

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 30 December 2016**

CASE NO.: 2015-DBA-30

*IN THE MATTER OF:*

Disputes concerning the payment of  
Prevailing wage rates and overtime pay by:

J.D. ECKMAN, INC.,  
*Prime Contractor,*

PANTHERA PAINTING, INC.,  
*1<sup>st</sup>-Tier Subcontractor,*

ANDREW MANGANAS,  
*President, 1<sup>st</sup>-Tier Subcontractor,*

BRUCE ROBERTS,  
*Secretary, 1<sup>st</sup>-Tier Subcontractor,*

446 PAINTING, *and*

JUSTIN HAUTH,  
*President, 446 Painting*  
*Former Vice-President, 1<sup>st</sup>-Tier Subcontractor,*

AND proposed debarment for labor standards violations by:

PANTHERA PAINTING, INC.,  
*1<sup>st</sup>-Tier Subcontractor,*

ANDREW MANGANAS,  
*President, 1<sup>st</sup>-Tier Subcontractor,*

BRUCE ROBERTS,  
*Secretary, 1<sup>st</sup>-Tier Subcontractor,*

446 PAINTING, *and*

JUSTIN HAUTH,  
*President, 446 Painting,*

*Former Vice-President, 1<sup>st</sup>-Tier Subcontractor,*

Respondents.

With respect to laborers and mechanics employed  
By the 1<sup>st</sup>-Tier Subcontractor to provide painting services  
at the George N. Wade Memorial Bridge under  
PA ECMS Contract No. 57764

### **DECISION AND ORDER**

This matter arises under the Davis Bacon Act (“the Act” or “DBA”) as amended, 40 U.S.C. §276a, *et seq.*, and the applicable regulations issued thereunder at 29 C.F.R. Part 5.<sup>1</sup> As background, the DBA is designed to give local laborers and contractors a fair opportunity to participate in federal building programs, to protect employees of government contractors from substandard wages, and to promote the hiring of local labor rather than cheap labor from distant sources. *U.S. v. Binghamton Constr. Co.*, 347 U.S. 171, *reh’g denied*, 347 U.S. 940 (1954).

The matter was initiated by an Order of Reference dated July 27, 2015, by the Administrator, Wage and Hour Division (WH), United States Department of Labor, (Administrator), asserting the failure to pay certain wages in accordance with the DBA and related regulations, and seeking debarment of Panthera Painting, Inc. (“Panthera” or “employer”), Andrew Manganas, Justin Hauth, 446 Painting and Bruce Roberts (collectively, “Respondents”). The Order of Reference further indicates that the Wage and Hour Division seeks \$208,879.05 due in back wages and fringe benefits, as more specifically described in Wage and Hour letters to the respondents, the letters of which are attached to the Order of Reference as Exhibit A. After receipt of the Order of reference, the Notice of Docketing by the Office of Administrative Law Judges was issued to the parties on August 19, 2015.

The Administrator’s response to the Notice of Docketing dated September 16, 2015 alleges that respondents: failed to pay proper fringe benefits totaling \$205,316.42 to 61 employees by failing to submit fringe benefits to the International Union of Painters and Allied Trades (“IUPAT” or “Union”) benefit plans; improperly classified three journeymen painters as apprentices and therefore owe a total of \$3,513.31 to these employees for the applicable prevailing wage rate and fringe benefits due; inaccurately maintained records; and that respondents should be debarred for their willful failure to pay applicable prevailing wage rates and fringe benefits.

In its October 6, 2015, Response to the Notice of Docketing, respondents Panthera and Manganas in general, deny the Administrators allegations, including that they underpaid employees set forth in the Administrator’s response. Rather, Panthera and Manganas indicate that they have paid the employees due the monies via a settlement with the IUPAT as indicated

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<sup>1</sup> The Administrator does not allege overtime compensation violations or related issues. Accordingly, the Contract Work Hours and Safety Standards Act (CWHSSA) does not apply.

in the September 10, 2015 letter to the U.S. DOL, WH Division, attached to its response. They likewise deny the allegations that they misclassified three employees as apprentices and owe them monies for the applicable prevailing wage rate and fringe benefits and deny that they engaged in any willful conduct or that debarment is appropriate. They did however admit that they were debarred in 2004, although deny it can be used to implicate debarment in this action. (See paragraph 9.C of Panthera Painting's Response to Notice of Docketing). None of the other parties in this matter submitted a response to the Notice of Docketing.

The matter was subsequently assigned to me and a hearing was held June 1-2, 2016 in Pittsburgh, Pennsylvania (PA). The Administrator, and respondents Panthera, Andrew Manganas, Justin Hauth, and 446 Painting, were represented by counsel.<sup>2,3</sup> Respondent Bruce Roberts was self-represented. The parties were given a full opportunity to examine and cross-examine witnesses and present evidence. All parties except Mr. Roberts submitted post hearing briefs. For the reasons stated below, I find that the respondents violated the DBA and that debarment is warranted under the Act for a period of three years.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **I. STIPULATIONS, EVIDENCE, WITNESS TESTIMONY AND ISSUES**

#### **A. Factual Stipulations**

The parties agreed to the following stipulations which were submitted as Joint Exhibit ("JX") 1 at hearing. (Tr. 243).

1. Respondent J.D. Eckman, Inc. ("Eckman") was the prime contractor on PA ECMS Contract No. 57764 ("the contract"), concerning repairs to the George M. Wade Memorial Bridge ("the Wade Bridge").

2. Respondent Panthera Painting ("Panthera") was a subcontractor to J.D. Eckman for the contract.

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<sup>2</sup> Prime Contractor, J.D. Eckman (Eckman) was also a named respondent in this matter. Eckman, as the prime contractor in this matter was responsible for the proper payment of all prevailing wages and fringe benefits under the DBA and applicable regulations, including those allegedly not paid by its subcontractor, Panthera. See, 29 C.F.R. § 5.5 (a)(6). At hearing however, the Administrator and Eckman reached an agreement as to the violations and repayment of monies up to \$3,513.31 due three (3) Panthera employees who the Administrator alleged were improperly classified as apprentices. (Tr. 9). For reasons unclear to me, the Administrator did not seek debarment of Eckman. (Tr. 10). As a result of the agreement, I granted the Administrator's request to dismiss Eckman from the case. (Tr. 9-10). A consent agreement between the Administrator and Eckman representing that the outstanding monies due Panthera's employees were to be paid and the issues in contest between the Administrator and Eckman were resolved was subsequently submitted and approved by my Order dated October 12, 2016. Accordingly, as respondent Eckman was/is dismissed, its name was removed from the above caption of the case.

<sup>3</sup> The hearing transcript covering both days, June 1-2, 2016, is paginated as a single volume and numbered consecutively. All references to the transcript will be made as "Tr. \_\_\_\_," (with the number referring to the page number of the transcript).

3. Respondent Andrew Manganas (“Manganas”) is the president of Panthera, and was so at all times from 2010 to the present.

4. Respondent Justin Hauth (“Hauth”) was employed by Panthera while work under the contract was ongoing.

5. Hauth currently is the president of Respondent 446 Painting (“446 Painting”).

6. Respondent Bruce Roberts (“Roberts”) was employed by Panthera while work under the contract was ongoing.

7. The International Union of Painters and Allied Tradesmen (“the Union”) is not a party to this matter, but was the designated recipient of fringe benefit payments on behalf of employees.

8. The contract was awarded to Eckman on September 30, 2009, in the amount of \$36,448,227.41 by the Pennsylvania Department of Transportation.

9. The contract was funded by the Federal-Aid Highway Act, as amended.

10. Eckman and its subcontractors were required to pay employees as per the prevailing wage provisions of the Davis-Bacon and Related Acts, and the regulations at 29 C.F.R. Part 5.

11. Wage determinations for the contract were set by Wage Determination No. PA 20080014.

12. The Wage Determination in effect for the contract required Bridge Painters to be paid prevailing wages of \$28.05 per hour and fringe benefits of \$8.90.

13. Panthera was required to file a certified payroll with J.D. Eckman, Inc. every week that employed persons at the Wade Bridge, indicating its compliance with prevailing wage regulations.

