

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 December 2014

CASE NO.: 2013-DBA-00010

In the Matter of:

Disputes concerning the payment of prevailing wage rates by:

INTERSTATE ROCK PRODUCTS, INC.,
DONALD STRATTON, CRAIG STRATTON, and
MICHAEL MADSEN,

and

Proposed debarment for labor standards violations by:

INTERSTATE ROCK PRODUCTS, INC.,
DONALD STRATTON, CRAIG STRATTON, and
MICHAEL MADSEN,

With respect to ironworkers, cement finishers, machine operators, and carpenters employed by Interstate Rock Products, Inc., Donald Stratton, Craig Stratton, and Michael Madsen on U.S. Department of Interior: National Park Service Contract No. 1443C2011080753, to redevelop visitor facilities and install flash flood protection in Willow Beach, Arizona.

Before: Richard M. Clark
Administrative Law Judge

DECISION AND ORDER

This matter arises under the Davis-Bacon Act (“DBA”), as amended, 40 U.S.C. § 276a, *et seq.*, and the Contract Work Hours and Safety Standards Act (“CWHSSA”), as amended, 40 U.S.C. §327-332, and the applicable regulations issued thereunder at 29 C.F.R. Parts 5 and 6. The DBA is designed to give local laborers and contractors a fair opportunity to participate in federal building programs, to protect employees of government contractors from substandard wages, and to promote the hiring of local labor rather than cheap labor from distant sources.

United States v. Binghamton Const. Co., 347 U.S. 171, *reh'g. denied*, 347 U.S. 940 (1954). Similarly, the Contract Work Hours and Safety Standards Act (“CWHSSA”), known as one of the “Related Acts,” ensures that laborers are properly compensated for any overtime work done under federal service contracts.

The case at issue involves a multimillion dollar federal contract to improve the Willow Beach area of the Lake Mead National Recreation Area. The Western Regional Administrator of the Wage and Hour Division (“Administrator”)¹ of the U.S. Department of Labor (“DOL”) filed an Order of Reference on February 27, 2013, asserting failure to pay prevailing wages, failure to pay for all hours worked, and misclassification under the DBA, failure to pay overtime under the CWHSSA, and incomplete records and submission of falsified payroll records under Section 5.5(a)(3). The Order of Reference also sought debarment of Interstate Rock Products, Inc. (“Interstate”), Donald Stratton – individually and as President, Craig Stratton – individually and as Secretary-Treasurer, and Michael Madsen – individually and as Controller (collectively, “Respondents”).² On March 4, 2013, Respondents sent a response to the Administrator requesting a hearing.

A hearing was held on December 10 to 12, 2013, in St. George, Utah. Jeannie Gorman, Brian Schmidt, and Emma M. Clark, Attorneys at Law, from the Office of the Solicitor, U.S. DOL (“Solicitor”), represented the Administrator. William S. Robbins, Jr., Attorney at Law, represented Respondents.

At the hearing, the following exhibits were admitted into evidence: Administrator’s exhibits (“SX”) 1 through 19, and Respondent’s exhibits (“RX”) 1 through 7, 8 through 78, and 79 through 149. Hearing Transcript (“TR”) at 7-26. Administrator filed his post-trial brief on March 7, 2014, and Respondents filed their brief March 10, 2013, which closed the record.

While reviewing the record, it became apparent that the Administrator had submitted exhibits that did not conform to the revised numbers he was seeking at trial. I held a conference call with the parties on September 11, 2014, and allowed the Administrator to submit a formal motion to amend the submitted exhibits to conform to the information provided during the testimony at trial. The Administrator submitted a formal motion (“Agency’s Motion to Amend”) on September 15, 2014, which included the revised exhibits previously submitted on September 11, 2014, which were marked as SX 4-A (86-page document of Excel spreadsheets). The revised pre-hearing document was marked as A-1, which was a three page document that had been

¹ Currently, the Western Regional Administrator for the Wage and Hour Division of the DOL is Ruben Rosalez.

² Respondents had received a determination letter on February 22, 2012, seeking to recover \$473,742.29. RX 1 at 3. In response, Respondents submitted a March 23, 2012 letter requesting a hearing to contest the Administrator’s findings. RX 2 at 6-7. Respondents then received a nearly identical order of reference one year later. Wage and Hour Division Assistant District Director Sarah Martinez testified that she did not know the reason. TR at 221-22. Respondents’ March 4, 2013 response alleged that they had submitted a timely hearing request after the first determination letter, and that the year of delay had prejudiced their ability to adequately present their defense. SX 6 at 104. Respondents did not offer any evidence of prejudice, and did not pursue this argument at the hearing or in their post-trial briefing. I treat the argument as abandoned.

previously filed under seal.³ The Respondents were allowed 30 days to submit a written objection to the requested amendment. No objection was received. The requested amendment reduces the amount sought in back wages by the Administrator from \$473,742.49 to \$446,366.10. Agency's Mot. to Amend at 2. After reviewing the record, and after discussion with counsel, I find good cause to admit the requested amended exhibits. 29 C.F.R. § 18.55. The exhibits conform to the proof offered at trial and also do not prejudice Respondents as they reduce the amount of back wages sought by the Administrator at trial. Administrator's exhibit SX 4-A is admitted into evidence. Exhibit A-1 is filed under seal and supplements the documents previously filed under seal.

For the reasons discussed below, I find that Respondents violated both the DBA and CWHSSA, and that debarment is warranted under both statutes for a period of three years.

I. STIPULATIONS

1. Respondents were employers under the Davis Bacon Act.
2. Respondents' Willow Beach contract was subject to the Davis Bacon Act.
3. Respondents' Willow Beach contract was subject to the CWHSSA.
4. Wage Determination AZ080010 for Heavy Construction Projects dated February 13, 2009, AZ10, Modification #8 applies to this contract.
5. Employees performing concrete work are properly classified as cement finishers.
6. The amount of \$473,742.49 is being withheld by the National Park Service for back wages and overtime calculated by the Administrator.

See Administrator's Prehearing Statement at 2; Respondents' Prehearing Statement at 3.

II. ISSUES

The issues to be resolved herein are:

1. Whether the Administrator established that employees performed work for which they were improperly compensated and, if so, whether the back wage calculations are a matter of just and reasonable inference; and
2. If so, whether Respondents negated the reasonableness of the inference from the Administrator's evidence and/or to show that particular employees do not fit within the pattern or practice; and

³ On the bottom of Exhibit A-1 are the notations of page 1 of 4, 2 of 4, and 3 of 4, but page 4 of 4 was not attached. The Administrator confirmed that the document is only three pages and there is no page 4 of 4. The numbering also matches the numbering found in the original Exhibit A.

3. Whether Respondents failed to make overtime payments in violation of the provisions of the CWHSSA; and
4. Whether the circumstances warrant the requested relief of debarment of Respondents under the DBA and/or CHWSSA, pursuant to 29 C.F.R. § 5.12(a)(1)-(2), for a period not to exceed three years.

III. FACTUAL FINDINGS

Background

Interstate is a construction company, incorporated since the early 1980s, that does a variety of work, including road construction, utilities, and building construction. TR at 450-51. Respondents have worked on at least one DBA project per year since the company was incorporated, and has experience with prevailing wage jobs. TR at 452. The Willow Beach project, awarded to Respondents on February 27, 2009, was the largest dollar-value DBA project Respondents had ever undertaken at just over \$20 million. TR at 453, 457; SX 3 at 5; SX 8 at 109-10. The Willow Beach job focused on flood control, repairing drainage systems, improving recreation sites, upgrading the marina and parking areas, and removing an old waste dump in the Lake Mead National Recreation Area. TR at 456-57. Interstate served as the general contractor, but hired several subcontractors to do more specialized tasks; there are no DBA claims against any of the subcontractors. TR at 458.

As the contracting agency, the National Parks Service (“Parks Service”), hired Alpha Engineering and Consulting (“Alpha”) to oversee the Willow Beach job and to verify that the project was “completed in accordance with plans and specifications.” Alpha representatives met daily with Respondents to go over the work, and periodically conducted wage interviews with Interstate employees. TR at 458-60. Respondents did not receive any reports regarding prevailing wage problems from Alpha, the Parks Service, or the U.S. Department of Interior. TR at 461-62.

The work for the Willow Beach project was completed in 2011, but the contract remains open, per resolution of this matter. TR at 454. Since completing the Willow Beach work, Respondents have undertaken roughly three or four more prevailing wage jobs. TR at 454.

Investigation

In January 2011, Wage-Hour Investigator Nicholas Fiorello initiated an investigation into Respondents’ compliance with federal labor laws. TR at 50. According to standard investigatory procedure, Mr. Fiorello conducted a site visit at Respondents’ Willow Beach project, but could not find a representative of the company to answer his questions, and called Michael Madsen afterward to ask him some groundwork questions and review basic investigation practices. TR at 51. Mr. Fiorello also sent a January 21, 2011⁴ appointment letter to Respondents, informing them that they had been “scheduled for a Wage-Hour Investigation to determine compliance” with the DBA and other applicable federal labor laws. SX 1 at 1. The letter included a list of requested

⁴ Mr. Fiorello noted at the hearing that the letter was mistakenly dated “January 21, 2010” instead of “January 21, 2011.” TR at 128; SX 1 at 1.

documents and records that Respondents were to submit to Mr. Fiorello, including certified payrolls and information about past federal contracts. SX 1 at 1.

Payroll Records

In response, Respondents sent Mr. Fiorello a CD containing digital copies of the payroll, but he noted that the payroll documents were not signed.⁵ TR at 49, 143-44; *see e.g.*, SX 15 at 216-17. Respondents also provided a roster of employees and a list of other federally funded projects they had completed. TR at 52. Mr. Fiorello considered these records to be accurate with regard to what Respondents paid the employees and the classifications under which those payments were made, but, as discussed below, further investigation led him to believe that these classifications did not accurately reflect the nature of the employees' labor. TR at 57-58. Respondents did not provide individual time cards for the employees at that time or during the preliminary final conference.⁶ TR at 62-63.

Employee Interviews

Mr. Fiorello explained at the hearing that upon speaking with a few of Respondents' employees, he began to notice discrepancies between the work classifications listed on the payroll and the workers' descriptions of the work they had done. TR at 57. In total, he interviewed 24 separate employees between January and June 2011 regarding the type of work they performed, how much time they spent on each task, and what type of tools they used to perform the work. TR at 58. Mr. Fiorello noted that these questions were asked of employees regarding work that had occurred as much as two years prior on the Willow Beach job, and that it was difficult for employees to remember exactly how much work they did at what time, but he tried to ask specific questions to break down the timeline and information as much as possible. TR at 130, 162-63.

⁵ At the hearing, the parties disputed whether these documents constituted a "certified payroll," in light of the missing signature and unchecked boxes on the last page. The Administrator argued that the payroll documents were not certified, and stated that the unchecked boxes made it impossible to know the manner in which fringe benefits had been paid, if at all. TR at 180-82. Respondents explained that they had submitted their payroll documents to the Parks Service electronically, with a digital signature attached, but did not make copies of the originals. TR at 675, 689-91. In response to Mr. Fiorello's appointment letter, Respondents printed out copies of the payroll documents that had been saved by their payroll software, which did not print the digital signature. SX 1 at 1; TR at 678, 688-89. Mr. Fiorello did not request certified copies of the payroll directly from the Parks Service, and testified that he did not know that the Parks Service received all payroll documents electronically with an electronic signature attached. TR at 144. I find that these documents were not certified payrolls, but are factually sound and reliable documents. Indeed, the certified and non-certified distinction appears largely moot, as Mr. Fiorello considered the records to be accurate and relied on the information provided therein to aid in his reconstruction. TR at 57-58, 72.

⁶ Mr. Fiorello's January 2011 assignment letter did not make a specific request for time cards. TR at 131. He further testified that he never made a written request for the time cards, but insisted that he verbally asked for them several times. *Id.* at 131-32.

