6.5	\$15.00	\$97.50	6.5	\$32.91	\$213.91	<b>\$116.41</b>
	DeRoyce Wright	8.5	\$15.00	\$127.50	8.5	\$32.91	\$279.73	<b>\$152.23</b>
	William Jenkins	6.5	\$14.00	\$104.00	6.5	\$32.91	\$213.91	<b>\$109.91</b>
<b>6/4/11</b>	Jerome Ingram	18.75	\$15.00	\$281.25	18.75	\$32.91	\$617.06	<b>\$335.81</b>
	Kenny Ingram	25.5	\$15.00	\$382.50	25.5	\$32.91	\$839.20	<b>\$456.70</b>
	William Jenkins	17.25	\$16.00	\$276.00	17.25	\$32.91	\$567.69	<b>\$291.69</b>
<b>6/11/11</b>	Archie Flemmings	28	\$16.00	\$448.00	28	\$32.91	\$921.48	<b>\$473.48</b>
	Will Hodges	16.5	\$12.21	\$201.47	16.5	\$32.91	\$543.01	<b>\$341.54</b>
	Jerome Ingram	25	\$15.00	\$375.00	25	\$32.91	\$822.75	<b>\$447.75</b>
	Kenny Ingram	19.5	\$15.00	\$292.50	19.5	\$32.91	\$641.74	<b>\$349.24</b>
	William Jenkins	26.5	\$16.00	\$424.00	26.5	\$32.91	\$872.11	<b>\$448.11</b>
	DeRoyce Wright	17.25	\$15.00	\$258.75	17.25	\$32.91	\$567.69	<b>\$308.94</b>
	Ausencio Puentes	35.5	\$12.21	\$433.46	35.5	\$32.91	\$1168.30	<b>\$734.84</b>
Shelton Fils	-	-	\$0	8	\$12.21	\$97.68	<b>\$97.68</b>	