14. Panthera was entitled to pay apprentice painters less than the prevailing wage of \$28.05 per hour on a scale commensurate with experience, provided that the apprentice painters were enrolled in a bona fide apprentice program.

15. Panthera was allowed to make fringe benefit payments either in cash directly to prevailing wage employees or the Union and its benefit fund.

16. Panthera began work at the Wade Bridge on or about the week ending February 28, 2010, and filed its first certified payroll with Wage Hour for that week.

17. Starting with Certified Payroll No. 1, Panthera certified that it paid fringe benefits due to Union painters into Union benefits funds.

18. Panthera filed a monthly report to the Union that specifically provided the number of hours worked by each Union Painter, and the identity of each Union painter working that month at the Wade Bridge.

19. The amount Panthera owed to the Union each month in fringe benefits was based on the hours worked according to the certified payroll.

20. Jeffrey Leech, attorney for the union funds, confirmed receipt of the payment in full of \$208,000 with respect to pension excluding apprenticeship.

### **B. Evidentiary Stipulations**

At hearing, the parties stipulated to the admissibility of the following exhibits which were admitted into evidence. (Tr. 13-15).

1. Administrator's Exhibit ("AX")-3 (Tr. 13, 15) – J.D. Eckman Contract
2. AX-4 (Tr. 13-15) – November 13, 2009 Panthera subcontract and April 16, 2013, amended subcontract between Panthera and J.D. Eckman.
3. AX-5 (Tr. 13, 15) – Contract special provisions concerning prevailing wage payments.
4. AX-9 (Tr. 13, 15) – Certified payroll records submitted by Panthera to Eckman.

### **C. Documentary Evidence Admitted without Objection**

At hearing, the following evidence was admitted without objection by a party.

1. Respondent Panthera's Exhibit ("RXP")-1 – September 10, 2015 letter from Attorney Jeffrey Leech to the Department of Labor, Wage and Hour Division. (Tr. 31-32)
2. RXP-2 - check number 3641 from Panthera Painting, dated March 24, 2015, in the amount of \$100,000 (Tr. 31-32)
3. RXP-3 – check number 3684 from Panthera Painting dated April 9, 2015 in the amount of \$110,000 (Tr. 31-32)
4. Respondents Hauth and 446 Painting's Exhibit ("RXH")-1 –Conditional Prequalification letter to Hauth from PennDOT dated June 12, 2013.

#### **D. Other Evidence**

At hearing the following additional evidence was offered and either admitted or excluded in part or total at hearing after argument by the parties. In their post-hearing briefs, no party addressed or revisited an objection, response, or related evidentiary argument made at hearing nor did any party seek reconsideration of any of the evidentiary rulings.<sup>4</sup>

Administrative hearings are governed by Department of Labor regulations that reflect the evidentiary limitations contained in the Federal Rules of Evidence. 29 C.F.R. § 18.101 *et seq.* As in the Federal Rules of Evidence, “hearsay is not admissible except as provided by these rules, or by rules or regulations of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress.” 29 C.F.R. § 18.802. However, there are certain exceptions for hearsay and nonhearsay, and hearsay is generally admissible in administrative proceedings. 29 C.F.R. § 18.801-806; *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004) (citing *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938)); *Opp Cotton Mills, Inc. v. Admin.*, 312 U.S. 129 (1949); *M & C Lazzinnaro Construction Corp.*, WAB Nos. 88-08 and 88-12 (WAB, Mar. 11, 1991).

1. AX-1 – Backwage computations by Wage and Hour and three letters dated December 2, 2013. Counsel for respondents Panthera and Manganas objected on the basis of hearsay. Counsel for Administrator responded that the supervisor from Wage and Hour who oversaw this investigation would be testifying to the authenticity of the records. (Tr. 17). AX-1 was admitted as a *business records* exception. (Tr. 17).

If shown by the testimony of a “custodian or other qualified witness” to be a business record, records of regularly conducted business activity, kept as a regular business practice and created by a person with knowledge, are admissible as an exception to hearsay. 29 C.F.R. § 18.803(a)(6). Alan Davis, Assistant District Director of the Wilkes-Barre District Director of the Wage and Hour Division, testified that he supervised Mr. Noel Marks, including when Mr. Marks investigated Panthera Painting. (Tr. 66-69). Davis testified that an investigator completes the back wage computations in course of his or her investigation, Mr. Marks completed the computations to determine the deficiency between what was being paid per the certified payroll and what should have been paid, and Mr. Davis testified that he reviewed Mr. Marks’ computations. (Tr. 76). The December 2, 2013 letters are prepared as a summary of the total amount of liability and it is normally dated as the date it was prepared and provided to an employer. (Tr. 121-123). As supervisor of the investigator and reviewer of the completed work, Davis is a qualified witness as considered by the Regulations. Because he testified that the backwage computations and the letters dated December 2, 2013 are created as a regular part of a Wage and Hour investigation and notification procedure, the backwage computations and letters at AX-1 meet the business record exception.

2. AX-2 – Notes of the investigator who handled the case initially, wage determination and other contract documents. Respondents Panthera, Manganas, Hauth and 446 Painting objected to

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<sup>4</sup> In her brief, counsel for Manganas and Panthera did however provide a list of all admitted and excluded evidence including the basis for the respective evidentiary ruling.

the first 3 pages and page 5, which contained handwritten notes of the investigator as hearsay and had no objection to the remaining documents of AX-2. As the investigator that prepared the notes was not a witness at the hearing and did not testify, the notes are excluded as inadmissible hearsay. (Tr. 17-19, 29-30). It is further noted that the Administrator did not rely upon or refer to the notes or otherwise try to revisit the ruling at hearing or in its post-hearing brief.

The remaining contract documents and wage determination included at AX-2-are admitted without objection.

3. AX-6 – Record of previous investigation of Panthera Painting by the Wage and Hour Division, including prior recommendation that Panthera be debarred in 2004. Counsel for respondents Panthera and Manganas “strenuously” objected on the basis of relevance, further argued that they are correspondence and not an Order of debarment and also objected that they are hearsay. (Tr. 19-20). Counsel for respondents Justin Hauth and 446 Painting objected on the basis of relevance and further argued they are prejudicial to Mr. Hauth, as the son-in law of Manganas and that he had no experience with debarment in 2003 or 2004. (Tr. 20). Mr. Roberts objected on the basis that he was not employed by Panthera at that time. (Tr. 20-21). Counsel for the Administrator argued that AX-6 is relevant because they show Panthera’s awareness of DBA requirements and also argued that these are the records of an official government file. (Tr. 22). AX-6 was admitted as relevant and as a business record.

“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” 29 C.F.R. § 18.401. The records of the previous investigation of Panthera Painting and Manganas are relevant to the current proceedings for several reasons. The correspondence is addressed to Panthera Painting and Andrew Manganas, who are respondents in this matter. The records address a previous investigation of Panthera Painting and Manganas for similar violations of the DBA, including misclassification of employees and failure to pay prevailing wage rates. They are also relevant to Manganas’ knowledge of the DBA requirements. As prior vice-president and prior employee of Panthera, AX-6 is relevant to Hauth and Roberts as well.

Records, reports, statements or data compilations which set forth the factual findings resulting from an investigation are an exception to hearsay. 29 C.F.R. § 18.803(a)(8)(iii). As argued by counsel for the Administrator, AX-6 meets this exception because it is the records of the previous debarment investigation completed by the Wage and Hour Division of the Department of Labor.

4. AX-7 – Records of employee apprenticeship programs. Counsel for respondents Panthera and Manganas objected to the notes of the investigator on the first page of the exhibit as hearsay and the remaining apprenticeship agreements as irrelevant because they are for individuals that are not employees within this proceeding. (Tr. 23-24). Counsel for Administrator responded that the lack of records is relevant to the proceedings because it demonstrates that there were no records on file for the three individuals at issue. (Tr. 24). AX-7 was excluded in part and admitted in part; the handwritten notes were excluded and the remaining records were admitted as business records. (Tr. 25).