Rebar as Ironwork

Mr. Fiorello personally observed rebar work at the site and spoke with a number of employees who described using rebar, but he noticed “there were no ironworkers on the certified payroll.” TR at 64, 88-92, 129; *see* SX 13 at 186-190.⁷ He then contacted Ironworkers Local Union 75, whose wage determinations prevailed for the project at issue, and received a letter in September 2012⁸ from the union business manager Martin “Buzz” Murphy with descriptions of what types of work should be considered “ironwork.” TR at 92; SX 11 at 120-36. Mr. Murphy wrote, “Ironworkers Local Union 75 has always claimed all work associated with the placement installation of on[sic] all Reinforcing Steel (Rebar) and continues to do so.” SX 11 at 120.

Reconstruction

Mr. Fiorello’s investigation revealed that Respondents were not in compliance with the DBA and had not properly classified and paid their employees. TR at 68-69. Mr. Fiorello then used the information from his interviews and observations to reconstruct what he approximated to be the correct classifications. TR at 58-61; SX 19 at 1. Mr. Fiorello’s arguments for proper classification and back wages are encapsulated in a series of spreadsheets, one for each of the 69 employees at issue. *See* SX 4 at 9-97, SX 4-A.

At the hearing, Mr. Fiorello explained his methodology using employee Felipe Herrera’s spreadsheet as an example. SX 4 at 38; SX 4-A at 27. He explained that the first nine columns of information, from “Last Name” to “OT Hours,” as well as the columns for “Reg Pay,” “OT Pay,”⁹ and “Gross Pay,”¹⁰ contain data that he transcribed directly from the provided payrolls.¹¹ TR at 72; SX 4 at 38, SX 4-A at 27. The remainder of the spreadsheet data was based on information Mr. Fiorello obtained during his investigation.

Banked Hours

The “Banked Hours” column referred to overtime hours that Mr. Fiorello estimated the employees worked beyond the 40-hour workweek. TR at 73-74; SX 4 at 38, SX 4-A. During the employee interviews, Mr. Fiorello discovered that when employees worked over 40 hours in a single week, “they weren’t paid the required time and a half, they were able to save those hours and use them at a later time and get paid straight time for that.” TR at 74. The practice of “banking” hours is illegal, and deprives employees of the additional pay they would receive if

⁷ At the hearing, Mr. Fiorello identified a series of photographs of the Willow Beach work sites, taken by Steve Hoffman and his co-workers, in which rebar could be seen. TR at 88-92, 103; SX 13 at 186-90.

⁸ Mr. Fiorello clarified that although he received the formal letter from Ironworkers Local Union 75 in September 2012, they had sent him copies of the ironwork definition documents as early as February 2011, which he used for his determination of whether or not there was ironwork done at the Willow Beach project. TR at 92-93.

⁹ The “OT Pay” column refers to the multiplication of the “OT Rate” column and “OT Hours” column.

¹⁰ The “Gross Pay” column refers to the sum of the “Reg Pay” and “OT Pay” columns.

¹¹ The fifth column from the left, titled “Base Hourly Rate,” represents the rate at which Respondents paid employees according to the payrolls Mr. Fiorello received. Mr. Fiorello explained at the hearing that Respondents paid employees at a higher rate for the first several weeks – e.g., paying Cesar Arteaga \$20 per hour, rather than the \$13 per hour due for the laborer classification – to compensate for the cost of travel and food at the remote work sites. *See, e.g.*, SX 4 at 9. After these initial weeks, Respondents changed their policy and paid employees at the lower laborer rate while providing a separate “per diem” for food and lodging. TR at 156-57.

the hours were properly categorized as overtime work and paid at a time-and-a-half rate. TR at 74. Based on his investigation, Mr. Fiorello estimated that employees were banking an average of four hours per week for the weeks where an employee had 40 regular hours paid. TR at 75, 77.

When Respondents were confronted with this information at the final conference, they admitted that employees had banked hours unbeknownst to them, as this was something that had been authorized on site by the individual supervisor. TR at 75. Respondents argued that an estimate of four hours of banked time per week was too high, especially since employees were able to use some of the banked hours when they did not work. TR at 75. Given this information, Mr. Fiorello gave Respondents credit for half of the banked hours in the “Banked Negotiated Hours” column, but did not completely eliminate the banked hours claims since this system still deprived employees of their additional half time pay for overtime work and there were no records to show that the employees had actually used the hours they banked. TR at 76.

On cross-examination, Mr. Fiorello was questioned regarding the discrepancies between Interstate Rock employee Steve Hoffman’s work journal and the spreadsheet reconstruction of his alleged overtime hours. TR at 133; *see* SX 4 at 41; SX 40-A at 29. Mr. Hoffman’s journal represents his own personal account of what work he did each week and the number of hours worked. TR at 109-110; SX 14 at 191-215. For several of the weeks on Mr. Fiorello’s spreadsheet, the number of hours he estimated Mr. Hoffman working did not match up with the numbers given in Mr. Hoffman’s journal, and were often several hours higher. TR at 135-42, 149-153; SX 14 at 193-95, 198, 203, 210. When asked about these discrepancies, Mr. Fiorello explained that “there was no good hard record of [the] banked hours,” so his decision to add four hours to every week in which an employee worked 40 hours, and his later decision to eliminate the additional four hours for half of those 40-hour weeks in an effort to lower the overall total, were based on his attempt at achieving a fair and approximate reconstruction in the absence of good record keeping. TR at 137, 140-41.

Work Classifications and Hourly Pay Rate Determinations

The ten columns directly to the right of the “Gross Pay” column refer to the base hourly rate (“BHR”) and fringe benefits (“FB”) for a series of work classifications, including ironworker (“Iron”), carpenter (“Carp”), cement finisher (“Cem”),¹² backhoe operator (“Back”),¹³ and pipe layer/laborer (“Labor”). *See, e.g.*, SX 4 at 38. Mr. Fiorello determined the BHR and FB for each classification using the wage determination that was included in the project contract. *See* SX 9 at 111-16. For some of the classifications, calculating the BHR required Mr. Fiorello to add zone pay to the total in order to compensate employees for the distance traveled to the work site. TR at 80-82.

¹² Mr. Fiorello opted to use the lower paying cement mason/finisher classification, rather than the classification for concrete worker, because he had difficulty determining how much time employees spent doing each type of cement work. TR at 84.

¹³ Given the choice between several equipment operator classifications – including backhoe, grader, crane, excavator, and loader, Mr. Fiorello decided to use the backhoe BHR of \$16.82 because it was a “middle of the road classification” that would “keep things simple.” TR at 86.

Mr. Fiorello explained that his original calculations assigned a percentage of time to each classification of work based directly on his interviews with employees, but the ironwork percentage was later capped at 20 percent of time for interviewed employees after the final conference negotiations with Respondents. TR at 86-88. If an interviewed employee claimed to have done more than 20 percent time as an ironworker, the extra time was transferred to the cement finisher field, which had a lower BHR. TR at 88.

Totals and Calculations

Mr. Fiorello then went on to explain the remaining columns at the far right of the spreadsheet. “BHR Total” represents the sum of all the BHR columns for the labor classifications in which an employee worked, based on interviews or reconstruction percentages. TR at 94-95. This total is meant to approximate what actually should have been paid to an employee that week based on “straight time,” and does not include overtime. TR at 95. Similarly, “FB Total” represents the sum of all the FB columns to which an employee would be entitled based on his or her labor classifications. TR at 95-96. The “BHR Due” column is based on a formula in which the “Gross Pay” is subtracted from the “BHR Total” to determine if there is any additional pay due to employee for that week. TR at 96. The “FB Due” column provides the summation of all the fringe benefits due the employee in a particular week. TR at 96.

The “CWHSSA Due” column refers to the issue of overtime pay violations and the illegal practice of banking hours. TR at 96-97. Mr. Fiorello explained that this column represents the halftime owed for estimated overtime payments. TR at 96. In order to calculate this amount, Mr. Fiorello took the “BHR Total” and divided it by 44 hours – the 40 regular hours and the four banked hours – and then multiplied that number by 0.5 to get the half time rate. TR at 97. Mr. Fiorello did not articulate this at the hearing, but he appears to have then multiplied that number by the number of estimated overtime hours for which the employee should have received the extra half-time pay. Mr. Fiorello did acknowledge that when this calculation is made for a week in which he agreed to lower the banked number to zero, he was “only calculating the half-time, because [he was] saying that the employer [already] paid straight time [those extra hours].” TR at 97. The “CWHSSA Due” column is only applicable where employer worked more than 40 hours a week, thus triggering Mr. Fiorello’s estimate for banked time. TR at 97-98.

The next two columns – “BHR Due” and “FB Due” – are copies of the identically named columns discussed earlier. Mr. Fiorello added these copies because he was concerned that the potential for negative totals in the “BHR Due” and “FB Due” columns would affect the bottom line when he tried to do a summation of the spreadsheet. TR at 98. For example, on the week of October 17, 2009, Respondents paid Felipe Herrera \$960.00 in Gross Pay, but, according to Mr. Fiorello’s calculations, only owed him \$891.04, based on the appropriate work classifications and BHRs. SX 4 at 38; TR at 99; SX 4-A at 27. Under the formula for determining “BHR Due,” this resulted in a negative \$68.96, an overage which Mr. Fiorello credited toward the “FB Due.” TR at 99-100. The final column, marked “LD,” represents the liquidated damage calculation that an employer is required to pay any time it fails to pay overtime after 40 hours under the DBA and CWHSSA. TR at 98.

Formula for Work Classification Percentages

As explained, Mr. Fiorello conducted interviews with only 24 of the 69 employees for whom he calculated DBA and CWHSSA violations. For the interviewed employees, Mr. Fiorello used their testimony to reconstruct percentage estimates for different labor classifications, with all ironwork capped at 20 percent. TR at 127. In order to estimate the wages owed to the non-interviewed employees, Mr. Fiorello devised a formula based on averages taken from all the interviewed employees' statements. TR at 101. Initially, Mr. Fiorello estimated that non-interviewed employees spent 20 percent of their time as ironworkers, 40 percent of their time as cement finishers, 20 percent of their time as backhoe operators, and 20 percent of their time as laborers. TR at 102. After the final conference with Respondents, Mr. Fiorello adjusted those time estimates for non-interviewed employees to 15 percent as ironworkers, 45 percent as cement finishers, 20 percent as backhoe operators, and 20 percent as laborers.¹⁴ TR at 103. Non-interviewed employees were not calculated to have completed any work as carpenters. TR at 126.

When he had finished his reconstruction calculations, Mr. Fiorello compared his findings to the additional records kept by some of the employees. Employee Steve Hoffman kept a journal of the work he performed at the Willow Beach site, which Mr. Fiorello used to make a mini-reconstruction for the calendar quarter to which Mr. Hoffman's journal refers. TR at 109-110. When he compared his reconstruction of back wages with the information in Mr. Hoffman's journal, Mr. Fiorello found that the numbers compared "[v]ery favorably" with "about a \$300.00 difference, which is pretty close." TR at 111. Mr. Fiorello further noted that Mr. Hoffman's ironworker hours – based on the journal – turned out to be 18 percent, which was very close to the 20 percent cap used in the reconstruction. TR at 111. The majority of the \$300 discrepancy came from Mr. Fiorello's reconstruction of back wages, which would not have been included in Mr. Hoffman's account. TR at 111-12. When asked about this, Mr. Fiorello explained that there was "no way to be accurate" with respect to back wages because he did not have any time records showing classifications and the segregation of hours. TR at 112.

Final Conference

Mr. Fiorello and other representatives from the Wage and Hour Division held a final conference in April 2011 in the Phoenix District Office with Mr. Madsen, Donald Stratton, and Craig Stratton. TR at 115. The final conference is meant to provide the employer with a summation of the investigation in which the investigator discusses the findings and any violations. TR at 115. The Willow Beach project was still ongoing at that point, but Mr. Fiorello had to stop his investigation in order to calculate his reconstruction for presentation at the meeting. TR at 104. He discussed his findings regarding misclassifications, the lack of

¹⁴ In their post hearing brief, Respondents make the claim that "[a]lthough the Administrator refused to share with the Respondents the actual calculations used in preparing the spreadsheets introduced into evidence, it is apparent from simple arithmetic computations that the formula used in the spreadsheets [admitted as SX 4 at 9-97] reflects a work allocation for non-interviewed employees of 20% ironworker, 40% cement finisher, 20% operator and 20% laborer – the "higher" allocation that the Administrator claims that he is not seeking in these proceedings." Respondents Post-Hearing Brief at 5. I will address this issue in my analysis below.

segregating hours, the final back wages, liquidated damages, and debarment. TR at 116. Mr. Fiorello testified that Respondents seemed surprised to learn that rebar work is classified as ironwork, yet, with this new understanding, acknowledged that they had erroneously classified workers. TR at 117. Respondents agreed to come into compliance with the DBA for the remainder of the project, but Mr. Fiorello did not ask for any payrolls after the investigation to verify this compliance. TR at 104. He did, however, invite Respondents to provide records to refute his reconstruction estimates. TR at 117-18.