Week Ending	Employee Name	Hours Paid (JX F)	Wage Paid (JX F)	Amount Paid (JX F)	Total Hours Worked (AX 6)	DBA Wage	DBA Total Wages	Back Pay Due
<b>6/18/11</b>	William Jenkins	30.5	\$16.00	\$488.00	30.5	\$32.91	\$1003.75	<b>\$515.75</b>
	Archie Flemmings	45.5	\$16.00	\$640.00	45.5 (40) <sup>20</sup>	\$32.91	\$1316.40	<b>\$676.40</b>
	Will Hodges	(40)	\$12.21	\$265.57	21.75	\$32.91	\$715.79	<b>\$450.22</b>
	Jerome Ingram	21.75	\$15.00	\$600.00	41 (40)	\$32.91	\$1316.40	<b>\$716.40</b>
	Kenny Ingram	41(40)	\$15.00	\$472.50	31.5	\$32.91	\$1036.66	<b>\$564.16</b>
	DeRoyce Wright	31.5	\$15.00	\$465.00	31	\$32.91	\$1020.21	<b>\$555.21</b>
	Shelton Fils	31-	-	\$0	37	\$12.21	\$451.77	<b>\$451.77</b>
<b>6/25/11</b>	William Jenkins	15	\$16.00	\$240.00	15	\$32.91	\$493.65	<b>\$253.65</b>
	Archie Flemmings	0	\$0	\$0	11.5	\$32.91	\$378.46	<b>\$378.46</b>
	Will Hodges	8.75	\$12.21	\$106.84	8.75	\$32.91	\$287.96	<b>\$181.12</b>
	Jerome Ingram	0	\$0	\$0	8.25	\$32.91	\$271.50	<b>\$271.50</b>
	Kenny Ingram	0	\$0	\$0	8.25	\$32.91	\$271.50	<b>\$271.50</b>
	DeRoyce Wright	0	\$0	\$0	10.5	\$32.91	\$345.55	<b>\$345.55</b>
	Shelton Fils	-	\$0	\$0	10.5	\$12.21	\$128.20	<b>\$128.20</b>
<b>7/2/11</b>	William Jenkins	25.5	\$16.00	\$408.00	25.5	\$32.91	\$839.20	<b>\$431.20</b>
	Archie Flemmings	15.25	\$16.00	\$244.00	26	\$32.91	\$855.66	<b>\$611.66</b>
	Will Hodges	16.5	\$12.21	\$201.47	16.5	\$32.91	\$543.01	<b>\$341.54</b>
	Jerome Ingram	14.5	\$15.00	\$217.50	14.5	\$32.91	\$477.19	<b>\$262.69</b>
	Kenny Ingram	24.75	\$15.00	\$371.25	24.75	\$32.91	\$814.52	<b>\$443.27</b>
	DeRoyce Wright	25.5	\$15.00	\$382.50	25.5	\$32.91	\$839.20	<b>\$456.70</b>
	Ausencio Puentes	0	\$0	\$0	15.75	\$32.91	\$518.33	<b>\$518.33</b>
	Antjuan Webster	0	\$0	\$0	9.75	\$12.21	\$119.04	<b>\$119.04</b>
	Shelton Fils	0	\$0	\$0	21	\$12.21	\$256.41	<b>\$256.41</b>
	Anthony Fitzgerald	0	\$0	\$0	22	\$12.21	\$268.62	<b>\$268.62</b>
	Will McLucas	0	\$0	\$0	20	\$32.91	\$658.20	<b>\$658.20</b>
<b>7/9/11</b>	William Jenkins	18	\$12.21/\$21.10	\$273.12	18	\$32.91	\$592.38	<b>\$319.26</b>
	Archie Flemmings	17.5	\$16.00/\$32.91	\$398.37	17.5	\$32.91	\$575.92	<b>\$177.55</b>