29 C.F.R. § 18.803(a)(6) provides that data compilation in any form of a regularly conducted business activity is admissible as an exception to hearsay. Here, the forms appear to be standard forms issued by the Registration Agency of Pennsylvania Apprenticeship and Training Council, filled out for various apprenticeships and produced by Panthera as the only records of apprenticeships. (Tr. 24). Although counsel for Panthera and Manganas argued that the lack of names of the three misclassified individuals means these records are irrelevant, the lack of the three misclassified individuals is relevant under 29 C.F.R. § 18.803(a)(7), which states that the absence of business records can be used to prove the nonexistence of the matter, here the nonexistence of bona fide apprenticeship for the three individuals. However, because the unsigned, handwritten notes included in AX-7 were not able to be verified by any witness and did not fit within any exception to hearsay, they were excluded.

5. AX-8 – Records of payment to the Union pension funds. Counsel for respondents Panthera and Manganas objected on the basis of hearsay. (Tr. 26-27). Counsel for Administrator stated that the payroll records relate to the hours reported to the union pension fund and show hours reported to a certain date and not reported after that time and contended that they thereby show failure to pay fringe benefits. AX-8 was admitted as a business records exception.

Payroll records are admissible as records of regularly conducted activity pursuant to 29 C.F.R. § 18.803(a)(6); *Ray Wilson Co.*, ARB Case No. 02-086. Davis identified AX-8 as the payroll report summary of the IUPAT District Council Number 2 benefit fund showing payment up to July 31, 2012. (Tr. 80). AX-8 was admitted under the business records exception to hearsay, as they were payroll records with Panthera Painting’s name. 29 C.F.R. § 18.803(a)(6).

6. AX-10 – Record from sam.gov of previous debarment. Counsel for respondents Panthera, Manganas, Hauth and 446 Painting as well as Mr. Roberts all objected to the admission of this document. (Tr. 27-28). Counsel for Panthera and Manganas “strenuously” objected that this record is insufficient to show that an order of debarment was entered in 2004 and it should not be admitted without proper authority and testimony. (Tr. 28). Counsel for Hauth and 446 Painting objected on the same basis. (Tr. 28). Roberts objected because he was not employed by Panthera in 2004. (Tr. 28). Counsel for Administrator responded that these pages were obtained from a government website and are the government records of the previous debarment. (Tr. 28-29). AX-10 was admitted pursuant to the public documents exception.

Public records that discuss the activities of an agency, and factual findings from an investigation are admissible as an exception to hearsay. 29 C.F.R. § 18.803(a)(8). The records from sam.gov of Panthera’s previous debarment, which are publically available on a U.S. government website and record the results of the 2004 investigation of Panthera meet the public document exception and are admitted. However no witness authenticated the document or otherwise testified to recognizing the document, therefore it is afforded little weight.

7. Indictment, *U.S. v. Andrew Manganas and Panthera Painting, Inc.*, M. D. Pa. no. 1:16-CR-209 (July 27, 2016) – In the closing brief, the Administrator requested that I take official notice of the indictment of Andrew Manganas and Panthera Painting in the District Court of the Middle District of Pennsylvania, which the Administrator included as an attachment to the brief.

(Administrator's Post-Hearing Brief 5, fn 2; *see* Indictment, *U.S. v. Andrew Manganas and Panthera Painting, Inc.*, M. D. Pa. no. 1:16-CR-209 (July 27, 2016). The indictment charges Manganas and Panthera with embezzlement from union benefit and pension plans between 2011 and 2013, false statements and wire fraud in connection with false certified payrolls between 2011 and 2013, and violating the Clean Water Act in connection with the Wade Bridge Project. No response to this request was provided by any party nor received by the undersigned.

An ALJ may take official notice of any material fact which does not appear in the evidence of the record and which is among the traditional matters of judicial notice, provided that the ALJ provides the parties adequate notice and an opportunity to dispute the matters officially noticed. 29 C.F.R. 18.45. Facts appropriate for official notice include generally known facts, facts capable of accurate and ready determination by accurate sources, or facts within a specialized field of knowledge that are derived from not-reasonably-questioned science, medicine or technology. 29 C.F.R. § 18.201. Official notice may also be taken of matters of public record. *Wm. J. Lang Land Clearing, Inc.*, ARB No. 01-072 and 01-079, ALJ Nos. 1998-DBA-1 through 6 (ARB, Sept. 28, 2004). Here, the indictment is a matter of public record and is capable of accurate determination by reliable sources, including the Public Access to Court Electronic Records database (PACER). I therefore take official notice that Manganas and Panthera were indicted for embezzlement, false statements, fraud and environmental violations in the U.S. District Court for the Middle District of Pennsylvania, on July 27, 2016. As it is merely an indictment without supporting evidence or findings, it is afforded little weight.

### **E. Witness Testimony**

#### **Mr. Alan Davis**

Mr. Alan Davis, the Assistant District Director (ADD) of the Wage and Hour (WH) division of the U.S. Department of Labor (DOL) testified on behalf of the Administrator. As the ADD, Mr. Davis oversees a staff of sixteen investigators, with direct responsibility for eight while the remaining eight report to him. (Tr. 66). He has held this position for the past year and a half. (Tr. 66). Prior to becoming the ADD, Mr. Davis was a WH investigator, for approximately 37-38 years and conducted more than fifty Davis-Bacon related investigations during this time. (Tr. 67). Once promoted to ADD, Mr. Davis supervised Noel Marks, the investigator that conducted WH's investigation of Panthera Painting in this matter. (Tr. 68-69). Mr. Marks trained Mr. Davis as an investigator, including on Davis Bacon investigations. (Tr. 68). According to Mr. Davis, Mr. Marks was the "go to" person for Davis Bacon contract investigations in his office, having routinely conducted such investigations for WH. (Tr. 68).

Mr. Davis testified that WH initiated the investigation of Panthera in 2013 to determine whether Panthera was in compliance with the DBA after receiving a complaint alleging improper payment of fringe benefits for employees on the George Wade project. (Tr. 72-73). Panthera was the bridge painting contractor and J.D. Eckman was the prime contractor for the project. (Tr. 73). Mr. Davis testified that during the investigation, Mr. Marks interviewed employees and reviewed the related contract and subcontract, certified payrolls, other payroll records provided by Panthera, and some documents showing individuals registered as apprentices. (Tr. 72-74, 76,

AX-1, AX-3, AX-4; AX-7-AX-9). Mr. Davis reviewed the file in this matter. (Tr. 151). In doing so, Mr. Davis double-checked Mr. Marks' findings, although he did not check every item. (Tr. 151). He looked at the back wage computations, the contract, and the wage determination to make sure selected items were calculated properly and that the proper conclusions were made. He also looked at the interview statements to ensure they corresponded to the investigator's (Mr. Marks') conclusions. (Tr. 151).

According to Mr. Davis, based on Mr. Marks review, he found three areas of violations: (1) money was not contributed to the welfare fund on behalf of the painters for a period of time; (2) some employees were classified as apprentices with no evidence that they were bona fide apprentices and (3) incorrect certified payrolls. (Tr. 77). Mr. Davis provided more detailed explanations as to the findings with respect to each of these areas. (Tr. 77-80).

Mr. Davis testified, on the face of the records, it appeared money was being contributed, however there was no indication that any contributions were made to the union on behalf of each individual working on the contract starting from about July 2012. (Tr. 77). Employee interviews further confirmed that benefit payments were not being made. (Tr. 78). Mr. Davis explained that the contributions for fringe benefits could be made in cash to the respective employee with their salary or to the union benefit fund on the employee's behalf within 90 days. (Tr. 78-79, 87-88, 205). In certifying the payrolls, the employer affirms or "certifies" that the payments will be made. (Tr. 87-88, 205, 213-214). If an employer indicates on the payroll certifications that fringe benefits were paid and at the expiration of the 90 days they were not paid, then according to Mr. Davis, it is a violation. (Tr. 88).

