

U.S. Department of Labor

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

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



Issue Date: 19 October 2017

Case Number: 2015-DBA-00014

In the Matter of:

Disputes concerning the payment of prevailing wage rates, fringe benefits, and overtime pay by:

WHITING-TURNER/WALSH JOINT VENTURE,
Prime Contractor,

INTERIOR SPECIALIST, INC.,
1st-Tier Subcontractor,

ASBESTOS SPECIALIST, INC.,
2nd-Tier Subcontractor,

With respect to laborers and mechanics employed
By WMS Solutions, LLC, a staffing company hired by
2nd Tier Subcontractor Asbestos Specialist, Inc.
On Contract GS-11P-10MKC-0025, The Asbestos
Abatement Project at General Services Administration
Headquarters Building, Washington D.C.

and

Proposed debarment for labor standards violations by:

ASBESTOS SPECIALIST, INC.,
2nd-Tier Subcontractor,

SAMUEL CHAIRS, III,
President and,

TIMOTHY J. CHAIRS,
Vice-President

With respect to laborers and mechanics employed
by WMS solutions, LLC, a staffing company hired
by 2nd Tier Subcontractor Asbestos Specialists, Inc.
on the above project.

APPEARANCES:

John A. Nocito, Esq.,
United States Department of Labor
For the Administrator

Ronald W. Taylor, Esq.,
Venable LLP
For the Respondent, Whiting-Turner/Walsh Joint Venture

Mark E. Baker, Esq.,
Baker Law PLC
For the Respondent, Interior Specialists Inc.

Eric Hemmindinger, Esq.,
Shawn Rosenthal LLP
For the Respondents, Asbestos Specialists, Inc., Samuel W. Chairs, III., Timothy
J. Chairs.

BEFORE: LARRY S. MERCK
Administrative Law Judge

DECISION AND ORDER

This proceeding was initiated by the issuance of an Order of Reference, dated February 24, 2014, by the Administrator, Wage and Hour Division, United States Department of Labor (“Administrator”), asserting the failure to pay prevailing wage rates, fringe benefits, and overtime compensation and improper worker classification by prime contractor Whiting-Turner/Walsh Joint Venture (“WTW”); first-tier subcontractor Interior Specialists, Inc. (“ISI”); second-tier subcontractor Asbestos Specialists, Inc. (“ASI”); and Samuel Chairs, III and Timothy J. Chairs (“Respondents”). The Order of Reference alleges that Respondents disregarded their obligations to their employees under the Davis-Bacon Act (“DBA”) and Davis-Bacon Related Acts (“DBRA” or “the Act”), 40 U.S.C. 276(a) *et seq.*, and committed violations of the labor standard provisions of the Contract Work Hours and Safety Standards Act (“CWHSSA”), 40 U.S.C. 327 *et seq.*, during an asbestos abatement project at the General Services Administration Headquarters Building in Washington, D.C.

Procedural History

On April 12, 2010, WTW entered into a contract with the U.S. General Services Administration (“GSA”) for construction services for the “modernization” of the GSA building

at 1800 F Street NW in Washington, D.C. JX¹ 1. On December 9, 2010, WTW entered into a first tier subcontract with ISI for the performance of certain portions of the project's demolition work. (JX 3). Part of this demolition work included demolition and abatement of asbestos-containing materials. On March 4, 2011, ISI entered into a second tier subcontract with ASI for the performance of the asbestos abatement portion of the project. JX 4. ASI's employees acted as supervisors and oversaw the asbestos abatement work. The general asbestos laborers were supplied by a staffing company, WMS Solutions, LLC ("WMS"). Samuel Chairs, III is part-owner and president of ASI. Timothy Chairs, Samuel Chairs' brother, is also a part-owner of ASI, and is the company's vice president.

The U.S. Department of Labor, Wage and Hour Division ("WHD"), conducted an investigation into ASI's compliance with the DBA. On January 15, 2015, the Regional Administrator ("Administrator") sent letters to ASI, ISI, WTW, Samuel Chairs, and Timothy Chairs informing them of the investigative findings.² The Administrator concluded that WMS, ISI, and ASI: (1) failed to pay workers the proper wage rates; (2) failed to pay workers their proper fringe benefits; (3) maintained incomplete records; (4) failed to maintain basic payroll records; and (5) "[f]ailed to pay proper overtime rates to 127 employees for the period of 28-Feb-2011 through 26-Feb-2012, despite submission of certified payroll statements that wages and benefits were paid for all hours worked." *See* RX 1. Regarding the failure to pay proper wage rates and fringe benefits, the Administrator specified that:

. . . site employees were misclassified as Common/General Laborers. WMS employees actually performed Skilled Laborer work approximately 70% of each workweek during the period of review; and workers were engaged in Common General Laborer activity the remaining 30% of each workweek during the period of review.

*Id.*³ The Administrator computed back wages owed to 127 employees as \$640,693.74, for which WMS, ISI, and ASI have yet to make restitution. *Id.* The Administrator further advised ASI that it found reasonable cause to believe that they had disregarded obligations to employees pursuant to 29 C.F.R. § 5.12(a)(2) of the DBA Regulations, and as such, faced a debarment action. Specifically, the Administrator seeks debarment of ASI, Sam Chairs, and Tim Chairs, for a period of three years, for disregarding their obligations owed to employees. The letters informed

¹ In this Decision and Order, "JX" refers to Joint Exhibits, "RX" refers to Respondents' Exhibits, "AX" refers to Administrator's Exhibits, and "TR" refers to the transcript of the formal hearing.

² The Administrator's letter to Samuel Chairs, ASI's President and part-owner, was included in the Respondents' Exhibits as RX 11. The remaining letters were forwarded to this Office and are contained in the case file.

³ I note that the January 15, 2015 Administrator's letters supersede earlier April 16, 2013 letters which stated:

Violations occurred when site employees were misclassified as Common/General Laborers. WMS employees actually performed Asbestos Worker: Hazardous Materials Handler work approximately 60% of each workweek during the period of review; and workers were engaged in Skilled Laborer activity the remaining 40% of each workweek.

RX 10. This initial letter included a back wage computation of \$853,499.22 for 127 workers. *Id.*

the Respondents of their right to request a hearing before the Office of Administrative Law Judges (“OALJ”). *Id.*

On February 2, 2015, Respondent ASI requested a formal hearing before the OALJ. On February 11, 2015, Respondent ISI also requested a hearing before the OALJ. And finally, on February 12, 2015, WTW requested a hearing before the OALJ. The OALJ received an Order of Reference in this case from the Wage and Hour Division on March 2, 2015.

I held a hearing in this case in Washington, D.C. from January 12, 2016 through January 15, 2016, and then continuing on February 24, 2016 through February 25, 2016.⁴ At the hearing, the following exhibits were admitted: Joint Exhibits 1-15 (TR at 9-10); DOL Exhibits 1-2 (TR at 590-95); DOL Exhibits 5-7 (TR at 337-40); Respondent ASI’s Exhibits 1A (TR at 407); ASI Exhibit 3A (TR at 486); ASI Exhibits 5-11 (TR at 608-39, 909-10); ASI Exhibits 13-16 (TR at 833, 756, 630-31); ASI Exhibit 23 (TR at 916); and ASI Exhibits 25-32 (TR at 534-36, 679, 684, 924, 930, 669, 758-59). DOL Exhibits 8 and 9 were offered for identification only. TR at 743, 803. Counsel for the Government objected to Respondent’s Exhibits 2 and 24; I marked these exhibits for identification, and provided the Government 30 days post-hearing to brief its objections. TR at 897-98; 917-19.⁵

⁴ Counsel for ASI objected to the fact that the Government did not disclose the names of its witnesses prior to the hearing, claiming informant’s privilege. At the hearing, I ruled that the informant’s privilege was applicable and did not require the Government to release the names of its witnesses prior to the hearing. Counsel for ISI pointed out that the Government provided a list of 127 potential witness names that had not been narrowed down. I ruled that the Government, if possible, should provide the names of its witnesses and that I would also provide all parties the time necessary to prepare any cross-examination of witnesses. TR at 11-14.

⁵ On March 24, 2016, the Government filed its objections to ASI Exhibits 2, a breakdown of ceiling work invoice amounts, and Exhibit 24, a weekly breakdown of total straight time and overtime hours worked by WMS workers. The Government argues that Exhibit 2 is summary evidence that should not be admitted because it does not comply with 29 C.F.R. § 18.1006. Section 18.1006 provides:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined at the hearing may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The judge may order that they be produced at the hearing.

The Government argues that the records summarized are not voluminous, and the originals of the underlying records were not made available for inspection, rendering Exhibit 2 inadmissible. The Respondents did present a set of supporting documents, which Respondents argue are a complete and accurate set of originals. I will consider the underlying documentation provided by Respondents in determining how much weight Exhibit 2 deserves, but I will not exclude this evidence. Therefore, Exhibit 2 is admitted.

Likewise, the Government argues that Exhibit 24 is a summary of records that is inadmissible because the underlying records were admitted in Joint Exhibit 5. The Government argues that Joint Exhibit 5 is “more probative on the point for which Exhibit 24 is being offered.” As such, the Government argues that Exhibit 24 is inadmissible as cumulative evidence pursuant to 29 C.F.R. § 18.403. Section 18.403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of issues, or misleading the judge as trier of fact, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ISSUES

1. Whether the Respondents misclassified the employees in question as Common/General Laborers and paid an incorrect prevailing wage rate;
2. Whether the Respondents failed to pay employees time and one-half of the appropriate wage determination rate for all work in excess of 40 hours in the work week;
3. If the employees were misclassified, what percentage of the employees' work belongs in the Skilled Labor wage rate classification;⁶
4. Whether Respondent ASI failed to maintain and submit complete and accurate payroll records; and
5. Whether the actions of Respondent ASI, its President Samuel Chairs, III, and/or its Vice President Timothy J. Chairs warrant the requested relief of debarment for three years, pursuant to 29 C.F.R. § 5.12(a).

TR at 19-22.

STIPULATIONS

The parties stipulate, and I so find:

1. The United States General Services Administration ("GSA") entered into a contract in 2010, Contract No. GS-11P-10-MKC-0025, with WTW for the modernization of the GSA headquarters building located at 1800 F Street NW, Washington, D.C. 20005. Joint Exhibit 1 is a true and accurate copy of Contract No. GS-11P-10-MKC-0025.
2. WTW entered into a written subcontract with ISI for interior demolition work to be performed at the GSA headquarters. Joint Exhibit 3 is a true and accurate copy of such contract between WTW and ISI.
3. ISI entered into a written subcontract with ASI for asbestos abatement work to be performed at the GSA headquarters. Joint Exhibit 4 is a true and accurate copy of such contract between ISI and ASI.
4. Asbestos abatement work performed at the GSA headquarters pursuant to the provisions of Contract No. GS-11P-10-MKC-0025 between GSA and WTW (JX 1), and its respective subcontracts (JX 3; JX 4), was subject to the prevailing wage, fringe benefit

Based on the above standard, and after consideration of the Government's arguments, I find that Exhibit 24 is admissible. Recognizing that Exhibit 24 is summary evidence, I will determine the weight it deserves in reaching my conclusions, but I will not exclude it. Therefore, Exhibit 24 is admitted.

⁶ At the hearing, this issue was stated as "the amount of underpayments due the WMS employees" and "the amount of overtime compensation due the WMS employees." TR at 20. In order to address the amount of any underpayments, a determination must be made as to the percentage of time spent working in one or more wage rate classifications.

and recordkeeping requirements of the Davis-Bacon Act, American Recovery and Reinvestment Act of 2009, Contract Work Hours and Safety Standards Act, and 29 C.F.R. § 5.5(a)(1).

5. The Wage Determination DC20100004, issued March 12, 2010, was the applicable wage determination to Contract No. GS-11P-10-MKC-0025 (JX 1) and the respective subcontracts (JX 3; JX 4). Joint Exhibit 2 is a true and accurate copy of the Wage Determination DC20100004.
6. Respondents classified WMS employees performing asbestos removal work during the relevant time period at the GSA headquarters covered under the Contract No. GS-11P-10-MKC-0025 as “**Laborer: Common or General**” and paid their workers performing in this classification at the rate of \$15.84 per hour (fringes included).
7. The President and Vice-President of ASI are Samuel Chairs, III, and Timothy J. Chairs, respectively; they have held such positions since ASI’s inception.

JX 16.⁷

Summary of Testimonial Evidence

Samuel W. Chairs, III (TR 49-105; 893-955)

Samuel W. Chairs, III testified that he is currently the President of Asbestos Specialists, Inc. (“ASI”), as well as the corporation’s founder. TR at 50. He testified that ASI has been in business for approximately thirty years, and he has been the company’s president since its inception. *Id.* at 51. The company was incorporated in Maryland and licensed in Washington, D.C., Virginia, Maryland, Pennsylvania, and Florida. *Id.* at 51-52. Its home office location is in Baltimore, Maryland, and its primary market is the Baltimore-Washington corridor. *Id.* at 52. Mr. Chairs agreed that part of his duty as president of the company is to ensure that ASI complies with the provisions of the Davis-Bacon Act. *Id.* at 54. Mr. Chairs’ brother, Timothy Chairs, is the company’s vice president. *Id.* at 932. Timothy Chairs has the authority to hire and fire workers, and direct the workforce. *Id.* at 952. He also does “estimating” for the company, and is involved with all aspects of the business operation. *Id.*

Mr. Chairs described the regular business of ASI as asbestos abatement and interior demolition work. *Id.* at 52. Approximately thirty to forty percent of ASI’s work is government-related, though not specifically federal government. Mr. Chairs estimated that twenty to twenty-five percent of its work over the past thirty years was federally funded. ASI currently employs forty to fifty employees, and in 2011, that number was the same or slightly less. *Id.*

Mr. Chairs testified that ASI’s business model is to use a temporary labor service for a lot of the labor on projects, and then ASI provides the shipping and receiving of materials and

⁷ The joint stipulations were signed by the parties at the hearing. *See* TR at 22-23. This was erroneously not admitted at the hearing. Accordingly, the joint stipulations document is admitted as Joint Exhibit 16.

supplies, and provides supervision and site foremen. *Id.* at 57. Typically, ASI uses Respondent WMS, a staffing agency, as its labor company. Mr. Chairs stated that a large portion of its workforce is technically under WMS's payroll, but under ASI's supervision. *Id.* at 58.

Mr. Chairs testified that the asbestos abatement project at the GSA headquarters was a large project that included between eight and ten floors, and encompassed 850,000 square feet. *Id.* at 56. When bidding on the project, labor costs were one of several factors considered when putting together the bid. *Id.* at 57. In formulating the bid, Mr. Chairs stated that ASI would look at the wage determination and decide what applied to their trade. *Id.* at 59. He considered the classification of asbestos worker for WMS employees, but that classification did not apply because the job entailed "removal from the mechanical systems which would not be replaced or scrapped." *Id.* at 60. Accordingly, ASI determined that the labor classification of common unskilled labor applied to WMS employees due to the nature of the job. *Id.* at 62.

ASI considered the classification of skilled labor, "[b]ut based on its description there [Wage Determination, JX 2], it seemed to be a lot more trade-related: concrete, road paving, structural demolition." *Id.* at 63. Therefore, they determined that the classification of skilled laborer did not apply. He did not confer with other contractors, union representatives, or the Department of Labor regarding the classification before submitting the bid. *Id.* at 64-65. Additionally, ASI employees, who were primarily supervisors or foremen, were classified as asbestos workers even though that classification was inapplicable to the work. *Id.* at 77. Mr. Chairs testified that it was his determination to classify the ASI employees as asbestos workers, but that the Department of Labor never challenged this classification. *Id.* at 78, 97.

During the course of the GSA project, approximately twenty-five ASI employees were employed at the worksite. *Id.* at 74. ASI supervisors assigned tasks, directed the work, and set the schedules of the WMS workers. *Id.* at 74-75. There were no WMS supervisors at the worksite. *Id.* at 74. The employees typically worked an eight- to ten-hour night shift from 6:00 p.m. until 2:30 a.m. or 3:00 a.m. *Id.* at 75. ASI supervisors kept track of the hours worked by WMS employees.

ASI supervisors also provided the tools to the WMS workers. *Id.* at 75. The WMS workers operated the following power tools to perform their asbestos work: sawzalls,⁸ chipping guns, power washers, vacuums, and airless sprayers. *Id.* at 76. Additionally, the WMS workers were certified asbestos workers who received thirty-two hours of training and an eight-hour refresher after the first year. *Id.* at 76. The supervisors received forty hours of training, with an eight-hour refresher after the first year, a 50-question test, and a 100-question test. *Id.*

⁸ The term "sawzall" was used a number of times at the hearing but was never fully defined by any of the witnesses. The undersigned hereby takes judicial notice of the following:

The term "sawzall" is a trademark of the Milwaukee Electric Tool Corporation for a "portable reciprocating power saw." See U.S. Patent and Trademark Office, *available at* http://tsdr.uspto.gov/#caseNumber=894551&caseSearchType=US_APPLICATION&caseType=DEFAULT&searchType=statusSearch.

Mr. Chairs stated that he was not aware that WMS employees had complained about their wage rates. *Id.* at 79. However, he was aware that a picket occurred:

When the labor organizers came down there and grabbed their people as they were going in, they started telling them that they weren't getting paid the right amount of wages and that they should strike or whatever. So they organized many meetings off site with the people and tried to get them to picket, I guess. But some people walked the picket line, but we never lost any hours of work.

Id. at 79. The wage rates were not changed as a result of the picket. *Id.* at 80. Mr. Chairs did not confer with Wage and Hour or contracting agencies after the picket. *Id.*

ASI began work on the GSA project in late 2010 or early 2011. *Id.* at 65-66. Mr. Chairs described the work that was performed on the project as follows:

We started, you know - - obviously, Whiting-Turner/Walsh would determine the schedule for where they wanted us to proceed. Interior Specialists would go in front of us and do pre-abatement demolition work. And then once it was turned over to us for abatement work, we would set up the enclosures, build our three-stage decons and our airlocks, put the work area under negative pressure, conduct abatement activities, conduct final cleaning, air samples and inspections by third-party people all the way through.

Before we start anything, the GSA had hired an industrial hygiene firm to inspect prior to starting. Then they would monitor while we were working and then approve an air sample when we were complete. Once completed, we remove the containment system and move to the next area.

Id. at 66. Mr. Chairs explained that a "three-stage decon"⁹ is a structure with three compartments with plastic "x-flap" doors – one for a clean room, one for a shower room, and one for workers to take off their suits when they return from the work area. *Id.* at 68. WMS employees likely built the three-stage decons, which involved tools such as saws, wood, poly, glue, staple guns, and screw guns. Mr. Chairs testified that it takes about fifteen minutes to build the frame, and an hour to construct the entire decon. *Id.* at 68-69. Approximately 30 decons would be built for a year-long project. *Id.* at 69. All demolition performed during the GSA project was non-structural, which means ASI did not remove any load-bearing structures. *Id.* at 94.

ASI also removed plaster from walls, using sledgehammers to knock down the walls, and then picking up the components by hand. *Id.* at 70. Chipping guns were used to remove asbestos from ceilings. *Id.* at 71. Asbestos was removed from floors with "tile poppers," which are five-foot steel bars with eight-inch wide blades on the bottom that removes the tiles. *Id.* at 72. ASI also removed asbestos from mechanical systems, typically using "wet methods" with a razor knife to cut the insulation off of it. A "wet method" is when you mist or wet the material to

⁹ The word "decon" was used a number of times by the witnesses who testified at the hearing. As clarification, in this Decision and Order, "decon" refers to the "decontamination chamber" constructed by the workers, as described by Mr. Chairs and others.

minimize the amount of airborne asbestos. *Id.* at 72-73. Although the skilled worker classification references power tool operators, Mr. Chairs stated that he did not consider this to apply to the work that the WMS workers performed for ASI because “we figured that most of the trades that are referenced here are heavier equipment than the small air tool that we use.” *Id.* at 94-95. Mr. Chairs testified that there is no skill involved in the tools that WMS employees used, and the workers did not build anything besides the containment. *Id.* at 95. The rest of the work that the employees perform is demolition and abatement. Mr. Chairs also stated that the electric chipping gun pictured in DOL Exhibit 6 would not be practical for demolishing walls, because it would blow a hole in the wall rather than knocking it down. DOL 6; TR at 894. It is necessary to keep the asbestos in large pieces, and so it makes more sense to knock down walls into manageable larger sections to dispose of using what is known as “Gaylord boxes.” TR at 894-95.

Mr. Chairs testified regarding the method of paying ASI and WMS workers. *Id.* at 81. Will Riggs, an ASI supervisor, tracked the hours worked by the WMS workers. Mr. Riggs turned in the hours to Sean Roscoe, the director of operations, who entered the information into ASI’s computer and emailed it to ASI’s controller, Todd Chairs (Mr. Chairs’ brother). Todd Chairs would then forward the information on the hours worked to WMS, which in turn generated the invoices with the hours provided, plus a markup for the WMS company. *Id.* at 82. Any hours over forty hours per week were paid at time and a half. *Id.* at 96.

A change order is a request for work that was not included in the initial bid. *Id.* at 97-98. Approximately thirty-five to forty percent of the project was work performed on change orders. *Id.* at 97. ASI submitted change orders to Interior Specialists and then to Whiting-Turner/Walsh, which processed, approved, or denied them. *Id.* at 98-99.