	Jerome Ingram	4.52	\$15.00/\$32.91	\$95.02	5.5	\$32.91	\$181.00	<b>\$85.98</b>
	Kenny Ingram	16.24	\$15.00/\$32.91	\$328.49	18	\$32.91	\$592.38	<b>\$263.89</b>
	Ausencio Puentes	22.5	\$12.21	\$271.67	22.5	\$32.91	\$740.47	<b>\$468.80</b>
	Anthony Fitzgerald	0	\$0	\$0	8.5	\$12.21	\$103.78	<b>\$103.78</b>
	Will McLucas	0	\$0	\$0	8.5	\$32.91	\$279.73	<b>\$279.73</b>
<b>7/16/11</b>	William Jenkins	7.5	\$12.21/\$21.10	\$140.40	7.5	\$32.91	\$246.82	<b>\$106.42</b>
	Archie Flemmings	8.5	\$16.00/\$32.91	\$216.32	8.5	\$32.91	\$279.73	<b>\$63.41</b>
	Jerome Ingram	14.46	\$15.00/\$32.91	\$363.94	19.75	\$32.91	\$649.97	<b>\$286.03</b>
	Kenny Ingram	24.86	\$15.00/\$32.91	\$618.96	30	\$32.91	\$987.30	<b>\$368.34</b>
	DeRoyce Wright	6.39	\$15.00/\$32.91	\$147.61	8.25	\$32.91	\$271.50	<b>\$123.89</b>
	Ausencio Puentes	30.5	\$12.21	\$372.41	30.5	\$32.91	\$1003.75	<b>\$631.34</b>
	Anthony Fitzgerald	0	\$0	\$0	6.75	\$12.21	\$82.41	<b>\$82.41</b>
	Will McLucas	16.71	\$12.21/\$32.91	\$373.98	22	\$32.91	\$724.02	<b>\$350.04</b>
	Antjuan Webster	0	\$0	\$0	30	\$12.21	\$366.30	<b>\$366.30</b>
	Shelton Fils	0	\$0	\$0	22.5	\$12.21	\$274.72	<b>\$274.72</b>
<b>7/23/11</b> <b>7/23/11</b>	Jerome Ingram	22.5	\$15.00/\$32.91	\$531.35	28.5	\$32.91	\$937.93	<b>\$406.58</b>
	Kenny Ingram	28.9	\$15.00/\$32.91	\$691.40	34.25	\$32.91	\$1127.16	<b>\$435.76</b>
	Will McLucas	12.09	\$15.00/\$32.91	\$303.85	17.5	\$32.91	\$575.92	<b>\$272.07</b>
<b>7/30/11</b>	Jerome Ingram	28.12	\$15.00/\$32.91	\$639.86	36	\$32.91	\$1184.76	<b>\$544.90</b>
	Kenny Ingram	17.32	\$0/\$32.91	\$570.00	43.25 (40)	\$32.91	\$1316.40	<b>\$746.40</b>
	Will McLucas	14.53	\$15.00/\$32.91	\$330.42	18.75	\$32.91	\$617.06	<b>\$286.64</b>
	Anthony Fitzgerald	0	\$0	\$0	28.5	\$12.21	\$347.98	<b>\$347.98</b>
	Ronnie Houston	0	\$0	\$0	8.25	\$12.21	\$100.73	<b>\$100.73</b>
	Antjuan Webster	0	\$0	\$0	15.5	\$12.21	\$189.25	<b>\$189.25</b>
<b>8/6/11</b>	Jerome Ingram	28.76	\$15.00/\$32.91	\$583.81	-	\$32.91	\$946.49	<b>\$362.68</b>
	Kenny Ingram	36.21	\$15.00/\$32.91	\$726.01	-	\$32.91	\$1191.67	<b>\$465.66</b>
	Will McLucas	23.99	\$12.21/\$32.91	\$437.61	-	\$32.91	\$789.51	<b>\$351.90</b>