Panthera's certified payrolls are found at AX-9. The certified payrolls indicate that Panthera certified all payrolls under the contract as correct and complete and wage rates for laborers and mechanics not less than the applicable wage rate contained in any wage determination incorporated into the contract. (AX-9; Tr. 85). Panthera further certified that each laborer or mechanic on the related payroll was paid, as indicated on the payroll, in an amount not less than the sum of the applicable basic hourly rate plus the amount of the required fringe benefits as listed in the contract. (AX-9; Tr. 86). In its investigation, WH found that after July 2012, there is no evidence of contributions made to the Union on behalf of each individual working on the contract while Panthera continued to certify that it was making the requisite fringe benefit payments to the union fund. (AX-9; Tr. 77-79).

Mr. Davis explained how Mr. Marks determined the amounts due for unpaid fringe benefits to the sixty-one (61) Panthera employees. For periods when the investigator found an employee was paid cash for his/her fringe benefits, he credited Panthera with having made full payment of wages and benefits. (Tr. 78-79; AX-1, AX-8-9). The investigator calculated losses to an employee by comparing the hours reported on the certified payrolls and the hours reported to the union. (Tr. 78-79). With the prevailing wage rate at \$28.05 per hour, when the records reflect payment at that hourly rate, but do not include payment of the fringe benefit rate of \$8.90 per hour, the investigator calculated the difference between what was paid the employee and the full fringe and wage rate of \$36.95 per hour. (Tr. 78-79, 84-85, AX-1, AX-8-9). Mr. Davis stated that the investigator found \$205,316.42 was due to 61 employees for missing fringe benefit contributions. (Tr. 175; AX -1, p. 7).

Mr. Davis also testified as to the investigator's findings that three employees, Christopher Cook, Ifrain Santana and Wesley Conclaves, were improperly classified as apprentices for periods of time and were due a combined total of \$3,513.31 for the difference in wages rates between that of a journeyman and an apprentice, due to the misclassification. (Tr. 78-81, 107-112; AX-1, 7-9; *see also* Consent Findings and Consent Order between J.D. Eckman and the Administrator). This amount does not include fringe benefits the three employees were owed during the same period. (Tr. 83-84).

Mr. Davis stated that the investigative records show the three employees were properly paid at the journeyman's wage rate, then the hourly rate was reduced to an alleged apprentice rate and after several weeks, the rate returned to the full journeyman rate. (Tr. 81). As a specific example, the records show employee Christopher Cook was paid the proper initial journeyman wage rate of \$28.05 per hour when he started in April, 2012, but his rate then dropped to \$19.46 per hour starting May 20, 2012 and returned to a higher prevailing wage rate of \$29.95 per hour. (Tr. 83-84; AX-1, p. 13). For the four weeks Mr. Cook was paid as an apprentice and not journeyman, the liability was calculated as \$1,236.96 due Mr. Cook. (Tr. 84). The calculations for the remaining two employees misclassified as apprentices were done in a similar manner. (Tr. 84).

In determining the amount due for the three misclassified employees, Mr. Davis explained that in reviewing records obtained during his investigation, Mr. Marks found none indicating that any of the three identified employees were enrolled in a bona fide apprenticeship program, but did see the applicable records for other employees. (Tr. 82, 133-134, 166-167, 193-194, AX-7). Mr. Davis also reviewed the file looking for the employee names and apprenticeship records and found none. (Tr. 82-83). According to Mr. Davis, given that there were no documents identifying the three disputed individuals as journeyman, it is the lack of certification as apprentices that made WH determine they should have been paid as journeyman. (Tr. 166-167).

With respect to the third violation found by WH during its investigation which Mr. Davis testified to as a record-keeping violation, he stated that while Mr. Marks found the information on Panthera's certified payrolls regarding hours and days employees worked to be correct, the same payrolls also showed that the employer paid the fringe benefits on a timely basis. (Tr. 84-85, AX-9). The certified payrolls by Panthera also certified that certain employees were registered in a bona fide apprentice program. (Tr. 85-86; AX-9). Mr. Davis further indicated that records obtained during the investigation showed that the fringe benefits were not timely paid and for three employees paid as apprentices, there was no record of any of them registered in a bona fide apprentice program. (Tr. 77-79; 80-81; 82-83, 87-89; AX-1, AX-8, AX-9).

Mr. Davis further testified that Mr. Marks did not initially recommend debarment of Respondents because he was not aware of the prior investigation and prior debarment (of Panthera). (Tr. 89). When the current matter did not settle, it was referred to WH's regional office in Philadelphia where the regional specialist there found there was a prior investigation and history of violations by Panthera. (Tr. 89-90). Mr. Davis testified that Panthera's prior history made the violations willful. (Tr. 90). As background, Mr. Davis stated that Panthera was

investigated for compliance with the prevailing wage laws under the Davis-Bacon Act in 2003. (Tr. 94). As a result of the investigation, there were some wage and fringe violations. (Tr. 96).

Panthera was notified in writing that there were wage violations found in 2003, as he testified that he saw the letter sent to Panthera notifying them that there was a violation and Panthera's acknowledgement of those letters. (Tr. 97-98). Mr. Davis elaborated, indicating that Panthera responded in one letter to WH that it sought additional time to respond to the allegations, although they did not formally respond to the allegations. (Tr. 98). Mr. Davis did not see an actual order regarding the prior debarment. (Tr. 123-124). Mr. Davis concluded that based on records from Mr. Davis' regional office, Panthera was previously debarred. (Tr. 99). Although not personally present, there would have been a final conference regarding the unpaid wages conducted by Mr. Marks; per the narrative from Mr. Marks, there was such a conference in this case. (Tr. 124, 167-168). He is unaware however of whether a final conference was held with respect to the 2003 investigation. (Tr. 98). Based on the records from Mr. Davis' regional office, the Wage-Hour division recommended that the company (Panthera) be debarred for a three year period. (Tr. 98-99).

Mr. Davis testified that regardless of whether there was a previous debarment of Panthera, the prior investigation should have put Panthera on notice that they needed to comply with the Davis-Bacon Act and that Davis-Bacon was applicable. (Tr. 99). Mr. Davis acknowledged the hearing testimony during this proceeding that Panthera had other government contract jobs and there were violations committed on those contracts. (Tr. 100). To Mr. Davis' knowledge, Panthera is an experienced government contractor. (Tr. 100). They are engaged in painting a bridge which is typically going to be government contract work, which means Davis-Bacon or the state Davis-Bacon prevailing wage law is going to apply. (Tr. 100). Panthera signed a subcontract with J.D. Eckman, in which under its terms and conditions, the subcontractor represented and warranted that he's fully familiar with all terms of the contract documents, and the subcontract and the wage determination are part of the contract. (Tr. 100-101).

Mr. Davis also testified that Mr. Manganas was the President of the company (Panthera). (Tr. 103). Based on the records obtained, Mr. Davis further testified that the contract was signed by Justin Hauth, VP (vice-president for Panthera). (Tr. 101). In all his investigations, maybe 50 per year, Mr. Davis does not recall someone signing a contract who was not what they purported to be on the signature line. (Tr. 128). Mr. Davis is not aware of any indication that Justin Hauth or 446 Painting, LLC were debarred in the past. (Tr. 144). DOL/Wage-Hour seeks debarment of Mr. Hauth because he signed the contract between Panthera Painting and Eckman. (Tr. 144). There are no other documents in evidence that contain Mr. Hauth's signature. (Tr. 145-146). Mr. Hauth signed the contract indicating that he was aware of the contents and requirements of the Davis-Bacon Act. (Tr. 147). Mr. Hauth's knowledge of the violation stems from his representing the company as vice-president and signing the contract. (Tr. 147). By signing the contract, Mr. Hauth is committing himself to knowing the requirements of the contract and subcontract. (Tr. 148).