Mr. Chairs testified that ASI had past government-funded jobs with ISI, but that the GSA project was the first time that there had been a written contract with ISI. *Id.* at 84-86. It was not ASI’s practice to engage in written subcontracts with ISI prior to the GSA project. *Id.* at 86.

Mr. Chairs reviewed the wage determination for this job before the bid, and determined that the rate of common/unskilled labor would be the appropriate rate for the job. *Id.* at 931. The company filed certified payrolls for both ASI workers and WMS workers throughout the entire project. When change orders were made, the wage rates remained the same. The change orders would have been submitted to Interior Specialists, who ultimately would have sent them to Whiting-Turner/Walsh.

Steven Lanning (TR 106-133)

Steven Lanning testified that he is currently the Director of Organizing for the Laborers’ International Union of North America (“LiUNA”), Mid-Atlantic Regional Organizing Coalition (“MAROC”). TR at 106-07. LiUNA is a labor organization that seeks to organize workers primarily in the construction industry within the following industries: asbestos abatement, concrete, mason tending, roadwork, and tunnel work. *Id.* at 107. MAROC is an organizing arm of that labor organization which seeks to organize non-union workers into the union for most respected crafts. Mr. Lanning has worked for LiUNA since 1996, and has been the Director of

Organizing since January 2003. His duties are to supervise and oversee the other organizers on staff; to help guide strategies within the various organizing campaigns throughout the Mid-Atlantic region; to oversee tactics; to make sure that actions are conducted and carried out in a lawful manner; and to help train and educate workers about their rights and the need to organize. *Id.* at 107-108.

Mr. Lanning testified that LiUNA claims the right to perform several types of work, including asbestos abatement, concrete, road construction, and demolition, among others. *Id.* at 108. He is familiar with the GSA building project that took place in 2011. *Id.* at 109. Mr. Lanning testified that LiUNA had been attempting to organize a bid for the project with its signatory contractors. *Id.* However, LiUNA was unable to negotiate a project labor agreement for that project. *Id.* at 109

Mr. Lanning testified that he visited the GSA job site at least twenty times because part of his job is to monitor and talk to non-union workers in the construction industry, “particularly . . . construction laborers, to just ascertain conditions on the project, to make sure they’re receiving on federal projects[,] appropriate wage, safety conditions, and general levels of respect.” *Id.* at 110. During these visits, Mr. Lanning talked to both ASI and WMS workers to assess their feelings about the project, workplace issues, safety concerns, and wages. *Id.* at 110-111. The workers for ASI and WMS were not organized by the union, and Mr. Lanning testified that he was trying to organize them. *Id.* at 118. When he visited the GSA site to speak with the workers, he never went inside the containment area. *Id.* at 119. He agreed that the union had been making a push to increase its market share in the D.C. area. *Id.* at 120.

Mr. Lanning is familiar with labor classifications through his work over the past ten years. *Id.* at 115. He testified as to the labor classification for asbestos workers:

The union practice is that asbestos abatement work, because of the training, the certification required, the need to pass an exam, the need to be licensed as an asbestos abatement worker, the fact that asbestos is a known carcinogen and the safety conditions involved, and traditionally the tools used to abatement work, that it would be - - the power tools involved, that asbestos abatement should be classified as a skilled labor position.

Id. at 115. Mr. Lanning confirmed that it is union practice, in Washington, D.C., to consider asbestos abatement work, or a portion of it, as skilled labor. *Id.* He added that currently, asbestos abatement workers at St. Elizabeth’s campus, and several other government projects, are paid as skilled workers. *Id.* at 116. Further, union practice has not changed at all since 2011 with respect to asbestos abatement work and the skilled labor classification. *Id.* When asked if there are any circumstances under which the union practice is to consider asbestos abatement workers as common or general labor, Mr. Lanning stated:

No, but we do recognize that inside a containment area all asbestos abatement work should be skilled, but there is work performed inside the containment area which could be considered a common labor or unskilled labor task.

Id. at 116-17.

According to Mr. Lanning, the union defines common or unskilled labor as “performing menial and rudimentary tasks that require limited skill.” *Id.* at 121. Typically, the union allows for one hour in an eight-hour workday for unskilled labor tasks. However, Mr. Lanning agreed that this one hour of unskilled work could be characterized as a price concession “to give our contractors help to remain competitive” with non-union contractors. *Id.* at 120-21. He stated that on a Davis-Bacon Act project, non-union contractors should not have lower wages than union contractors, but on a non-Davis-Bacon Act project, non-union contractors can pay the minimum wage. *Id.* at 121.

With regard to tools, Mr. Lanning testified that LiUNA would consider a sawzall, chipping gun, air hammer, power washer, and vacuum to be power tools, but would not consider a sledgehammer, shovel, squeegee, or pry bar to be power tools, if they are manually operated by force of arms. *Id.* at 126, 130-131.

Ernest Ojito (TR 133-156)

Ernest Ojito testified that he currently is the International Representative and Business Manager of the Laborers’ International Union of North America (LiUNA). TR at 133. He worked for LiUNA for five years, and his job entails investigating worker complaints, organizing, and recruiting workers. In 2011, Mr. Ojito’s job title was Organizer. *Id.* at 134. As an Organizer, Mr. Ojito would do worker outreach, and assist workers with filing complaints to government agencies for discrimination, misclassification, abuse, or safety concerns.

Before he joined the Laborers’ Union, he worked with Respondent ASI and WMS as a licensed asbestos worker. He was licensed in 2010 in metropolitan D.C., Virginia, and Maryland. *Id.* at 134-35. He stated that he is familiar with the certification process for asbestos abatement, and described the process as follows:

. . . in order to be certified in asbestos, you must take an EPA-mandated 32-hour course. This is based on EPA’s Title 40. And what it is, is it’s a course. It’s half hands-on and half in-class training, so you learn theory and you learn practical application. You’re taught everything from how to get in and prepare the work area to how to remove and abate the asbestos.

You’re also taught about the different health risks with asbestos. You know, asbestos is a carcinogen, and if people are exposed to it, they can develop what’s called mesothelioma or asbestosis or lung cancer or stomach cancer or throat cancer from handling these materials, as well as other end-users in buildings who occupied buildings where the abatement is done. So they really go into the health risks and ways to handle the asbestos and ways to handle the fibers to make sure that people are not contaminated.

Id. at 135-36. Additionally, Mr. Ojito was taught how to identify different types of asbestos, what agencies to call if abatement was not done correctly, how to dispose of asbestos, and how

to prepare and take down the work area. *Id.* at 136-37. Regarding disposal of asbestos, Mr. Ojito testified that in class he learned:

So if you were - - let's say you were getting rid of some asbestos. You couldn't just put it in a bag and throw it out. You'd have to put it first in one bag, wet it down, seal that bag and put it in another bag. Then you want to gooseneck that bag, tape it around and make sure you got a good seal on that and then you want to tag it, tag it with a sticker. And then that bag then gets taken out of the containment and then taken and put into a truck. The truck's all wrapped in poly inside of the truck, and from there it goes to a secure hazardous waste disposal site.

Id. at 137. Everyone who handles asbestos must be certified; the class was fairly rigorous and heavily covered safety procedures. *Id.* at 138. Mr. Ojito described these procedures as follows:

Like they teach you about your personal protective equipment, how to use it and how to maintain it. They teach you about hygiene.

....

So you have to get a good seal. They teach you about fit testing. Fit testing is where they do the different ways to test to make sure the mask fits you properly because they don't want you to get - they really don't want you to get exposed. They also teach you about going to the fit testing.

They teach you the procedures, you know, when you come in, like putting poly on the ground. You have to put plastic down on the ground. You know, you want to put two sheets. The mil of the poly. You can't just put any plastic, it has to be six-mil.

Then they teach you different ways to remove it, like glove bags. One way to remove it is glove bags. So, like, you would see a pipe in a bag and you would stick your hands through this bag that has these gloves, kind of something out of a sci-fi movie, and you stick your hands in there and you want to remove the piece of the pipe and then seal it out without exposing the fibers to the air. Then, of course, like I said before, you want to bag that all up and wrap it and take it out, and the way I said before, taking it out to a secure truck to go [to] a hazardous material site. And every single bag is again tagged with a number so that they can trace back to where that hazardous material came from.

Id. at 139. During this certification class, Mr. Ojito also learned how to build containments by building a vacuum-sealed room and setting up a decontamination chamber. *Id.* at 140.

Mr. Ojito explained that the personal protective equipment ("PPE") required to perform asbestos abatement work included a respirator, a Tyvek suit with a hat over the hood of the suit, and either a half face or a full face mask at all times. *Id.* at 142, 144, 146. According to Mr.

Ojito, the work is “strenuous . . . it’s like a sauna suit, so you’re constantly hot and you’re sweating. I mean, it’s a plastic suit.” *Id.* at 144.

At the end of the certification course, the workers perform a mock containment, then remove mock asbestos and dispose of it. *Id.* at 146. The workers are given a test of 50-70 questions that they must pass to become certified. *Id.* at 146-47. After obtaining a license, every worker who wishes to continue in the industry must take an eight-hour refresher course annually, along with a physical examination. *Id.* at 147-48. He testified that he used the information he learned in class every day on the job. *Id.* at 151-52. The class did not teach him to use any power tools. *Id.* at 155.

Mr. Ojito worked for WMS for a year and a half, beginning in 2010. *Id.* at 148. He worked on demolition, asbestos, and lead projects. Mr. Ojito worked on several ASI projects while employed at WMS, including the Capitol Hill Power Plant, the Capitol tunnels, and several other jobs. On the Capitol Hill Power Plant job, Mr. Ojito performed heavy chipping of hazardous materials. *Id.* at 148-49. He used the following power tools on the job: reciprocating saws, pneumatic chipping guns, electric chipping guns, material lifts, hoists, scissor lifts, grinders, and electric sprayers. *Id.* at 151.

Brian McNeil (TR 156-224)¹⁰

Brian McNeil testified that he is currently unemployed, and last worked for a company called Matos Builders as an asbestos removal worker. TR at 157. He worked for Matos Builders for one and a half years, and generally performed asbestos abatement, lead abatement, and removal of mold, among other tasks. *Id.* at 157-58. Although he is not currently a licensed asbestos worker, he was licensed in asbestos abatement when he worked for Matos. *Id.* at 158. He has a twelfth grade education and a GED. *Id.* at 195.

Before he worked at Matos, Mr. McNeil worked for WMS Solutions for two and a half years, from 2010 to the end of 2012. *Id.* at 158. He performed asbestos abatement, lead abatement, mold remediation, and demolition. *Id.* at 159. He worked at the asbestos abatement project at the GSA building for eight months, from August to March. His supervisors were ASI employees David Authenreath, Mario Hernandez, Julio Barrera, and Will Riggs. *Id.* at 159-60. His first work was with ASI, and he testified that he was terminated from that job by the company for a confrontation between his supervisors and himself. *Id.* at 196.

When asked what his duties were on the GSA project, he testified: “most of the time we were setting up to start the job, you know, plastic the windows, the floor, set up the decon, get everything ready and have it inspected by our [Industrial Hygienist].” *Id.* at 160. Additionally, he performed asbestos removal and light demolition. He constructed four decons, and was involved in deconstructing them. To construct a decon, they used two-by-threes, screws, and the six-mil poly, duct tape, glue, a screw gun, and occasionally a circular saw or a sawzall. *Id.* at 161. At any given time, they might be removing asbestos from water piping in the walls, using pneumatic chipping guns to chip it off the ceiling, or removing floor tiles with asbestos. *Id.*

¹⁰ During this portion of the transcript, the Court reporter refers to Judge Merck as Judge Bell. This is an error; I presided over the entire proceeding.

Mr. McNeil would typically arrive at the GSA site between 5:00 pm and 6:00 pm, then go inside to sign in. *Id.* at 162. On Mondays, there would be a five- to ten-minute safety meeting, and they would receive instructions from ASI supervisors on what they would do that day. Following the meeting, Mr. McNeil would meet with whichever ASI supervisor he was working with, who would let him know which tools he needed. Then, Mr. McNeil would get his tools, go upstairs to the decon, and put on his safety gear. After that, he would begin work, which would depend on the instruction from the ASI supervisor. *Id.* at 164-65. It was typically half an hour between when he arrived at the site and when he started work. *Id.* at 176.

On a daily basis, Mr. McNeil would use various tools depending on the job at hand. *Id.* at 164. For cutting, he used sawzalls (which are electric) and tin snips. For floor tile work, he used scrapers, a mastic solvent, and buffers. Sawzalls require extreme precision and care because if used incorrectly, it could pulverize the asbestos, which is what the asbestos workers are trained not to do. *Id.* at 179. For walls or ceiling, he ran hoses to air compressors and used pneumatic or electric chipping guns. Mr. McNeil testified that he used a sprayer to spray the containment down to keep the asbestos fibers down. *Id.* at 172. Additionally, he would use a vacuum during cleanup. His protective gear included a hooded Tyvek suit¹¹, a respirator¹², safety glasses, and a hard hat, and gloves. *Id.* at 164, 166. Mr. McNeil testified that the chipping gun required accuracy so as not to break the terra cotta above the ceilings. *Id.* at 172.

Once assigned a floor, Mr. McNeil would go through a decontamination chamber and suit up. *Id.* at 167. Then, the workers would perform whatever task was assigned to them by their supervisor. Mr. McNeil testified that he would be on a ladder chipping the ceiling, or cleaning up, or removing the asbestos from the walls.

The asbestos was abated from the walls using a hammer, pneumatic chipping guns, or the electric chipping guns. *Id.* at 167. Mr. McNeil also removed asbestos from water pipes which were in the wall. *Id.* at 168. He did this by performing demolition on the section of the wall, removing the asbestos off of the pipes, and putting the asbestos into bags. Asbestos was also removed from the ceiling by using ladders and pneumatic chipping guns to chip the ceiling. *Id.* at 169. The workers had to be careful not to destroy the terra cotta above the ceiling. At least half of the 25-30 men on the crew would be chipping on a typical day (10 to 15 people). All of these workers would use chipping guns. The rest of the workers would be either cleaning up, or taking asbestos off of the walls, wall chases, or pipes. Finally, asbestos was removed from floors. The process differed depending on the type of floor. For instance, if the floor was tile and had “mastic” adhesive, the workers would have to use heavy razor scrapers to scrape up the floor tile, then use a solvent and electric buffer to clean up the adhesive on the floor. *Id.* at 169-70.

Cleanup started around 1:20 a.m., and involved filling up a Gaylord box with asbestos bags, covering the top of the box and sealing it so nothing could go in or out. *Id.* at 174. The workers would then clean the box and send it down the elevator. All of the asbestos is double bagged to keep the asbestos fibers from getting out.

¹¹ The Solicitor’s counsel stipulated that Mr. McNeil wore a Tyvek suit. (TR at 165).

¹² The Solicitor’s counsel also stipulated that Mr. McNeil wore a respirator in containment areas. (TR at 166).

Mr. McNeil testified regarding his training. *Id.* at 173. He received on-the-job training in the beginning, but all of his asbestos knowledge came from the asbestos courses he had to take. There are multiple courses – a two-day course for “visual,” a four-day course for workers, and a five-day course for supervisors. *Id.* at 183. Mr. McNeil obtained the supervisor asbestos license, which required a five day course of eight hour training sessions. *Id.* at 182-3. The first two days broadly covered the abatement process, how to do it, how to set up a decon, the containment, and what was required to set it up. *Id.* at 183-84. The following three days involved hands-on training where instructors showed Mr. McNeil how to build the decon, how to use the glove bags when necessary, how to set up containment, and how to use the respirators. *Id.* at 185. At the end of the course, there was a 100-question exam based on the course work. *Id.* at 186. Mr. McNeil passed his exam and received his asbestos license; if he had not passed, he could come back in two weeks and retake it. Additionally, the asbestos license must be re-certified once a year. *Id.* at 187. This required a physical and a refresher course. Mr. McNeil testified that he uses the knowledge that he learned in his course while performing his work. *Id.* at 188.

All of the workers at the project performed roughly the same work. *Id.* at 176. The supervisors, Mario and Julian, would perform the same work as the asbestos workers. *Id.* at 177. The amount of time spent using power tools varied from day to day depending on the work assignment. Mr. McNeil testified that some days he would use the chipping gun for seven and a half hours, but sometimes cleaning would take an extra half hour to hour, which would mean less time using power tools. He also testified that he would use a sawzall and occasionally he would use a floor buffer. *Id.* at 180-81. A floor buffer is very difficult to use because it is heavy, and the user can lose control of it easily if used incorrectly. *Id.* at 181. He did not use a chipper gun to establish containment, which would take several days. *Id.* at 202. Approximately half of his work was using a sledgehammer and other hand tools to demolish walls. *Id.* at 203. Ten to fifteen people at a time were typically on ladders using the chipping gun. *Id.* at 205. His work also included the taking down of the containment, and performing a final cleaning. *Id.* at 207-08.

Mr. McNeil was shown a power tool he identified as a compressor hose, which connects to a splitter connected to an air compressor located outside to power the tool. *Id.* at 190. Mr. McNeil testified that he used a similar tool on the GSA project for asbestos removal on walls when necessary, but that the one he used was lighter and “drastically” smaller. Additionally, Mr. McNeil was shown and identified a chipping gun. *Id.* at 193.

Mr. McNeil stated that he was supposed to be paid \$26.85 per hour for the asbestos removal, but that he did not receive that amount. *Id.* at 211. He was actually paid \$15.85 per hour. *Id.* at 217.

Alvaro José Tum Calo (TR at 268-393)

Mr. Tum Calo testified that he currently performs asbestos work and demolition. TR at 269. He worked for WMS doing asbestos work from 2010 to 2014. *Id.* To receive his certification over the years, he took classes and a physical examination or test. *Id.* at 269. In the classes, he learned about issues of protection of asbestos removal, and protective equipment. *Id.*

at 269-70. Mr. Tum Calo's protective equipment included a special suit that covers the whole body, a respirator, and gloves. *Id.* at 270.

He worked on the asbestos abatement project at the GSA building in Washington, D.C. in 2011, and was there for approximately 13 to 14 months. *Id.* at 270. His supervisors were Mario Hernandez, Cesar Rosa, Mario Sandoval, Brandon Bentley, Will Riggs, Eric Aurthenreath, and Julio Barrera. These supervisors were employed by ASI. *Id.* at 271. Mr. Tum Calo's job duties included asbestos reduction, demolition, scraping the ceiling with a chipping gun, and using a chipping hammer, a grinder, and a sawzall. He used the chipping gun to remove plaster from the ceilings and walls, and the sawzall to cut metal and wood. *Id.* at 272. There would be about five to seven people using chipping guns at one time, and approximately three or more additional people would be at the bottom of the latter picking up the debris. *Id.* at 286. The power washer was used to remove remaining plaster from the ceiling after removing most of it with the chipping tool. *Id.* at 273. He used an airless sprayer to spray water to keep areas moist, and used an electric pallet jack to move boxes. He also used a floor buffer to remove asbestos and glue that was stuck on the ground. *Id.* at 274. He also performed stripping work—stripping asbestos from the floors and walls. *Id.* at 275. Additionally, he used chemicals to loosen floor tiles, and a hand tool called a scraper to lift the tiles. *Id.* at 289.

Mr. Tum Calo's work also included demolishing walls using sledge hammers, bars, and scrapers. *Id.* at 284. Additionally, demolition involved significant amounts of cleaning work to dispose of the debris using shovels and hands. The number of people performing demolition and the number of people cleaning up the debris were approximately equal, although sometimes there would be more people cleaning than performing demolition. *Id.* at 284-85.

Mr. Tum Calo also built containment structures, which involved putting plastic on windows and any of the holes where air might escape. *Id.* at 281. Additionally, he would help to put in a decon that has three separate sections. In the first section, the workers would remove contaminated clothing; in the second section, the workers would clean themselves off; and in the third section, the workers would exit the site. There were many work areas or containments on the GSA job, and when the workers finished one area and moved on to another, the workers would build a new containment. *Id.* at 282. Setting up a containment would take two to three days. *Id.* at 283.

He performed cleaning-related tasks before leaving for the night. *Id.* at 276. During cleaning, he would use squeegees to clean shovels, and vacuum cleaners for the final clean; the vacuums were not like the kind a person would have at home, but they were used the same way. *Id.* at 287-88.

Mr. Tum Calo also testified regarding his schedule; his shift began at 6:00 p.m., he took one break from 11:00 p.m. to 11:30 p.m., and stopped work about ten minutes before 3:00 a.m. *Id.* at 275-76, 292. He was paid for nine hours per day. *Id.* at 292.

Mr. Tum Calo stated that the ASI supervisors did not perform work, and that they just observed the employees to ensure they did their jobs. *Id.* at 276-77.

Nery Hernandez (TR at 293-309)

Nery Hernandez testified that he currently works for a window installation company, but was employed by WMS Solutions in 2011 performing asbestos work. TR at 293-95. He worked at the asbestos abatement project at the GSA building at 1800 F Street in Washington, D.C. for approximately five to seven months. *Id.* at 294.

Mr. Hernandez is certified in asbestos abatement. *Id.* at 295. To become certified, he took a week-long course, during which he learned about asbestos dangers, clothing, cleaning up after asbestos, and security. The classes also included a hands-on portion where Mr. Hernandez performed in a mock asbestos situation, and had to put on the proper clothing and use his hands to pull out the asbestos. Additionally, there was a test of approximately one-hundred questions. *Id.* at 296.