<sup>20</sup> The overtime payments were already successfully calculated by the Administrator; accordingly, the maximum back pay calculations will reflect 40 regular work hours.

Week Ending	Employee Name	Hours Paid (JX F)	Wage Paid (JX F)	Amount Paid (JX F)	Total Hours Worked (AX 6)	DBA Wage	DBA Total Wages	Back Pay Due
8/13/11	Jerome Ingram	16.6	\$15.00/\$32.91	\$322.43	19.25	\$32.91	\$633.51	\$311.08
	Kenny Ingram	31.28	\$15.00/\$32.91	\$591.82	33.75	\$32.91	\$1110.71	\$518.89
	Will McLucas	24.02	\$12.21/\$32.91	\$412.72	27.75	\$32.91	\$913.25	\$500.53
8/20/11	Jerome Ingram	34.87	\$15.00/\$32.91	\$686.39	40.75 (40)	\$32.91	\$1316.40	\$630.01
	Kenny Ingram	40.45	\$15.00/\$32.91	\$874.50	46 (40)	\$32.91	\$1316.40	\$441.90
	Will McLucas	34.87	\$12.21/\$32.91	\$614.54	40.75 (40)	\$32.91	\$1316.40	\$701.86
8/27/11	Jerome Ingram	35.38	\$15.00/\$32.91	\$707.65	41.75 (40)	\$32.91	\$1316.40	\$608.75
	Kenny Ingram	35.68	\$15.00/\$32.91	\$695.14	39.25	\$32.91	\$1291.71	\$596.57
	Will McLucas	35.38	\$12.21/\$32.91	\$636.51	41.75 (40)	\$32.91	\$1316.40	\$679.89
	Antonio Portillo	0	\$0	\$0	33.75	\$32.91	\$1110.71	\$1110.71
	Martin Portillo	0	\$0	\$0	33.25	\$23.91	\$1094.25	\$1094.25
9/3/11	Jerome Ingram	13	\$15.00	\$195.00	24.4	\$32.91	\$803.00	\$608.00
	Kenny Ingram	27.75	\$15.00	\$416.25	35.75	\$32.91	\$1176.53	\$760.28
	Will McLucas	25	\$12.21	\$305.25	33	\$32.91	\$1086.03	\$780.78
	Anthony Fitzgerald	17	\$12.21	\$207.57	25	\$12.21	\$305.25	\$97.68
	Shelton Fils	8	\$12.21	\$97.68	16	\$12.21	\$195.36	\$195.36
	James Minor	0	\$0	\$0	10.25	\$12.21	\$125.15	\$125.15
	Anthony Portillo	0	\$0	\$0	34	\$32.91	\$1118.94	\$1118.94
	Martin Portillo	0	\$0	\$0	34	\$32.91	\$1118.94	\$1118.94
9/10/11	Jerome Ingram	0	\$0	\$0	3.75	\$32.91	\$123.41	\$123.41
	Will McLucas	0	\$0	\$0	3.75	\$32.91	\$123.41	\$123.41
	Kenny Ingram	9.55	\$15.00/\$32.91	\$188.92	18.25	\$32.91	\$600.60	\$411.68
	Anthony Fitzgerald	0	\$0	\$0	7.25	\$12.21	\$88.52	\$88.52
	Antonio Portillo	7	\$12.21	\$85.47	15	\$32.91	\$493.65	\$408.18
	Martin Portillo	7	\$12.21	\$85.47	15	\$32.91	\$493.65	\$408.18
9/17/11	Kenny Ingram	26.05	\$15.00/\$32.91	\$436.42	31.5	\$32.91	\$1036.66	\$600.24
	Anthony Fitzgerald	18.5	\$12.21	\$225.88	26.5	\$12.21	\$323.56	\$97.68
	Antonio Portillo	25.25	\$12.21	\$308.30	33.25	\$32.91	\$1094.25	\$785.95
	Martin Portillo	25.25	\$12.21	\$308.30	33.25	\$32.91	\$1094.25	\$785.95
9/24/11	Kenny Ingram	28.8	\$15.00/\$32.91	\$740.93	41.5 (40)	\$32.91	\$1316.40	\$575.47
	Antonio Portillo	32.5	\$12.21	\$396.83	40.5 (40)	\$32.91	\$1316.40	\$919.57
	Martin Portillo	32.5	\$12.21	\$396.83	40.5 (40)	\$32.91	\$1316.40	\$919.57
	Heli Cervantes	0	\$12.21	\$0	39.25	\$12.21	\$479.24	\$479.24
10/1/11	Kenny Ingram	-	-	-	39.5	\$32.91	\$1299.94	\$1299.94
	Antjuan Webster				37	\$12.21	\$451.77	\$451.77
	Antonio Portillo				45.75 (40)	\$32.91	\$1316.40	\$1316.40
	Martin Portillo				45.75 (40)	\$32.91	\$1316.40	\$1316.40
	Heli Cervantes				27.5	\$12.21	\$335.77	\$335.77
10/8/11	Kenny Ingram	36.15	\$15.00/\$32.91	\$800.15	40.5 (40)	\$32.91	\$1316.40	\$516.25
	Antonio Portillo	40.25	\$12.21	\$494.45	40.25(40)	\$32.91	\$1316.40	\$824.95
	Martin Portillo	40.25	\$12.21	\$491.45	40.25(40)	\$32.91	\$1316.40	\$824.95
	Heli Cervantes	20.75	\$12.21	\$253.36	22.25	\$12.21	\$271.67	\$18.31
	Kenneth Shelton	0	\$0	\$0	39.25	\$12.21	\$479.24	\$479.24
10/15/11	Kenny Ingram	31.39	\$15.00/\$32.91	\$621.11	34.5	\$32.91	\$1135.39	\$514.28
	Antonio Portillo	39.5	\$12.21	\$482.30	39.5	\$32.91	\$1299.94	\$817.64
	Martin Portillo	39.5	\$12.21	\$482.30	39.5	\$32.91	\$1299.94	\$817.64
	Kenneth Shelton	0	\$0	\$0	36.75	\$12.21	\$448.71	\$448.71
10/22/11	Kenny Ingram	19.23	\$15.00/\$32.91	\$377.64	30.75	\$32.91	\$1011.98	\$634.34
	Antonio Portillo	32	\$12.91	\$390.72	32	\$32.91	\$1053.12	\$662.40
	Martin Portillo	32	\$12.91	\$390.72	32	\$32.91	\$1053.12	\$662.40
	Kenneth Shelton	0	\$0	\$0	20.75	\$12.21	\$253.35	\$253.35
10/29/11	Kenny Ingram	25.69	\$15.00/\$32.91	\$523.08	52 (40)	\$32.91	\$1316.40	\$793.32
	Antonio Portillo	45	\$12.91/\$36.63	\$653.24	43.5(40)	\$32.91	\$1316.40	\$663.16
	Martin Portillo	45	\$12.91/\$36.63	\$653.24	43.5(40)	\$32.91	\$1316.40	\$663.16
	Kenneth Shelton	0	\$0	\$0	38.75	\$12.21	\$473.13	\$473.13
	Johnny Tiller	0	\$0	\$0	5.25	\$32.91	\$172.77	\$172.77
11/5/11	Kenny Ingram	40.87	\$15.00/\$32.91	\$852.51	34.25	\$32.91	\$1127.16	\$274.65