Respondents' Memo and Adjustments to Reconstruction

As mentioned above, the final conference with Respondents also led Mr. Fiorello to lower his initial estimate of the back wages owed. Initially, he calculated the number to be a little over \$563,000.00, but lowered his estimate to the current \$473,742.49 after receiving a memo from Mr. Madsen.¹⁵ TR at 106, 704; SX 5 at 98. The memo argued for revision of the back wages reconstruction based on the total number of estimated rebar hours for the project, a reduction in the amount of overtime owed based on the argument that straight time was already paid for these hours, and removal of truck driver employees who would not have participated in the kind of work addressed by Mr. Fiorello's summary; the memo also included a spreadsheet in which Mr. Madsen and his employees attempted to provide more information regarding labor classifications using their job costing information. SX 5 at 98-99. The memo further asked Mr. Fiorello to share his database so that Respondents would be better able to reconstruct his data and come up with alternative calculations based on their information. SX 5 at 99. Lastly, the memo included an estimate of the hours spent working with rebar for the Willow Beach job, based on the total weight of rebar purchased for the project and an excerpt from a means book for estimating the man-hours needed for each ton of rebar. SX 5 at 100-02; TR at 705. The "Rebar Summary," which listed the invoice number, description, weight of rebar used, and name of the installer for each part of the Willow Beach job that used rebar, estimated that 143 tons of rebar was used at 18 man-hours per ton, for a total of 2574 man-hours. RX 6 at 20.

Mr. Fiorello testified that he did not find the memo particularly persuasive, as it relied only on the amount of rebar ordered for the project to estimate the amount of ironwork done without accounting for other variables. TR at 106-07; SX 5 at 98. Despite his skepticism, Mr. Fiorello decided to reduce the total amount through a variety of methods, including giving credit for straight time, capping the number of ironworker hours to 20 percent for interviewed employees and 15 percent for non-interviewed employees, using the cement finisher designation for all cement work, and limiting the liquid damages to a single violation per week – in the hope that a settlement could be reached. TR at 107-08, 113-14. Respondents did not submit any additional records beyond Mr. Madsen's memo and the accompanying documents. TR at 118.

Following Mr. Fiorello's reduction from \$563,000.00 to \$473,742.49, the parties had a second level telephonic conference to which the Park Service was invited as the contracting agency. TR at 118; SX 7 at 108. Respondents felt that the reductions were not adequate, given Mr. Madsen's letter, but Mr. Fiorello felt that the lower number was fair in light of Respondents' poor record keeping and the reconstruction efforts he had made. TR at 118-19. Respondents were told that if they did not agree to pay the back wages, that money would be withheld from the

¹⁵ The Administrator now seeks a total of \$446,366.10.

contract. TR at 119. A little over a week later, Respondents' attorney contacted Mr. Fiorello to reject the proposed \$473,742.49, and the case was then referred to the Solicitor's Office with a WH-56 recommendation that DBA violations occurred and debarment was in order. TR at 119-21; SX 2 at 2-4.

Internal Review of Mr. Fiorello's Findings

Wage and Hour Division Assistant District Director ("ADD") Sarah Martinez testified at the hearing regarding the internal review process for Mr. Fiorello's findings. TR at 166-67. Ms. Martinez has been an ADD in the Phoenix office since 2010, and has supervised around 60 to 70 DBA investigations since that time. TR at 171. As an ADD, Ms. Martinez is responsible for reviewing the findings of the Wage and Hour Investigators to make sure that they have analyzed the data correctly and in a way that complies with the regulations and department procedures. TR at 172. She reviewed Mr. Fiorello's findings in this case, including the recommendation for sufficiency of debarment and withholding of back wages. TR at 174-75. After Ms. Martinez conferred with her supervisor regarding the amount of back wages and the request for debarment, the actual withholding letter went out under District Director Eric Murray's name on February 27, 2013, seeking to recover \$473,742.49. TR at 175, 219-20; SX 3 at 7-8.

When considering a DBA debarment, Ms. Martinez testified that she first looks for evidence that the employer disregarded its obligations to employees, including the employer's familiarity with DBA cases, how long employer has been doing DBA jobs, the kinds of work employer performs, the kinds of workers employer employs, classification of employees, and payment. TR at 176-77. In her review, Ms. Martinez also reviewed the payrolls from Respondents, noting that they were problematic not just because they had not been signed, but because Respondents had not checked the boxes to indicate whether fringe benefits were being paid in cash or to approved plans, funds, or programs. TR at 180-82; *see, e.g.*, SX 15 at 288. It was not clear from the payroll documents whether all the employees were even receiving these benefits.¹⁶ TR at 189; *see, e.g.*, SX 15 at 287. She stated that the lack of journeymen classifications on the payroll was also a red flag that the employer was not in compliance with the DBA. TR at 188; *see* SX 15 at 287.

Ms. Martinez testified that she attended the final conference telephonically, and that time cards were verbally requested at the meeting. TR at 184-85. She also confirmed that Respondents were told about the misclassification of ironworkers at the final conference, and invited to produce additional documentation to show that the investigation findings were wrong. TR at 191-92. Ms. Martinez expected Respondents to submit something from the work site daily log, showing what type of work was done or what tasks remained. TR at 192-93. Instead, Respondents submitted an "excerpt out of an estimator's guide to ironwork," which Ms. Martinez felt did not represent anything persuasive about the reality of the Willow Beach project. TR at 193-94; SX 5 at 98-103. When asked why the Wage and Hour Division estimated six and a half times more ironwork man-hours than the estimator's guide reflected for the tonnage of rebar

¹⁶ Not all of the entries for employees had the "w/INS" designation, which Ms. Martinez interpreted to mean "with insurance" or "with benefits." *See, e.g.*, SX 15 at 287. Because Respondents did not check either of the boxes to indicate whether benefits were paid in cash or to a program, it was impossible for investigators to verify DBA compliance from these documents and they had to question employees for clarification. TR at 189-90.

at the Willow Beach project, Ms. Martinez explained that she was not familiar with the skill level of the employees performing the work and whether they performed at journeyman capacity. TR at 207. She acknowledged that it was possible that the reconstruction had estimated ironwork where there may not have been any for a particular employee, but emphasized that Respondents must live with estimations where they did not provide accurate records or bring up evidence at the conference to show that Mr. Fiorello misclassified specific employees' labor. TR at 201-11.

Despite Ms. Martinez's skepticism regarding Respondents' response, she approved Mr. Fiorello's compromises in an attempt to reduce the back wages total and reach a settlement, including giving Respondents credit for 50 percent of the banked hours at straight time, capping and reducing the percentage of ironwork, and deleting the truck drivers classification. TR at 194-95, 202-03. She stressed that, in the absence of accurate records, the Wage and Hour calculations would always be an approximate reconstruction of back wages, but felt that they were as accurate as possible under the circumstances of this case. TR at 197.

Ironworkers International Union General Organizer

Donald Zampa, the General Organizer for the Ironworkers International Union, has over 35 years of experience with the Ironworker Union and spent 19 years working in the ironwork field. TR at 225, 237-38. Mr. Zampa spends most of his time west of the Rockies, and is familiar with work practices in Arizona. TR at 227. He explained that under the collective bargaining agreement, ironwork includes "structural, erection, fabrication of structural steel, rigging, welding, reinforcing ironwork, architectural work," and tying rebar. TR at 227, 234-35. Mr. Zampa was questioned about a series of photographs of the work site, contained in SX 13. Mr. Zampa identified ironwork based on the use of rebar in the following photos: top and bottom photos, SX 13 at 186; top photo, SX 13 at 187; top and bottom photos, SX 13 at 188; top photo, SX 13 at 189; and top photo, SX 13 at 190. TR at 227-33. Based on his experience and expertise, Mr. Zampa also testified that it was highly likely that the structures shown in the bottom photos of SX 13 at 187 and 189 also contained rebar, and, therefore, required ironwork. TR at 229, 233.

Mr. Zampa explained that different skill levels are required to be a "rod buster" – someone who does everything involved with rebar, and a "tier" – someone who just ties the rebar together, which results in different pay rates in some states; Mr. Zampa was not sure if this was the case for Arizona. TR at 235-36. The Arizona ironwork definition and wage rate are governed by Ironworkers Regional Local 847 and Local 75. TR at 237. Mr. Zampa was not sure which union's wage determination would prevail in case of a conflict. TR at 237. He also testified that the time it takes to do rebar ironwork tasks can vary a great deal depending on "experience, productivity, site conditions, how much experience the rod buster has, what else is used – if there's cranes or forklifts used, in addition to just manual." TR at 239.

Employee Testimony

Mike Phillips

Mike Phillips is a resident of St. George, Utah, who has been working as an equipment operator since the age of 18. TR at 237. Mr. Phillips worked for Respondents on the Willow Beach job from roughly October 2009 to June 2010. TR at 247. He testified that he did not know that the Willow Beach position was a prevailing wage job, he did not see a poster at the job site explaining it as such, and he had never before seen the prevailing wage determination document for the job. TR at 248-49; SX 9 at 111-16. Mr. Phillips was able to verify the photos from SX 13 based on his personal knowledge of the work site, and found them to be a fair and accurate depiction of the work done on the Willow Beach project.¹⁷ TR at 263-72. He also explained that he spoke with Mr. Fiorello over the phone after his employment with Respondents, but they never discussed any unpaid overtime work. TR at 312.

Mr. Phillips primarily worked on a number of Willow Beach projects, including the water tanks, the flood channel, the boat ramp, picnic areas, and diamond block walls. TR at 249, 258. For the flood channel, the majority of Mr. Phillip's work involved bringing in the rebar from the parking lot staging area, laying it out on marks across the floor of the wash to create a grid, and then tying everything off. TR at 250. This was done twice to create two mats of rebar before the cement was poured. TR at 250. Mr. Phillips and his crew also built hundreds of yards of vertical wall, approximately four to five feet wide and 18 inches deep, along the side of the flood channel using similar rebar methods. TR at 251. Their rebar work was mainly manual with the use of a rebar bender, pliers, and a gas powered cutoff saw. TR at 252. Constructing the steel form for the flood channel slab took three or four days of steel tying. TR at 309. Mr. Phillips recalled carrying out this rebar work during the early summer months in 2010, with temperatures reaching 128 degrees Fahrenheit in June, which made it difficult for workers to continue at full productivity by the end of a 10 to 12 hour day. TR at 254. For example, workers often carried up to 10 pieces of 20-foot rebar sticks, but, by late afternoon, they could only carry four or five pieces at a time. TR at 260-61. Mr. Phillips testified that Adam Smith, the surveyor for the Willow Beach job, helped tie rebar on "quite a few" occasions when the satellites would go down and Mr. Smith no longer had functioning equipment for his survey work. TR at 302. Mr. Phillips did not indicate how long the satellites were down each time this happened.