Mr. Hernandez testified regarding the clothing he had to wear for the asbestos work, including a Tyvek suit, a hardhat, a respirator, and sometimes gloves. *Id.* at 296-97. The suits were hot, and caused him to be “soaked in sweat.” *Id.* at 303.

His supervisor at the GSA project was Mario, although Mr. Hernandez could not recall Mario’s last name. *Id.* at 297. Mario did not perform asbestos work.

Mr. Hernandez’s work at the GSA project included removing brick-like material from the ceiling, and from pipes, and removing some of the flooring that contained asbestos. *Id.* at 297. The workers had to remove everything that contained asbestos, then put it all together in boxes. He removed material from the ceiling by scraping it with an air hammer. *Id.* at 298. He removed asbestos from pipes by using a brush and knife to scrape it. He removed asbestos from flooring by first putting chemicals on the floor, and then removing the flooring and glue, using a hand tool called a scraper and an electrically-powered buffer. Other tools used on the job included electric vacuums and sawzalls. Sawzalls were used to cut ducts to remove them more easily. *Id.* at 299. He also used a pallet jack. Additionally, there was some asbestos bagging work, which involved putting the asbestos into bags and putting the bags in boxes. *Id.* at 301-02. There were several workers whose job it was to remove the boxes. *Id.* at 301. He also used a sledge hammer to bring down brick walls. *Id.* at 304-05. He also used a squeegee, shovels, and glue. *Id.* at 306. Cleaning up for the night took approximately one hour. *Id.* at 306-07.

Mr. Hernandez also testified regarding his work schedule. He worked approximately nine hours each day. *Id.* at 300. His shift started at 6:00 p.m. Mr. Hernandez testified that occasionally there would be boxes that had not been removed, and the first one to two hours would be spent removing the boxes before he could continue removing asbestos. Most of his day was spent on ladders performing chipping. If he was not chipping, he would remove boxes so that there would be more room to work. He was paid \$15.84 per hour for the GSA project work. *Id.* at 301. He did not receive any training on the job from WMS Solutions. His shift ended at dawn the next morning, but Mr. Hernandez could not recall an exact time. *Id.* at 302.

Mauro Rivas Gonzalez (TR at 309-324)

Mauro Rivas Gonzalez testified that he worked for WMS Solutions for about nine years, beginning around 2005. TR at 309. He worked at the asbestos abatement project in the GSA building beginning in 2011, for one year. *Id.* at 315. He holds an asbestos license, which he received after taking a one-week course. *Id.* at 310. The course covered the topic of which materials contain asbestos, how to remove asbestos, and included a fifty question test. *Id.* at 310, 313. He has to be recertified every year by attending a one-day class for eight hours, and taking a test. *Id.* at 313-14.

Mr. Gonzalez's supervisor was Julio Barrera, who worked for ASI. *Id.* at 315. Mr. Barrera did not perform asbestos work, but instead performed supervisor work. Mr. Gonzalez began his shift at 6:00 p.m. and worked for nine hours after that. *Id.* at 318. He was paid approximately \$15.84 per hour. *Id.* at 319.

Mr. Gonzalez wears protective equipment when performing asbestos work. *Id.* at 314. This includes a Tyvek suit, sometimes a hardhat, a respirator, sometime protective eyewear, protective gloves, and protective boots.

Mr. Gonzalez testified that his work at the GSA project included chipping walls and ceilings while standing on a ladder, and cutting pipes with a sawzall. *Id.* at 315-17. Approximately fifteen other employees also performed chipping. *Id.* at 316. He removed asbestos from floors with a shovel. He also sometimes had to "get an area ready," which involved putting plastic over windows and doors and covering air ducts. *Id.* at 318.

Miguel Lorenzo (TR at 324-357)

Miguel Lorenzo testified that he worked at WMS Solutions for nine months in 2011. TR at 325. He worked at the asbestos abatement project at 1800 F Street in Washington, D.C. *Id.* at 328. His supervisors—Julio Barrera, Mario Hernandez, Mario Sandoval, and David Authenreath, all worked for ASI. *Id.* at 329.

He is certified in asbestos work. *Id.* at 326. To receive the certification, he took a week-long course that covered protection, safety, and removal of asbestos. *Id.* at 326-27. At the end of the course was a test. *Id.* at 327. Mr. Lorenzo had to become recertified once a year, which involves a two-day course and a test of approximately 36 questions. *Id.* at 327-28.

Mr. Lorenzo testified that he wore a Tyvek suit, hard hat, respirator, protective glasses, protective gloves, and protective boots while he was working. His main job duties at the GSA site were chipping ceilings and removing plaster. *Id.* at 329. He removed plaster from the ceilings with an air chipping gun, which he used approximately 80 percent of the time. He removed floors with a hammer drill, which is electric. *Id.* at 330. He used a sawzall to cut ducts and pipes. He used a chipping hammer to demolish columns that were "very, very hard." *Id.* at 339. The last half hour to forty-five minutes before leaving was spent cleaning up the areas where he had worked. *Id.* at 332. He used a hammer to break a wall a couple of times. *Id.* at 344. He sometimes demolished walls, but only "a little bit." *Id.* at 347. He did not put up plastic, did not work on floor tiles, and did not put debris into boxes. *Id.* at 344-45, 347.

Mr. Lorenzo was paid \$15.84 per hour for the GSA job. *Id.* at 331. Currently, Mr. Lorenzo is working for a construction company. *Id.* at 342. He learned about this hearing from his friend Nery Hernandez. *Id.* at 348. He did not receive a letter or email or call from the Department of Labor. *Id.* at 348-49.

Porfirio Arias (TR at 357-380)

Porfirio Arias testified that he worked at WMS Solutions four years ago. TR at 357. He worked at the GSA building in Washington, D.C. performing asbestos abatement beginning in March of 2011 and continuing for six months. His supervisors were Eric Salminen and Mario Hernandez. *Id.* at 360. He was paid \$15.84 for his work at the GSA project. *Id.* at 366.

Mr. Arias is certified in asbestos abatement. *Id.* at 358. He obtained his license through WMS Solutions and Harold Ortega. He took a week-long class in 2009 to learn about the dangers of asbestos and how to remove asbestos. At the end of the class he took a test that consisted of twenty-five questions. *Id.* at 359.

Mr. Arias wore the following protective equipment while removing asbestos: a Tyvek suit, a hard hat, a respirator, protective eyewear, protective gloves, and protective boots. *Id.* at 359-60.

Mr. Arias testified that, at the GSA project, the first thing he would do would be to set up a containment area. *Id.* at 367. This was time consuming and involved sealing off the area with plastic. His main duties were demolishing walls, removing material from the ceiling using a chipping gun, and removing asbestos. *Id.* at 362. He would take out the heavy boxes with an electrical pallet jack and stack them in the elevator. *Id.* at 363. He used a sawzall to cut thick pipes, and two types of vacuums – one for dust and one to “suck in water.” Additionally, he used a hammer, sledge hammer, a cutter that was similar to scissors, and an electric sprayer. *Id.* at 363-64, 369. Employees collected debris from demolition and chipping using shovels. *Id.* at 369. Squeegees were used at the very end. He also helped to bag asbestos, place it in a box, and move it to the disposal area. *Id.* at 370.

Mr. Arias was asked about the decontamination chamber. *Id.* at 365. He stated that the workers would remove their dirty suits and go into the “clean room” where the shower and decon are located. *Id.* Mr. Arias would occasionally assist in setting up the decon. *Id.* He did not use power tools to construct the decon.

Mr. Arias worked eight hour shifts, beginning at 6:00 p.m. and lasting until 2:00 a.m. or 2:30 a.m. *Id.* at 364-65.

Before this case, Mr. Arias talked to someone with the laborer’s union who told him that the salary he was receiving was not right. *Id.* at 372. The laborer’s union representative did not discuss power tools. He is represented by a lawyer from the union. *Id.* at 377.

Erick Roberto Mancilla Gomez (TR at 389-420)

Erick Mancilla testified that he is currently employed with “Harold at WMS,” but works for ASI. TR at 390. He has worked for WMS for nine years, and primarily removes asbestos. He worked at the 1800 F Street GSA project in Washington, D.C. for about a year. *Id.* at 393. His supervisors were Eric Salminen, David Authenreath, Julio Barrera, Mario Hernandez, and Cesar Rosa. Mr. Mancilla was paid \$15.84 per hour.

Mr. Mancilla has been certified in asbestos abatement for nine years. *Id.* at 390. He received the license after attending a week-long class on how to remove asbestos, how to prepare the area for asbestos removal, and how to enter the site with protection to avoid contamination. *Id.* at 390-91. He took a test to receive his license, and now must take a yearly recertification test. *Id.* at 392.

Mr. Mancilla’s shift was from 6:00 p.m. to 3:00 a.m. *Id.* at 395. He typically stopped removing asbestos an hour before 3:00 a.m. so that he could clean up and take out boxes. *Id.* at 395-96. The boxes were removed from the area using a pallet jack, and then other employees would take the boxes out on a lift. *Id.* at 396. His protective gear included a Tyvek suit, protective eye wear, a hard hat, and protective boots. *Id.* at 391.

Mr. Mancilla’s duties at the GSA project included asbestos removal from the ceilings, walls, floors, and plaster columns. *Id.* at 394. He would use a small air chipping gun to remove asbestos from the ceiling while standing on a ladder. He used the chipping gun on the walls, and used a scraper to remove asbestos from the floor. *Id.* at 394-95. Additionally, he used a buffer to take off “mastic” from the floors. *Id.* at 395. He testified that he worked approximately 80 percent of the time using a chipping gun to remove asbestos and the rest of the time preparing the area. *Id.* at 396. He used a sawzall for cutting ducts or pipes; and an electrically-powered sprayer to contain the dust. *Id.* at 396-97. In the approximately twenty percent of the time that Mr. Mancilla was not removing asbestos, his work included building containments. *Id.* at 399. Each work area had its own containment. *Id.* at 401. Putting up the containment took approximately two to three hours. *Id.* at 401-402. He never used a sledgehammer, a shovel, a squeegee, or a crowbar. *Id.* at 402-03. He used a knife to cut plastic. *Id.* at 403. While approximately twelve employees at a time were performing removal with chipping guns, the rest of the workers would be cutting with a sawzall, or breaking down walls with the chipping gun. *Id.* at 405.

Mr. Mancilla stated that he did not speak to anyone about his testimony before the hearing. *Id.* at 405. He is represented by a lawyer from the union. *Id.* at 406. He did not receive a witness fee. *Id.* at 410.

Wilfredo Hernandez (TR at 420-438)

Wilfredo Hernandez testified that he currently works in construction, but was formerly employed by WMS Solutions between 2011 and 2012. TR at 420-21. He worked at the asbestos abatement project at the GSA building at 1800 F Street in Washington D.C. from June of 2011 through March of 2012. *Id.* at 421, 423. His supervisors were David Authenreath, Mario Churas,

and Julio Barrera. *Id.* at 423. Mr. Hernandez was paid \$15.84 per hour. *Id.* at 427. His shift began at 6:00 p.m. and lasted until 2:00 p.m., and then he spent an additional hour cleaning. *Id.* at 428.

He obtained an asbestos certification after completing a one-week course, where he learned about how to remove asbestos and protection. *Id.* at 421. He also learned how to prepare the area for asbestos removal, and had to take a fifty question test. *Id.* at 422.

Mr. Hernandez's work clothing included a mask, respirator, Tyvek suit, gloves, construction shoes, and eyewear. *Id.* at 421.

Mr. Hernandez testified regarding his work at the GSA project. This included removing asbestos, chipping plaster, cutting frames of the doors with a sawzall, and moving boxes with a pallet jack. *Id.* at 423. He removed asbestos from the ceilings and walls with a chipper gun. *Id.* at 424. After removing the asbestos, he would pick it up and put it in boxes. *Id.* at 425. He would also sometimes remove asbestos from floors using a buffer. He testified that he spent 80 percent of his time performing chipping work. *Id.* at 425. The tools he used included a chipping gun, a sawzall, an electric chipping gun, a sprayer, a sledgehammer, an iron bar, scissors, knives, and shovels. *Id.* at 426, 432. He worked on seven different floors at the GSA project. *Id.* at 430. There was a separate containment for each floor, but Mr. Hernandez never helped to set up the containments. While using the chipping gun on the ceiling, he stood on a ladder. *Id.* at 432. The gun he used was approximately 5 to 6 pounds. *Id.* at 434. He also helped to remove tile from the floor with a crow bar, but this would only take approximately 15 to 20 minutes. *Id.* at 435.

The workers performed a full cleanup after all the work was done in an area. *Id.* at 436. During cleaning, Mr. Hernandez used a squeegee and towels. He boxed up materials and disposed of them. *Id.* at 437. The whole crew did not work on the cleanup. The supervisors would only pick two to four people to clean an area and then the rest of the people would move on to the next area to begin asbestos removal there.

Manuel Vega Dubon (TR at 438 – 464)

Manuel Vega Dubon testified that he is currently employed by WMS, and has worked for the company for six years. TR at 438. He worked at the asbestos abatement project at the GSA building in Washington, D.C., around 2012. *Id.* at 439. At first, Eric Salminen was his supervisor, and after Mr. Salminen left, Will Riggs took over. *Id.* at 441-42. Julio Barrera, Mario Hernandez, and Cesar Rosa were also his supervisors. Mr. Barrera, Mr. Rosa, and Mr. Hernandez removed asbestos as well, but not in the same way the employees did. *Id.* at 443. The supervisors ensured the crew was working. *Id.* at 444. Mr. Dubon was paid \$15.84 per hour. *Id.* at 447-48.

Mr. Dubon obtained a license in asbestos abatement by attending a course covering how to remove asbestos from pipes, ceilings, floors, and walls. *Id.* at 439. He also learned about protection equipment. *Id.* at 440. This included a Tyvek suit, a mask, goggles, and protective gloves. He also took a 50-question test regarding protection during asbestos removal. *Id.* at 441. He takes a yearly 8-hour refresher training for recertification.

Mr. Dubon testified that, at the GSA project, his shifts began at 6:00 p.m. and lasted until 3:00 a.m. *Id.* at 444. He received a thirty minute paid lunch break. *Id.* at 457. The first task he performed was to prepare the area by sealing it off. *Id.* at 444-45. After the area was prepared, he would remove asbestos all night. *Id.* at 445. Preparing an area took approximately three to five hours, and this was done about every week. After the asbestos was removed, the workers would pick it up and put it in boxes, seal the boxes, and take them outside with a pallet jack. *Id.* at 445-46. Other tools used to clean the asbestos included shovels, brooms, and a sprayer. *Id.* at 446. He also used a small chipping gun, or air hammer, on the ceilings, and a larger chipping gun on walls. *Id.* at 447.

Mr. Dubon testified that during morning meetings, the person who held the meetings would consistently emphasize safety, and also discussed the workers' pay:

He was the one that held the meeting. He was the one who every time emphasized safety. It was safety, safety, safety, safety, safety, all the time safety. And he said, you all are getting paid well, so you have to make sure that you always protect yourself. And we all went, "Well, what do you mean?" And he said, you're making such and such, and he said the amount. . . . He was the one who said 26.

Id. at 448-49. Mr. Dubon could not remember this person's name or who he worked for. *Id.* at 449.

Mr. Dubon had previously provided a statement to the Department of Labor prior to this hearing, which was provided to Respondent's counsel at the hearing. *Id.* at 444-446.¹³ Mr. Dubon confirmed that, consistent with his statement, he used sledge hammers, hammers, shovels, steel rods, scrapers, and cutters. *Id.* at 454-55. He testified that there could be about twelve workers in an area, and that four would use electric tools while the rest would "do other things." *Id.* at 455-56. He is unsure of how many hours he used electric tools. *Id.* at 456. In a big area, it can take up to a week to prepare it by closing it with plastic. If the workers are performing demolition, they do five hours of demo and four hours of cleanup, which involves bags, shovels, and boxes.

Walter Alvarado (TR at 465-488)

Walter Alvarado testified that he used to work for WMS. TR at 466. He worked for WMS for eight years from 2007 to 2015. His worked at the GSA project in Washington, D.C. *Id.* at 471. His shift lasted nine hours, from 7:00 p.m. to 3:00 a.m. He was paid \$15.84 per hour. *Id.* at 472.

Mr. Alvarado is certified in asbestos abatement. *Id.* at 466. He obtained his license after attending one week of classes, taking a medical exam, and taking a test. *Id.* at 467. During these classes, he learned "everything you do with asbestos, how you remove it, how you cover with plastic . . . how to protect yourself, to put on the suit [and] mask." Mr. Alvarado also testified that in addition to the suit, he wore a respirator, hard hat, protective gloves, protective glasses,

¹³ During the hearing, an issue arose as to the accuracy of the translation of this statement from Spanish to English, and there appeared to be a page missing from the Spanish version. TR at 462-64.

and boots. *Id.* at 467-68. He recertifies his license every year by taking a one-day course on asbestos removal and safety. *Id.*

At the GSA site, Mr. Alvarado began work on March 28, 2011. *Id.* at 469. His supervisor was Mario Hernandez. Mr. Alvarado worked with power tools to remove plaster from the ceiling, walls, and floor. These tools included a sawzall, a power hammer, a sprayer, and a pallet jack. *Id.* at 470. He used the sawzall to cut metal, the sprayer to settle dust, and the hammer to remove plaster from the walls. He also used a chipping gun to remove plaster from walls. He worked mainly with the chipping gun and the sprayer approximately 80 percent of the time. *Id.* at 472. He also helped to create the containments.

Mr. Alvarado was interviewed by the Department of Labor prior to this hearing, and he provided a statement in Spanish. *Id.* at 474.¹⁴ Mr. Alvarado confirmed that, according to the statement, he used tape, a knife, a manual stapler, and a hand hammer. *Id.* at 477-80. His previous statement was offered and admitted as Respondent's Exhibit 3A.

Luis Hernandez (TR at 489-511)

Luis Hernandez testified that he used to work for WMS Solutions. TR at 489. He worked for WMS in 2011, and performed asbestos abatement work at the GSA project in Washington, D.C. for six months. *Id.* at 489-90. His supervisors were Mario and an American named Eric. *Id.* at 493. Mr. Hernandez could not recall the supervisors' last names.

Mr. Hernandez obtained an asbestos certification by taking a four-day course, during which he learned how to remove asbestos. *Id.* at 490-91. He learned how to dispose of the asbestos properly, and how to take precautions against health hazards. *Id.* at 491. He learned about safety equipment including a full face mask, hat, gloves, and Tyvek suit. At the end of the course there was an oral and written exam, and a physical exam. *Id.* at 492.

Mr. Hernandez testified regarding his work at the GSA project:

Everything was done: the plaster from the ceiling, brushing, removing the floor; we would use a buffer to remove the mastic; everything was demolished [and] was put in boxes that were sealed and they also had plastic.

Id. at 493. He used a chipping hammer on plaster, a sprayer, and a sawzall. There were two types of chipping hammers. One was used for plaster and the other was used for concrete. *Id.* at 494. The chipping hammer for concrete had a handle and was air-powered; it weighed about fifteen to twenty-five pounds. The chipping hammer used for plaster was small, and was typically used while standing on a ladder. The sawzall is approximately a foot long with blades of varying size. *Id.* at 495. It weighed about ten pounds, and was used to cut ducts and pipes. *Id.* at 496. He used the sawzall about once or twice a day. *Id.* at 496-97. He used a buffer after the floor was

¹⁴ Again, the translation of this statement appeared to be inaccurate at the hearing, and there was a page missing from the Spanish version. The parties stipulated that a page was missing from the Spanish version of the statement, and that the English version is correct.

removed to get the mastic. *Id.* at 497. He also used a sledgehammer, a scraper, a pry bar, a knife, and wire cutters. *Id.* at 505-07.

Mr. Hernandez described a typical shift at the GSA site which was approximately nine hours, during the night. *Id.* at 501. The workers first had to check all of the plastic to ensure there were no asbestos leaks, “put out the hoses . . . for spraying; put the ladders and the scaffolds up in the work area.” *Id.* at 499. Everyone would set up their own scaffolding. He also helped to build decon chambers. *Id.* at 501. He spent about an hour and to an hour and a half at the end of his shift cleaning up, which involved bagging the asbestos and placing the bags in boxes. *Id.* at 508-09. Mr. Hernandez earned \$15.84 per hour.

Gustavo Lopez Hernandez (TR at 522-547)

Gustavo Lopez Hernandez testified that he used to work for WMS Solutions. TR at 523. He worked for WMS for seven years, ending in November of 2014. He worked at the asbestos abatement project at the GSA building located at 1800 F Street in Washington, D.C. beginning in March of 2011, for approximately a year. His supervisors were Mario Hernandez, Mario Sandoval, Will Riggs, Eric Salminen, Brandon Bently, Julio Barrera, and David Authenreath. *Id.* at 526.

Mr. Hernandez is certified in asbestos abatement removal. *Id.* at 523. He received his certification from a week-long training class where he learned how to remove asbestos, how to work with it, how to use the asbestos materials, and how to “be careful.” *Id.* at 523-24. His protective equipment includes a respirator, a hard hat, and protective gloves and boots. *Id.* at 524. He had to pass a hands-on and written test to receive his license initially, and he attends a one-day recertification class each year, including a test, to renew his license. *Id.* at 525-26.