Week Ending	Employee Name	Hours Paid (JX F)	Wage Paid (JX F)	Amount Paid (JX F)	Total Hours Worked (AX 6)	DBA Wage	DBA Total Wages	Back Pay Due
	Will McLucas	8.25	\$12.21	\$100.73	8.25	\$32.91	\$271.50	<b>\$170.77</b>
	Carl Tiller	0	\$0	\$0	30	\$32.91	\$987.30	<b>\$987.30</b>
	Johnny Tiller	12	\$16.00	\$192.00	12	\$32.91	\$394.92	<b>\$202.92</b>
	Martin Portillo	28.75	\$12.21	\$351.04	28.75	\$32.91	\$946.16	<b>\$595.12</b>
	Antonio Portillo	28.75	\$12.21	\$351.04	28.75	\$32.91	\$946.16	<b>\$595.12</b>
<b>11/12/11</b>	Kenny Ingram	18.85	\$15.00/\$32.91	\$374.09	20.75	\$32.91	\$682.88	<b>\$308.79</b>
	Carl Tiller	0	\$12.21	\$0	22.5	\$32.91	\$740.47	<b>\$740.47</b>
	Johnny Tiller	11.5	\$12.21	\$140.42	11.5	\$32.91	\$378.46	<b>\$238.04</b>
	Antonio Portillo	21.25	\$12.21	\$259.46	18.25	\$32.91	\$600.60	<b>\$341.14</b>
	Martin Portillo	21.25	\$12.21	\$259.46	18.25	\$32.91	\$600.60	<b>\$341.14</b>

*Employee Regular Time Back Pay Totals*

Employee Name	Total Due
Chiwanda Ammons	\$775.33
Richard Barker	\$683.76
Heli Cervantes	\$833.32
Shelton Fils	\$1,404.14
Anthony Fitzgerald	\$1,086.67
Archie Flemmings	\$7,554.72
Jerome Harper	\$366.30
Mark Hill	\$556.91
Will Hodges	\$4,763.17
Otis Hopkins	\$329.67
Ronnie Houston	\$100.73
Jerome Ingram	\$11,370.97
Kenny Ingram	\$17,349.94
William Jenkins	\$7,903.33
Will McLucas	\$5,155.82
James Minor	\$125.15
Kerry Pope	\$488.40
Antonio Portillo	\$9,564.18
Martin Portillo	\$9,547.73
Ausencio Puentes	\$5,472.66
Lee Robinson	\$345.75
Carl Tiller	\$1,727.78
Johnny Tiller	\$613.74
Antjuan Webster	\$1,376.66
DeRoyce Wright	\$7,582.41
<b>Total Back Pay Due</b>	<b>\$97,079.24</b>

*Overtime Payments*

Respondent concedes that it, “inadvertently” failed to make overtime payments in the amount of \$1,941.42, as computed by the Administrator in AX 10. *Respondent’s Final Argument* at p. 5. Accordingly, I find that the Administrator’s overtime payment computation is accepted and the amount withheld from Respondent to account for said failure was proper.

## Debarment

Debarment is warranted only when a person or firm has “disregarded their obligations” to their employees and to the employees of subcontractors protected by the Act. 40 U.S.C. § 276-2(a). In *Thomas and Sons Building Contractors, Inc.*, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB Aug. 27, 2001), *order denying reconsideration* (ARB Dec. 6, 2001), the Board defined “disregard for obligations” under the Act to mean a level of culpability beyond mere negligence, involving some element of intent. Debarment would not only bar Coleman Construction from entering into federal contracts for three years, but would extend to Coleman’s President, Mr. Freeman Coleman Sr., as well. In *Facchiano Const. Co. v. U.S. Dep’t. of Labor*, 987 F.2d 206 (3d Cir. 1993), the circuit court held that, pursuant to 29 C.F.R. § 5.12(a)(1), it was proper to debar responsible corporate officers, in addition to the company, for a period of three years. However, the court declined to assess liability against corporate officers unless they had knowledge of the violations committed by their subordinates, *i.e.* their conduct was “willful or aggravated.” *Id.* See also *Hugo Reforestation, Inc.*, ARB Case No. 99-003,1997-SCA-20 (ARB, Apr. 30, 2001) (owner and president of Respondent charged with supervision of day-to-day operations must be debarred for CWHSSA and SCA violations); *Berbice Corp.*, 1998-DBA-9 (ALJ, Apr. 16, 1999); *Superior Masonry, Inc.*, 1994-DBA-19(ALJ, Oct. 13, 1994) (president and owner of company was debarred; he controlled and managed company operations and directed falsification of the payroll records).