With respect to cement work, Mr. Phillips testified that the cement pouring in the wash involved two or three rakers helping to move the cement from the truck and into the structure. TR at 255. Two finishers would come afterward to smooth everything out, cut joints, and put a finish on the concrete. TR at 255. The entire process only took a couple of hours. TR at 255. The cement pouring for the vertical wall along the flood channel was slower and more labor

¹⁷ Mr. Phillips identified the following activities and/or items in the photos: support column for the roof of the water tank (SX 13 at 186, top), beginning of flood channel next to boat ramp (SX 13 at 186, bottom), catwalk or walkway around the top of the water tank (SX 13 at 187, top), support column for the roof of the water tank that contained rebar (SX 13 at 187, bottom), water tank picture with surrounding catwalk (SX 13 at 188, top), water tank showing columns with rebar (SX 13 at 188, bottom), view from outside the water tank looking across the top (SX 13 at 189, top), finished and poured roof with ventilation pipes sticking out (SX 13 at 189, bottom), workers using the bid wheel to help them level and spread the concrete, with Mr. Phillips pictured in the middle wearing a gray sweatshirt (SX 13 at 190). TR at 263-72.

intensive, as only 10 to 15-foot sections could be poured at a time so that the concrete wouldn't slide too much. TR at 256. The rebar structures for the vertical wall were also built in small sections with special attention to maintaining straight lines. TR at 309-10. Mr. Phillips also worked with rebar and cement pouring to construct the 50-by-50-by-24 foot water tanks needed to provide water storage for the campground, to add on to the boat ramp, and to pour a series of picnic pads and a driveway. TR at 257-60. He sometimes helped stack rough cement bricks to make diamond block walls and did general clean up tasks. TR at 259. Mr. Phillips testified that he occasionally operated heavy equipment at Willow Beach, including a track hoe, a backhoe, a water truck, and a dump truck. TR at 261. He was unable to state exactly how much time he spent doing each task, but estimated that he spent 60 percent of his time working with rebar, 20 percent working with concrete forms, 10 percent doing concrete finishing, five percent operating heavy equipment, and five percent doing general clean-up work. TR at 262.

Mr. Phillips testified the typical employee plan was to try to work 12 hours on Monday, Tuesday, and Wednesday, so that workers only had to put in four hours on Thursday and could start their drive home earlier. TR at 273. He stated that workers "were let go, from the job, typically, when we had reached 40 hours." TR at 273. During the week, Mr. Phillips and most of the other employees stayed at a nearby hotel called The Hacienda. TR at 273. Mr. Phillips typically worked in a crew of approximately 10 people, including Steve Hoffman, Ricky Gurele, Gerra Paleka, and Mike Rasmussen, but explained that certain people would be called off to do other miscellaneous jobs on occasion. TR at 296-97. He estimated that 30 people in addition to his crew worked at the job site doing excavation, pipe laying, surveying, and foreman duties. TR at 298. Asphalt paving began after Mr. Phillips had finished working for Respondents. TR at 299.

With regard to his time cards, Mr. Phillips explained that he filled out his name, employee name, ending date, hours, and a description of where he worked and what type of work he did there. TR at 275; RX 123 at 1680-1716. Mr. Phillips explained that Respondents asked him to keep track of where his hours had been spent each day – e.g., the wash or the tank – but that he stopped writing out a description of the nature of work he was doing at these sites after a few weeks because his supervisor, Brady Holt, told him that it was "not needed." TR at 278-80. Mr. Phillips further stated that he received roughly \$14 per hour including per diem regardless of the job he performed. TR at 280. He expressed a belief that he had been underpaid for his labor, but never brought up his concerns with his supervisors or Respondents. TR at 283-85. Mr. Phillips claimed to have worked more than 40 hours per week without overtime compensation on two or three occasions,¹⁸ but testified that the time cards that reflect 40 hours per week or less, those numbers are accurate. TR at 285, 289. He was paid by direct deposit. TR at 310.

Gerra Paleka

Gerra Paleka is a carpenter from Hurricane, Utah. TR at 314. He worked for Respondents on the Willow Beach job for two years, starting in July 2009. TR at 315. Mr. Paleka testified that he did not know the Willow Beach job was a prevailing wage job, and had never seen the DBA

¹⁸ Respondents' counsel reviewed Mr. Phillips' time cards during his cross examination, and Mr. Phillips confirmed eight different instances in which he worked more than 40 hours per week and did not receive overtime payment. TR at 289-92.

poster at the work site until Mr. Fiorello began investigating, when he saw it was posted outside a trailer. TR at 317, 360. Mr. Paleka worked on a variety of tasks, including the water tank, flood channel, RV pads, and slope protection “turn-downs.” TR at 317. For the water tank, flood channel, and RV pads, Mr. Paleka described his work as a combination of carpentry to create a form for the cement, use of rebar to reinforce the concrete, and cement finishing via mucking, shoveling, and screeding. TR at 318-23. He explained that the number of rebar sticks a worker could carry depended on the size and strength of that worker and his partner. TR at 319. Additionally, Mr. Paleka also did work using a backhoe and compactor for the RV pads, especially during the first three months of his employment. TR at 323. For the slope protection jobs, he primarily used wire mesh, form work, and finishing concrete to control erosion. TR at 324. Though Mr. Paleka also did some painting, drywall repair, and worked on the drain pipe, he estimated that 40 percent of his time was spent working with rebar, 40 percent was devoted to concrete, and 20 percent was used doing form work. TR at 327.

Mr. Paleka testified that he was paid weekly and filled out his own time cards. TR at 328. He did not indicate on his time card the amount of time he spent doing each type of work, though he did record the hours he spent working on specific types of equipment. TR at 331. Mr. Paleka did, however, keep track of the breakdown of tasks and labor in his personal daily journal when he got to his hotel room at night, as has been his practice for construction jobs since 2006.¹⁹ TR at 333, 366; *see* SX 17 at 295-347. Mr. Paleka also testified that he talked with Mr. Fiorello, but was never asked to provide his journal; he did eventually submit his journal to the Solicitor’s Office. TR at 364, 367.

Based on this record, Mr. Paleka testified that he was paid the same rate for all types of work and was told by his supervisor Brady Holt to bank any hours he worked over the standard 40, meaning that he could leave early some other week. TR at 337-38. He explained that Respondents never kept track of the banked hours, but Mr. Paleka recorded them in his journal “just for the purpose of, you know, if we wanted to use them...” TR at 344. During the course of his testimony, using his journal and a comparison to his time cards, Mr. Paleka identified three instances in which he worked one or two hours more than a standard 40-hour work week, but was not paid time and half. TR at 338-44; SX 17 at 297, 306; RX 118 at 1559, 1593. He also testified to and pointed out an instance where he changed the total hours on his timesheet from “41” to “40” because “we was told not to put down more than 40 hours on a time card.” TR at 341. To Mr. Paleka’s knowledge, Craig Stratton was not aware of this “banking” practice. TR at 350.

Kevan Walker

Kevan Walker is a former carpenter and construction worker who worked for Respondents from January 2010 to April 2010. TR at 374. At the time he was hired, primarily to work on the flood channel, he was not told that the Willow Beach job was a prevailing wage job and did not recall seeing a DBA poster. TR at 375. For his work on the flood channel, Mr. Walker was involved in setting forms, placing and tying rebar, stripping and moving the forms,

¹⁹ Mr. Paleka did not keep a journal for the first three months that he worked for Respondents, from July to October 2009. TR at 346. He testified that during this time, he was working with a compactor doing “earth work” and was paid at an average rate of \$28 per hour. TR at 353-54.

and pouring the concrete. TR at 376-77. He testified that the forklift drivers were good about dropping the rebar close to the work area, so he did not have to carry rebar from other locations to the channel very often. TR at 383. Mr. Walker estimated that he split his time working on the flood channel roughly in equal thirds between setting or stripping forms, working with rebar, and pouring and finishing cement. TR at 385.

When asked about his time cards, Mr. Walker testified that he did not write the total hour section or the job codes, and that no one asked him for a breakdown of what tasks he did for how many hours. TR at 387-88. Mr. Walker was paid at the same rate for all his work. TR at 388. He worked from dawn to dusk on Monday, Tuesday, and Wednesday, and then completed the remainder of his 40-hour work week on Thursday morning. TR at 389. Mr. Walker stated that he did work more than 40 hours on occasion, but did not get time and a half pay; instead, he was told he could verbally “bank” the time to leave a little early on another week. TR at 389-90.

Felipe Herrera

Felipe Herrera is a carpenter from Las Vegas, Nevada, who worked for Respondents on the Willow Beach job for two years and three months, starting in July 2009. TR at 397-98. He testified that he did not know that this was a prevailing wage job, but he did recall seeing the DBA poster outside the trailer. TR at 398-99. While at Willow Beach, Mr. Herrera worked on a variety of different jobs, including the water tank, the flood channel, the RV pads, the parking lot for the RVs, and painting the campgrounds. TR at 400. He explained that his work on the water tank, flood channel, and RV pad consisted of setting forms, tying rebar, and pouring concrete. TR at 400-01. Mr. Herrera estimated that he spent 30 percent of his time setting forms, 40 percent working with rebar, 30 percent pouring cement, five percent painting, and 10 percent doing general labor.²⁰ TR at 404-05. He worked in a crew of roughly 10 people, but his crew was joined by others at different points in the project, depending on the need for additional labor. TR at 416.

Mr. Herrera stated that he filled out his own time cards by hand, and was never told to record how much time he spent doing a particular type of work. TR at 409. He was paid at a flat rate for all his work, but noted that the rate decreased from \$24 per hour when he first started to \$11.50 per hour. TR at 407-08. Mr. Herrera asked his foreman why his pay rate had decreased but was never given an answer. TR at 408. He also testified that he never received time and half pay for his occasional overtime hours, and was instead told to verbally bank them with his foreman so he could leave early on another week. TR at 409. Mr. Herrera estimated that he worked maybe two or three overtime hours each month. TR at 415.

Ryan Shook

Ryan Shook lives in Fort Mojave, Arizona and worked for Respondents from September 2009 to January 2011. TR at 421-22. When he was hired, he was not told that it was a prevailing wage job, but remembers seeing the prevailing wage book for about a year before it “disappeared” around December 2010. TR at 422-23, 440; SX 9 at 111-16. While on the Willow Beach job, Mr. Shook worked on a variety of projects, including the water tanks, grading,

²⁰ These estimates add up to 115 percent. TR at 404-05.

underground sewer and water work, rebar, landscaping, and general labor. TR at 423. Mr. Shook operated a number of heavy machines, including running the forklift to bring materials to the water tank, using a backhoe to dump dirt for landscaping, and using a mini-excavator for the underground work. TR at 424. Mr. Shook did not keep track of how much time he spent doing these different types of work, but estimated that he spent about 40 percent of his time doing general labor, 10 percent setting forms, 30 percent operating machinery, and 20 percent working with rebar. TR at 425.

Mr. Shook corroborated the testimony of other Willow Beach workers who stated that employees were paid once per week, at the same rate for all work,²¹ and that the hours were typically 12-hour days for Monday through Wednesday with four hours on Thursday morning. TR at 426-27. Mr. Shook also testified that he was very seldom paid time and a half for the occasions when he worked over 40-hours in a week, and was instead told to verbally bank his hours so that he could leave early on another week. TR at 427. With respect to time cards, Mr. Shook testified that from September 2009 to May 2010, his supervisor, Brady Holt, filled out the time cards and gave Mr. Shook an opportunity to review the time cards at the end of the week to correct any discrepancies. TR at 431-33; *see, e.g.*, RX 132 at 1890. For the remainder of Mr. Shook's time with Respondents, when Colby Stratton was his supervisor, Mr. Shook filled out his own time cards and used the foreman's reference list to fill in the correct job numbers. TR at 436-37. In reviewing his time cards, Mr. Shook was unable to discern how much time he spent tying rebar, doing landscaping, doing underground work, or doing grading. TR at 446.

Respondents' Rebuttal Evidence

Testimony of Craig Stratton

Craig Stratton is the Secretary Treasurer for Interstate Rock, and has worked for the company for the last 34 years. TR at 449-50. He also serves as Project Superintendent on many projects. TR at 450. Interstate Rock President Don Stratton is Craig Stratton's cousin. TR at 450.

DBA Compliance

Mr. Stratton testified that Respondents received a packet of posters and wage information upon award of the Willow Beach job, which Respondents then immediately made available to employees in a binder hung from a cable to a bulletin board in front of the office trailer. TR at 463-64. He explained that posting this information is "one of the first things" Respondents do upon opening a work site, and added that it remained up for the entirety of the two year project, with the exception of one week when the cable was clipped and had to be replaced. TR at 465-66.