At the GSA project, Mr. Hernandez performed asbestos removal work. *Id.* at 527. The workers would begin by covering everything with plastic to prepare the area. If an inspector approved the set-up, then the workers would go into the area with the equipment needed to remove it. *Id.* at 528. This included hand cutters, hammers, electric sawzall, and scissors. The workers including Mr. Hernandez removed asbestos from pipes, floors, walls, ceiling, and from inside the boiler room. To remove asbestos from pipes, the workers would use ladders and cutters and cutting wire and electric hammers. The air hammers were small machines that had a hose, were powered by air pressure, and weighed about five pounds. *Id.* at 528-29. Mr. Hernandez used scrapers and electric hammers to remove asbestos from the floors. *Id.* at 529. He removed asbestos from walls using air hammers and chipping tools, which were hammers with pressure. He also used a grinder to cut ducts when the metal was thick and the sawzall would not cut it. *Id.* at 532.

Mr. Hernandez’s shifts were nine hours, beginning at 6:00 p.m. and ending at 3:00 a.m. *Id.* at 532. He did not remove asbestos for the entire shift, because after removing the asbestos he would have to clean it up. *Id.* at 533. Sometimes he had meetings at work, and the supervisors would talk to the group of employees regarding safety. These meetings happened approximately twice a month. The supervisors checked on personnel to make sure they were working properly.

Id. at 534. Mr. Hernandez was paid \$15.84 per hour for his work at the GSA site. There were times during the day where one or two people would be picking up debris. *Id.* at 543.

Luis Fonseca (TR at 547-566)

Luis Fonseca testified that he worked for WMS from 2010 to 2014. TR at 548. In 2011, Mr. Fonseca worked at the GSA project in Washington, D.C. for about three or four months. *Id.* at 551. His supervisors were Eric Salminen, Julio Barrera, Mario Hernandez, and a supervisor named David. *Id.* at 551-52.

Mr. Fonseca is certified in asbestos abatement, and obtained the certification from a five-day training class. *Id.* at 548. During this class, he learned about asbestos removal, personal security, relationships between coworkers, and state laws and regulations regarding asbestos removal. *Id.* at 549. At the end of the class he took a test based on the class and the state regulations. *Id.* at 550. To keep his license, Mr. Fonseca attends an eight-hour refresher class that also requires a test. *Id.* at 551.

Mr. Fonseca's protective equipment included a Tyvek suit, a hard hat, protective eyewear, a respirator, protective gloves, and protective boots. *Id.* at 550.

Mr. Fonseca's work at the GSA project included removing asbestos from the ceiling with a chipping hammer, and also from the floor with an air hammer. *Id.* at 552, 554. When the removal was finished, they would pick up the debris and put it in boxes. *Id.* at 552-53. He removed asbestos from the walls with a chipping hammer that is different from the chipping hammer used on the ceiling. *Id.* at 554. Other tools used on this project included a sawzall, and a pallet jack. *Id.* at 556. He helped to prepare the area for asbestos work by covering everything with plastic and building the pressurized decon chambers. *Id.* at 558. He used a sledge hammer "very little," and did not see other employees using a sledge hammer for significant periods of time. *Id.* at 561-62.

Mr. Fonseca testified that his shift began at 6:00 p.m. *Id.* at 557. On a typical day he would sign in, and sometimes attend a meeting. Then the supervisor would tell him to go in, and he would put on his protective gear. The tools would be inside the area. *Id.* at 558. Mr. Fonseca did not build containments; they were already set up when he would arrive. *Id.* at 563. The shift lasted nine hours, ending at 3:30 a.m. *Id.* at 559. Before leaving work, he had to go through the containment area and decontaminate. He was paid \$15.84 per hour. *Id.* at 560. He did not participate in the final cleanup.

Aurelio Juarez (TR at 566-578)

Aurelio Juarez testified that he worked for WMS in 2011. TR at 567. He worked at the asbestos abatement project at the GSA building in Washington, D.C. in 2011. *Id.* at 568. His supervisor was named David. *Id.* at 569. He was paid \$15.84 per hour. *Id.* at 572.

Mr. Juarez is certified in asbestos abatement, and received his license after a one-week course and test. *Id.* at 567. His protective equipment includes a hard hat, a Tyvek suit, a mask, a respirator, protective glasses, and protective gloves and boots. *Id.* at 568.

At the GSA project, Mr. Juarez performed asbestos abatement and primarily used a chipper to perform his work. *Id.* at 569. Preparing an area for asbestos removal requires covering windows with plastic. *Id.* at 572. He would also use a saw to cut metal and ducts and then after the material came down, Mr. Juarez and other workers would throw it away in asbestos bags, which were placed in a box. *Id.* at 569-570.

Mr. Juarez's shift lasted nine hours, from 6:00 p.m. to 3:00 a.m. *Id.* at 570. Prior to the hearing, he was interviewed by someone from DOL. *Id.* at 575.

Bruce Dory (TR at 578-648)

Bruce Dory testified that he has worked for the U.S. Department of Labor, Wage and Hour Division for approximately 32 years. TR at 579. He has acted as Assistant District Director for the past seven years, beginning in 2009. He was a wage and hour investigator for approximately 25 years. In those twenty-five years, he conducted over one thousand investigations, about seventy to eighty percent involving government contracts. *Id.* at 580. His primary duties as Assistant District Director are supervising the work of investigators, as well as training and mentoring. *Id.* at 581. The investigation that resulted in the above-captioned case came out of the Baltimore district office. *Id.* at 582. Mr. Dory's office falls under the umbrella of the Baltimore District office. Mr. Dory assigned the investigators, who were Alan Renshe, Ed O'Brien, and Julie Martinez. *Id.* at 597.

His initial training when he was hired included a basic training course that lasted three weeks covering a variety of topics related to the Fair Labor Standards Act and other labor provisions. *Id.* at 579. He also received specific Davis-Bacon Act training in a second basic training class that he took after he had worked for the agency for two years. *Id.* at 580.

Mr. Dory generally described the Davis-Bacon Act Requirements:

The Davis-Bacon Act requires . . . contractors who are subject to that Act to pay at least the prevailing local wages for laborers and mechanics on any construction, federal construction contract site, a funded site or project.

Id. at 581-82. He explained that a wage determination "sets out various classifications for workers and their classification that also encompasses wages and fringes for laborers or mechanics working on federal [construction] jobs." *Id.* at 582. Additionally, the Contract, Work Hours and Safety Standards Act is an "overtime requirement for federal contracts, prime contracts that are procured for at least \$100,000, and it requires a contract to pay at least time and a half up to 40 hours per work – 40 hours of work." *Id.*

Mr. Dory's office computed the amount of underpayment of wages alleged to be due in this case. *Id.* at 483. Mr. Dory explained his general methodology for computing the back wages in this case:

General methodology is we take in - - we will investigate a federal job site, determine what the proper classification pursuant to a wage decision or the classification of the wage decision versus what the employees actually were paid, and we multiply or compute the difference if there's a deficiency.

Id. Next, Mr. Dory's office would determine what the applicable rate or classification should have been versus the workers' actual classification. *Id.* at 587. They would take that information and transcribe it into a Wage Computation and Transcription Sheet, or WH-55, which is a sheet determining the calculation of back wages to determine the amount of unpaid wages each worker is due. After this, Mr. Dory's office would take the difference of the rate of pay and multiply it times all of the hours worked on the project. *Id.* at 588.

Specifically, Mr. Dory's office determined the hours worked by the WMS employees in this case from their certified payroll records. *Id.* at 583. Federal contractors are required to maintain records of hours worked, classification, rates of pay, and any legal deductions for each laborer or mechanic performing work on the contract.

Mr. Dory was directed to look at Joint Exhibit 5, which contains certified payroll records for WMS employees for the GSA project in Washington, D.C. at 1800 F Street. *Id.* at 584-85. According to this document, the straight time rate of pay for each worker is \$15.84. *Id.* at 585. The workers are classified as "Laborer Common/General."

Classification and wage rates for a project are determined from a wage decision or the wage determination. *Id.* at 586. A wage determination or decision are specific wage rates, "and classification and wage rates that a contractor must comply with when they are working on any federal construction project." The classifications are determined "based on the type of work that the workers are performing pursuant to a wage determination." Mr. Dory was next directed to look at Joint Exhibit 2, which he identified as the wage determination for the 1800 F Street Project in Washington, D.C. *Id.* at 586.

Mr. Dory also identified DOL Exhibit 1 as a methodology of computation of back wages. *Id.* at 587. Mr. Dory explained that the difference in rate of pay between the skilled laborer rate and the WMS workers' rate resulted in a difference of \$9.63 per hour. *Id.* at 588, 592. Next, Mr. Dory explained that he multiplied the differential number by 70% based on a directive from Wage and Hour regional office. *Id.* at 588-89. The 70 percent represents the classification at a skilled laborer's rate. The final thirty percent is representative of the unskilled work or labor. *Id.* at 592.

Page 2 of Joint Exhibit 1 explains the methodology of computations, and the overall back wage deficiency. *Id.* at 589. Mr. Dory explained:

The WH-55 is prepared in any . . . and all cases where we find deficiencies. But more specifically, this case here we would input or enter the names of each affected employee. We would've taken all the straight time hours. We would've transcribed all the overtime hours, the rates of pay, or the rate of pay that was paid. We also would've indicated the deficiency on the WH-55, multiply that times all of the overtime – the minimum wage deficiencies and the overtime deficiencies, and we would have a total amount due for each employee per work week.

Id. at 589-90. This would include the amount due for both straight time and overtime. *Id.* at 590. Additionally, the WH-55 covers the period from February 28, 2011 to February 26, 2012. *Id.* at 593.

Mr. Dory was directed to examine DOL Exhibit 2. *Id.* at 593. He identified this exhibit as a Wage/Hour form, or WH-56, which is an Overall Summary of Unpaid Wages that is the total amount due per employee. The document's purpose is to summarize the findings of the totality of the investigation. The document is created by putting information from the WH-55 into the "Wizard system," which is used for creating back wage and other documents. The Wizard system generated this report. Mr. Dory described each entry of the WH-56. *Id.* at 594. The total amount of back wages due based on this WH-56 is \$640,693.95.

Mr. Dory noted that the steps he described for computations were what normally happens in an investigation, the standard operating procedure, and what would have happened in this investigation. *Id.* at 598. Mr. Dory supervised the investigation, and did not actually witness these steps happening first hand.

In this investigation, the investigators interviewed a number of workers at the site of 1800 F Street. *Id.* at 601. Mr. Dory was not sure how the interviewees were selected. The investigators did not witness the work being performed.

Mr. Dory was also shown Employer's Exhibit 10, which he identified as a charging letter. *Id.* at 607. He agreed that in the summary of violations, the Department of Labor took the position that 60 percent of the work in the job classification of asbestos worker – hazardous material handler, and 40 percent was in the category of skilled labor. *Id.* at 608. Skilled labor is a higher classification than hazardous material handler. *Id.* at 610. The fact that the workers used power tools and worked with asbestos contributed to the higher classification. *Id.* at 611. Mr. Dory was not consulted with respect to the issuance of the charging letter. *Id.* at 613.

A second charging letter (Employer's Exhibit 11) was also shown to Mr. Dory. *Id.* at 613. Mr. Dory was not involved in issuing this charging letter either. *Id.* at 614. The classification percentages on the new charging document reflects 70 percent "Labor: Skilled", and 30 percent Labor: Common/General. *Id.* at 615. Mr. Dory explained that although he was not a part of the decision made for the charging letter, he understood why this charging letter differs from the first letter:

A. Wage and Hour – and I can speak to Wage/Hour under the Baltimore District Office, strongly considered the contractor’s argument as it relates or pertains to a parenthetical in the wage decision that asbestos that [was] removed from – and I’m kind of paraphrasing – the mechanical systems were being replaced and scrapped.

Q. And you agree that on the job mechanical systems were scrapped?

A. I have knowledge they were scrapped.

Id. at 615. He reiterated that the 70 percent of work in the skilled labor classification is based on more than just power tool use:

Well, what other factors – and I have to agree with the approximation, the approximately 70 percent in the totality of all the evidence that we gathered and all the evidence that we have heard. You know, we had to also consider in the statements that there is an allowance for setup, which is minimal; set it up at the beginning of the workday, and towards the end of the workday, there is cleanup, which does take a little bit more time at the end as opposed to the beginning.

Now, with that being said, their testimony from various people who work on the project, this testimony from the union, the union that actually has an allowance, and they acknowledge that part of the work was – and a minimal part of the work is unskilled labor. But the preponderance of it is as a skilled labor[er].

Now, and if you take other – if you take into consideration that we have statements that – whether or not they give a percentage or not. I’ve heard 80 percent, and a significant amount of the work is done as a skilled labor, then our number is fairly generous. So in that respect, did we cut the Employer a break? Absolutely.

So if we wanted to act on the side of caution in a given allowance of a certain percentage, because I just – we just know that some of this work may be deemed to be unskilled labor.

Id. at 618-19.

Mr. Dory explained that he considered an electric air sprayer and a floor buffer as tools used in performance of skilled labor. *Id.* at 620-21. Mr. Dory also stated that a manual shovel without power is not generally used in the performance of skilled labor. *Id.* at 621. However, coming up with wage rates is not within Mr. Dory’s or his office’s purview. *Id.* at 623.

Shawn L. Morosko (TR at 699-726)

Shawn Morosko testified that he currently works for Asbestos Specialists, Inc. (“ASI”), and has been employed by the company for thirty-two years. TR at 670. He began working for

ASI after high school as a supervisor. *Id.* at 694. He is the Director of Operations, and reports directly to Sam Chairs. *Id.* at 670. Will Riggs and the other supervisors report directly to Mr. Morosko.

Mr. Morosko's main job responsibility is oversight of all of ASI's field operations. Specifically, "[o]nce the office is successful bidder on a job, [Mr. Morosko] would get a package that would show what the job would entail. From that point it would be my responsibility to schedule the job and oversee it until completion." *Id.* at 694. He would oversee multiple jobs at one time. In 2011, during the GSA project, his work shift lasted from 3:30 a.m. to 6:00 p.m. or 7:00 p.m. *Id.* at 695. Four to five hours of that shift was operations work, and the remainder of the time would be spent in the field visiting multiple sites. He was also involved in time collection, and would compile timesheets from supervisors into a spread sheet, which he would forward to the accounting department.

Mr. Morosko is also certified in asbestos abatement as a supervisor. *Id.* at 695-96. He passed a test after a week-long course in Maryland, and must recertify his license every year by attending an eight-hour refresher course. *Id.* at 696. He cannot enter a containment without this certification.

ASI had approximately 700 jobs in 2011. *Id.* at 697. Mr. Morosko was responsible for oversight of these jobs as well, but stated that it would be "impossible to visit 700 job sites." He visited approximately 300 of these sites over the course of 2011. *Id.* at 698. His first duty at a field site would be to meet with the supervisor, which at the GSA project was Will Riggs. He went over scheduling and production, manpower, and individual responsibilities for the laborers. *Id.* at 698-99. Mr. Morosko helped Mr. Riggs with the overall organization of the GSA site, but Mr. Riggs was responsible for supervising the WMS workers and the eight to ten other ASI supervisors. *Id.* at 699-700. The GSA project was ASI's largest job in 2011. *Id.* at 725.

With respect to the GSA project in Washington, D.C., Mr. Morosko's role was project management. *Id.* at 671. He visited the job site almost daily, and went inside the containment. The purpose of his visits was to coordinate the schedule and manpower, and to observe the work being performed. Specifically, he visited the GSA project four times a week at the beginning of the GSA shift, during which time he would meet with Mr. Riggs. *Id.* at 700. It was also Mr. Morosko's job to order the tools used at the site. *Id.* at 701. However, there was no document to track how many tools were at a worksite, and there was no reason to track how often workers were handling particular tools. *Id.* at 702. It would be Mr. Riggs's duty to document in inspection reports which tools were used on a particular night. *Id.* at 703. The daily reports were submitted to Whiting-Turner. *Id.* at 704-05. There is no document in existence that shows how often a particular employee handled a particular tool at the GSA site. *Id.* at 706. Mr. Morosko kept a list of how many tools were at the GSA site in his office, but stated that this list was probably "long gone." *Id.* at 708-09. He testified that he likely threw it out a year after the job ended. *Id.* at 709.

The overall scope of the GSA project was to remove asbestos-containing material from the plaster, mechanical systems, and flooring before turning the site over to other contractors. *Id.* at 671. The individual containments were approximately the size of one floor and one wing at a time, which is anywhere from 18,000 to 20,000 square feet. The workers would set up the

containment, and then proceed with asbestos abatement work once an industrial hygienist approved the containment. *Id.* at 671-72. There would be approximately three containments set up at any one time, with a total of twenty for the entire project. *Id.* at 672. Setting up the containment involved sealing anything that the workers were not removing asbestos from, which would take approximately one week. The work of setting up the containment included cutting the plastic, then taping and gluing it to cover the structures. *Id.* at 673.

After the containment is set up, the workers perform gross demolition, which includes knocking down walls and cleaning them up, putting them in Gaylord boxes, and then removing them from the worksite. *Id.* at 674. After that, the workers tackle the mechanical systems and ceiling. At some point, the workers would perform chipping of ceilings where plaster needs to be removed. Eventually, the workers perform demolition on the flooring as well. After demolition, the workers perform a final cleaning using wet-wiping and HEPA vacuuming. The demolition phase lasts approximately a week, and the cleaning phase also lasts a week. All of the floors took approximately three weeks from start to finish.

During the demolition period, workers would be involved in tasks ranging from building the boxes for the waste, to active abatement, to cleanup, to wetting the area, to removing boxes out of the area. *Id.* at 675. Mr. Morosko testified that:

Typically, we had approximately 18 [people] in each containment that we had going. So you would have one person doing nothing but keeping the material wet. Fiber counts were critical to keep down. The others, you probably had six or so bagging up and transferring out while you had another six to eight doing gross removal and cleanup.

Id. at 675-76.

Mr. Morosko testified that walls were demolished using sledgehammers. *Id.* at 676. If one person was demolishing walls, at least two other people would be associated with cleaning up after that work. Ninety percent of the demolition work was wall work. *Id.* at 677. The other demolition work was done on the ceilings, and performed with an air-operated chipping gun. At any one time, six people could be operating chipping guns. *Id.* at 680. While the six employees were chipping, other employees would simultaneously be performing cleanup. *Id.* at 682-83. By law, this had to happen because debris cannot accumulate on the floor at any given time. *Id.* at 683. There would be one employee cleaning for each employee chipping. However, Mr. Morosko noted that there was no documentation to support these time estimations. *Id.* at 711.

Mr. Morosko was shown DOL Exhibit 7, which he identified as a photograph of a rivet buster. *Id.* at 684. He stated that the rivet buster was not used on this job at all because it would be impossible to hold over your head for a prolonged period of time. *Id.* at 685. It was not used on floors or walls, and ASI does not own tools such as these.

Mr. Morosko was shown DOL Exhibit 6, which he identified as a photograph of an “electric demo hammer.” *Id.* at 686. He stated that such a tool would be used at the GSA project

for “[a] couple hours probably at the end when we were removing the wall that was inset in the flooring.” *Id.*

Regarding the sawzall tool, Mr. Morosko stated that they were used on the GSA job for demolition of the mechanical systems, which included pipes and duct too large to remove from the containment. *Id.* at 687. In any particular containment, approximately two employees would use the sawzalls for “a couple of hours each time we would be working on the mechanical system.” *Id.* at 688. The workers performed work on the mechanical system in “the middle,” when gross demolition was occurring. However, there is no documentation recording any of this. *Id.* at 721. The sawzalls were not used to construct the containment, because the containments were usually prefabricated and wood did not need to be cut. *Id.* at 715. Battery operated screw guns were used to construct the containments when they were not prefabricated. *Id.* at 716.

ASI also used gas powered power washers. *Id.* at 689, 717. Typically, one individual would use the power washer for a final cleaning of the ceiling. Additionally, there were three pallet jacks at the GSA site, which were used by laborers or ASI employees to move boxes of material. There were three to four vacuums, which would be used by laborers for the final cleaning of the work area. The vacuums would be operated for three to four days per containment. *Id.* at 690. An airless sprayer, which is a “piece of equipment that produces water out the tip and atomizes it for more distribution,” would be used throughout the abatement process by one person at a time. Approximately two buffers per containment would be used on the floors. *Id.* at 691. Mr. Morosko stated that the buffer requires no skill to use. *Id.* at 692.

When the tools at the GSA site were being used, there was no need for the employees to make measurements, read drawings, make clean cuts, or build anything. *Id.* at 692. The employees were not trained on how to use any of the tools on the job site. *Id.* at 693.

Before the hearing, Mr. Morosko did not consult any document to refresh his recollection of how many particular tools were at the GSA site. *Id.* at 710. He stated that he goes “off memory.”

David Purdum (TR at 726-749)

David Purdum testified that he currently works for ASI as a project manager, and has held that position for ten years. (TR at 726-27). As project manager, his main job responsibility is to estimate asbestos abatement projects. *Id.* at 727. Mr. Purdum performed the estimation for the GSA project, and his work was not reviewed by anyone. There are four other estimators at ASI: Sam Chairs, Tim Chairs, Tim Chairs, Jr., and Mike Cataneo. *Id.* at 733.

Mr. Purdum described his typical estimation process as follows:

You’re looking at the job as a whole. From my perspective, I’m looking at the time it’s going to take to contain the work area, to remove the materials, to final clean the work area in regards to passing a visual inspection by the third-party industrial hygiene firm, and removing the containment barriers following completion of the visual and the air sampling.

Id. at 727. When coming up with estimations, Mr. Purdum takes into account site conditions, production rates, the size of the job, labor costs, equipment markup, time involved to do the work, types of materials, time to clean up, and time to contain the work areas. *Id.* at 733, 735.