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

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

Debarment has consistently been found to be a remedial rather than punitive measure so as to encourage compliance and discourage employers from adopting business practices designed to maximize profits by underpaying employees in violation of the Act. See, *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990); *S.A. Healy Co. v. Occupational Safety and Health Review Comm’n*, 96 F.3d 906, 911 (7th Cir. 1996); *Minor Construction Co.*, 1995-DBA-00042 (ALJ, June 12, 1997). Debarment is an appropriate compliance tool because it discourages attitudes that violations of the Act will not be detected and, if they are, that said violations will be lightly treated by requiring only a confession of violation and restitution of back pay. *Phoenix Paint Co.*, WAB Case No. 97-8 (WAB, May 5, 1989). See also *Palisades Urban Renewal Enterprises, LLP*, 2006-DBA-1 (ALJ, Aug. 3, 2007), *aff’d.*, ARB Case No. 07-124 (ARB, July 30, 2009) (debarment is intended to be “remedial” in nature; violations of the Act “do not *per se*

result in debarment”) (on appeal to the ARB, Case No. 07-124); *S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 96 F.3d 906, 911 (7th Cir. 1996); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990); *Bae v. Shalala*, 44 F.3d 489, 493 (7th Cir. 1995).

To support a debarment order, the evidence must establish a level of culpability such as “aggravated or willful” and beyond mere negligence or inadvertent behavior. *A. Vento Construction*, WAB Case No. 87-51 (WAB, Oct. 17, 1990). Allowing violations to persist can constitute evidence of intent to evade or a purposeful lack of attention to a statutory responsibility in support of debarment. *P&N Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116 (ARB, Oct. 25, 1996). In *A. Vento Construction*, the Wage Appeals Board explained that “[a]ctions typically found to be ‘aggravated or willful’ seem to meet the literal definition of those terms – intentional, deliberate, knowing violations of the Act.” Furthermore, in *Hugo Reforestation, Inc.*, ARB Case No. 99-003, the Board adopted the Supreme Court’s standard for establishing willful conduct under the Fair Labor Standards Act in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), which requires establishing that the “employer [knew] or showed reckless disregard for the matter of whether its conduct was prohibited by statute.” *Id.*

In *Sundex, Ltd.*, ARB Case No. 98-130, 1994-DBA-58 (ARB, Dec. 30, 1999), citing to *G&O General Contractors, Inc.*, WAB Case No. 90-35 (WAB, Feb. 19, 1991), the ARB stated that, once an intentional violation is established, “the standard for debarment is a ‘bright-line’ test, *i.e.* a 3-year debarment period is mandatory, without consideration of mitigating factors or extraordinary circumstances.” The ARB noted that, while there is a statutory debarment provision under the Davis-Bacon Act, the DOL’s regulations also provide for debarment for violations of “related acts,” including the CWHSSA. Therefore, where the contractor intentionally failed to pay proper overtime as required by the CWHSSA, the ALJ properly entered an order of debarment. *See also, Thomas and Sons Building Contractors, Inc.*, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001), *order denying reconsideration* (ARB, Dec. 6, 2001). Furthermore, in *Structural Concepts, Inc.*, 1994-DBA-23 (ALJ, Feb. 23, 1995), the ALJ held that while mitigating factors may affect debarment under labor standards regulations, they do not have an impact on the debarment issue under the Davis-Bacon Act. 29 C.F.R. § 512(a)(1). Additionally, it was held that an ALJ lacks the discretion to lessen the three year period of debarment as contained in 40 U.S.C. § 276(a)(2).

#### *Knowledge of Misclassification*

I find that Respondent knowingly misclassified finishers as laborers. As abovementioned, there are long periods where Mr. Main and Mr. Coleman were the only persons classified as finishers, and other periods where only Mr. Ingram was classified as a finisher. While it is not a concrete rule that projects have a 50/50 division of labor, it is clear that Mr. Main and Mr. Coleman were not the only people performing finishing work, as they were mainly, if not exclusively, supervising. Furthermore, the evidence demonstrates that many other workers performed finishing work, as defined as Respondent, and were not adequately compensated.