Finally, Mr. Davis stated that most of the certified payrolls were signed by Mr. (Bruce) Roberts. Based on hearing testimony, Mr. Davis stated that Mr. Roberts was one of the key

individuals or the key person in regards to overseeing the payroll and helping the painters union calculate the liability for fringes and other benefits that weren't paid to their respective funds. (Tr. 101-102). He also heard testimony that Panthera was aware that it was not making contributions to the union fund. (Tr. 103). According to Mr. Davis, someone who prepares the payroll and signs the certified payroll may not have actually prepared the actual payroll register, but by signing the certified payroll, (s)he is stating that the payroll was accurate. (Tr. 102-103). Mr. Roberts certified that apprentices are duly registered and WH found three were not, which is a violation. (Tr. 193-194). He also certified that fringe benefits were paid to approved plans, funds or programs and WH found fringes were not paid during a period of the contract to approved plans, funds or programs. (Tr. 194). Lastly, he certified that where fringes are paid in cash, each laborer, or mechanic, listed on the payroll has been paid an amount not less than the sum of the applicable hourly wage rate plus the amount of the required fringe benefits. (Tr. 194-195) WH found these 3 areas that were either inaccurate or falsified from the certified payrolls. Mr. Davis testified that Mr. Roberts' signature on the certified payrolls, certifying they are accurate is the basis for seeking debarment of Mr. Roberts. (Tr. 181-182).

#### Mr. Jeffrey Leech

Mr. Jeffrey Leech, counsel representing the National Pension Fund and their District Council benefit funds ("DC funds" or "Union") in a lawsuit filed against J.D. Eckman and Panthera Painting to collect fringe benefit contributions owed on the Wade Bridge Job, testified on behalf of Respondents. (Tr. 47-48). He indicated that he represented the DC welfare, pension and apprenticeship funds. (Tr. 48). At hearing, Mr. Leech reviewed AX-1, the Summary of Unpaid Wages, which represents the U.S. Department of Labor (DOL) findings, dated December 2, 2013 and indicated it was familiar to him due to his representation of the DCs in the lawsuit against J.D. Eckman and Panthera Painting. (Tr. 47). Mr. Leech testified that the document reflected only a portion of the total fringe benefits he claimed was owed on the Wage Bridge Job. (Tr. 47-48). He stated that auditors for the DC funds did a separate independent audit of the books and records of Panthera painting for use in his (the DC) lawsuit. (Tr. 48). There is some overlap between it and the DOL audit, which Mr. Leech reviewed. (Tr. 48).

The union's case involving the DC funds was settled for \$750,000. (Tr. 55). He said that Panthera paid in excess of \$600,000 to Mr. Leech's clients as a result of the settlement agreement. (Tr. 51, RXP-2, RXP-3). The payment included the \$208,879.50 sought by the DOL. (Tr. 50-51, RXP-1, RXP-2). Mr. Leech wrote a letter to DOL Regional Administrator Mark Watson, dated September 10, 2015, advising him that Panthera Painting had paid the \$208,879.50 to the funds the amount of which represented the unpaid wages in the DOL Summary of Unpaid Wages. (Tr. 50, AX-1, RX-1). From Mr. Leech's perspective, with the payment of the monies due as part of the settlement with the DC funds, Panthera paid 100 percent of the pension, apprenticeship and welfare deficiencies for the three DC groups he represented in his lawsuit. (Tr. 52). Mr. Leech stated he had no knowledge of the DOL allegation that certain persons were improperly paid as apprentices rather than as journeyman. (Tr. 53).

Mr. Leech testified that he was told by Panthera's counsel and Mr. Manganas that there were financial issues related to the job, that cash flow was poor and that there wasn't enough money to pay what was owed. (Tr. 56). It became clear that money was owed. (Tr. 56).

Upon questioning by Mr. Roberts, Mr. Leech stated that during the lawsuit, Mr. Roberts prepared the remittance reports and he performed payroll functions for Panthera. (Tr. 59). He recalled from deposition testimony that Mr. Roberts was not a corporate officer and did not make decisions as to what bills were to be paid or not paid. (Tr. 59). He testified however that Mr. Roberts also worked with Mr. Leech's staff members to calculate amounts owed and to "sort out the numbers". (Tr. 60). Mr. Roberts was helpful because he was the keeper of the records of Panthera, more acquainted with those records than Mr. Leech's auditors and was better able to help them "split out the numbers". (Tr. 60). Mr. Leech testified that they were involved in sorting out the numbers for at least a year, because it was so complicated. (Tr. 60).

#### Mr. George Retos

Mr. Retos, an employee of Panthera, was called to testify on behalf of Respondents. Mr. Retos said he was involved in resolving the lawsuit filed by the Union to recover over \$700,000 in fringe benefits due it from the Wade Bridge project. (Tr. 323-325). Mr. Retos said he started working on the matter in 2012 and the matter was resolved by settlement with the Union in 2015. Mr. Retos stated that a portion of the money sought by the Union's lawsuit, approximately \$208,000 was also sought by the DOL. (Tr. 324-325). He indicated that part of the settlement with the Union was that they were to notify the DOL that the employees were paid the monies they were allegedly owed. (Tr. 326). His testimony confirmed that Jeffrey Leech represented the Union in the lawsuit. (Tr. 324).

It is Mr. Retos' position that under paragraph 7.1 of the subcontract, which starts by saying, ... "[i]n all cases of non-payment by a subcontractor..." which is what the situation was here, Eckman was to pay or was expected to pay the monies due for union fringe benefits for work done in 2013. (Tr. 332-333; 335-336).

#### Mr. Justin Hauth

Justin Hauth started work at Panthera in 2004. (Tr. 354). He is Manganas' son-in-law. (Tr. 377). Hauth testified that he was never vice-president of Panthera. (Tr. 352). Hauth was never elected or appointed to be an officer and was not a shareholder of Panthera. (Tr. 361). Hauth stated that he was directed to sign the November 13, 2009 subcontract with J.D. Eckman as vice-president by Manganas; he did not have a choice because Manganas was his boss. (Tr. 352, 378; AX-4 at 10). Hauth said that he signed the contract on behalf of the company and did not sign it for himself individually. (Tr. 352). He understood that Manganas had read the contract and Hauth did not read it for himself. (Tr. 353).

On January 2, 2013, however, Hauth gave a sworn statement to the Occupational Safety and Health Administration (OSHA) in a matter involving Panthera. (Tr. 369, 371). In the OSHA sworn statement, Hauth answered that he was "vice-president" when asked "What is your current position with Panthera?" and his other job title was "operations." When asked if the title of vice-

president was official, he said, “No, it’s how Andy refers to me.” (Tr. 372-73). When asked what the title vice-president means, he stated “Not much, there’s no meaning to it. I am second in command as far as the office stuff goes.” (Tr. 373). Hauth stated that the title of vice-president is “a joke.” (Tr. 373). Hauth meant that the title of vice-president was a joke within the company; the guys on the job would call him CEO and show disrespect towards Hauth. (Tr. 377).

Hauth’s job duties for the Wade Bridge project included working from the office in Canonsburg, PA on sandblasting, painting, containment, materials, and paperwork to the state. (Tr. 354). He had a company vehicle and said Manganas decided who could have a company vehicle. (Tr. 374). He did not have authority to hire, fire or discipline employees, to set bonuses, to bid on projects, to decide or make payments, did not have input into strategic decisions and did not have control over the operations of Panthera. (Tr. 362-63).

Hauth also worked onsite at the Wade Bridge. (Tr. 364). He was sent onsite by J.D. Eckman when there were paperwork issues in 2012 to 2013. (Tr. 364). According to Hauth, J.D. Eckman wanted Hauth onsite because there were a lot of quality control problems in paperwork and Eckman knew that Hauth primarily handled the paperwork. (Tr. 367). He was on site about once a week in 2012 and 2013. (Tr. 364). He verified documents and did some quality control at the site. (Tr. 364). The subcontract specified that Hauth should be on site 2-3 days per week until paperwork is caught up and signed off and then as needed. (Tr. 366). He did not work on payroll or certified payrolls. (Tr. 353, 366).