Mr. Purdum testified that he is familiar with wage determinations, which he stated identify different classifications of work and the cost and the rates paid. *Id.* at 728. He was shown the Davis-Bacon classification rates for the GSA project. Mr. Purdum stated that his job involved reviewing the classification rates and determining which classifications applied for the abatement work.

Mr. Purdum's estimate for the GSA project was close to \$2 million, which is the largest estimate he had prepared and been awarded as an ASI employee. *Id.* at 735. When estimating wage rates, he referred to the Davis-Bacon wage rates. *Id.* at 736. The purpose of reviewing the wage determination is as follows:

I have to review the wage determination to determine if the wage rates are applicable and if they indeed exceed our average hourly rate. If they did, I would have to account for it in accordance with the average hourly rate and the wage scale.

Id. at 738.

Mr. Purdum determined that the common laborer rate from the wage determination applied. *Id.* at 739. However, he did not use the wage rates contained in the wage determination to formulate his estimate. *Id.* at 737. Instead, he used an hourly rate between \$18 and \$19 because that was the "average hourly rate that we use on a typical job." *Id.* at 738. He stated that this is the "standard for the industry," and the rate that ASI has been using for 25 or 30 years. This standard hourly rate was higher than what Mr. Purdum believed was applicable in the wage determination, which was \$15.87. *Id.* at 739. Additionally, he has used the common laborer rate on other government prevailing wage jobs. *Id.* at 756.

Mr. Purdum stated that a change order is an addition or subtraction to the scope of work, and that there were a lot of change orders involved at the GSA project. *Id.* at 740. In this case, Interior Specialists initiated the change orders. *Id.* at 747. One particularly large change order was for additional plaster to be removed. *Id.* at 748.

Mr. Purdum was contacted by a Department of Labor investigator named Allen Wrenchy in 2012. *Id.* at 741. The investigator requested that Mr. Purdum incorporate appropriate labor clauses in the subcontract with WMS.

Michael J. Cataneo (TR at 749-768)

Michael J. Cataneo testified that, since September of 2010, he has worked for ASI as an estimator. (TR at 749-50, 763). His job title is Project Manager. *Id.* at 750. Before that, he was a

project manager for another asbestos removal company called Hudak's Asbestos Removal ("Hudak's").

Federal government jobs were Hudak's primary market, and he bid on several federal projects between 2006 and 2010 while working for Hudak's. *Id.* at 751. These included the Commerce Department's Herbert Hoover building, which was a large-scale complete renovation. *Id.* at 752. Hudak's won the bid on that project for Phase I: demolition and abatement. This was worth approximately \$2 million. The project commenced in 2009 and continued through 2010. *Id.* at 753. The scope of the project was very similar to the GSA project in Washington, D.C. *Id.* at 754. It involved ceiling work, wall work, and floor work. The buildings were similarly constructed. There were no differences in the materials and tools used by ASI and Hudak, and both projects called for use of electric tools. *Id.* at 754-55. The prevailing wage rate used for the workers in the Herbert Hoover building project was "Asbestos abatement worker, removal from floor, ceilings, walls, and mechanical systems, \$10.60, no fringe." *Id.* at 756.

Mr. Cateano testified that if there was no asbestos rate specifically applicable to a job, he would defer to the unskilled labor rate. *Id.* at 761. This is what he did with Hudak's, and also with ASI, and with his employer before Hudak's. He never used the skilled laborer rate in a bid. *Id.* at 762.

William E. Riggs, III (TR at 768-810)

William Riggs testified that he has worked for ASI for approximately twelve years. (TR at 769). Before that, he worked for Gilford Corporation performing similar work. *Id.* at 769. At ASI, Mr. Riggs's position is Field Superintendent. He is the company's only field superintendent, and reports to Shawn Morosko, who is the director of operations. The Field supervisors report to Mr. Riggs. Mr. Riggs is a licensed asbestos worker. *Id.* at 787.

Mr. Riggs worked on the GSA job for approximately the last fifty percent of the project. *Id.* at 769. He functioned as the onsite supervisor, and was in charge of the manpower. Mr. Riggs described a typical day on his job:

I would get there before the crew would arrive. Usually I would start my day by going in the containments and making sure that we don't have any breaches in the areas that are active abatements. After that, I would go down to our field office, begin the prep, you know, the daily assignment sheets, the safety meetings, checkouts of other equipment that we had on the job and just start prepping, you know, and doing my – go through my day and my planning at that time.

Once the crew arrived, which is roughly 6:00 p.m. was the start of our shift, I would conduct an anywhere from 10- to 15-minute safety briefing with everyone, assign crews to their respective areas, and if anything new was starting, I would pass the word on to the supervisors and perhaps walk through with them on what needs to happen in these new-started areas that we're working and things like that. That's usually the first couple hours out of the day and then I would just go back

and start doing the daily paperwork and things like that, make site visits, walk around the job sites, load up.

. . . .

I would go inside the containments. I would be visiting people that weren't in containments yet, making sure everybody's working in a safe manner, making sure everybody's on task and you know, if they have any questions I'd be right there. I would load – you know, I would load trucks with debris boxes. I mean, I kind of just – I would fix, you know – I just kind of did whatever it took down there.

Id. at 770-71.

Mr. Riggs testified that the GSA job was the largest project he ever worked on for ASI in terms of scope and duration. *Id.* at 788. There were thirteen floors on the work site, with approximately eighteen to twenty thousand square feet per floor. *Id.* at 788-89. Approximately three floors would be worked on at once. *Id.* at 789. Sixteen to twenty workers would be working on each floor, which meant that approximately sixty to sixty-five workers would be on the site at one time. Fifty-five of those workers would be WMS employees. Mr. Riggs later clarified that the GSA building is seven stories high. *Id.* at 809. When he referred to thirteen floors, he meant that some stories had two wings, and each wing was counted as a floor.

Mr. Riggs would fill out a daily project report every day. *Id.* at 772. There were 18 to 20 containments on this job, and the work process was exactly the same in every containment. The workers would “set up the poly containment, construct the poly criticals, commence with the demolition of whatever walls or architectural features that came out, chipping the asbestos-laden plaster from the ceilings.” *Id.* at 772. The entire floor would be “basically gutted.” At the end of each containment, there would be “final clearance, final cleanings, final visuals that happen from . . . the industrial hygienist and things like that.” *Id.* at 773. The typical average duration of the work on a particular containment would be approximately three to four weeks per containment. Two weeks would be devoted to demolition work, and “within the fourth week would be the cleanup.” The cleanup would take place while the demolition would be going on because the regulations call for prompt cleanup.

Mr. Riggs testified as to the tools used on the project. First, to establish the containment, the workers used step ladders, staple guns, duct tape and glue. *Id.* at 774. They also used materials including “six mil polyethylene sheeting,” spray glue, and spray adhesive. At the entrance to the containment, the workers would build a decontamination chamber (“decon”) out of wood and polyethylene sheeting. Some were built completely, while others were prefabricated. No more than two hours would be devoted to cutting and screwing wood for the decon if one person was working on it. *Id.* at 775.

Once the decon was set up, the next phase would be a pre-abatement inspection by the industrial hygienist, which took approximately two hours. *Id.* at 775. After that, the workers

began demolition of the interior walls, HVAC, and plumbing. In some cases the floor tile and carpet also had to be removed.

The walls would be removed with sledgehammers, shovels, and squeegees, and this phase lasted two weeks. *Id.* at 776. The ceilings needed to be stripped as well using pneumatic chipping guns. This would be done at the same time as the wall demolition. Six chipping guns would be working at any one time in a containment. *Id.* at 777. When six people were chipping, six to eight workers would be cleaning up the debris at the same time. *Id.* at 777-78. It is possible that there were about twenty-four chipping guns on the site. *Id.* at 798. No training was required for the workers to learn how to use the chipping guns, and Mr. Riggs opined that not a lot of skill is involved. *Id.* at 778. Rivet busters were not used on the GSA project. *Id.* at 779. Electric chipping guns were sometimes used for a minimal amount of time – approximately three hours per containment. The workers used electrically powered sawzalls to cut mechanical equipment, ductwork, and wood. *Id.* at 780. Approximately two workers would spend two hours per day during the last week of a containment using the sawzall. *Id.* at 781. It would also be used for only a “couple minutes” while building the containment. *Id.* at 782.

There was one power washer per containment that would be used during the final cleanup. *Id.* at 782. There were two pallet jacks at the site, which were operated by foremen. There were between nine and twelve vacuums, and two would be functioning at a time per containment. Approximately forty man-hours would have been devoted to the power washer. All of the workers used vacuums during cleanup. *Id.* at 783. Approximately forty man-hours per containment would be spent vacuuming. Typically, there would be two people using the vacuum for six to eight hours per day for two to three days per containment. All of the workers also used the airless sprayer. There was one airless sprayer per containment, and it would be used throughout the entire time that the workers were in the containment, except for during the setup. *Id.* at 784. There was also a floor buffer, but the time spent using that was inconsistent, as it was required more for some containments than others.

There was a “bobcat” at the site, but only Mr. Riggs and other supervisors used it. *Id.* at 784. The supervisors were the only workers who used a chop saw at the site, which is a handheld saw that can spin a 14-inch blade. *Id.* at 784-85.

Approximately 16 to 20 workers would be in each containment for each nine-hour day. *Id.* at 785-86. About forty-five minutes of each day would be devoted to pre-work activities such as briefings, clothing changes, and entering the containment. *Id.* at 786. Approximately thirty minutes were spent after stopping work on “concluding activities.” There was also a thirty minute lunch break.

Part of Mr. Riggs’s job was to lead safety meetings. *Id.* at 790. These covered topics such as electrical, tile and pipe safety. They also covered topics related to asbestos safety, including protective clothing. *Id.* at 791. Mr. Riggs would remind the workers that the substance they deal with is dangerous, in that it causes cancer, mesothelioma, and other conditions.

There is no paperwork available that tracked how long a particular employee handled a particular tool. *Id.* at 795. Mr. Riggs testified that approximately thirty percent of his job entailed

assisting with manual labor around the site when needed. Other ASI supervisors also performed manual work, for approximately 70 percent of their job duties. *Id.* at 796.

Mr. Riggs reported directly to Shawn Morosko. *Id.* at 796. Mr. Morosko would visit the worksite at least three nights a week, and sometimes more. *Id.* at 797.

Brandon C. Bentley (TR at 810-825)

Brandon Bentley testified that he currently works for ASI, and has worked there for fifteen years. (TR at 810-11). His job title is Senior Site Supervisor. *Id.* at 811. He worked as a site supervisor at the GSA job in Washington for the first half of the project. His job duties were to oversee the job and to run containments. He reported to Eric, another site supervisor. He spent approximately 90 percent of his day working in containments. There would typically be two to three containments going at one time, and he would supervise all two or three. He would direct workers himself, and also give instructions to other supervisors. He is a licensed asbestos worker. *Id.* at 817.

At any one time, there would be approximately fifteen to sixteen WMS workers per containment. *Id.* at 814.

Mr. Bentley testified that the rivet buster powered by air compression shown in DOL Exhibit 7 was not used on the GSA project. *Id.* at 812. The chipping gun shown in DOL Exhibit 6 was used at the GSA site for knocking down walls, however it would only be used for a few hours per containment. *Id.* at 813. Mr. Bentley was also shown a photograph of ASI Exhibit 27, and identified the tool pictured as an air compressor. He testified that the air compressor was used at the GSA job site to demolish plaster off of the ceiling. *Id.* at 814. No more than six air compressors would be used per containment at a time. While six people were chipping, others would be cleaning, getting the debris off of the floor, moving pallets out of the work area, and watering the job site down. *Id.*

Walls were demolished using “[l]arge sledgehammers, mini-mauls, which is just a smaller sledgehammer, and digging bars.” *Id.* at 814. Shovels and squeegees were used to clean up the demolished walls. *Id.* at 815. Sawzalls were also used at the GSA project to demolish mechanical equipment such as ductwork. It was used to “cut bigger pieces down to smaller pieces to get them to fit in the boxes.” It would be used for a two to three hours per day, and at most, one would be in operation at a time. They were not used to demolish walls. *Id.* at 816. Buffers were used to remove the mastic underneath floor tiles after the walls had been knocked down and the floor tiles scraped off. There would be two buffers used at a time, for three to four days. The workers spent a “week or so” knocking down and cleaning up walls.

Paul P. Harkins (TR at 835-876)

Paul Harkins testified that he is currently employed by Interior Specialists (“ISI”). (TR at 836). He has worked in the construction industry for over 37 years. His experience includes working as a field laborer, carpenter, quality control inspector, estimator, project manager, and vice president of a company. He has largely worked for general contractor companies, with

primary focuses on government and federally funded projects which were subject to the Davis-Bacon Act. *Id.* at 837. Additionally, most of his work in his career has focused on demolition and asbestos abatement. *Id.* at 838. However, none of Mr. Harkins's former companies were specifically asbestos contractors. *Id.* at 857. Mr. Harkins does not personally have an asbestos certification, and has never entered an asbestos containment. He did not see the WMS workers performing asbestos abatement work, but did see them building and tearing down containments. *Id.* at 858.

Mr. Harkins joined ISI in 2001, and has been there for fifteen years. His position at ISI is Executive Vice President. *Id.* at 837. He described his job duties as follows:

Basically in charge of oversight on many facets of the business. I'm involved in estimating, project management. I oversee several project managers. I'm involved in negotiations. And then, also, I primarily take on the larger projects for ISI and the more difficult projects.

Id. at 837. Specifically,

That meant getting the project organized, get scheduled, get manpower allocations, coordinating subcontractors that were under our control, meeting with Whiting and Turner to, you know, go over schedules. I, on a weekly basis, pretty much on a weekly basis, would've been at the site at least one day a week, involved with progress meetings. Then, every time that I'd visit the site, I would do a thorough walkthrough [of] the entire site to see what work activities were going on and make sure everything was on schedule and make sure that things were done in accordance with contract documents, so on and so on.

Id. at 847.

Mr. Harkins testified that in the Baltimore/Washington construction market, ISI is in the top percentage of the larger contractors in the asbestos abatement and demolition field. *Id.* at 838. The company has a large presence in the market of public works and prevailing wage projects. About eighty percent of the jobs Mr. Harkins has worked on have involved asbestos abatement. This asbestos abatement work is subcontracted.

Mr. Harkins stated that the work on the GSA project concerning asbestos abatement is similar to the other projects he has been involved in over the course of his career. *Id.* at 839. During his career, he has worked with six or seven subcontractors directly, and approximately ten or twelve indirectly. These have been primarily nonunion companies, but he does have minimal experience with union companies. He testified that in his experience, asbestos abatement work in the Washington, D.C. metropolitan area has been performed by nonunion contractors. *Id.* at 842.

In Washington D.C., Mr. Harkins worked on the Walter Reed building, the Intelligence Agency, and the National Institute of Health building. *Id.* at 839. In the Baltimore market, he has worked on the Federal Fallon building, the Naval Academy, Fort Meade, and the Social Security

Administration building. *Id.* at 840. He also worked on the Bethesda Naval Hospital in 2009 or 2010. The asbestos abatement work at the Bethesda Naval Hospital, Walter Reed, and National Institute of Health was classified as Common/General labor. *Id.* at 840-42.

Based on his experience, Mr. Harkins testified that he is generally aware of how asbestos work is performed. *Id.* at 842. When asked if he is aware of how that work is classified under the Davis-Bacon Act, Mr. Harkins responded:

All my experience has been that it's been common or unskilled labor, except in the instance where there are mechanical systems that stay operational, and then the classification sometimes is different.

Id. at 842. If the mechanical systems stay operational, the workers are classified under a special asbestos worker classification. On the GSA job, the mechanical systems were all removed, and not kept in place. According to Mr. Harkins, there was nothing unusual about the way ASI classified its asbestos work on the GSA project. *Id.* at 844.

Mr. Harkins described the relationship between ASI and ISI. *Id.* at 844. The companies have worked together on projects, and have had a long term relationship. ASI performs the asbestos abatement work, and ISI does not. ISI considers ASI to be the best in the industry at asbestos abatement. ASI has been the subcontractor for ISI in hundreds of projects. *Id.* at 845. During those projects, Mr. Harkins has not observed any unusual practices by ASI as to how it classifies asbestos work for prevailing wage purposes.

Mr. Harkins testified that he was involved in the negotiations with Whiting and Turner. Once the contract was settled, he had full responsibility for the project from start to finish. Contractually, the scope of ISI's work on the project was to perform all of the demolition work and the asbestos abatement work. *Id.* at 845. ISI subcontracted the asbestos abatement work out to ASI because ISI is not licensed to do asbestos abatement work. Mr. Harkins participated in preparatory meetings involving all players prior to starting the work. *Id.* at 847. During these meetings, the participants went through how the work was going to be performed, safety precautions, and other items for every task on the job.

ASI's work on the GSA job was essentially the same as what ISI normally does, except that ASI's work involved asbestos-containing materials while ISI's work did not. *Id.* at 848. In similar situations without asbestos, ISI would use sledgehammers to knock down walls, and take plaster off ceilings using scrapers. The only time Mr. Harkins would see a power tool being used in ISI's work is when there is a tight corner where a sledgehammer will not fit, and when the workers used five-pound pneumatic chipping guns on plaster. *Id.* at 852. ISI workers would typically spend "considerably below 10 percent" of their time during demolition using power tools. *Id.* at 854. In addition to performing similar work as the ASI employees, minus the asbestos work, ISI also performs heavy structural demolition. *Id.* at 866. Part of ISI's scope of work on the GSA project was to "take down a building inside the courtyard . . . a three- or four-story building . . . with like ten feet on each side of it to the other buildings[.]" *Id.* at 866-67.

At the GSA project, ASI workers removed most of the smaller pipes, but cleaned asbestos off of the large pipes. *Id.* at 853. After the asbestos was cleaned, ISI workers would take the pipes down.

Regarding protective gear, ISI workers used hard hats, steel-toed safety boots, eye protection, and respirators, even when no asbestos was present. *Id.* at 854. There is no particular skill required to use the personal protective equipment. *Id.* at 855.

Mr. Harkins testified that during the time he was involved in the GSA project, he was never aware of any letter, correspondence, ruling, or directive from the Department of Labor, indicating that a labor classification other than common or unskilled should be used for the asbestos workers. *Id.* at 855. He is, however, familiar with the Davis-Bacon Act and “flow-down clauses” that apply to subcontracts. *Id.* at 860. The contract between ISI and ASI for the GSA had a flow-down clause. Mr. Harkins stated that, to ensure ISI’s compliance with the Davis-Bacon Act, ISI “received certified payrolls every week from ASI and we reviewed those and then we submitted them and we had no objections to their certified payrolls.” *Id.* at 861. Before the GSA project, there were no written contracts between ASI and ISI because of trust between the companies based on a past relationship. *Id.* at 861-62. The only reason there was a written contract on the GSA project was because Whiting and Turner required a written contract. *Id.* at 863.

ISI classifies some of its workers as skilled workers. *Id.* at 867. However, not all of its workers perform skilled jobs. Mr. Harkins explained how he distinguished between skilled and unskilled workers:

Whenever there was precise cutting to do, rigging to do, shoring to do, those were skilled people. They had to have special training to do those kind of operations. When you’re rigging a piece of concrete out of a wall that weighs thousands of pounds, it’s not the same as going up there with a jackhammer and hitting it. Now if they took it out with a jackhammer, they were paid common/unskilled.

Id. at 868.

Mr. Harkins further explained that ISI workers required specific certifications for skid steer operators, equipment operators, and the use of the “Bobcat” because, “in Washington, D.C. you have to have special training for that.” *Id.* at 869. Additionally, any workers involved in “structural components” were required to go through in-house training “because they’re very dangerous operations.” *Id.* at 870.

There were a lot of change orders during the GSA project because of components that the project designers for the government originally missed. *Id.* at 870. The change orders were not just related to asbestos work. *Id.* at 871. One large, \$2 million change order related to asbestos in the plaster on the ceilings. The original project designers did not realize the plaster had to come off. One means to remove plaster from the ceilings is to use chipping guns. *Id.* at 872.

John W. Keith, Jr. (TR at 876-893)

John W. Keith, Jr. testified that he has been employed by Whiting-Turner for twenty-three years. (TR at 877). He began working full time for Whiting-Turner in 1993, when he graduated from college with a bachelor of science in civil engineering. *Id.* at 877. In 1996, he was promoted to project manager. *Id.* at 878. He was eventually promoted to Senior Project Manager, which is his current title. *Id.* at 878. He is not certified in asbestos abatement. *Id.* at 885.

During his career, he has worked on approximately 14 projects that were subject to the Davis-Bacon Act. *Id.* at 878. This included 11 years at the Naval Academy in Annapolis, Maryland on federally funded renovation projects. He also worked on the Fallon Federal Building in Baltimore, the NASA building in Langley, Hampton, Virginia, and the GSA project in Washington, D.C. *Id.* at 878-79. ASI's work at the Naval Academy involved hazardous material and asbestos removal. *Id.* at 879. Whiting-Turner also worked with Hudak's Asbestos Removal on the Naval Academy project in addition to ASI. *Id.* at 880. Many of these projects involved asbestos abatement work. *Id.* at 882. In all of these projects, the asbestos abatement work was similar to that performed on the GSA project, and the workers were classified as unskilled or common labor. Hudak also classified its asbestos workers as unskilled laborers for the same type of work as was performed on the GSA building. *Id.* at 883. In all of his work for previous projects, he was never aware of asbestos abatement workers classified as skilled labor. *Id.* at 884.