In *P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, the ARB found that the ALJ improperly required evidence that Respondent's officers had direct, certain knowledge that employees classified as laborers were performing the work of sheet metal mechanics. An earlier meeting with a Wage and Hour investigator put Respondent on notice regarding the misclassification of laborers who were, during some periods, performing the work of sheet metal mechanics. The Board found that allowing the violations to persist demonstrated a "reckless disregard" for respondent's obligations to pay its employees in accordance with the wage determination. *P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996). *See also KP&L Electrical Contractors, Inc.*, 996-DBA-34 (ALJ, Dec. 31, 1998), *aff'd. in part*, ARB Case No. 99-039 (ARB, May 31, 2000) (the ALJ held that Respondent misclassified employees as laborers when they actually performed the work of electricians or carpenters). Similarly, in this instance, Respondent was put on notice by Dicon regarding misclassification. However, instead of fixing the problem, Respondent falsified records to avoid compliance with the regulations.

Despite his explanations for incorrectly splitting hours, Respondent has not offered an adequate explanation as to why he failed to classify a sufficient amount of workers as finishers. Mr. Coleman testified that he paid himself at the finisher rate so he would be among the highest paid workers, even though he was not performing finishing work. There is no explanation as to why many weeks of the Project went without any true workers being classified as finishers, or why only one worker was classified as a finishers alongside some thirteen laborers. In *Berbice Corp.*, 1998-DBA-9 (ALJ, Apr. 16, 1999), the ALJ held that "[b]lissfully ignorant is no way to operate a business and is certainly no defense to debarment under the DBA." The ALJ cited to the company's long history of performing federal government contract work. He found that, where the company's officers allowed the violations to persist (such as misclassification of workers), there is "evidence of an intent to evade or a purposeful lack of attention to a statutory responsibility in support of debarment." *Id.* The ALJ found that the company's owner continued to misclassify and underpay his employees after being informed of the DBA violations by a government investigator. As a result, the ALJ concluded that the contractor's actions were "willful" and debarment was proper. *Id.*

Lastly, Respondent argues that it paid back-wages to five individuals to correct misclassifications. I agree with the Administrator and will not credit Respondent for any claimed back pay as Respondent has failed to prove these alleged payments were actually made. While Respondent submitted Bank account records from January 2011 through August 2011, these records do not reflect any employee checks being issued during the months of July and August 2011. *See CX 1.* It is unclear how these back pay payments were made, but two employees testified that no such payments were received, and Respondent has not shown these statements to be false.

### *Falsification of Payroll*

Here, I find that Respondent purposely destroyed time records in order to conceal violations of the DBA. Pursuant to 29 CFR §5.5 (3)(i):

Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid.

29 CFR §5.5 (3)(i). Respondent did not maintain copies of official time records and did not explain why hours found on the time records differed from the payroll. Respondent's only response was a blanket denial of wrongdoing and a claim of ignorance. It is clear that Respondent destroyed time records to conceal deceitful business practices and falsified payroll. Accordingly, I find that Respondent's actions warrants debarment. *See Fred Wiggins*, 1999-DBA-30 (ALJ, Mar. 3, 2000)(where the ALJ found that the contractor destroyed relevant time cards which constituted a "clear cut, willful violation of the record keeping requirements of the Act and were part of Respondent's pattern of business practice on this project which violated the provisions of the Act" and ordered debarment)

Furthermore, Respondent falsified payroll records and certified payrolls, which also constitutes a sufficient basis for debarment. Mr. Coleman certified each payroll form, indicating that no deductions were made, and that employees were being properly paid for the work they performed. (JX F). However, Respondent falsified, manipulated, and decreased the hours of its workers to simulate prevailing wage compliance. *See Tr. 349; JX 18, AX 6*. Respondent also failed to pay employees the full amount of hours they worked deducting hours to recoup time performing correctional work. Additionally, in some instances, many employees found on the time records were not paid at all. *See summary of time above, (JX 18, AX 6)*. These actions demonstrate fraud, deceit, and, in the court's opinion, constitute knowing violations of the law. *See e.g., Pythagoras General Contracting Corp.*, 2005-DBA-14 (ALJ, June 4, 2008), *aff'd.*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011); *see also Dumarc Corp.*, Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006); *Abhe & Svoboda, Inc.*, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (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) (the Board held that underpayment of prevailing wages and submission of falsified payrolls "that masks the underpayments" constitute a willful violation of the DBRA and warrants debarment); *Commonwealth of Massachusetts v. U.S. Dep't. of Labor*, Case No. 1998-JTP-6 (ALJ, Oct. 29, 2001); *Star Brite Construction Co.*, ARB Case No. 98-113, 1997-DBA-12 (ARB, June 30, 2000); *KP&L Electrical Contractors, Inc.*, 1996-DBA-34 (ALJ, Dec. 31, 1998), *aff'd. in part*, ARB Case No. 99-039 (ARB, May 31, 2000)