Hauth testified that he currently owns and operates his own painting company, 446 Painting, which he started in late 2012. (Tr. 356). About 4 or 5 of the 15 or 16 projects he has done since beginning 446 were federal highway contract projects. (Tr. 369). He also works in the energy field, the pipeline industry, and does commercial and industrial painting. (Tr. 369). He now works for PennDOT (PA Department of Transportation). (Tr. 358). He works for PennDOT pursuant to a “conditional prequalification,” which means that he has to recertify his superintendents’ names, number of employees, he will be running the jobs, and Andrew Manganas or Manganas’ employees are not allowed to be on his projects. (Tr. 358). Hauth identified a copy of the prequalification letter and the first condition is that he cannot work for Andrew Manganas or Panthera Painting. (Tr. 359). Hauth is required to update and certify the conditional prequalification quarterly and has been complying since June 2013. (Tr. 360). According to Hauth, since June 2013, Manganas and Panthera have not participated or entered into any state-supervised, state funded or federally funded construction contracts or subcontracts between 446 and Pennsylvania. (Tr. 360). In 2014, Hauth worked with Manganas on a private project, a parking garage. (Tr. 360-61). He does not intend to work with Manganas or Panthera on any of his government contracts in the future. (Tr. 361).

Hauth testified that he was uncertain how long it took to catch up the Panthera paperwork and did not finish the paperwork before he started 446. (Tr. 366-67). He does certify payroll at 446 Painting, but was not able to do certified payroll when at Panthera. (Tr. 356). His wife, who has experience doing certified payroll, helps him. (Tr. 357). He personally did his first certified payroll in August 2013 on his first job. (Tr. 368). Hauth stopped working for Panthera in the middle of 2013, before he got the pre-qualification letter. He was still working for Panthera in April 2013. (Tr. 363). No one ever told him that Panthera was not allowed to work on projects

that were funded by federal money or on state contracts. (Tr. 355). He did not know what debarment was until these proceedings. (Tr. 355).

Mr. Andrew Manganas

Andrew Manganas testified that he is the sole shareholder, president and only officer of Panthera Painting, Inc. (Tr. 247). According to Manganas, Hauth and Roberts are not nor were not officers. (Tr. 248). Manganas makes project decisions, estimating decisions and contract decisions. (Tr. 248). He bid on the Wade Bridge Project in 2009. (Tr. 248). Panthera was hired to do industrial painting and sandblasting of the Wade Bridge superstructure. (Tr. 249). Following problems with a superintendent, PennDOT required Manganas to be on the jobsite daily, beginning around May or June 2012. (Tr. 254-55). The state notified J.D. Eckman and J.D. Eckman notified Manganas of this requirement. (Tr. 256). Panthera had to redo 75% of the project and cover the \$9-10 million cost of redoing the project. (Tr. 257). Additional work and environmental cleanup were added to the project. (Tr. 257, 269).

The painting season runs from April 1 to October 31 and Manganas was in Harrisburg from April/May to October/November of 2012 and March/April to June/July 2013. (Tr. 264-65). According to Manganas, there were unpaid bills and invoices due to vendors when Manganas returned from Harrisburg in 2012 and he sold personal property and equipment to pay bills. (Tr. 264-65). Manganas testified that in 2012, he did not have enough money to finish the job and informed J.D. Eckman it would need to pay for everything. (Tr. 265). He said that Panthera and J.D. Eckman then amended the subcontract. (Tr. 265). Following the amended subcontract, according to Manganas, J.D. Eckman paid payroll, some invoices, and taxes, but did not pay insurance, fringe benefits, the union, and some invoices. (Tr. 267). Manganas said that he/ Panthera objected to J.D. Eckman not paying, and Eckman said they would pay. (Tr. 268). During this time, Manganas said he intended to follow the wage laws and expected Eckman to make payments if Panthera was unable to pay, as in the subcontract. (Tr. 270).

Manganas testified that he directed payment of wages from his office in Washington, PA. (Tr. 250). He stated that for payroll, the foreman gave Manganas the hours, Manganas added rates and gave it to Roberts, Roberts made it, certified it, and people were paid. (Tr. 250-51). Then Manganas said he would do a similar process for the unions to separate the fringe benefits from hourly wages to send to the unions. (Tr. 250-51). The DBA rate was \$28.05 and later was raised to \$29.95 and with fringe benefits, it was \$36. (Tr. 258-59). Manganas testified that benefits and fringes varied between different painters' unions and Manganas had to pay the higher of Davis-Bacon rate or the union rate. (Tr. 259, 263).

When he was working onsite, Manganas said he would get daily time sheets and fax them to Roberts with instructions to make the payroll. (Tr. 259). Manganas provided Roberts with the dates, names and hours and Roberts would complete payroll and certify it. (Tr. 287). He did not tell Roberts to pay fringe benefits and did not include it in the total he faxed back to Roberts. (Tr. 288). The computer told Roberts to which union the fringe benefits should be paid. (Tr. 288). According to Manganas, if he did not tell Roberts to pay fringe benefits, he probably would not have paid the fringe benefits. (Tr. 289). Manganas said he did not review certified payrolls before submitting them. (Tr. 259).

Manganas testified that Panthera was supposed to submit payrolls to J.D. Eckman weekly, although they sometimes fell behind and were notified. (Tr. 260). Manganas said J.D. Eckman also fell behind submitting Panthera's payrolls to the district office. (Tr. 260). He said if Panthera fell behind, Eckman would tell Panthera at a regularly held meeting and Panthera would have to submit them the following week. (Tr. 260). It was not unusual for general contractors to fall several weeks behind in submitting payroll. (Tr. 260). According to Manganas, if certified payrolls were not submitted, J.D. Eckman would not pay Panthera and Panthera would have been unable to pay its workers, but Panthera was paid. (Tr. 263).

Manganas testified he had records showing fringe benefits being paid after July 2012 and the union audit shows units paid in August, September and October 2012, though some unions were missed.<sup>5</sup> (Tr. 290). Manganas said many employees received fringe benefits through the union until November. (Tr. 289). J.D. Eckman was supposed to start paying fringe benefits in April 2013 because of the amended contract, but Eckman did not make fringe benefits payments. (Tr. 293, 295). Manganas said he called Eckman and they said they would be paying. (Tr. 293).

Manganas testified that between November 2012 and January 2013 he learned that the DOL "had an issue". (Tr. 270). Manganas said he reviewed it and Roberts determined there were some discrepancies where Panthera had paid benefits through 2012, but one union with a complex setup "fell short." (Tr. 271). Manganas stated the union then conducted an audit. (Tr. 271). He said, the union's audit showed more money that needed to be paid than the DOL determined, but Panthera settled with the union for the amount determined by the DOL. (Tr. 272-73). According to Manganas, the first check was written by Panthera to the union, with money from Eckman, and the second check also came from Panthera to the union. (Tr. 273). Manganas testified Panthera paid the \$208,879.05 described in the DOL summary and believed everything had been paid after that. (Tr. 273-74).

Manganas emphasized in his testimony that J.D. Eckman was responsible for paying fringe benefits because of the 2013 contract. (Tr. 317). He stated that he did not do anything intentional and tried to make the correction in 90 days, but was notified by the DOL after 90 days had passed, and then made his corrections. (Tr. 285). Manganas thought that the hearing process favored J.D. Eckman and was unfair to him. (Tr. 318). He testified, "I don't believe I did violate any law. I paid them. Okay, it was a matter of time." (Tr. 318). Manganas testified that the union was entitled to the money it sued for. (Tr. 290).

Manganas further testified he could not classify the three workers as laborers because the union does not allow Manganas, a painting contractor, to classify a painter as a laborer. (Tr. 277). Manganas said if he could not get workers as apprentices, they had to be paid the painters' rate. (Tr. 279). With respect to the three employee alleged to be misclassified as apprentices rather than journeymen, Manganas stated, "They [did not] have the skills of the painter. They were apprentices. They were beginners." (Tr. 275). Manganas stated he did not want to pay the full painters' rate, so he made them apprentices. (Tr. 277). He had other apprentices on the job site and never saw apprenticeship papers for any apprentices. (Tr. 276). Manganas described the

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<sup>5</sup> Counsel for Manganas said that these records were no longer available after the litigation began and they could not acquire them. (Tr. 291).

process for setting up an apprenticeship with the union as calling the union, sending money, and the union then sends papers, which the union has told him takes two or three months. (Tr. 276). Manganas did not think any of those three workers were working for two or three months. (Tr. 276).