Mr. Stratton also testified that Respondents held weekly safety meetings or "tool box meetings," in which the supervisors would gather the workers at their respective areas of the work site to discuss safety topics, and to let workers know that if they had concerns regarding their wages, they could find information at the bulletin board outside the office trailer. TR at

²¹ Like Mr. Herrera, Mr. Shook noted that he was initially paid "in the twenties, sometimes eleven" dollars per hour. TR at 426.

465-67. Mr. Stratton was of the belief that every employee knew or should have known that Willow Beach was a prevailing wage job because many of the Nevada workers had expressed disdain or refused the work because the Arizona prevailing wages are much lower than those in Nevada. TR at 467-68. He acknowledged that he was not able to attend every safety meeting, so he could not say for certain exactly how this safety meeting information was phrased, but he believed workers were told affirmatively that this was “an affirmative job” and “the Davis Bacon wages were there for them to review, if they didn’t have a copy of it.” TR at 592.

Mr. Stratton acknowledged that when Respondents were advised that their prevailing wage records were inaccurate and they had not properly compensated employees, they did not make any attempt to go back and revise their payroll to ensure that employees were paid properly. TR at 642.

Crews, Tools, and Classifications

Based on his memory, Mr. Stratton explained that the job classifications at Willow Beach included equipment operators, laborers, pipe-layers, carpenters, cement laborers, and cement finishers. TR at 469-70. He stated that the equipment operators used track-hoes, loaders, trucks, mixer trucks, paving operators, rollers, and compactors for the various tasks. TR at 470. Respondents also kept a crusher onsite from roughly Fall 2009 to Spring 2011 in case additional materials needed to be created. TR at 587-88. When asked about the wages for these different classifications, Mr. Stratton insisted that Respondents paid at least prevailing wages for these classifications according to the wage determination. TR at 472; SX 9 at 111-16.

Mr. Stratton explained that the crews had to be carefully rotated so that preparatory work could be done first, and so that at least part of the recreation area would remain open to the public at all times. TR at 474-75. Because of this, he testified that the concrete work for the water tanks took around 10 weeks and the concrete work for the flood channel, which overlapped with the water tanks, took 10 to 12 weeks. TR at 476-77. Mr. Stratton later revised that estimate to a possible maximum of 14 weeks for the water tanks. TR at 648. Mr. Stratton estimated that 80 to 90 percent of the rebar expended on the Willow Beach project was used for the two water tanks and the wash channel. TR at 569. The other 10 to 20 percent went to cement slabs for the ramadas (shade coverings for picnic tables) and other small areas. TR at 569-70.

Phase Codes

Respondents kept track of how many man-hours were going into the different projects using a system of phase codes for job costing. TR at 478, 586-87; RX 4 at 9-17.²² The phase code prefix “2902” was used to denote the Willow Beach job, as some of the employees were working for Respondents on other projects as well. TR at 484. The first set of three numbers in the phase code indicated the “location of the area of the job.” TR at 482. Mr. Stratton gave the example of Willow Beach wash, which corresponded to phase code “109.” TR at 482; RX at 12. The second set of three numbers in the phase code indicated the type of work in that location,

²² Mr. Madsen testified that he wrote out the handwritten codes on the first two pages of RX 4, and that this was just for “ease of reference” so that he would not have to look through the entire document to find the most common phase codes. TR at 724; RX 4 at 9-10.

such as pipe installation, masonry, or landscaping. TR at 485-86. For example, phase code 2902-111-210 would indicate earth work at the water treatment plant of the Willow Beach project. TR at 485-86; RX 4 at 13.

Based on this system of phase codes, Mr. Stratton testified that he was able to discern whether or not an employee would have worked with rebar at a given time, despite the fact that there was no code specifically for rebar work. TR at 603. For instance, he explained that once the water tank was built, there was no additional rebar work involved at that particular site location, but there was other work that had to be done. TR at 488. Thus, he explained that for the phase codes beginning in “111,” the designation for the water treatment plant, only a phase code ending in “506” would indicate use of rebar; all of the other water tank work descriptions did not involve rebar. TR at 488-89; RX 4 at 13. Similarly, Mr. Stratton stated that he would be able to determine whether any of the water tank phase codes involved carpentry or cement finishing. TR at 491. For example, Mr. Paleka’s time card for November 29, 2009 showed two entries regarding the job code: 2902-111-506 and 2902-109-506. TR at 495; RX 118 at 1559. Mr. Stratton explained that the “2902” indicated that the work was part of the Willow Beach project, and the “506” in both entries meant Mr. Paleka was doing concrete work. TR at 495-96; RX 118 at 1559. The “111” meant he was working at the water tank for 12 hours on Monday, and the “109” meant he worked on the flood channel for the next three days. TR at 496; RX 118 at 1559.

Mr. Stratton argued that the second set of three numbers in the phase code could be used to parse the labor classifications necessary to get the work performed. For instance, for the following second set of three phase code numbers, Mr. Stratton testified that no rebar work, carpentry work, or cement finishing work would be done: “151” – mobilization, TR at 512; “999” – crushing operations, TR at 513-14; “200” – removal items/demolition, TR at 515-16; “301” – road base, TR at 517-18; “210” – earth work, TR at 489-90; “402” – asphalt paving, TR at 518-22; “100” – building demolition, TR at 498; “110” – asbestos abatement, TR at 498; “641” – installing a pipe, TR at 500; “621” – sewer pipe installation, TR at 536-37; “690” – excavation for pipe crew, TR at 538-39; “550” – masonry, TR at 544; “900” – storm drain pipe installation, TR at 553; “925” – erosion gabion, TR at 554-56; “980” – site furnishings, TR at 556-58; “999” – installation of water filtration system, TR at 560-61; “920” – rip-rap work, TR at 561-62. RX 4 at 9-17. Mr. Stratton acknowledged, however, that these phase codes were used to collect internal costs and were not the same as wage classifications, which were used for payroll purposes. TR at 499, 637. Mr. Fiorello had access to these phase codes during his investigation. TR at 724.

Upon cross examination, Mr. Stratton also admitted the possibility that the phase codes used to describe a worker’s tasks may have been incorrectly labeled or recorded. Counsel for the government pointed Mr. Stratton to the November 12, 2010 time card for Mr. Paleka, where all the labor was coded under “2902-127-603,” which indicates sidewalk and flat work. RX 118 at 1609. Mr. Paleka’s journal from that week, however, described prepping concrete pads for RVs at the campgrounds, which required him to “for[m] and tie steel.” SX 17 at 319-20. Mr. Stratton had previously testified that there was no ironwork involved with classification “603,” for sidewalks and flat work, but when faced with these inconsistent accounts, he admitted that he “wouldn’t classify an RV pad as a sidewalk.” TR at 492-93, 621-22. Based on this exchange,

Respondents' counsel relinquished the argument that phase code "603" did not include use of rebar. TR at 626.

Cross examination also focused on Mr. Stratton's estimates of the time taken to complete the water tanks and flood channel. Based on his estimate of 14 weeks for the water tanks and 10 to 12 weeks for the flood channel, Mr. Stratton was asked why Mr. Paleka and Mr. Herrera both have time cards that reflect concrete work at the water treatment plant site ("2902-111-506") from October 2009 to April 2010. TR at 648-49. Mr. Stratton explained that the evaporative pond and foundation for the water treatment plant would require concrete work in addition to that done on the water tanks, so this could explain the additional time and work under this phase code. TR at 649-50.

Workers with no rebar, carpentry, or cement finishing

To better illustrate his point regarding what he believed to be the Administrator's exaggerated estimates of back wages, Mr. Stratton discussed a number of employees who did not perform much – if any – carpentry, cement finishing, or work with rebar. He first cited employee Chris Steglich, who was hired as the asphalt foreman for the Willow Beach project, and whose time cards, according to Mr. Stratton, reflect that the vast majority of Mr. Steglich's time was spent doing asphalt work that did not involve any rebar, carpentry, or cement finishing. TR at 502-506; SX 4 at 84; RX 139 at 2258-65. Similarly, employee Tyler Excell's time cards reflect only road base or asphalt paving work, neither of which involved any rebar, carpentry, or cement finishing. TR at 522-523; RX 94 at 750-57. Employee David Gledhill, a member of the paving crew, had time cards that listed only the codes "402" for asphalt work, "301" for road base, and "601," which was not listed in RX 4. TR at 523-24. Mr. Stratton hypothesized, based on the equipment listed in conjunction with the "601" phase code, that Mr. Gledhill may have accidentally written "601" instead of "301." TR at 525. After reviewing both of Mr. Gledhill's time cards, Mr. Stratton testified that Mr. Gledhill did not do any work with rebar, carpentry, or cement finishing. TR at 526-27; RX 95 at 756-57. Based on time card analysis, Jim Hall, another member of the paving crew, also did not do any rebar, carpentry, or cement finishing work. TR at 527-28; RX 100 at 912-23.

When asked about the time cards for Jeff Hausauer, Mr. Stratton explained that Mr. Hausauer is a mechanic for Respondents, so his time sheet is tracked differently. TR at 528-29. After reviewing the time sheets, Mr. Stratton testified that Mr. Hausauer did not do any other work beyond repairing equipment, and did not engage in rebar work, carpentry, cement finishing, or machine operating. TR at 530; RX 101 at 924-51. Mr. Stratton also explained that Mr. Hausauer had been paid for his overtime work beyond 40 hours per week because mechanics "generally get a lot of overtime...[b]ecause without that piece of equipment back and running operations, our crews can't work. So, they're called in at all times..." TR at 531. Mr. Stratton testified that he also paid large amounts of overtime to surveyor, Adam Smith. TR at 572.

Overtime Hours and Pay

Mr. Stratton explained that Respondents are used to paying overtime when they get behind on projects and need to catch up, but that this did not happen often on the project at issue since they were given plenty of time to complete the Willow Beach job. TR at 573. He stated that Respondents do not have a policy of prohibiting overtime and that certain projects, like cement pours, require workers to stay longer on occasion. TR at 573-74. Mr. Stratton originally planned to have workers work 10-hour days, Monday through Thursday, but, after the first month, began allowing longer hours on the first several days of the week so that workers could leave earlier on Thursday and avoid tourism traffic near Hoover Dam on their commute back to Nevada. TR at 574. During his testimony, Mr. Stratton stressed that working longer hours earlier in the week only entitled workers to leave earlier on Thursday of that same week, he did not condone the practice of banking hours, and was not aware that supervisors had allowed this practice until Mr. Fiorello's investigation brought it to light. TR at 577-78. When Respondents found out it was occurring, they immediately spoke with all supervisors in a meeting at the office trailer about stopping this practice and altered the format of their time cards to ensure that it accounted for all hours worked that week. TR at 578-82.

Testimony of Michael Madsen

Michael Madsen has been the Controller for Interstate for 24 years. TR at 662-63. As Controller, he oversees "all of the financial information, accounting procedures, bookkeeping, payroll, accounts payable, accounts receivable, cash flow, and some other management duties." TR at 663. With the assistance of employee Laura Lee, Mr. Madsen handled the payroll for the Willow Beach project. TR at 664. He visited the work site twice to hold meetings, roughly one year after the project started and again three months later. TR at 664. At the first meeting, Mr. Madsen reviewed basic safety procedures and recent activities, and reminded the workers that he was the equal employment officer who they could contact in case of complaint and that the DBA wage rates were posted on the bulletin board outside the office trailer. TR at 666-67. His second meeting was less formal and consisted primarily of observation of the work site and supervisor-led safety meetings. TR at 668.

With regard to the memo that Mr. Madsen sent to Mr. Fiorello following the final conference, Mr. Madsen explained that he first became concerned with Mr. Fiorello's back wages estimates when he "re-input everything into the computer and tried to redo [Mr. Fiorello's] formulas, and you know, so I could come up and balance to his number." TR at 708. When Mr. Madsen did this, he found that Mr. Fiorello estimated 16,417.41 hours of labor completed under the rebar, or ironwork, classification. TR at 708. These numbers appeared "catastrophic" to Mr. Madsen, who felt "you couldn't, possibly have performed the work and paid 16,000 hours, ... under that or any other classification." TR at 709. He then consulted with his subcontractors and a means book by which labor estimates are often made, and came up with a calculation of how many hours of labor would reasonably be required for 143 tons of rebar. TR at 709. The excerpt from the means book that Mr. Madsen included with his memo estimates that it would take 18 man hours per ton of rebar. SX 5 at 100; TR at 709.