(failure to pay prevailing wages and failure to submit accurate certified payroll records in compliance with the Copeland Act constitutes grounds for debarment); *Fred Wiggins*, 1999-DBA-30 (ALJ, Mar. 3, 2000); *Thomas & Sons Building Contractors, Inc.*, ARB Case No. 00-050, 1996-DBA-37 (ARB, Aug. 27, 2001), *order denying reconsideration* (ARB, Dec. 6, 2001) (Employer's "failure to offer any verifiable explanation of the discrepancies between the certified and home payroll records"); *Sundex, Ltd.*, 1994-DBA-58 (ARB, Dec. 30, 1999) (significant discrepancies between the employee's paychecks and certified payrolls constituted violations of the Davis-Bacon Act and CWHSSA sufficient to warrant debarment); *Superior Masonry, Inc.*, 1994-DBA-19 (ALJ, Oct. 13, 1994) (debarment proper where Contractor falsified payroll records to simulate prevailing wage compliance).

Lastly, while I have not awarded back pay to the employees that did not appear on Respondent's payroll, almost twenty workers worked on the Project and were arguably not compensated under the correct wage determination. This also demonstrates Respondent's attempt to complete the Project as inexpensively as possible, potentially compensating himself at the expense of his workers. In *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004), the ALJ properly debarred a subcontractor and its officers, who had ten years of federal contracting experience such that they were likely aware that the prevailing wage requirements applied despite a "partnership agreement" its subcontractor had with workers on the job. Likewise, Respondents has previous federal contracting experience, as Mr. Coleman and other DOL investigators testified, therefore Mr. Coleman and Coleman Construction knew what the DBA required and he knowingly elected not to pay the prevailing wage.

## **CONCLUSION**

Based on the abovementioned discussion, I find Respondent knowingly misclassified twelve workers, and underpaid twenty-five workers. Additionally, Respondent willfully destroyed time keeping records and falsified its certified payroll records. Accordingly Respondent owes back wages in the amount of \$99,020.66, including \$1,941.42 for overtime violations. Furthermore, Respondents Coleman Construction Company and Mr. Freeman Coleman are debarred from any and all federal contracts for a period of three years, pursuant 29 C.F.R. § 5.12(a).

## **ORDER**

Accordingly,

IT IS HEREBY ORDERED that Respondents, Coleman Construction Company and Mr. Freeman Coleman are liable for payment of back wage amounts to the employees of Coleman Construction Company, herein specified, in the total amount of \$97,079.24;

IT IS FURTHER ORDERED that Respondents, Coleman Construction Company and Mr. Freeman Coleman are liable for payment of back wage amounts for overtime to the employees Coleman Construction Company, herein specified, in the total amount of \$1,941.42;

IT IS FURTHER ORDERED that The U.S. Department of Housing and Urban Development shall release to the Administrator the \$101,677.20, which is being withheld from Respondent for the purpose of distributing \$99,020.66, to the underpaid workers in accordance with this decision;

IT IS FURTHER ORDERED that The Administrator shall return to Respondents the funds withheld by the U.S. Department of Housing and Urban Development remaining after distribution of the monies paid to the underpaid workers referred to herein;<sup>21</sup> and

IT IS FURTHER ORDERED that Respondents, Coleman Construction Company and Mr. Freeman Coleman, Sr. are debarred from receiving federal contracts subject to the DBRA for a period of three years, from the date of publication by the Comptroller General of the names of Respondents, pursuant to 29 C.F.R. § 5.12(a)(1).

SO ORDERED:

STEPHEN R. HENLEY  
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.

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<sup>21</sup> The U.S. Department of Housing and Urban Development withheld \$101,677.20 in satisfaction of back wages. Given that this court has determined only \$99,020.66 is due to underpaid workers, Mr. Coleman should receive the remaining \$2,656.54.