When the three employees at issue, Cook, Santana and Goncalves first came on the job, Manganas said he paid all as journeymen for the first week. (Tr. 300). He testified he might have paid them \$28.05 at the beginning, with benefits, and he had to put them in the union. (Tr. 274). He then paid them as apprentices for a few weeks. (Tr. 301). He then started paying Cook as a journeyman again because he did not have an apprenticeship program, although Cook told Manganas that he was an apprentice. (Tr. 301). Manganas changed his rate, but did not make up Cook's pay. (Tr. 301). For Santana and Goncalves, he contacted Roberts, who contacted the union in Jacksonville to put them into union and he "believed we also sent payment to the union for the apprenticeship for them" and the "union did not file the papers." (Tr. 274). He testified he did not intentionally misclassify the individuals as apprentices and believed them to be apprentices with the appropriate training in place. (Tr. 275).

Manganas testified, "This is what happened in 2004 with the disbarment. It was a misclassification, and the union stepped in and they said these are painters, and I was paying these guys that were laborers, like these guys right here, the labor rate. They said you can't do that. So I had to pay all 10, 20 guys another 8, 10 bucks an hour. That's what happened. And where they talk about the debarment, it was all about misclassification." (Tr. 277). The attorneys determined the amount Panthera owed and the company Panthera was working for paid around \$66,000. (Tr. 278). "After that [Manganas] continued working." (Tr. 278). Manganas never received an order of debarment debaring him or Panthera. (Tr. 280). He received letters "saying that somebody was requested for debarment." (Tr. 280). Manganas did other public projects after 2004. (Tr. 281). He bid on public projects from 2004 on and his first job when he "got back on [his] feet" was a bridge in 2004 that was a federal project. (Tr. 281). Manganas stated that if he had been debarred, he would not have been able to work on any state or federal project, it would come up "blackballed." (Tr. 284). He said he was not debarred. (Tr. 284).

According to Manganas, every contract he has had has been a federally funded project. (Tr. 286). He has been in business since he was 16 or 17 with his father and learned then to pay the higher of the prevailing wage or union wage and to pay union benefits. (Tr. 263, 303).

According to Manganas, Hauth signed the contract between Panthera and J.D. Eckman on November 13, 2009 at Manganas' direction, probably because Manganas was not available. (Tr. 249, 306). He said Hauth was not appointed or elected by the board of directors to be an officer. (Tr. 305). Hauth has not held a position of authority over other employees at Panthera and Hauth worked primarily at Manganas' direction. (Tr. 306). Manganas stated Hauth did not have an ownership interest in Panthera. (Tr. 307). According to Manganas, Hauth was in charge of compliance including poster boards, chain of command for EEO, quality control, proper paint thicknesses, and humidity gauges. (Tr. 319). Hauth was also in charge of environmental conditions, the site-specific environmental plan, setting up training for the lead standard, personal air monitors, management for the projects, and ordering materials, though Manganas specified paint quantities. (Tr. 308-09). Manganas testified that Hauth was not responsible for

payroll. (Tr. 310). He said Hauth received bonuses, but so did other employees. (Tr. 307). Hauth had a company vehicle and every superintendent had one. (Tr. 307). On the Wade Bridge, Hauth managed everything through Manganas while Manganas was in Harrisburg. (Tr. 310).

With respect to Bruce Roberts, Manganas testified that Roberts worked for Manganas from March 2010 to November 2013. (Tr. 311). Roberts' first job with Manganas was to suck sand, then filing, and then Manganas taught him how to do payroll. (Tr. 311). Manganas stated that Roberts would make union dues reports and give them to Manganas for review; Roberts would double check that the numbers were right and then reported them. (Tr. 312). Manganas agreed that Roberts completed certified payroll correctly. (Tr. 313). Manganas said Roberts worked with J. D. Eckman for Eckman to pay union dues, payroll taxes and wages. (Tr. 314). According to Manganas, Union dues would be paid the following month or Panthera would send a remittance report; if dues were not paid, delinquent charges would accrue. (Tr. 314). Manganas said he intended to have the union dues paid. (Tr. 313).

## **F. Issues Presented**

At the beginning of the hearing, the parties agreed that the following issues were presented for hearing.<sup>6</sup>

1. Whether respondents violated the DBA and 29 C.F.R. 5.5(a)(1) by failing to pay Panthera employees the full prevailing wage rate, including \$8.90 in fringe benefits, for work performed on the George N. Wade Memorial Bridge;

2. Whether respondents violated the DBA and 29 C.F.R. 5.5(a)(4) by classifying journeyman workers as apprentices and paying them less than the full prevailing wage rate of \$28.05; and

3. Whether respondents should be debarred for their willful failure to comply with the DBA requirements to pay prevailing wage rates and properly classify their workers. (Tr. 36-38).

At the end of the hearing, all parties agreed that the fringe benefits and wages sought by the Administrator on behalf of Panthera employees in this action have been or will be satisfied. (Tr. 381-82). As agreed upon by all parties after the presentation of hearing testimony and other evidence at hearing, the sole issue remaining is whether Respondents should be debarred for their disregard of the requirements to pay prevailing wage rates and properly classify their workers. (See also respondents Panthera and Manganas brief at 2).

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<sup>6</sup> "Respondents," as indicated above, does not include or refer to J.D. Eckman. Additionally, although not affirmatively raised at hearing, the Administrator, in its brief, raised and discussed the issue of whether Respondents committed recordkeeping violations which is noted generally in the attachment to the Order of Reference. No other party raised this issue in its brief or at hearing. Finally, in their brief, respondent Justin Hauth and 446 Painting only addressed the issue related to debarment; respondents Manganas and Panthera Painting likewise primarily addressed the issue of debarment but also discussed the payment in full of all the monies sought by the Administrator for the work performed on the Wade Bridge project, as a result of its settlement with the Union which will be discussed further herein. (See, Brief of 446 Painting and Justin Hauth; and Post Trial Brief of Panthera Painting, Inc. and Andrew Manganas).

## **II. DISCUSSION AND ANALYSIS**

### **A. CREDIBILITY**

I have considered and evaluated the rationality and consistencies of the testimony of the witnesses, including the manner in which the testimony supports or detracts from other evidence. In doing so, I have taken into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record. *Holt and Holt, Inc.*, 2014 DBA 00005 (ALJ, Apr. 21, 2015) at 9 (citing *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971)). An Administrative Law Judge is not bound to believe or disbelieve the entirety of a witness's testimony but may choose to believe only certain portions of the testimony. *Id.* (citing *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941 (5th Cir. 1991)).

In arriving at a decision, it is well settled that the factfinder is entitled to determine the credibility of witnesses, weigh the evidence and draw its own inferences therefrom. *Pasack Builders, Inc., Tristate Building Co., and Franklin Petty, Jr.*, 2015-DBA-00017 at 12 (ALJ, Feb. 2, 2016) (citing *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997)); *Administrator v. Groberg Trucking, Inc.*, ALJ No., 01-SCA-22, ARB No. 03-137 (ARB, Nov. 30, 2004) (citing *Sundex, LTD.*, ARB No. 98-130 (ARB, Dec. 30, 1999)).

I did not find the testimony of Justin Hauth to be entirely credible. During questioning, he was evasive in his responses and not forthcoming with information. While he repeatedly denied he was vice-president at Panthera, and explained that he signed the 2009 contract as vice-president at Manganas' direction, he did not explain why he responded that he was vice-president of operations at Panthera, when questioned by the Administrator about the same response as part of another DOL investigation in an OSHA matter. Rather, he simply said the title was a joke because employees laughed at it, knowing he was the son-in-law of Manganas. Joke or not, Hauth admitted to the title of vice-president in one DOL investigation yet denied it for purposes of this matter, providing no forthcoming explanation for the different responses. This inconsistency alone is sufficient to call his credibility, at least in part, into question, especially with respect to his position at Panthera.