Mr. Madsen testified that Respondents have performed DBA work on four projects since the Willow Beach job, including DBA projects in Arizona, with no complaints. TR at 712. Mr. Madsen further stated that at the time of the Willow Beach project, Respondents believed that they had properly classified all employees. TR at 712. He also explained the decrease in the pay rates for many of Respondents' employees on the Willow Beach job, stating "we decided, at the point in time that there was travel involved, and so rather than pay them in wages that would be subject to Social Security, we paid them in per diem, that would be subject only to federal income tax." TR at 717. The employees received the per diem as straight cash, and Mr. Madsen did not recall any complaints from employees regarding the per diem change, their classifications, or overtime. TR at 718.

Mr. Madsen also expressed some of Respondents' initial confusion regarding their obligations to the Department of Labor, stating:

"We felt like our contract was with the federal government. We did not know there was a separation of duties between our contracting officer, their inspection force, and another...We thought what we sent in, to the federal government, which would have been the National Parks Service, and to their agent, Alpha Engineering, we thought that was their inspection of our information. And if it was incorrect, they would tell us...it was a totally new experience for us, when [Mr. Fiorello] called us and said, no, there's something else going on."

TR at 725-26. He avowed Respondents' renewed commitment to complying with all requests from the Department of Labor, and explained that he now understands the importance of giving the Department certified payrolls. TR at 729-30.

Ironworker Classification

Mr. Stratton testified that he did not consider work with rebar to be "ironwork" at the time that the Willow Beach work was being completed. TR at 542. He explained, "...usually, ironworker is something that does with ironwork" and he "would not have thought that that would have been rebar." TR at 543. In other prevailing wage projects where rebar was used, there was no classification for ironworker and rebar work was considered "part of the concrete and cement masons stuff." TR at 543. Mr. Madsen echoed these sentiments, explaining that Respondents tried to convince Mr. Fiorello that use of rebar warranted a "labor" classification, as that was how rebar work had been classified in other prevailing wage jobs that Respondents had done outside of Arizona. TR at 702. As Mr. Madsen explained, "...we always felt structured steel was a structural type thing, with, you know, with building and going up high. And we were not of the opinion that it dealt with rebar." TR at 703. Mr. Madsen added that Respondents have since corrected their understanding of rebar work in Arizona, and would classify future rebar work in that state as "ironwork." TR at 703.

Time Cards

As noted, Respondents did not submit time cards to Mr. Fiorello prior to the hearing. Mr. Fiorello insists that he verbally asked for the time cards on multiple occasions, but never put this request into writing. TR at 131. He had some awareness that time cards existed, based on the fact that interviewed employees mentioned not recording banked hours on the time cards, but he was not aware before the hearing that the time cards contained information concerning the location and nature of the work that had been performed. TR at 131-32. When asked why the Department of Labor was not given time cards during their investigation, Mr. Stratton stated that he had a vague memory of being told that it did not matter if Respondents submitted the time cards or not because the government would not consider evidence like that. TR at 657. Mr. Madsen testified that Mr. Fiorello never formally requested that Respondents submit time cards, and that Respondents were told that the time cards were “useless” and would not be considered because they “did not include the rebar classification.” TR at 677.

The time cards were turned in at the end of each workweek, usually on a Thursday, at which point the supervisor would bring them to Respondents’ office in Hurricane, Utah. TR at 670-71. Laura Lee processed the time cards the following Monday, with the assistance of Mr. Stratton, who would use the phase code list at RX 4 to describe what type of work each individual performed on the Willow Beach job. TR at 671-72. The rate of pay for an individual was determined according to the classification of work, but Mr. Madsen testified that workers were sometimes paid more than these rates if Respondents felt it was appropriate. TR at 673. At the conclusion of this process,²³ Respondents’ Pro-Mation GEAC payroll program produced a certified payroll sheet, which Ms. Lee signed and completed by checking the correct boxes before digitally sending copies to Alpha and the federal government. TR at 675, 691. The copies given to Mr. Fiorello were printed directly from the payroll program and contained all the same information, but the documents were not signed and the boxes were not checked. TR at 678, 688-89. Respondents did not make a copy of the signed/checked payroll documents that Ms. Lee sent to Alpha and the federal government. TR at 689. Individual pay stubs were kept locked up in the office, where employees could pick them up or have them mailed out; if the stubs were not picked up in four weeks, Respondents automatically mailed them to the employee’s home address. TR at 683.

As mentioned above, Respondents altered the format of their time cards in response to the Department of Labor’s investigation. Mr. Madsen explained that Respondents added a section for “classification,” as “most of [their] classification for pay happened internally,” and they wanted employees to be more specific in describing their work. TR at 684. The time cards now include a section for the job cost code, the payroll code, and the classification. TR at 684. Respondents also added a question that asks whether the employee has been paid for 100 percent of his or her hours that week, as a way to discourage the practice of banking. TR at 684. Respondents further added sections to indicate whether the worker was hurt on the job that week,

²³ To start this process, Ms. Lee and Mr. Madsen would input the employee number, which then pulled up the person’s name. The information regarding the classification and corresponding wage rate had to be added manually the first time, but that data would be saved in the system for future reference. Next, the worker’s total hours, total overtime hours, and any deductions would be added, and the payroll system would produce a final result. TR at 691-92.

and whether the worker understands his or her wage rate. TR at 684. The Willow Beach project had been completed by the time Respondents made these changes. TR at 685.

Alternative Calculations

Respondents submitted exhibits eight through 78 for summary purposes. TR at 625. These documents were initially prepared for the hearing to aid Respondents in arguing for an alternative basis for calculating the percentage of ironwork, cement finishing work, and carpentry work; however, Respondents' counsel later decided not to introduce evidence of an alternative formula and did not present the aforementioned exhibits for the purpose of advancing alternative calculations. TR at 624. Instead, Respondents stipulated to using the Department of Labor's formula for work that was done under phase codes that Mr. Stratton indicated would involve rebar, carpentry, and/or cement finishing work. TR at 624. In other words, Respondents offered only the columns from "Last Name" through "Phase Code," as a summary of each employee's work. TR at 628. Respondents' counsel explained that he did not have a chance to revise the spreadsheets to align with this new argument. TR at 628. The Administrator voiced concerns that because there was no phase code specifically for rebar, the phase code information does not provide a reliable breakdown of the ironwork done at Willow Beach. TR at 625-26. The Administrator also argued again that these summary sheets were not received in a timely manner. TR at 628.

Mr. Madsen was responsible for preparing the spreadsheets provided in exhibits eight through 78. TR at 685. He used the payroll information available from the payroll program and time cards to populate the spreadsheets, which are formatted the same for all employees. TR at 686-87, 690. He calculated the regular pay by adding the base hourly rate and the fringe benefit rate, and multiplying that amount by the regular hours. TR at 693. The overtime pay was calculated by multiplying the base hourly rate by one and a half, and then multiplying that number by the overtime hours. TR at 694. The gross pay was determined by adding the regular and overtime pay together. TR at 694. Mr. Madsen testified that these spreadsheets accurately reflect a summary of the various phase codes and locations of the work for each week, as recorded in the time cards, which also appear as exhibits in this trial. TR at 695. While I have accepted these documents into the record as credible summaries of the information contained on employees' time cards, in doing so, I have not considered Mr. Madsen's calculations on the right half of the spreadsheets.

IV. ANALYSIS AND LEGAL CONCLUSIONS

A. DBA Violations and Back Wage Calculations

The Davis-Bacon Act requires that laborers and mechanics working on covered contracts be paid a minimum wage "based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed." 40 U.S.C. § 3142(b). This minimum wage is referred to as the prevailing wage. *Id.*; see 29 C.F.R. §1.3. Where laborers and mechanics perform work in more than one work classification, they may be compensated at the established rate for each classification for the time

worked therein, provided that “the employer’s payroll record accurately set forth the time spent in each classification in which work is performed.” 29 C.F.R § 5.5(a)(1)(i). This requires contractors to keep accurate payroll records that sufficiently and accurately demonstrate that workers were paid prevailing wages and fringe benefits for all compensable work. 29 C.F.R. §5.5(a)(3)(i). Here, the parties have stipulated that the Willow Beach contract was subject to the DBA, and that Wage Determination AZ090010 Mod 8 applied to the contract.

The Administrator, as the party bringing the Order of Reference, has the initial burden of proving that the Interstate employees performed work on the Willow Beach job for which they were improperly compensated. *See, e.g., 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); *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); *Thomas & Sons Bldg Contractors, Inc.*, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001). When the employer’s records are “inaccurate or inadequate” and the Administrator has no adequate substitute, the evidentiary principles enunciated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) will apply. *Thomas & Sons Bldg Contractors, Inc.*, Case No. 00-050 at *5. Under these principles, the Administrator carries his burden if he proves that the employees have:

...in fact performed work for which [they were] improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the [Administrator’s] evidence. If the employer fails to produce such evidence, the court may then award damages to the [Administrator, on behalf of employees], even though the result be only approximate.

Mt. Clemens Pottery Co., 328 U.S. at 687-88.

Here, upon learning that use of rebar constituted ironwork according to the local union definitions controlling in Arizona, Respondents admitted that they did not properly classify ironwork on the Willow Beach job as “ironwork,” and, thus, did not appropriately compensate workers for their labor. TR at 117. Mr. Fiorello’s observation of rebar work on site, the photographic evidence at SX 13, and information from Ironworkers Local Union 75 further confirm that Respondents violated the DBA in failing to classify use of rebar as ironwork. Thus, I find that there is no dispute that violations of the DBA occurred; the remaining issue concerns the validity of the Administrator’s reconstruction and back wages calculation.

As discussed above, there is contradictory evidence as to whether Respondents failed to provide Mr. Fiorello with copies of employee time cards in a timely manner or whether Mr. Fiorello rejected the time cards as inadequate on the grounds that they did not include the ironworker classification. TR at 117-18, 131-32, 184-85, 657, 677. Based upon a review of the record, I find that Mr. Fiorello did ask for the time cards and that Respondents did not provide the requested information. Mr. Fiorello was a credible, thorough witness and I believed his testimony that he requested the time cards. Moreover, Respondents had an obligation to keep

proper documentation of each employee’s work classifications, which they failed to do. After the final conference, Respondents were invited to produce documents that would refute Mr. Fiorello’s findings, but they chose not to produce the employee time cards at that point. Whether Mr. Fiorello should have asked for the time cards in writing, or whether Respondents were told that the time cards were inadequate, ultimately does not impact the outcome of this analysis. In either scenario, the Administrator did not have records at his disposal to readily determine how much time Interstate employees had spent working with rebar at the Willow Beach project, and, instead, was forced to create his own reconstruction. I must now evaluate whether the Administrator’s evidence shows that his reconstruction and back wage estimates are a matter of just and reasonable inference.

Mr. Fiorello was primarily responsible for conducting the investigation and creating the reconstruction. His methodology included site visits, interviews with 24 employees, use of existing payroll documents, consultation with the local ironworkers union, and review of at least one employee’s work journal. Mr. Fiorello explained that he tried to ask pointed questions during his interviews to elicit precise responses from the interviewed employees, and acknowledged the difficulty for employees in accurately remembering their previous work timelines. TR at 58, 130, 162-63. He then used this information to estimate a percentage of time that workers spent on each classification of work. For the interviewed employees, Mr. Fiorello tried to establish classification percentages that mirrored employee testimony, with all ironwork capped at 20 percent. TR at 127. In order to estimate the wages owed to the non-interviewed employees, Mr. Fiorello devised a formula for the employees’ time based on averages taken from all the interviewed employees’ statements: 20 percent as ironworkers, 40 percent as cement finishers, 20 percent as backhoe operators, and 20 as percent laborers. TR at 101-02.