Mr. Keith was the lead in developing the proposal for the work at the GSA headquarters for Whiting-Turner/Walsh. *Id.* at 880. He described the proposal as follows:

There were two main components of our proposal to GSA. There was a technical proposal and a price proposal. The technical proposal would include things like resumes of key personnel, past project worksheets that show relevant experience, past performance questionnaires. There would be references from clients. It would involve technical plans, for instance, like a logistics plan, a schedule, a subcontracting plan, things of that nature, show our qualifications. I headed that effort up. There were other people that worked with me on that, but I was the lead. I wrote a lot of the technical proposal, a lot of the technical writing for that plan. And then the price proposal, which is our bid.

Id. at 880. In order to develop the proposal, Mr. Keith visited the GSA job site twice. *Id.* at 881.

After the bid was submitted and Whiting-Turner/Walsh was awarded the project, Mr. Keith acted as full-time senior project manager for Whiting-Turner/Walsh at the GSA site. *Id.* at 881. The bid that Whiting-Turner/Walsh submitted included work for demolition and asbestos abatement. ISI handled the larger asbestos removal package, but there was a smaller lead removal package that was not included in ISI's work. ISI subcontracted the asbestos work to ASI.

Mr. Keith took the following steps as a prime contractor to ensure that Whiting-Turner/Walsh complied with the Davis-Bacon Act:

We checked subcontractors certified – we make sure subcontractors submit certified payrolls. We check their certified payrolls against the wage decision. We conduct periodic interviews with random employees to make sure they're being paid what's actually on the certified payrolls.

Id. at 889. Whiting-Turner/Walsh maintains copies of contracts with first tier subcontractors, but does not require copies of all second tier subcontracts. *Id.* at 889-90.

Summary of Documentary Evidence

*Joint Exhibits*¹⁵

- JX 1: Prime Contract No. GS-11P-10-MKC-0025 (including solicitation and award documents)
- JX 2: Wage Determination (General Decision: DC20100004 03/12/2010 DC4)
- JX 3: Subcontract between WT-W/JV and ISI for 1800 F Street Modernization Project
- JX 4: Subcontract between ISI and ASI for 1800 F Street Modernization Project
- JX 5: Certified Payrolls submitted by WMS for work weeks ending 3/6/11 through 2/5/12
- JX 6: WT-W/JV Responses to Interrogatories and Requests for Admissions
- JX 7: ISI Responses to Interrogatories and Requests for Admissions
- JX 8: ASI Responses to Interrogatories and Requests for Admissions
- JX 9: Daily project reports Wing I, 2nd floor
- JX 10: Daily project reports Wing I, 3rd floor
- JX 11: 1800 F Street Daily Reports (produced by WTW)
- JX 12: Letter from Eisenberg to Riensche dated May 9, 2012
- JX 13: Department of Labor's Answers to ASI's Requests for Admissions
- JX 14: Marta Goldstein's curriculum vitae
- JX 15: Martha Gutierrez Shepard's curriculum vitae

Administrator Exhibits

- DOL 1: Back wage computations
- DOL 2: Summary of unpaid wages
- DOL 5: Letter from Wage and Hour, Branch of Construction Wage Determinations to Mary Pineda, Supervisory Contracting Officer, dated March 2, 2012
- DOL 6: Photograph of electrically-powered chipping gun
- DOL 7: Photograph of rivet buster

Respondent's Exhibits

¹⁵ Joint Exhibits 1-15 were admitted at the hearing with no objections. TR at 9-10.

- RX 2: Breakdown of Ceiling Work
- RX 5: Summary of Wing I, 2nd Floor to April 13, 2012
- RX 6: Summary of Wing I, 3rd Floor
- RX 7: DOL Prevailing Wage Resource Book 2010, Additional Classification Process
- RX 8: DOL Prevailing Wage Resource Book 2010, Investigative Procedures under DBA/DBRA/CWHSSA
- RX 9: DOL Prevailing Wage Resource Book 2010, DBA/DBRA Compliance Principles
- RX 10: DOL April 16, 2013 summary of violations
- RX 11: DOL February 15, 2013 summary of violations
- RX 13: Wage Agreement, Laborers Direct Council of Washington D.C. and Vicinity June 1, 2002 through May 31, 2005)
- RX 14: Wage Determination DC8003 February 20, 2009 (example from similar project)
- RX 15: Wage Determination DC8003 May 1, 2009 (example from similar project)
- RX 16: Wage Determination DC8003 May 29, 2009 (example from similar project)
- RX 23: 1800 F. Street Daily Project Reports
- RX 24: Total WMS hours on the GSA Project, broken down by pay period, straight hours and overtime hours
- RX 25: Montgomery County Wage Determination September 3, 2010
- RX 26: Montgomery County Wage Determination February 2, 2010
- RX 27: Photograph of a chipping gun
- RX 28: Photograph of manifold used to feed air to chipping gun
- RX 29: Summaries of projects performed in Washington, D.C. by ASI using General Laborer rates with back up documentation
- RX 30: Summary of Architect of Capitol project performed using Hazardous Material Handler rate
- RX 31: Scope of work on Hoover building (Department of Commerce). This accompanies RX 24, which is the wage determination for the Hoover building
- RX 32: Request for Authorization of Additional Classification and Rate (Form SF-1444) for DC20100004 03/12/2010 submitted January 31, 2012
- RX 1A: Letter from Department of Labor, Office of the Regional Solicitor to Eric Mancilla Galdimez
- RX 3A: Employee Personal Interview Statement: Walter Alvarado

UNDISPUTED FACTS

On April 12, 2010, GSA and WTW entered into a contract, subject to the DBA regulations, to modernize the GSA headquarters building at 1800 F Street NW, Washington, D.C. 20005. JX 16. The contract between GSA and WTW also provided that the DBA applied to subcontractor agreements. JX 1 at 21, 33-35; JX 16 at ¶ 4. The parties stipulated that the GSA contract was subject to the Davis-Bacon Act, and that Wage Determination DC20100004 applied to the contract. Stip. 4; Stip. 5. The parties also stipulated that the asbestos abatement work performed at the GSA headquarters, pursuant to the provisions of Contract No. GS-11P-10-MKC-0025 between GSA and WTW (JX 1) and its respective subcontracts (JX 3 and JX 4), was subject to the prevailing wage, fringe benefit, and recordkeeping requirements of the Davis-Bacon Act, American Recovery and Reinvestment Act of 2009, Contract Work Hours and Safety Standards Act, and 29 C.F.R. § 5.5(a)(1).

WTW subcontracted with ISI to perform interior demolition work—specifically asbestos removal from the plaster, mechanical systems, and flooring. JX 4; JX 16 at ¶ 2; TR at 671, 845. The WTW and ISI contract contained the requisite flow-down clauses that it was subject to the wage requirements of the DBA and CHWSSA. JX 3 at 19-20; JX 16 at ¶ 2, 4. ISI then subcontracted with ASI to perform the asbestos abatement work at the GSA project. This contract also contained the requisite flow-down clauses. JX 4 at 7-8; JX 16 at ¶ 3, 4; TR at 846, 860-61. Finally, ASI subcontracted with labor staffing company, WMS, to supply workers to perform asbestos abatement removal at the GSA project. There was no written contract between ASI and WMS. TR at 83.

ASI hired 127 WMS asbestos abatement workers and 13 ASI employees to complete the asbestos abatement work on multiple floors of the GSA building. TR at 56, 710, 809; JX 8 at 12. Each floor had three to four wings, covering 18,000 to 20,000 square feet per wing. TR at 671, 710, 789.

The decision as to how to classify the ASI supervisors and the WMS workers was made by ASI. TR at 62, 78, 97. The WMS workers were certified in asbestos abatement, classified as “Laborers: Common or General,” and paid a minimum hourly rate of \$15.84 (including fringe benefits). Stip. 6; TR at 62-63; JX 2; JX 16 ¶ 16. The WMS workers operated a number of different kinds of power tools to perform the asbestos abatement work, including the following: sawzalls, pneumatic chipping guns, electric chipping hammers, air hammers, grinders, sprayers, power washers, and floor buffers. Fourteen WMS workers testified at the hearing. Twelve of the fourteen WMS workers who testified at the hearing, testified to using power tools such as chipping guns. TR at 156-224 (Brian McNeil); TR at 268-393 (Alvaro Tum Calo); TR at 293-309 (Nery Hernandez); TR at 309-324 (Mauro Rivas Gonzalez); TR at 324-357 (Miguel Lorenzo); TR at 357-380 (Porfirio Arias); TR at 389-420 (Erick Roberto Mancilla Gomez); TR at 420-438 (Wilfredo Hernandez); TR at 438-464 (Manuel Vega Dubon); TR at 465-488 (Walter Alvarado); TR at 489-511 (Luis Hernandez); TR at 522-547 (Gustavo Lopez Hernandez); TR at 547-566 (Luis Fonseca); TR at 566-578 (Aurelio Juarez).

The ASI employees who were supervising the WMS workers at the project were classified as “Asbestos Worker: Hazardous Material Handler (Removal from mechanical systems, which will not be scrapped or replaced),” and were paid a minimum hourly rate of \$24.50 (including fringes). JX 2; TR at 77, 177, 399, 443-44, 718-19, 724, 796. The mechanical systems were, however, entirely scrapped at the GSA project. TR at 61, 78-79, 615.¹⁶

The definitions of these classifications are set forth in the Wage Determination DC20100004, issued on March 12, 2010, which the parties agree applied to the work performed

¹⁶ According to Samuel Chairs, ASI knew from the bid process that the mechanical systems were slated to be replaced or scrapped:

We certainly knew from our bid process that this was a total gut job and that all of the furnaces in the building would be eliminated completely. They were going to, you know, four walls, basically. So we figured that didn't apply, that description didn't apply.

TR at 60.

by the WMS asbestos abatement workers at the GSA project. JX 16; Stip. 5. The classifications, descriptions, rates, and fringes from the Wage Determination that are relevant to this matter are as follows:

Classification	Rates	Fringes
ASBE0024-008 10/01/2008 ASBESTOS WORKER: Hazardous Material Handler (Removal from mechanical systems which will not be replaced or scrapped)	\$17.85	\$6.60
SUDC2009-003 05/19/2009 LABORER: Common or General	\$13.04	\$2.80
LAB00657-015 06/01/2009 LABORER: Skilled FOOTNOTE: Potmen, power tool operator, small machine operator, signalmen, laser beam operator, waterproofer, open caisson, test pit, underpinning[sic], pier hole and ditches, ladders and all work associated with lagging that is not expressly stated, strippers, operator of hand derricks, vibrator operators, pipe layers, or tile layers, operators of jackhammers, paving breakers, spaders or any machine that does the same general type of work, carpenter tenders, scaffold builders, operators of towmasters, scootcretes, buggymobiles and other machines of similar character, operators of tampers and rammers and other machines that do the same general type of work, whether powered by air, electric, or gasoline, builders of trestle scaffolds over one tier high and blasters, power and chain saw operators used in clearing, installers of well points, wagon drill operators, acetylene burners and licensed powdermen, stake jumper, structural demolition.	\$20.22	\$5.25

JX 2 (Wage Determination).

After an investigation by the Wage and Hour Division of the Department of Labor, the Administrator determined that the WMS workers were not paid the proper wage rates or fringe benefits, and were misclassified as “Laborer: Common or General” for seventy percent of their time. RX 10-11. During the investigation, Wage and Hour investigators interviewed some of the WMS workers at the GSA project site, and obtained certified payroll records and relevant contract documents from Respondent ASI. JX 1-5; *ASI Opening Br.* at 7. On April 16, 2013 and

January 15, 2015, the Administrator issued charging letters alleging the misclassification to WTW, ISI, and ASI.¹⁷ RX 10-11; TR at 612.

APPLICABLE LAW

The Davis-Bacon Act requires that laborers and mechanics working on covered federal construction projects 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 character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there.” 40 U.S.C. § 3142(b). The purpose of the DBA is to (1) give local laborers and contractors a fair opportunity to participate in building programs when federal money is involved; and (2) protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the locality. *L.P. Cavett Co. v. U.S. Dep’t of Labor*, 101 F.3d 1111 (6th Cir. 1996); *United States v. Binghamton Constr. Co.*, 347 U.S. 171, *reh’g denied*, 347 U.S. 940 (1954). This minimum wage is referred to as the “prevailing wage.” *Id.*; *see also* 29 C.F.R. § 1.3. If the DBA covers a construction project, the applicable wage determination is incorporated into the governing contract and provides the minimum rates for workers in the job classifications who work on the project. 29 C.F.R. § 5.5(a).

The authority to classify workers lies with the Department of Labor, not with the contracting agency on the project. *See Fry Bros. Corp.*, WAB¹⁸ 76-6 (June 14, 1977). It is incumbent upon the contractor to be certain that its employees were properly classified when performing a job where the Act applies. By misclassifying and underpaying workers, respondents proceed at their own peril. *Tele-Sentry Sec.*, WAB Case No. 87-43 (WAB June 7, 1989).

A general contractor is responsible for ensuring that all persons engaged in performing the duties of a “laborer” or “mechanic” on the construction site receive the appropriate prevailing wage rate, irrespective of any contractual relationship alleged to exist or not to exist between the contractor and such persons. *Arliss D. Merrell, Inc.*, 1994-DBA-00041 (ALJ Oct. 26, 1995); 29 C.F.R. §§ 5.2(o), 5.2(i), 5.5(a)(2), 5.5(a)(6). 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

¹⁷ In the charging letters dated April 16, 2013, the Administrator determined that forty percent of the WMS workers’ time should have been classified as “Laborer: Skilled.” RX 10. In the charging letters dated January 15, 2015, the Administrator determined that seventy percent of the WMS workers’ time should have been classified as “Laborer: Skilled.” The Administrator’s determinations contained in RX 11 are those at issue in this case.

The Administrator also determined that the “Asbestos Worker: Hazardous Material Handler (Removal from mechanical systems which will not be replaced or scrapped)” classification was inapplicable to the GSA project because all of the mechanical systems at the GSA project were replaced or scrapped. TR at 615; *Adm’r Br.* at 8.

¹⁸ The “Wage Appeals Board” was the predecessor to the Administrative Review Board.

accurately demonstrate that workers were paid prevailing wages and fringe benefits for all compensable work. 29 C.F.R. § 5.5(a)(3)(i).

The Administrator has the initial burden of proving that employees performed work on the GSA project for which they were improperly compensated. *See, e.g., Cody Zeigler, Inc.*, 1997-DBA-00017 (ALJ Apr. 7, 2000), *aff'd in relevant part*, ARB Case Nos. 01-014, 01-015 (ARB Dec. 19, 2003); *Pythagoras Gen. Contracting Corp.*, 2005-DBA-00014 (ALJ June 4, 2008), *aff'd*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011). 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.

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

The Administrator does not need to establish “the precise extent of uncompensated work.” *See Thomas & Sons Bldg. Contractors, Inc.*, 1996-DBA-00037 (ALJ Feb. 17, 2000), *aff'd*, ARB Case No. 00-050 (ARB Aug. 27, 2001), *Order Denying Recons.* (ARB Dec. 6, 2001). Testimony by workers is acceptable “in the absence of accurate employer records” from either the contractor or the subcontractor. *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-00014 (ARB Feb. 27, 2004). Additionally, in *Star Brite Construction Company*, the Board held that, given the respondent’s lack of records, it was proper for an Administrative Law Judge to rely on the testimony of witnesses. ARB Case No. 98-113, 1997-DBA-00012 (ARB June 30, 2000).

If the Administrator meets its burden, the burden then shifts to the respondent employer, who bears the ultimate burden of proof by a preponderance of the evidence. *Cody Zeigler, Inc.*, 1997-DBA-00017, at 31 (ALJ Apr. 7, 2000), *aff'd in relevant part*, ARB Case Nos. 01-014, 01-015 (ARB Dec. 19, 2003); *Pythagoras Gen. Contracting Corp.*, 2005-DBA-00014 (ALJ June 4, 2008), *aff'd*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011). The employer must “come forward with evidence of the precise amount of work performed or with evidence to negat[e] the reasonableness of the inference to be drawn from the employees’ or Administrator’s evidence.” *Id.*; *see also Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-00014 (ARB Feb. 27, 2004); *Thomas & Sons Bldg. Contractors, Inc.*, ARB Case No. 00-050, 1996-DBA-00037 (ARB Aug. 27, 2001). If the employer fails to produce such evidence, the court may then award damages to the Administrator, on behalf of employees, even if the result is only approximate. *Mt. Clemens Potter Co.*, 328 U.S. at 687-88.

DISCUSSION

In order to comply with the Davis-Bacon Act provisions of a contract, contract workers must be paid according to the classifications used in the locality in which the contract is performed. *See Building & Constr. Trades’ Dept., AFL-CIO v. Donovan*, 712 F.2d 611, 614 (D.C. Cir. 1983); *Emerald Maint., Inc. v. United States*, 925 F.2d 1425, 1427 (Fed. Cir. 1991) (*citing Building & Constr. Trades’ Dept.*, 712 F.2d at 614.); *Johnson-Massman, Inc.*, ARB Case No. 96-118 (ARB 1996).

In this case, the Administrator determined that the WMS workers were not paid the proper wages based on an investigation that “revealed that the work performed by the WMS asbestos abatement workers was not unskilled in nature.” *Adm’r Opening Br.* at 7; TR at 612. This determination was largely based on union practice in the Washington, D.C. area, as well as discussions with the WMS employees themselves. *Id.* at 7, 9.

The Respondents assert that the Administrator failed to meet his burden because he did not conduct a local area practice survey to determine which classification predominantly performs similar work in the relevant geographical area. *ISI Br.* at 2-3; *ASI Br.* at 8-11. The Respondents also assert that the work performed by the employees in question was not skilled and that the WMS employees were properly classified under the “Laborer: Common or General” classification. *ASI Br.* at 8-10.

Accordingly, in order to determine whether the Administrator has met his initial burden of proof that the 127 employees in question were improperly compensated, I must determine the appropriate classification for said employees and, specifically, whether the work, or some of the work, they performed at the GSA project should have been classified as “Laborer: Skilled,” as set forth in the Wage Determination.

A. The WMS Employees Were Misclassified

The initial burden of proof is on the Administrator to make a prima facie showing that employees performed work for which they were improperly compensated. *Thomas & Sons Bldg. Contractors, Inc.*, ARB Case No. 00-050, 1996-DBA-00037 (ARB Aug. 27, 2001). To do so, the Administrator must produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. *Mt. Clemens Potter Co.*, 328 U.S. at 687-88.

The Administrator contends that the WMS workers performing asbestos abatement work at the GSA project were performing work in the “Labor: Skilled” classification. *Adm’r Opening Br.* at 17. In support of its position, the Administrator points to testimony from fourteen WMS workers as well as testimony from two representatives of a local labor union. *Id.* The Administrator contends that the testimony demonstrates that the WMS workers performed skilled labor because the workers were required to have asbestos abatement certifications and used power tools. *Id.* Furthermore, the Administrator contends that the “correct classification of the work performed by [the WMS workers] must conform to the union determination that is skilled labor.” *Id.*

i. The WMS Workers Used Power Tools

A “worker’s classification depends upon the tasks he performs and the tools he uses.” *See Dumarc Corp.*, 2005-DBA-00007, at 22 (ALJ Apr. 27, 2006); *see also Double Eagle Constr., Inc.*, 1993-DBA-00014, at 8 (ALJ June 13, 1994) (“Employees are to be classified and paid according to the work they perform. . . .”); *Johnson-Massman, Inc.*, ARB Case No. 96-118 (Sept. 27, 1996) (“Exact delineation of the duties laborers may perform and the tools they may utilize is a matter defined on a case by case basis. . . .”). As set out above in the *Findings of Fact* section

of this decision, the “Laborer: Common or General” classification does not contain any description. *See* JX 2. The “Laborer: Skilled” classification, however, contains a list of types of workers considered to fall under that classification, including a “power tool operator.” *Id.*

At the hearing, the Administrator presented the testimony of 14 WMS asbestos abatement workers at the GSA project. These workers testified about their certifications in asbestos removal, their work time spent inside and outside the containment areas, and their use of power tools, including chipping guns and sawzalls. *See* TR at 156-224 (Brian McNeil); TR at 268-393 (Alvaro Tum Calo); TR at 293-309 (Nery Hernandez); TR at 309-324 (Mauro Rivas Gonzalez); TR at 324-357 (Miguel Lorenzo); TR at 357-380 (Porfirio Arias); TR at 389-420 (Erick Roberto Mancilla Gomez); TR at 420-438 (Wilfredo Hernandez); TR at 438-464 (Manuel Vega Dubon); TR at 465-488 (Walter Alvarado); TR at 489-511 (Luis Hernandez); TR at 522-547 (Gustavo Lopez Hernandez); TR at 547-566 (Luis Fonseca); TR at 566-578 (Aurelio Juarez).

Chipping guns or “pneumatic” chipping guns are the size of a hand gun, weighing approximately 5-6 pounds when empty and approximately 15 pounds with air pressure. TR at 170-71, 434, 494, 529, 776-77. The WMS asbestos abatement workers operated chipping guns while standing on ladders and scaffolds, which allowed them to chip the ceilings carefully, without destroying the terra cotta above. *Id.* at 169, 471, 529. Two compressors on-site powered multiple chipping guns. *Id.* Some workers also testified to using electric hammers and electric sawzalls, which were used to cut pipes at the GSA project. TR at 315, 330, 426, 444, 496. Sawzalls are over one-foot long, weigh 5-10 pounds, and have 6-inch blades. TR at 495-96, 530.