Mr. Fiorello’s efforts were thorough, especially given that he directly interviewed roughly 35 percent of the employees in creating his reconstruction. The percentage breakdown estimates given by the employees at the hearing roughly support the averages that Mr. Fiorello came up with, given that he artificially capped the rebar percentage at 20 percent:

Employer Name	Estimated Rebar %	Estimated Carpentry %	Estimated Cement Finishing %	Estimated Equipment Operation %	Estimated Other %
Mike Phillips, TR at 262	60	20	10	5	5
Gerra Paleka, TR at 327	40	20	40	0	0
Felipe Herrera, TR at 404-05	40	30	30	0	15 ²⁴
Ryan Shook, TR at 425	20	10	0	30	40
Average	40	20	20	8.75	15

Furthermore, after speaking with Respondents, Mr. Fiorello reduced his time estimates for non-interviewed employees to 15 percent as ironworkers, 45 percent as cement finishers, 20 percent as backhoe operators, and 20 percent as laborers. TR at 103; *see* SX 4-A. Mr. Fiorello’s

²⁴ As noted earlier, these estimates add up to 115 percent.

findings and reconstruction methodology were subjected to and withstood multiple levels of internal review at the Wage and Hour Division. TR at 175, 219-20. Finally, Mr. Fiorello gave the Respondents more than adequate opportunity to offer documents or other evidence that refuted his totals.

Ultimately, I find that the Administrator's reconstruction of back wages is a matter of just and reasonable inference. Courts have found that "it is permissible to award back pay to non-testifying employees based upon the representative testimony of a small number of employees," which formed the basis of the reconstruction methodology. *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468 (11th Cir. 1982). The legal standard governing the DBA recognizes that damages for violations may "be only approximate" where the employer has not kept proper and accurate records. *Mt. Clemens*, 328 U.S. at 687-88. Indeed, "[d]ue regard must also be given to the fact that it is the employer who has the duty...to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and produce the most probative facts concerning the nature and amount of work performed." *Mt. Clemens*, 328 U.S. at 687-88.

The Administrator also alleged that Respondents had violated the DBA by failing to maintain payroll records accurately documenting the time employees spent in each classification of work, 29 C.F.R. §§ 5.5(a)(1)(i), 5.5(a)(3)(i), and by failing to maintain accurate records of the "daily and weekly number of hours worked." 29 C.F.R. § 5.5(a)(3)(i). Because Respondents did not classify any of their employees' labor as "ironwork," despite the extensive use of rebar on the Willow Beach project, their failure to comply with the requirements of the DBA are obvious. Moreover, Respondents' classification errors extend to other types of work, including carpentry and cement finishing, as the Administrator has shown. The evidence overwhelmingly established that Respondents did not keep proper and adequate records. Thus, I find that Respondents violated the DBA in failing to maintain accurate payroll classifications. Moreover, given the banking of hours practices going on and the failure to record these overtime hours, I find that Respondents violated the DBA by failing to maintain accurate records of the daily and weekly number of hours worked.

B. Respondents' Rebuttal Arguments

The burden now shifts to Respondents to offer evidence of the precise amount of work performed or evidence to negate the reasonableness of the inference to be drawn from the Administrator's evidence. *See Mt. Clemens*, 328 U.S. at 687-88. In order to do this, Respondents offer two main arguments: first, that by using phase codes to reconstruct work classifications, Respondents have definitively shown that a number of workers/crews included in the Administrator's reconstruction in fact performed no rebar work, carpentry, or cement finishing; and second, that the Administrator's reconstruction is not reasonable and just because it relies on the higher percentage formula for non-interviewed employees, which Mr. Fiorello had testified that he abandoned.

At the hearing, Respondents presented summaries of the phase codes listed on each employee's time cards, which Mr. Stratton explained as a way to determine the classification of work that the employees were performing at any given time. RX 8 – RX 78; RX 4 at 9-17. In

particular, Mr. Stratton explained that the second set of three numbers in the phase code could be used to determine the labor classifications necessary to perform that work, and then testified that a number of phase codes would not have required any rebar work, carpentry, or cement finishing. TR at 512-62; RX 4 at 9-17. Respondents stated that they would not contest the Administrator's reconstruction for employees whose time cards reflected phase codes that would require rebar, carpentry, and/or cement finishing, but argued that the reconstruction estimates should not be applied for workers who completed work under non-rebar/carpentry/cement finishing phase codes. TR at 624.

Using the list of non-rebar/carpentry/cement finishing phase codes that Mr. Stratton articulated at trial, Respondents argued that the phase code summaries demonstrate that Douglas Jones, Chris Steglich, Tyler Excell, Jim Hall, David Gledhill, Mike Bingham, Tony Cuske, Lucas Peterson, James Sexton, Tom A. Spencer, Tom P. Spencer, Sr., Jeff Hausauer, and Pete Leavitt all worked on crews or in positions that did not require them to use rebar or perform carpentry or cement finishing work. Respondents' Post-Hearing Brief at 13; *see* RX 82, RX 91, RX 122, RX 136 at 2143-48, RX 130 at 1831-36, RX 137 at 2199-2203, RX 101, RX 111. Respondents also argued that the Administrator's reconstruction grossly overstates the amount of time that surveyor Adam Smith spent doing rebar, carpentry, and cement finishing work – claiming that Mr. Smith only performed a total of six hours of cement finishing work on August 29, 2009, as opposed to the 1006 hours estimated by the Administrator. SX 4 at 75-76; RX 133. Mr. Phillips' testimony that Mr. Smith only occasionally helped tie rebar when the satellites were down and his surveyor equipment was not working further supports this argument that the Administrator overestimated Mr. Smith's time doing rebar, carpentry, and cement finishing work. TR at 302.

Respondents' argument relies heavily on the credibility of Mr. Stratton regarding the phase codes and what they represent. The Administrator has argued that the phase codes cannot properly be used in this way because they exist for the fundamentally different purpose of job pricing and are not the same as payroll classifications under the DBA. During cross examination, the Administrator also got Mr. Stratton to admit to an instance where his previous testimony that phase code "603" did not involve rebar was effectively refuted by one of the employee's journals. TR at 492-93, 621-22. Thereupon, Respondents relinquished their argument regarding phase code "603" and the use of rebar. Mr. Stratton was generally a credible witness with respect to his understanding of the phase-code system and the work carried out at the Willow Beach job site. However, given his experience as a Project Superintendent over the years, Mr. Stratton's testimony demonstrated that Respondents displayed a degree of ineptitude in using their post-hoc classification process during payroll calculations, rather than having employees keep track of their work classifications on the work site each day. Mr. Stratton's testimony in this regard appeared self-serving and less credible. Phase codes are not a substitute for proper work classification under the DBA. To the extent that Mr. Stratton's testimony regarding the phase codes directly contradicts Mr. Fiorello's findings, I find that Mr. Fiorello was a more credible witness. He conducted a more thorough investigation, had a keen working knowledge of the Willow Beach project and had better recollection of the investigation generally. Mr. Stratton, as previously stated, appeared to be offering self-serving information, and his recollection of such a major project was disappointing.

Nevertheless, I do find that Respondents' arguments that not all employees or crews would be involved in the same type of work logical for a work site requiring skilled labor, and are consistent with the employee testimony at the hearing regarding working in crews. TR at 251, 296-97, 416. For the aforementioned workers who Respondents can prove consistently worked under phase codes that clearly would not involve any rebar, carpentry, or cement finishing work, it appears that the Administrator's wage reconstruction formula is not reasonable and just.

After reviewing all the evidence, I find that Respondents presented evidence of the precise amount of work performed for each of the aforementioned employees, and, thus, successfully refuted the reasonableness of the Administrator's reconstruction estimates with respect to the following: Douglas Jones, Chris Steglich, Tyler Excell, Jim Hall, David Gledhill, Mike Bingham, Tony Cuske, Lucas Peterson, James Sexton, Tom A. Spencer, Tom P. Spencer, Sr., Jeff Hausauer, Pete Leavitt, and Adam Smith. The back wage reconstruction for those employees, a sum of \$21,161.67, will be deducted from the total award due.

Employee	DBA Back wage Calculation According to Administrator's Totals at SX 10
Douglas Jones	\$0.00
Chris Steglich	\$4.08
Tyler Excell	\$1,560.02
Jim (James) Hall	\$782.59
David Gledhill	\$269.09
Mike Bingham	\$62.65
Tony Cuske	\$125.43
Lucas Peterson	\$21.05
James Sexton	\$1,524.07
Tom A. Spencer	\$1,504.52
Tom P. Spencer, Sr.	\$1,629.44
Jeff Hausauer	\$55.06
Pete Leavitt	\$41.80
Adam Smith	\$16,581.87
Total	\$21,161.67

Respondents' second rebuttal argument centers on the spreadsheets that Mr. Fiorello compiled and submitted as SX 4, which Respondents' claim still uses the higher work allocation for non-interviewed employees of 20 percent ironworker, 40 percent cement finisher, 20 percent operator and 20 percent laborer. *See* Respondents' Post-Hearing Brief at 7. The Administrator agreed and submitted information showing that the correct amount sought was \$446,366.10 if the reduced formula was properly applied. SX 4-A. Thus, Mr. Fiorello's reduction of the back wages reconstruction from \$563,000.00 to \$473,742.49, did not incorporate the 15 percent ironworker, 45 percent cement finisher, 20 percent backhoe operator, and 20 percent laborer formula to which Mr. Fiorello testified. TR at 113. When the correct formula is applied, the amount of back wages sought is \$446,366.10. Because I find that the Respondents have rebutted

the evidence as to the specific employees listed above, I will further reduce the back wages by \$21,161.67. The back wages owed by Respondents total \$425,204.43.²⁵

C. CWHSSA Violations and Back Wage Calculations

The CWHSSA requires employers to pay overtime to employees working under contracts that are subject to the DBA:

For each workweek in which the laborer or mechanic is so employed, wages include compensation, at a rate not less than one and one-half times the basic rate of pay, for all hours worked in excess of 40 hours in the workweek.

40 U.S.C. § 3702(a). Respondents have stipulated that work performed under the Willow Beach contract is subject to the CWHSSA.

Respondents and former employees testified that workers on the Willow Beach job typically worked 12-hour days on Monday through Wednesday, and then four hours in the morning on Thursday. TR at 273, 389, 426-27. This schedule was adopted largely so that workers who had to commute back to Nevada would not be caught in tourist traffic near Hoover Dam. TR at 574. Employee testimony also revealed that at least one of the supervisors at the Willow Beach job had adopted a practice of “banking,” in which employees who worked overtime hours were told to verbally keep track of those hours without writing them down and then use those hours as a type of credit, which would allow them to leave earlier on other weeks. *See, e.g.*, TR at 409. This practice is illegal and violates the CWHSSA because it deprives employees of their time-and-a-half overtime pay. Moreover, because the unpaid overtime hours were not recorded by Respondents, there is no way of knowing how often this occurred or that employees actually “banked” these extra hours in order to leave early on other weeks. Thus, the evidence establishes a clear CWHSSA violation.

The employee testimony regarding overtime violations and “banking” was generally consistent. Mr. Phillips estimated that he worked unpaid overtime on two or three occasions, but closer examination of his time cards revealed eight instances in which he worked more than 40 hours per week and did not receive overtime payment. TR at 289-92. Mr. Paleka reviewed his work journal during his testimony and found three instances where he worked one or two hours more than the standard 40-hour work week, but was not paid time and a half. TR at 338-44; SX 17 at 297, 306; RX 118 at 1559, 1593. Mr. Walker testified that he banked overtime hours “on occasion.” TR at 389-90. Mr. Herrera estimated that he worked two or three overtime hours each month. TR at 415. Mr. Shook did not give any estimates as to the frequency with which he worked overtime, or how many overtime hours he worked, but stated that he was “very seldom” paid time-and-a-half for these hours. TR at 427.

This testimony provides insights into how often employees might have worked overtime and how many hours they might have logged. Mr. Phillips, who testified to the highest frequency of unpaid overtime at eight occasions, worked for Respondents for roughly nine months, suggesting that he worked unpaid overtime a little less than once a month. TR at 247. Mr. Paleka

²⁵ \$446,366.10 - \$21,161.67 = \$425,204.43.

worked for Respondents for two years, and testified that he kept a fairly faithful work journal for all but three months of his time on the Willow Beach project. TR at 315, 333, 366. In comparing his journal to his time cards, Mr. Paleka found three instances of unpaid overtime work, meaning that he did not receive his time-and-a-half pay roughly once every seven months on average. Mr. Walker and Mr. Shook do not provide any helpful testimony as to the frequency of unpaid overtime, but Mr. Herrera estimated that he worked two or three overtime hours per month. It is not clear whether these hours were all worked in the same month, or whether they occurred over two or three different weeks in the same month. None of the employees explicitly testified to working more than two hours of unpaid overtime on any given week.

In reconstructing back wages due for unpaid overtime, Mr. Fiorello estimated that employees were banking an average of four hours per week for the weeks where they had 40 regular hours paid. TR at 75, 77. Based on Respondents' argument that employees who did bank their overtime hours received straight time pay for those hours at a later time, Mr. Fiorello reduced his initial estimate by giving credit for half of the straight time for the banked hours while still requiring Respondents to pay the extra half time pay for the overtime work. TR at 76. Though Mr. Fiorello's estimates for overtime work per week are a couple hours higher than the numbers given in the employee testimony, I find his calculations to be just and reasonable. Without any record of how many hours were banked, there is no way of showing how much overtime pay that employees were not receiving. I find that Mr. Fiorello's estimate of four hours per 40-hour work week is a reasonable calculation given the lack of time adequate recordkeeping. Further, given the egregious lack of accounting practices, I find it more reasonable to err on the side of compensating the workers. Thus, I find that Respondents violated the CWHSSA and that the Administrator's calculation of CWHSSA back wages due is reasonable and supported by the evidence submitted at trial.

D. Debarment

Violations of the DBA do not *per se* constitute a disregard of an employer's obligations within the meaning of Section 5.12(a) so as to result in automatic debarment. *Miller Insulation Co.*, WAB Case No. 91-38 (WAB, Dec. 30, 1992). To support a debarment order, the evidence must establish a level of culpability such as "aggravated or willful" and beyond mere negligence or inadvertent behavior. 29 C.F.R. § 5.12(a)(1); *A. Vento Construction*, WAB Case No. 87-51 (WAB, Oct. 17, 1990). For example, allowing violations to persist can constitute evidence of intent to evade or a purposeful lack of attention to a statutory responsibility in support of debarment. *P&N Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116 (ARB, Oct. 25, 1996). The individuals responsible for managing the employing entity's affairs are also subject to debarment when the violation is aggravated or willful, 29 C.F.R. § 5.12(a)(2), and "a company official [may not] avoid debarment under either the Davis-Bacon Act or the Related Acts by claiming that the labor standards violations were committed by agents or employees of the firm." *In re Howell Construction, Inc.*, Case No. 93-12, 1994 WL 269361, at *7 (WAB May 31, 1994). 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 905, 911 (7th Cir. 1996); *Minor Construction Co.*, 1995-DBA-00042 (ALJ, June 17, 1997).

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.” No. 87-51 (WAB, Oct. 17, 1990). Furthermore, in *Hugo Reforestation, Inc.*, ARB Case No. 99-003, the Administrative Review Board adopted the Supreme Court’s standard for establishing willful conduct under the Fair Labor Standards Act in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), which requires establishing that the “employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute.” Some courts have held that it is sufficient to show gross negligence or gross carelessness. *Thomas & Sons*, Case No. 1996-DBA-37 (ARB Aug. 27, 2001).

For a contractor debarred under the DBA, that company’s name is put on a list that the Administrator transmits to the Comptroller General for distribution to all federal agencies of parties and people who are ineligible to be awarded “any contract or subcontract of the United States.” 29 C.F.R. § 5.12(a)(2). The debarment lasts for a period of three years from date of publication of the ineligible list. 29 C.F.R. § 5.12(d)(1). Under the DOL’s regulations and Board precedent, a contractor debarred under the Davis-Bacon Related Acts (including the CWHSSA) is placed on the ineligibility list for a period “not to exceed” three years, 29 C.F.R. § 5.12(a)(1), from which the contractor may petition to be removed after six months. 29 C.F.R. § 5.12(c).

The Administrator suggests that Respondents intentionally misclassified workers to save on costs and knowingly submitted false payroll records to the contracting agency, and that Respondents – including Interstate Rock Products, Inc., and the named officers Donald Stratton, Craig Stratton, and Michael Madsen – should be debarred based on their DBA and CWHSSA violations. Respondents counter that there was no intentional misrepresentation of worker classification to save money, that the workers were all generally paid more than the minimum prevailing wage for the job, and there was no fraud in the timekeeping. Here, having considered the record in its entirety, I find that the violations of the DBA and CWHSSA rise to the level warranting debarment for three years.

Mr. Fiorello first revealed his findings about the contract violations at the final conference, which appeared to have been Respondents first notification that they were violating the DBA; Respondents agreed to come into compliance with the DBA for the remainder of the project. Prior to that time, Respondents had not received any complaints from the Parks Service or Alpha regarding the adequacy of their certified payroll submissions, despite the fact that Alpha had specifically been hired to provide oversight on Respondents’ DBA compliance. Respondents testified that they were unaware that use of rebar was considered “ironwork,” in Arizona, and that they had never had a prevailing wage contract with those definitions before. TR at 543, 702-03. I find this evidence not credible. It is difficult to believe, given its experience with DBA contracts, that Interstate Rock Products, Inc. would not have encountered this type of inclusive ironwork calculation. Nevertheless, Respondents immediately acknowledged their misclassification of the rebar work, which lessens the appearance of fraudulent behavior. TR at 117. Furthermore, the Administrator offered no evidence to show that Respondents failed to honor this promise, unlike many of debarred contractors. *See, e.g., P&N, Inc./Thermodyn*

Mechanical Contractors, Inc., ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996)(finding that Respondents failed to take steps to come into compliance with DBA obligations and statutory responsibilities after having been warned of its misclassifying and underpaying employees); *Pythagoras General Contracting Corp.*, 2005-DBA-14 (ALJ, June 4, 2008)(finding that misclassifications, even after meeting with the Wage and Hour investigator, indicated an intent to evade the prevailing wage requirements under the DBA).

The Administrator also argued that Respondents are all experienced contractors who have been working on DBA contracts since the early 1980s and are aware of the requirement to segregate and record different classifications of labor, so the failure to properly classify rebar work, carpentry, and cement finishing should be enough to show a willful violation of the DBA, or at least gross negligence. I agree. The Respondents should have been aware of the requirements of the DBA after years of having completed prevailing wage contracts under the Act; yet, they failed to ensure that their employees' labor was properly classified under the law. Respondents argue that although the individual time cards did not contain descriptions and classifications of work, Mr. Stratton worked with Mr. Madsen and Ms. Lee to add those classifications during the payroll process in an attempt to make sure that Respondents were paid according to the work that they had done. TR at 671-72. This type of post-hoc reverse classification does not satisfy the requirements of the DBA and is an inadequate substitute for the timekeeping required to adequately compensate workers. It is not credible that Mr. Stratton was aware of what type of work each worker did on any given day during the contract, such that he could recount that information to Mr. Madsen and Ms. Lee for payroll, which was done off the worksite and back in Hurricane, Utah. As Respondents have admitted, the phase codes were used primarily for tracking the cost of the Willow Beach project, and are not the same as wage classifications, which are used to ensure that workers are paid appropriately for their labor. The phase codes may be helpful in creating a general reconstruction of an employee's daily activities, but the DBA tasks employers with recording work classifications as they occur, not guessing at this information after the fact. Moreover, this system likely introduced errors through use of incorrect phase codes or misclassification on Mr. Stratton's part during the payroll process.

Further, the violations were widespread across every category of work performed on the job. A cursory reading of the wage determination, as argued by the Administrator, would have demonstrated that there were multiple classifications within a category of work, for example concrete work and concrete finishing, and that "cement form work" is considered carpentry. The company classified experienced workers as general laborers, and there were no journeyman level workers on such a massive project, which was a red flag to the investigators. The company did not use an ironworker classification for those who tied the significant amount of rebar, even though it argued that it had never done so before. The company disregarded its obligations to its workers to compensate them appropriately under the contract, and a number of workers established that they were not informed that the Willow Beach project was a prevailing wage job. Finally, the evidence during the course of the investigation shows that the company and the corporate officers had knowledge of the violations. Rather than immediately try to provide information to the investigator to show his conclusions were incorrect or that in fact the company had appropriate documentation, the company took a lackadaisical approach to the investigation and did not provide even basic justification for its recordkeeping, including providing the timecards of the workers until the hearing.

Given that Respondents are veteran DBA contractors and were familiar with the classification requirements under the Act, I find that these inadequate procedures and the record as a whole rise to the type of gross negligence that constitutes a willful violation of the DBA. The conduct of Interstate Rock Products, Inc., and Donald Stratton, Craig Stratton, and Michael Madsen individually warrant a three year debarment under the DBA. 29 C.F.R § 5.12(a)(2)-(d)(1).

The Administrator also argues that Respondents knowingly violated the CWHSSA when their supervisors told employees to “bank” their overtime hours rather than paying these employees the time-and-a-half wages. Employees testified to instances where their time cards appeared to have been falsified to reflect a 40-hour work week and to erase any overtime hours. The employees, Mr. Stratton, and Mr. Madsen testified that company leadership were not aware of this practice, and that it was being approved on an immediate supervisor level, primarily by supervisor Brady Holt. TR at 350, 389-90, 409, 431-33, 577-78. When Respondents were first alerted to this practice at the final conference in which Mr. Fiorello shared his findings, they undertook their own investigation to determine whether this practice was indeed happening; Respondents followed up by holding a meeting with all supervisors to immediately stop this practice, and altered the format of their time cards to ensure that it accounted for all hours worked that week. TR at 578-82. Again, I find this evidence inherently incredible. If Mr. Stratton was familiar with the work done on the jobsite sufficient to instruct Mr. Madsen and Ms. Lee for payroll, then it is not credible that he was unaware that workers were banking hours so they could leave early and beat traffic. I find that purposeful altering of time card documents to eliminate the record of overtime hours and Respondents’ reluctance to keep a record of these “banked” hours all reflect the knowing nature of this CWHSSA violation. *See, e.g.*, TR at 341. Here, I find that Respondents actions, committed by a select number of supervisors, rise to the level of a willful violation of the Related Acts, and warrants debarment. *See, e.g., Hugo Reforestation, Inc.*, ARB Case No. 99-103, 1997-SCA-20 (ARB, Apr. 30, 2001)(holding that debarment was warranted for failure to pay overtime compensation where respondents falsified payroll documents to simulate compliance and conceal violations). Respondents are responsible for the actions of their supervisors, and have a duty to educate their employees – at all levels – regarding appropriate wage and overtime practices. The conduct of Interstate Rock Products, Inc., and Donald Stratton, Craig Stratton, and Michael Madsen individually warrant established an aggravated and willful violation and also showed gross negligence under the CWHSSA.

Thus, I find that the conduct of Interstate Rock Products, Inc., and Donald Stratton, Craig Stratton, and Michael Madsen individually warrant a three year debarment under the under the CWHSSA. 29 C.F.R. § 5.12(a)(1). The debarment shall run concurrently with the DBA debarment. Respondents may petition to be removed from the CWHSSA debarment after six months. 29 C.F.R. § 5.12(c).

ORDER

1. Interstate Rock Products, Inc. violated the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act as alleged by the Administrator.

2. Interstate Rock Products, Inc. shall pay the amount of \$425,204.43 in back wages to its workers as determined by the Administrator and reduced by this Decision and Order.

3. The amount of \$473,742.49 that is being withheld by the U.S. Department of Interior, National Park Service shall be released to the Administrator to satisfy the back wage determination. Any excess funds withheld shall be returned to Interstate Rock Products, Inc.

4. Interstate Rock Products, Inc., and Donald Stratton, Craig Stratton, and Michael Madsen individually are hereby debarred for a period of three years under both the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act. The debarments shall run concurrently.

RICHARD M. CLARK
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.