All of the employees working inside the containment areas at the GSA project had to be certified in asbestos abatement removal in order to perform their job correctly and safely. TR at 35-37, 76. Several of the WMS workers testified about using power tools inside the containment areas for a large portion of the workday to perform the asbestos abatement work. Mr. Rivas Gonzalez testified that he and fifteen others used chipping guns during his shifts. *Id.* at 315-16. Mr. Lorenzo testified that during his shifts, he used a chipping gun, an electric hammer, and a sawzall. *Id.* at 330. According to Mr. Arias, he used a chipping gun on the ceilings, a pallet jack to move heavy boxes, and a sawzall to cut pipes. *Id.* at 362-63. Mr. Mancilla Gomez testified that he and his fellow workers used chipping guns as well as sawzalls. *Id.* at 394; 404-405. Mr. Wilfredo Hernandez testified that he used a chipping gun, a sawzall, and a sprayer to perform his work. *Id.* at 425-26. Mr. Dubon testified that he used a chipping gun to remove asbestos from the ceilings, and at times, he used a sawzall. *Id.* at 443-44. Mr. Alvarado testified that he used a chipping gun, sawzall, hammer, sprayer, and pallet jack to perform his work. *Id.* at 469-70. Mr. Lopez Hernandez testified that he used cutters, hammers, sawzalls, scissors, air hammers, and electric hammers to perform his work. *Id.* at 528. Mr. Fonseca testified that he used a chipping hammer and an air hammer to remove asbestos, as well as a sawzall. *Id.* at 552. Mr. Juarez testified that he used an electric hammer, chipping gun, and sawzall. *Id.* at 570.

I find that the WMS workers’ testimony is credible, to the extent they discussed the actual work they performed, and the different types of power tools they used. Each of them was able to testify about the specific types of tools used as well as about the different tasks involved when working in the containments. Each worker was able to clearly testify about the type of training required to work in the containment, and how it was applicable to the work. Having

considered the testimony of the WMS workers regarding the work they performed at the GSA project, as well as testimony describing the tools used at the project, I find that pneumatic chipping guns, electric hammers, and sawzalls are “power tools.”¹⁹ I further find that the WMS workers operated these power tools while inside the containment areas at the GSA project.

ii. *The Prevailing Wages in the Wage Determination Control*

A prevailing wage is the “wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question.” 20 C.F.R. § 1.2(a)(1). It is the responsibility of the contractors and subcontractors to abide by the labor standards provisions of the contract. *See Batteast Constr. Co.*, WAB Case No. 83-12 (WAB June 22, 1984).

The Administrator contends that the prevailing rate for “Laborer: Skilled” in the applicable Wage Determination has been determined to be the union rate of Local Union 657. JX 2 at 6-7; TR at 644. The parties stipulated that the Wage Determination DC20100004 applied to the GSA project. JX 16. In the Wage Determination, the “Laborer: Skilled” classification contains an identifier “LABO0657-015,” and the “Laborer: Common or General” classification contains identifier “SU DC2009-003.” The designations are described in the Wage Determination as follows:

... the “SU” designation means that rates listed under the identifier do not reflect collectively bargained wage and fringe benefit rates. Other designations indicate unions whose rates have been determined to be prevailing.

JX 2 at 6-7.

Therefore, according to the Wage Determination agreed to by the parties, the “Laborer: Skilled” classification is a union prevailing rate, and the “Laborer: Common or General” classification is not. For this reason, the Administrator contends that “the work claimed by the local laborers’ union is determinative of the correct application of this wage rate . . . [and] [a]s a matter of law, this Court must rely on union testimony to determine the correct classification of the WMS asbestos abatement workers on the GSA project.” *Adm’r Br.* at 18-19.

Testimony from union representatives can be used to establish whether a local laborers’ union claims the work the type of work at issue. *Double Eagle*, 1993-DBA-00014, at 9 (ALJ June 13, 1994); *Johnson-Massman*, ARB Case No. 96-118, at 4 (ARB Sept. 27, 1996). At the hearing, the Administrator presented testimony of representatives from Local Union 657 of the Laborers’ International Union of North America (“LiUNA”), Mid-Atlantic Regional Organizing Coalition.

Steve Lanning, Director of Organizing at LiUNA testified as to union practice for asbestos abatement work in the Washington, D.C. area:

¹⁹ ASI agrees that pneumatic chipping guns, electric hammers, and sawzalls are power tools. *ASI Br.* at 26.

The union practice is that asbestos work, because of the training, the certification required, the need to pass an exam, the need to be licensed as an asbestos abatement worker, the fact that asbestos is a known carcinogen and the safety conditions involved, and traditionally the tools used [for] abatement work, that it would be - - the power tools involved, that asbestos abatement should be classified as a skilled labor position.

TR at 115. Mr. Lanning further testified that work inside a containment area is considered to be skilled asbestos abatement work and work performed outside the containment area is unskilled labor. *Id.* at 117. According to Mr. Lanning, not all work performed inside the containment area is skilled, however, and the union does consider some work inside the containment area as a “common labor or unskilled labor task.” *Id.*

The Wage Determination contains a prevailing union rate for the skilled laborer classification. According to Mr. Lanning, this rate is used by the union to classify asbestos abatement workers for some time spent inside containment areas. The Administrator argues that the time should be quantified based on the workers’ use of power tools. At this stage in the analysis, the Administrator has the initial burden of proving, as a matter of just and reasonable inference, that the employees performed work for which they were improperly compensated. I have already found that the WMS workers utilized power tools as part of their duties at the GSA project. Because the Wage Determination, as agreed to in the contract, specifically states that a power tool operator falls under the “Laborer: Skilled” classification, I find that the Administrator has met his initial burden of proving that the WMS employees performed some work using power tools for which they were improperly compensated according to the classifications set forth in the Wage Determination.

B. Respondents’ Rebuttal

After the Administrator has met his initial burden, the burden shifts to the respondent, who bears the ultimate burden of proof by a preponderance of the evidence. *Cody Zeigler, Inc.*, 1997-DBA-00017, at 31 (ALJ Apr. 7, 2000), *aff’d in relevant part*, ARB Case Nos. 01-014, 01-015 (ARB Dec. 19, 2003); *Pythagoras Gen. Contracting Corp.*, 2005-DBA-00014 (ALJ June 4, 2008), *aff’d*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011).

The Respondents contend that the WMS employees’ work was not skilled, the use of power tools was minimal, and the type of work performed was controlled by area practice which shows that the work is predominantly performed by non-union General Laborers. *ASI Br.* at 7-17; *ISI Br.* at 2-3; *WTW Br.* at 8. ASI also contends that the Administrator was required to conduct a local area practice survey.

i. A local area practice survey was not required

A local area practice survey is an “investigatory tool in the compliance investigation to verify information the investigator received from union and other representatives.” *Abhe & Svoboda, Inc.*, ARB Case No. 01-063, at 22 (ARB May 17, 2001). The Field Operations

Handbook²⁰ states that “[t]o determine the proper classification of work performed on a DBA covered project, it *may* be necessary to conduct a local area practice survey.” Field Operations Handbook (FOH) 15f05(a) (emphasis added). This provides the Administrator with discretion regarding whether to conduct a local area practice survey.²¹ Also, the record contains testimony from both union representatives and non-union witnesses regarding area practice for asbestos abatement workers. Therefore, the Administrator was not required to conduct a local area practice survey in this case.²²

The Administrator is required to “give foremost consideration to area practice in resolving the question” regarding application of wage rate schedules. 29 C.F.R. § 1.6(b). In accordance with 29 C.F.R. § 5.13, “questions relating to the application and interpretation of wage determinations” must be referred to the Administrator for a ruling or an interpretation. The regulations also provide clear guidelines for changing or adding a necessary classification to a contract. 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(3). A request pursuant to 29 C.F.R. § 5.5 for “new classifications to be employed on the project” is distinguishable from a “question of area practice as to what classification an existing wage determination performs the work.” *Rite Landscape Constr.*, WAB No. 83*03, slip op. at 8 (Oct. 18, 1983).

The WAB has held that:

²⁰ “The Field Operations Handbook (FOH) is an operations manual that provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance.” *United States Dep’t. of Labor, Wage and Hour Division, Field Operations Handbook (FOH)*, available at www.dol.gov/whd/FOH/index.htm.

²¹ The ARB has stated that “legal precedent does not dictate that a local area practice survey be conducted as a prerequisite to granting or denying a conformance request. In such cases, the decision on whether a LAPS [local area practice survey] is required is generally left to the discretion of the Administrator, depending on the circumstances of the particular case.” *Barco*, ARB Case No. 13-041, at 12 (ARB July 31, 2015) (citing *Pizzagalli Constr.*, ARB No. 98-090, at 8 (ARB May 28, 1999)).

²² Even if the Administrator were to conduct a local area practice survey at this point, I do not find that the results would provide substantially different information than what is already contained in the record. The Field Operations Handbook sets forth the steps for conducting surveys to determine prevailing area practice:

If a combination of union and non-union rates are listed in the wage determination for classifications that may have performed the work in question on similar construction in the area (usually the same county), the dispute will be resolved based on the combined information from:

1. union contractors for the classification(s) for which union rate(s) are listed in the applicable wage determination; and
2. non-union contractors for the classification(s) for which non-union rate(s) are listed in the applicable wage determination.

FOH 15f05(c)(5)(c)(1)-(2).

The record already contains testimony as to union and non-union practice and rates which are considered in this Decision and Order.

The Davis-Bacon and related acts were intended to protect the rights of laborers and mechanics employed on Federal and federally assisted projects, not to protect contractors who have violated the law and then attempt to mitigate the violations through alleged dereliction of enforcement by either the Wage and Hour Division or the contracting agency.

Batteast Constr. Co., WAB Case No. 83-12 (WAB June 22, 1984).

In this case, the Wage Determination was already issued, used in the bidding process, and stipulated to by the parties. JX 2. Respondents had the opportunity to seek guidance from the Administrator pursuant to the procedure at 29 C.F.R. § 5.13 on how to interpret the classifications listed on the wage determination, or the Respondent could have requested that additional classifications be included in the wage determination pursuant to the procedure at 29 C.F.R. § 5.5(a)(1)(ii)(A). The record does not reflect that the Respondents utilized either procedure.²³

Based on the foregoing, I find that the Administrator did not abuse his discretion in relying on the existing Wage Determination and not conducting a local area practice survey.

- ii. *Respondents failed to justify why the WMS workers were not paid according to multiple applicable classifications in the Wage Determination*

The Respondents argue that they used the classification for the WMS workers that had been “used many times by ASI and the higher tier contractors in this case without objection from anyone.” *ASI Br.* at 31. Additionally, ASI contends that most of the work was performed with manual tools and, as such, the work did not belong at the skilled laborer level. *Id.* Mr. Lanning, the Director of Organizing for the Laborers’ International Union of North America (“LiUNA”), Mid-Atlantic Regional Organizing Coalition (“MAROC”) testified that the union defines common or unskilled labor as “performing menial and rudimentary tasks that require limited skill.” *Id.* at 121. ASI did not confer with other contractors, union representatives, or the Department of Labor regarding the classification before submitting its bid. *Id.* at 64-65. Instead, the Respondents contend that it is the Administrator who should have performed a local area practice survey to determine the appropriate classification and rate. But, as I found above, the

²³ I note that on January 4, 2012, WTW submitted a request for authorization of additional classification and rate, seeking to pay the \$15.84 wage but under a classification entitled “Labor: Environmental Asbestos Abatement from Non-Mechanical System.” DOL Ex. 4. On March 12, 2012, this request was rejected for the following reasons, as set forth by Wage and Hour division Section Chief, Forest Randall:

The request cannot be approved because the work to be performed by this classification may be performed by classifications already included in the wage decision (See section 5.5(a)(1)(ii)(A)(1)). The appropriate classifications are the Asbestos Worker: Hazardous Material Handler for asbestos abatement from mechanical systems which will not be replaced or scrapped and Laborer: Skilled for all other Asbestos Abatement. If it is not practical to segregate the work, the higher of the two wage rates may be paid for all asbestos abatement.

DOL Ex. 5.

Administrator was not required to conduct such a survey, and did not abuse his discretion in opting not to conduct a survey.

The Respondents' also argue that asbestos abatement work is predominantly performed by non-union general laborers. ASI presented the testimony of John Keith, a Project Manager for WTW, who testified that on other major federal government projects in the area involving asbestos abatement, the work was classified as unskilled labor. *Id.* at 884. ASI also presented testimony from a former ASI estimator, Mr. Cataneo, who testified that, in his experience, if there was no asbestos rate specifically applicable to a job, he would defer to the unskilled labor rate. *Id.* at 761. He did this while working for ASI, as well as with other employers. Mr. Cataneo never used the skilled laborer rate in a bid. *Id.* at 762. ASI also noted that in the year prior to the contract award, ASI performed similar work in Washington, D.C., including the use of the same power tools, using General Laborer rates. RX 29; *ASI Br.* at 17. According to ASI, this "evidence of area practice shows that the work in question, including the use of power tools, was predominantly performed by non-union General Laborers. Based on that prevailing area practice, the work was properly classified in its entirety as General Laborer work." *ASI Br.* at 2.

The Respondents also presented testimony from Paul Harkins, Executive Vice President of ISI. He testified that in his 37 years of management experience in the construction industry, asbestos abatement work has been classified as:

. . . . common or unskilled labor, except in the instance where there are mechanical systems that stay operational, and then the classification sometimes is different.

. . . .

In that case, there's usually a special asbestos worker classification. It's usually a higher rate, yes.

TR at 842.

Mr. Harkins further testified that ISI segregated the work at the GSA project between skilled versus unskilled work:

. . . you can take the tools that are these exhibits here and you can take a hammer and chisel and give it to a skilled laborer and they can go and create, you know, this beautiful sculpture out of a piece of stone. But a common/unskilled laborer takes those tools and it's called demolition. They destroy it.

. . . .

Whenever there was precise cutting to do, rigging to do, shoring to do, those were skilled people. They had to have special training to do those kind of operations. When you're rigging a piece of concrete out of a wall that weighs thousands of pounds, it's not the same as going up there with a jackhammer and hitting it. Now if they took it out with a jackhammer, they were paid common/unskilled.

TR at 867-68.

The WMS workers testified about their use of electric sawzalls to perform asbestos abatement at the GSA project. Mr. McNeil testified that sawzalls require extreme precision and care because, if used incorrectly, they could pulverize the asbestos, which is what the asbestos workers are trained not to do. *Id.* at 179. I find that such use of power tools is consistent with Mr. Harkins' explanation of some of the precise cutting involved in skilled labor. I find that, unlike ISI's practice, ASI did not distinguish between skilled and unskilled work and, instead, used the blanket classification of general laborer for all the work that the WMS workers did at the GSA project.

An employer who utilizes employees in more than one classification must ensure that those employees are properly paid for the various types of work performed and for the hours such work was performed. *See P&N, Inc./Thermodyn Mech. Contractors, Inc.*, ARB Case No. 96-116, 1994-DBA-00072 (ARB Oct. 25, 1996). In this case, ASI did not distinguish between asbestos abatement work using power tools, work inside the containment area, or work outside the containment area. ASI classified the WMS workers as General Laborers for *all* the work they performed at the GSA project. I find that the Respondents failed to rebut the just and reasonable inference that some of the asbestos abatement work should have been classified as skilled labor.

C. Determination of the Amount of Compensable Time

i. The Respondents failed to maintain and submit complete and accurate payroll records

The regulation governing recordkeeping obligations under the DBA provides, *inter alia*, that a contractor must keep payrolls and basic records that include the "name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid." 29 C.F.R. § 5.5(a)(3)(i).

Moreover, 29 C.F.R. § 5.5(a)(3)(ii)(A) provides that a contractor "shall submit weekly for each week in which any contract work is performed a copy of all payrolls. . . ." The contractor must sign and certify that the payroll submission complies with the regulations, and that each laborer or mechanic "has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract." 29 C.F.R. § 5.5(a)(3)(ii)(B).

I find that the Respondents failed to maintain and submit complete and accurate payroll records, in accordance with the Act. The record in this case does not contain payroll records that "accurately set forth the time spent in each classification in which work is performed." *See* 29 C.F.R. § 5.5(a)(3)(i). There are not any documents in existence that show how often a particular

employee was performing either a skilled or common/general laborer function, nor are there any records tracking how often a particular employee handled a particular tool at the GSA site. TR at 706. Mr. Morosko kept a list of how many tools were at the GSA site in his office, but stated that this list was probably “long gone” and that he likely threw it out a year after the job ended. *Id.* at 708-09. ASI provided an exhibit showing the amount of man hours per tool used for a similar job at a different project site; however, no such records exist for the GSA project. *ASI Br.* at 24; RX 23. In addition, ASI only tracked hours based on a sign in sheet which did not require workers to sign out because, according to William Riggs, III, one of the ASI supervisors, the workers always started at 6:00 p.m. and ended at 3:00 a.m. TR at 792.

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 forms 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. “[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 [a] position to know and produce the most probative facts concerning the nature and amount of work performed.” *Id.* While it is permissible under contract labor requirements to work an employee in more than one classification, to do so imposes the added responsibility on the contractor to make certain that such employee is properly paid for the various types of work he performed and for those hours he performed that particular job. *See Framlau Corp.*, WAB Case No. 70-05, at 4-5 (April 19, 1971).

Accordingly, due to the absence of accurate employer records, I will consider the testimony of the WMS workers in drawing a reasonable inference as to the percentage of time they spent doing work that should have been classified as “Laborer: Skilled.”

ii. *40% of the WMS employees’ work should have been classified as Skilled Labor*

The Administrator must “produce[] sufficient evidence to show the amount and extent of [the improperly compensated work] as a matter of just and reasonable inference.” *Mt. Clemens Potter Co.*, 328 U.S. at 687-88. The Administrator does not need to establish “the precise extent of uncompensated work.” *See Thomas & Sons Bldg. Contractors, Inc.*, 1996-DBA-00037 (ALJ Feb. 17, 2000), *aff’d*, ARB Case No. 00-050 (ARB Aug. 27, 2001), *Order Denying Recons.* (ARB Dec. 6, 2001). The burden is then on the respondent 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. 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*, 328 U.S. at 688; *see also Thomas & Sons Bldg. Contractors, Inc.*, 1996-DBA-00037 (ALJ Feb. 17, 2000), *aff’d*, ARB Case No. 00-050 (ARB Aug. 27, 2001), *Order Denying Recons.* (ARB Dec. 6, 2001).

The Administrator argues that the WMS workers should have been classified as “Laborer: Skilled” for 70% of their time, and “Laborer: Common or General” for 30% of their time. *Adm’r Br.* at 2. Mr. Bruce Dory, Wage and Hour Assistant District Director, explained that

the 70% “Laborer: Skilled” wage rate was used by the Administrator as an approximation based on:

[T]he totality of all the evidence that we gathered and all the evidence that we have heard. You know, we had to also consider in the statements that there is an allowance for setup, which is minimal; set it up at the beginning of the workday, and towards the end of the workday, there is cleanup, which does take a little bit more time at the end as opposed to the beginning.

Now, with that being said, their testimony from various people who work on the project, this testimony from the union, the union that actually has an allowance, and they acknowledge that part of the work was – and a minimal part of the work is unskilled labor. But the preponderance of it is as a skilled labor[er].

TR at 618-19.

The Respondents do not deny that the WMS workers used power tools; however, the Respondents contend that power tool use represented only a small portion of the work. *ASI Br.* at 24. In support of this contention, ASI provided an estimation of the amount of time spent using power tools in its post-hearing brief, which summarized the phases of work as well as the tools used in each phase. *ASI Br.* at 26-29. ASI contends that the time spent preparing the decontamination area and the wetting phases, as well as the final clean up phases, did not involve the use of power tools. *ASI Br.* at 26. The phases for wall demolition, ceiling chipping, and material pick up and packaging involved the use of the following power tools: electric hammers, sawzalls, and chipping guns. *Id.* at 27. ASI estimated that 3,838 man-power hours were spent on each containment. *ASI Br.* at 28. ASI then calculated a weighted average of the percent of power tool use, finding that the overall project used power tools 11.7% of the time. *Id.* at 28-29.

I find that the table provided in ASI’s brief regarding the usage of power tools does not, by itself, satisfy the rebuttal requirement that the respondent employer offer 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.” *See Thomas & Sons Bldg. Contractors, Inc.*, 1996-DBA-00037 (ALJ Feb. 17, 2000), *aff’d*, ARB Case No. 00-050 (ARB Aug. 27, 2001), *Order Denying Recons.* (ARB Dec. 6, 2001); *Mt. Clemens*, 328 U.S. at 688. I must also consider and weigh the testimony of Respondent ASI’s supervisors as well as the testimony of the fourteen WMS workers. Based on the record before me, I agree with ASI that “[a] large portion of asbestos work involves preparing the area, getting rid of debris and cleaning up.” *ASI Br.* at 29.

Three ASI supervisors testified at the hearing regarding the work at the GSA project: William Riggs, III, Shawn Morosko, and Brandon Bentley. *Id.* at 670-726; 769-809; 810-22. Mr. Bentley testified that there were approximately 15-16 workers per containment at any time and that while six people were chipping, the others were cleaning, removing the bulk of debris, removing pallets, and watering down the job site. TR at 811-817. Chipping hammers were used for a few hours in each containment, while one to two sawzalls were used daily for two to three hours per day. TR at 813, 815. As the senior site supervisor, he spent two to three hours in each

containment per night. TR at 818. He testified that he did not know with certainty how much time each worker used power tools. TR at 819.

Mr. Riggs, III testified that work in each containment took three to four weeks. TR at 773. Demolition lasted about two weeks; during ceiling demolition, six people performed chipping while six to eight people would be cleaning. TR at 773, 777. An electric hammer was used two to three hours per containment, and sawzalls were used by a few workers for a couple hours per day. TR at 779-80. There was also one power washer per containment, and forty man hours were dedicated to vacuuming in each containment. TR at 782-83.

Mr. Morosko testified that setting up containments would usually take about one week, and then gross demolition would begin. TR at 672-73. Gross demolition spanned approximately one week, and final clean up typically took one week. TR at 674. During ceiling demolition, six people would be chipping while six others would be cleaning up. TR at 680. He also testified that an electric hammer would be used for a few hours at the end of the demolition, and sawzalls were used by a couple of workers for a couple hours each time. TR at 686-88. He further testified that there are no documents tracking how many tools were located at the worksite, nor are there documents specifying how long workers used the tools. TR 701-703.

Fourteen WMS workers testified at the hearing regarding their asbestos abatement removal certifications, their use of power tools, the amount of time spent inside the containment areas, and the amount of time spent cleaning up.

Mr. McNeil testified that the amount of time spent using power tools varied from day to day, depending on the work assignment. TR at 177. On some days, Mr. McNeil would use a chipping gun for 7.5 hours, and the remainder of the time would be spent cleaning. However, Mr. McNeil also testified that some days cleaning might take an extra half an hour, meaning that only 7 hours were spent using a chipping gun. Mr. Tum Calo testified that at any given time, approximately five to seven people would be using chipping guns while three or more people would be picking up debris. TR at 286.

Mr. Nery Hernandez testified that most of his nine hour shift was spent chipping, but he occasionally spent time removing boxes. *Id.* at 300-301. He and other workers picked up asbestos and bagged it at the end of his shift for one hour. *Id.* Mr. Lorenzo testified that he used a chipping gun about 80% of the time. *Id.* at 329. He spent the last thirty to forty-five minutes of his shift cleaning up the work area. *Id.* at 330-31. Mr. Arias testified that he spent time using a chipping gun, a pallet jack, and a sawzall, but he also helped to build containments before performing removal work. *Id.* at 362-63. He also demolished walls with a sledge hammer, used a shovel to remove debris, and participated in the final clean up. *Id.* at 367-69; 371.

Mr. Mancilla Gomez testified that he used a chipping gun, and worked in groups of twenty to thirty workers. *Id.* at 394. He also testified that he and the other workers used the chipping guns about 80% of the time, and the remainder of the time was spent preparing the area. *Id.* at 395. The last part of his nine hour shift was spent placing asbestos in boxes and removing them from the area. *Id.* at 396. All of the workers participated in putting up containments, which took two to three hours. *Id.* at 401. While twelve workers performed asbestos removal, the others

used sawzalls to open up other areas. *Id.* at 404-405. Also, other workers continued to break down walls using chipping guns. *Id.*

Mr. Wilfredo Hernandez testified that he used a chipping gun, and that it accounted for about 80% of his work. *Id.* at 425. He knew how to build containments, but he did not participate in building them at the 1800 F project. *Id.* at 427. There were workers shoveling debris while others performed demolition work, and there were also workers cleaning up while others were chipping. *Id.* at 432, 434. Mr. Dubon testified that he used a chipping gun to remove asbestos from the ceilings, and a scraper to remove asbestos from the floors. *Id.* at 443. He also used a sawzall. *Id.* at 444. He worked in a crew of twenty-three workers, and it took them three to five hours to prepare an area. *Id.* at 445. The remainder of their time was spent removing asbestos. *Id.* He testified that all workers used electric tools, but while four workers used them, the rest performed clean up. *Id.* at 456.

Mr. Alvarado testified that he worked nine hour shifts, and used power tools about eighty percent of the time. *Id.* at 471-72. Mr. Luis Hernandez testified that he performed chipping work on a scaffold while others chipped on ladders. *Id.* at 507. Cleanup was sometimes done during the work period, and at other times, the workers would begin cleaning up an hour to an hour and a half before the shift in ended. *Id.* at 508.

Mr. Lopez Hernandez testified that he usually worked in a group of about ten people. *Id.* at 527. He worked on setting up areas and covering areas with plastic before removing asbestos, and then he removed asbestos from pipes, floors, walls, and ceilings. *Id.* at 527-28. His shifts were nine hours, but part of the end of his shift was spent picking up asbestos. *Id.* at 533. Throughout the shift, one or two people would pick up debris. *Id.* at 543. Mr. Fonseca testified that there were about sixty-eight people working in groups of twelve to fifteen. *Id.* at 557. Groups would work together to construct the decons, but Mr. Fonseca did not construct containments. *Id.* at 562. His work mainly consisted of using a chipping hammer, air hammer, and sawzall, but he picked things up and placed them in boxes after the removal. *Id.* at 552; 556.

Mr. Juarez testified that he worked nine hour shifts. *Id.* at 570. He used an electric hammer, chipping gun, and sawzall to perform his work. *Id.* After cleaning up asbestos, and placing it in bags, he demolished walls with a sledgehammer. *Id.* at 572. According to a statement produced at the hearing during his testimony, Mr. Juarez was not able to quantify how much time he spent using the tools. *Id.* at 576.

Based on the extensive testimony in the record and the workers' use of power tools, asbestos abatement work, and the amount of clean-up necessary, I find that the Administrator's contention that 70% of the WMS workers' time should be classified as skilled labor is higher than the record supports. On some days, an employee may have used a chipping gun for 70% of the day, but the record reflects that on other days, that same employee may not use a power tool at all. Some days were spent preparing the containment areas, wetting materials, and taking down containments before moving on to a new area, so I must also factor in time where no power tools were used by anyone.

The ASI supervisors consistently testified that constructing containments took approximately one week, and clean up took approximately one week. Their testimony regarding the demolition phases of containments ranged from one to two weeks, during which time tools such as chipping hammers, sawzalls, and electric hammers were used. Therefore, one-third to one-half (33-50%) of the time in each containment could reasonably have been spent using power tools. Further, some WMS workers testified about their use of tools used in demolition that would not be considered power tools, such as sledgehammers. Some WMS workers also testified to participating in cleanup activities, as well as assisting with the construction of decons. Both the ASI supervisors and the WMS workers consistently testified that approximately six people would perform chipping work while approximately six people would perform cleanup duties. However, there is not any documentary evidence demonstrating which workers used which tools, or for how long.

I find that the WMS employees' testimony is credible to the extent they discussed the actual work they performed and their general hours, but I have given less weight to the percentages of time they provided when describing how long they worked with power tools. While testifying, many of them were asked about how much time they spent using particular power tools, but the questioning did not take into account that due to the nature of the job, on some days no one used power tools due to set up or final clean up occurring. I have afforded more weight to the ASI supervisors consistent testimony about how long phases of each containment lasted in reaching a reasonable inference as to how much of the WMS workers' time was spent performing skilled labor. However, in doing so, I have also carefully weighed the testimony of the WMS workers in light of the fact that none of the ASI supervisors were able to testify to specifics, such as which workers used which tools, and for how long, nor did any of the supervisors testify to having maintained records of these specific details while overseeing the GSA project.

Based on my weighing of the evidence before me, including the testimony of fourteen WMS workers and the testimony of the ASI supervisors, I find that, by a preponderance of the evidence, a reasonable inference is that 40% of the WMS workers' time should have been classified as "Laborer: Skilled." An inference of 40% falls into the reasonable range I established above (33-50%), and provides for time in which some workers may have used demolition tools not considered power tools, as well as time for participating in cleanup activities and constructing decons.

D. Calculation of Back Wages and Overtime

The failure to properly classify some of the work performed by the WMS workers results in underpaid wages and overtime. The Administrator alleges that Respondents owe \$640,693.95 in back wages to the asbestos abatement workers. (DOL-2 at 1). The Administrator detailed that he came to this value by using the:

[C]ertified payroll records (JX-5) and the applicable Wage Determination (JX-2) (Tr. 583-595). Wage and Hour took the difference in rate of pay between the "Laborer: Common or

General” and “Laborer: Skilled” (\$9.63) and multiplied by the total hours worked by each of the 127 misclassified WMS asbestos abatement workers during the investigative period as set forth in the certified payroll records (Tr. 588; DOL Ex. 1). That number was multiplied by 70 percent, which is the percentage of time the work was misclassified as asserted in the amended charging letter (Tr. 588-89). Using this formula, Wage and Hour calculated DBA back wages totaling \$621,907.81 due to 127 WMS asbestos abatement workers (DOL Ex. 1, p.40; DOL Ex.2).

CHWSSA (overtime back wages were calculated based on the weighted average of the “Laborer: Common or General” rate and the “Laborer: Skilled” rate for a particular week (DOL Ex. 1, p.1; Tr. 591-92). The weighted average was taken from the total earnings, excluding fringe benefits, and divided by the total number of hours worked at all jobs that week (DOL Ex. 1). Using this methodology, Wage and Hour calculated CHWSSA back wages totaling \$18,785.93 due to 107 WMS abatement workers (DOL Ex. 1, p.40; DOL Ex.2). Together, the DBA and CHWSSA back wages totaled \$640,693.74 (Tr. 593-94; DOL Ex.1; DOL Ex.2).

Adm’r Br. at 14-15.

I find that the Administrator’s calculation method is logical and reasonable, and the Respondents did not object to the calculation method. This method should be used by the Administrator to determine a new total back wages amount where 40% of the WMS workers’ time is classified as “Laborer: Skilled” and 60% of their time is classified as “Laborer: Common or General.”

iii. The Respondents failed to pay employees time and one-half of the appropriate wage determination rate for all work in excess of 40 hours in the work week

The CWHSSA requires that workers are paid time and one-half the basic rate of pay for all hours over forty worked in a workweek. 40 U.S.C. § 3702(A); 29 C.F.R. § 5.5(b)(1). Because I found that, based on the record before me, a reasonable inference that 40% of the WMS workers’ time should have been classified under the skilled laborer classification, it follows that some of that time may have been overtime. The Administrator used a weighted average methodology to determine that 107 WMS workers should have been paid \$18,785.93 in overtime wages. *Adm’r Br.* at 14-15; DOL Ex. 1; DOL Ex. 2. Using the method set forth by the Administrator in DOL Exhibit 1, page 1, I find that overtime is to be calculated for each employee who worked overtime based on the weighted average of the hours worked per workweek using my finding of 40% skilled and 60% unskilled work.

iv. Prime Contractor Liability for Violations by its Subcontractors

A prime contractor is responsible for the back wages due employees of its subcontractor under the DBA, and is responsible for ensuring that all persons engaged in performing the duties of a laborer on a construction site receive the appropriate prevailing wage rate. 29 C.F.R. §§ 5.5(a)(2), 5.5(a)(6); *Arliss D. Merrill, Inc.*, 1994-DBA-00041 (Oct. 26, 1995); *Palisades Urban Renewal Enters., LLP*, 2006-DBA-00001 (Aug. 3, 2007), *aff'd.*, ARB Case No. 07-124 (ARB, July 30, 2009); *Dumarc Corp.*, Case No. 2005-DBA-00007 (Apr. 27, 2006) (prime contractor is responsible for the payment of back wages owed to employees of its subcontractor). Whiting Turner Walsh, as prime contractor, is therefore responsible for wage underpayments by its subcontractors and lower tier subcontractors. *See also* JX 4, p. 11 (citing Subcontracts (Labor Standards) (July 2005) 52.222-11).

The case law also supports the conclusion that ASI, ISI, and WMS, as subcontractors, are also responsible for failing to pay the prevailing wage rate to the WMS employees pursuant to the DBA. *Ray Wilson Co.*, 2000-DBA-00014 (May 10, 2002) (subcontractor is responsible for the actions of the lower tier subcontractors), *aff'd.*, ARB Case No. 02-086 (ARB, Feb. 27, 2004); *Arliss D. Merill, Inc.*, 1994-DBA-00041 (Oct. 26, 1995) (subcontractors were found to be jointly and severally liable for the unpaid wages and fringe benefits owed to their former employees).

Debarment

The Administrator argues that ASI and its responsible officers, Samuel Chairs and Timothy Chairs, should be debarred for a period of three years, pursuant to 29 C.F.R. § 5.12(a). The Administrator has the burden of proof on the issue of debarment. Debarment proceedings are governed by 29 C.F.R. § 5.12(a), which states:

In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible persons or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of the statutes listed in § 5.1.

29 C.F.R. § 5.12(a)(2).

Violations of the Davis-Bacon Act do not per se constitute a “disregard of an employer’s obligations” within the meaning of Section 5.12(a)(2). *See Framlau Corp.*, WAB Case No. 70-05, at 4-5 (April 19, 1971); *Structural Concepts, Inc.*, WAB Case No. 95-02, at 3-4 (Nov. 30, 1995). The Board defines “disregard for obligations” under the Act to mean a level of culpability beyond mere negligence that involves some element of intent. *Thomas & Sons Bldg.*

Contractors, Inc., ARB Case No. 00-050, 1996-DBA-00037 (ARB Aug. 27, 2001), *Order Denying Recons.* (ARB Dec. 6, 2001). Accordingly, to support a debarment order, the evidence must establish a level of culpability beyond mere negligence. *Id.*; see also *P.J. Stella Constr. Corp.*, WAB Case No. 80-13, at 5-6 (Mar. 1, 1984) (employer held to be “grossly negligent”); *Vicon Corp.*, WAB Case No. 65-03, at 6-7 (Dec. 15, 1965) (“bad faith or gross carelessness” regarding compliance).

Respondent ASI contends that it considered the classifications listed on the wage determination and chose the one it believed was most applicable. *ASI Br.* at 31. ASI further contends that the “Laborer: Common or General” classification chosen was used several times in the past without any objection, and noted that the Administrator even agreed that 30% of the work was appropriately classified. *Id.* ASI further contends that the only dispute is about the level of skill within the classification, and it had “sound reasons for believing that the work did not belong at the Skilled Laborer level.” *Id.* Also, ASI contends that it accurately reported wages paid via certified payroll. *Id.* For these reasons, ASI argues that debarment against ASI, Timothy Chairs, and Samuel Chairs is an overreach, and that there is not any evidence to support such as “drastic measure.” *Id.* at 30.

ASI was responsible for the classification of the WMS workers at the GSA project. Mr. Chairs testified about ASI’s decision as to how to classify the WMS workers, stating that “[d]ue to the nature of the job and what we saw,” the “Laborer: Common or General” classification was appropriate for the WMS workers. TR at 62, 78, 97. According to Mr. Chairs, ASI considered the skilled laborer classification for the WMS workers, “[b]ut based on its description there [in the wage determination], it seemed to be a lot more trade-related: concrete, road paving, structural demolition.” *Id.* at 63.

Former ASI estimator, Mr. Cataneo, testified that, in his experience, if there was no asbestos rate specifically applicable to a job, he would defer to the unskilled labor rate. *Id.* at 761. He did this while working for ASI, as well as with other employers. Mr. Cataneo never used the skilled laborer rate in a bid. *Id.* at 762.

I find that Mr. Cataneo’s practice of deferring to an unskilled labor rate is not consistent with the DBA. The regulations set forth clear guidelines as to the appropriate steps a contractor should take if an existing classification does not fit the work to be performed. ASI could have submitted a request under either 29 C.F.R. § 5.5(a)(1)(ii)(A), (B), or (C) to add a new classification to the wage determination, or ASI could have clarified which existing classification covered the work, under 29 C.F.R. § 5.13.

John Keith, a Project Manager for WTW, testified that on other major federal government projects in the area involving asbestos abatement, the work has been classified as unskilled labor. *Id.* at 884. ASI also noted that its workers performed similar work, including the use of the same power tools, in Washington, D.C., in the year prior to the contract award, using General Laborer rates. RX 29; *ASI Br.* at 17. According to ASI, the “evidence of area practice shows that the work in question, including the use of power tools, was predominantly performed by non-union General Laborers. Based on that prevailing area practice, the work was properly classified in its entirety as General Laborer work.” *ASI Br.* at 2.

The record shows that both the WMS workers and the ASI supervisors performed asbestos abatement work at the GSA project. TR at 77. Samuel Chairs, testifying on behalf of ASI, confirmed that the ASI supervisors performed the same work as the WMS employees. *Id.* To explain why the ASI employees were paid differently, Mr. Chairs testified that the ASI supervisors “were the ones that were giving direction for what they were trying to get done and they were the ones that had to count further materials and their guys. And sure, so there’s some responsibility associated with that. So we wanted to put them up a step ahead of – for rate-wise.” TR at 78.

ASI also admitted that the Asbestos Abatement worker classification used for its own employees (who were primarily supervisors or foremen), was inapplicable to the work.²⁴ *Id.* at 77. However, according to ASI, the supervisors needed to be paid a different rate than the WMS employees. Both the ASI workers and the WMS workers performed the same manual asbestos removal work, but were paid differently. TR at 77. According to Samuel Chairs, supervisors were given a “higher incentive” because they had to account for materials and workers, and had additional responsibility, so ASI wanted to put them “a step ahead.” TR at 77-78. While the Respondents were aware that they were subject to the prevailing wage rates, I find that their actions did not rise to the level of gross negligence, fraud, or a knowing violation of the law such that I would recommend debarment proceedings.

The Respondents stipulated that the contract they signed concerning the work to be performed at the GSA headquarters contained provisions that stated that Respondents would be subject to the prevailing wage rates. Stip. 4. Respondents should have been aware that classifying employees based on their subjective beliefs, as they did in this case, was a violation of the Davis-Bacon Act. *See Mt. Clemens Potter Co.*, 328 U.S. at 687-88. Additionally, Respondent ASI was aware that a picket regarding wages occurred at the GSA construction site. TR at 79. Mr. Chairs testified that he was aware that:

[L]abor organizers came down there and grabbed their people as they were going in, they started telling them that they weren’t getting paid the right amount of wages and that they should strike or whatever. So, they organized many meetings off site with the people and tried to get them to picket, I guess. But some people walked the picket line, but we never lost any hours of work.

TR at 79. Mr. Chairs also testified that as a result of the picket the wage rates were not changed and he did not confer with Wage and Hour or contracting agencies after the picket. TR at 80.

I find that Mr. Chairs’ knowledge of the picketing approaches recklessness, but does not satisfy the standard of deliberate intent to avoid Davis-Bacon Act requirements. The WAB has stated that the terms “aggravated or willful” do not encompass “merely inadvertent or negligent behavior. Instead, the actions typically found to be ‘aggravated or willful’ seem to meet the

²⁴ The Asbestos Worker: Hazardous Material Handler (Removal from mechanical systems which will not be replaced or scrapped) was inapplicable because the mechanical systems were scrapped. TR at 60; *see also* fn. 16.

literal definition of those terms – intentional, deliberate, knowing violations.” *A. Vento Constr.*, WAB No. 87-51, slip op. at 7 (Oct. 17, 1990) (footnotes omitted).

In *Cody Zeigler, Inc.*, the ALJ held that debarment was not warranted where there was “no evidence of altered records, fraud, or deceit or any of the other telltale signs of knowing violation of the law.” 1997-DBA-00017, at 40 (ALJ Apr. 7, 2000). In *NCC Electrical Services, Inc.*, the ARB found that “some level of intent” is needed to find that a contractor or subcontractor has “disregarded their obligations to employees.” ARB Case No. 13-097 (ARB Sept. 30, 2015). The Board held that a finding of “bad faith on the part of the employer as well as gross negligence regarding compliance have each been found to constitute disregard of obligations under the DBA.” *Id.*

I do not find any evidence that the Respondents intended, in bad faith, to avoid complying with the Davis-Bacon Act, such as by falsifying records or purposefully failing to maintain records. Further, the Respondents actions do not rise to the level of gross negligence. While the facts in this case show that the Respondents did not bother to investigate into the wage determination classifications after knowledge of the picketing, this fact, alone, does not rise to the level of willful and deliberate conduct necessary to debar the Respondents.

CONCLUSION

In sum, the record reveals that the Respondents were contractually obligated to pay their employees pursuant to the prevailing wage provisions of the Davis Bacon Act, and in conformance with the Wage Determination. I find that Whiting-Turner Walsh violated the Davis-Bacon Act for: (1) failure to classify its workers as skilled laborers for 40% of the time worked; (2) failure to pay its workers the applicable prevailing wage rates for regular and overtime, in accordance with the appropriate classification; and (3) failure to maintain and submit accurate payroll records. Finally, I find that the facts of this case and the evidence in the record do not support a finding of debarment.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that Whiting-Turner Walsh pay back wages and overtime wages to the WMS workers, to be calculated by the Administrator according to the following: 40% of the hours worked at the “Laborer: Skilled” rate and 60% of the hours worked at the “Laborer: Common or General” rate. **IT IS FURTHER ORDERED** that the Government’s request to debar ASI and its responsible officers, Samuel Chairs and Timothy Chairs, for a period of three years is **DENIED**.

LARRY S. MERCK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within forty (40) days of the date of issuance of the administrative law judge’s decision. *See* 29 C.F.R. § 6.34. The Petition must refer to the specific findings of fact, conclusions of law, or order at issue. *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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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.