### **B. DBA VIOLATIONS**

The dual purposes of the Davis-Bacon Act are to (1) give laborers and contractors a fair opportunity to participate in building programs when federal money is involved; and (2) protest local wage standards 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); *U.S. v. Binghamton Construction Co.*, 347 U.S. 171 (1954). Moreover, a general contractor is responsible for ensuring that all persons engaged in performing the duties of a "laborer" or "mechanic" on the construction site receive the appropriate prevailing wage rate, irrespective of any contractual relationship alleged to exist or not to exist between the contractor and such

persons. *Arliss D. Merrell, Inc.*, 1994-DBA-41, (ALJ, Oct. 26, 1995), 29 C.F.R. §§ 5.2(o), (i), 5.5(a)(2), 5.5(a)(6); *Mass. v. U.S. Dep't of Labor*, Case No. 1998-JTP-6 (ALJ, Oct. 29, 2001).

The Administrator, as the proponent of the Order of Reference in a Davis-Bacon Act case, bears the initial burden of going forward with the evidence and establishing a prima facie claim. The burden then shifts to Respondents, who bears the ultimate burden of proof by a preponderance of the evidence. *Cody Zeigler, Inc.*, 1997-DBA-17 (ALJ, Apr. 7, 2000), *aff'd in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003); *see also Pythagoras Gen. Contracting Corp.*, 2005-DBA-14 (ALJ, June 4, 2008), *aff'd*, ARB Nos. 08-107, 09-007 (ARB, Feb. 10, 2011) (*errata* issued Mar. 1, 2011), *summary judgment granted, Pythagoras Gen. Contracting Corp. v. DOL*, No. 11-cv-2775 (S.D.N.Y. Feb. 20, 2013) (the Administrator has the initial burden of “establishing that the employees performed work for which they were improperly compensated”; the burden then shifts to Respondent to “come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee’s evidence”); *Ray Wilson Co.*, ARB Case No. 02-086 (respondent has the burden to rebut Department’s proof of extent and amount of violations); *Thomas and Sons Building Contractors, Inc.*, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001) (“The Administrator has the burden of establishing that the employees performed work for which they were improperly compensated.”).

### **1. Failure to Pay Prevailing Wage Rate Including Fringe Benefits**

As a result of Panthera’s settlement of litigation with the Union in 2015, it is undisputed that the monies WH sought as a result of its investigation, on behalf of 61 employees for Panthera’s failure to pay fringe benefits, have all been paid. (Tr. 137; JX-1 at ¶ 20; RX-1-3). With this payment, as well as the parties’ agreement that these monies have all been paid, I construe this action as a stipulation that Respondents committed such violations. *See In the Matter of Ray’s Lawn and Cleaning Services, Inc. and Howard Ray*, ARB No. 06-112, ALJ No. 2005-SCA-7 (ARB, Aug. 29, 2008) (because Ray’s Lawn paid the backwages and fringe benefits it owed to 39 service contract employees, the ALJ properly found that it had “stipulated” to violations of the SCA for failing to pay service contract employees the wages and fringe benefits due them). Accordingly, I find that respondents violated the DBA by failing to pay the employee wages and fringe benefits due. Despite the construed stipulation, I will nevertheless discuss the violation.

WH initiated the investigation of Panthera in 2013 after receiving a complaint alleging improper payment of fringe benefits for employees on the George Wade project. (Tr. 72-73). Panthera was the bridge painting contractor and J.D. Eckman was the prime contractor for the project. (Tr. 73). The administrator alleges that from July 2012 to 2013, Respondents failed to pay fringe benefits to 61 painters covered by the Union Benefit Funds and sought a total of \$205,316.42 due for the missing fringe benefit contributions. (Tr. 72, 78-79 and 175; AX -1; Administrator’s Brief at 12). The Administrator alleges that Panthera’s failure to pay the fringe benefits are evidenced by the certified payroll records, checks for fringe benefits and payment of the monies due to the Union on behalf of the sixty-one employees for the fringe benefits.

The Administrator provided the testimony of WH Assistant District Director (ADD) Alan Davis with respect to the methodology used to calculate the missed or late fringe benefit payments and the result of WH's investigation. (Tr. 76-79, AX-1, AX-2, AX-7, AX-8, AX-9). Mr. Davis testified that during the investigation, Mr. Marks interviewed employees, and reviewed the related contract and subcontract, certified payrolls, other payroll records provided by Panthera and some documents showing individuals registered as apprentices. (Tr. 72-74, 76, AX-1, AX-3, AX-4; AX-7-AX-9). Mr. Davis reviewed the file in this matter, looking at the back wage computations, the contract, and the wage determination to make sure selected items were calculated properly and that the proper conclusions were made. He also looked at the interview statements to ensure they corresponded to the investigator's (Mr. Marks') conclusions. (Tr. 151).

According to Mr. Davis, it appeared from the records that money was being contributed, however there was no indication that any contributions were made to the union on behalf of each individual working on the contract starting from about July 2012. (Tr. 77). Employee interviews further confirmed that benefit payments were not being made. (Tr. 78). Mr. Davis explained that the contributions for fringe benefits could be made in cash to the respective employee with their salary or to the union benefit fund on the employee's behalf within 90 days. (Tr. 78-79, 87-88, 205). In certifying the payrolls, the employer affirms or "certifies" that the payments will be made. (Tr. 87-88, 205, 213-214). If an employer indicates on the payroll certifications that fringe benefits were paid and at the expiration of the 90 days they were not paid, then according to Mr. Davis, it is a violation. (Tr. 88). Panthera's certified payrolls are found at AX-9. The certified payrolls indicate that Panthera certified that all payrolls under the contract are correct and complete and the wage rates for laborers and mechanics are not less than the applicable wage rate contained in any wage determination incorporated into the contract. (AX-9, number 2; Tr. 85). Panthera further certified that each laborer or mechanic on the related payroll was paid, as indicated on the payroll, in an amount not less than the sum of the applicable basic hourly rate plus the amount of the required fringe benefits as listed in the contract. (AX-9; Tr. 86). In its investigation, WH found that after July 2012, there is no evidence of contributions made to the Union on behalf of each individual working on the contract and Panthera continued to certify that it was making the requisite fringe benefit payments to the union fund. (AX-9; Tr. 77-79).

Mr. Davis explained how Mr. Marks determined the amounts due for unpaid fringe benefits to Panthera employees. For periods when the investigator found an employee was paid cash for his/her fringe benefits, he credited Panthera with having made full payment of wages and benefits. (Tr. 78-79; AX-1, AX-8-9). The investigator calculated losses to employees by comparing the hours reported on the certified payrolls and the hours reported to the union. (Tr. 78-79). With the prevailing wage rate at \$28.05 per hour, when the records reflect payment at that hourly rate, but do not include payment of the fringe benefit rate of \$8.90 per hour, the investigator calculated the difference between what was paid the employee and the full fringe and wage rate of \$36.95 per hour. (Tr. 78-79, 84-85, AX-1, AX-8-9). In sum, Mr. Davis stated that the investigator found \$205,316.42 was due to 61 employees for missing fringe benefit contributions. (Tr. 175; AX -1, p. 7).

In addition to Mr. Davis's testimony, at the hearing, Jeffery Leech, the lawyer on behalf of the Union Benefit fund, testified that benefits were not timely paid to its members working for

Panthera and that only after they initiated litigation against Panthera to collect the monies, were the monies paid as part of a settlement in 2015. (Tr. 50-52, 55).

The regulations allow a delay of up to a fiscal quarter (i.e. 90 days) for fringe benefit payments to be paid to benefit funds on behalf of employees. 29 C.F.R. § 5.5(a)(1)(i). Although Panthera's certified payrolls showed on their face that fringe benefits were being paid to a union fund, none were actually paid after July 2012 or early 2013. (Tr. 78-79; AX-9). Respondents offered no evidence that it complied with the requirements of the DBA to timely pay the fringe benefits. Rather, their evidence consisted primarily of showing that the fringe benefits payments sought by Wage and Hour were indeed subsequently paid as part of the settlement with the union. (Tr. 50-51, 56, 296-297, 326; RXP-1-RXP-3; *see also* Post Trial Brief of Panthera Painting, Inc. and Andrew Manganas at 5). In fact, Mr. Retos, the "consultant" hired by Panthera, confirmed that he spent two years or more working on resolving the matter with the Union on calculating and agreeing upon the proper amounts due employees and confirmed that the settlement was reached with the Union in 2015, with some overlap in employees due fringe benefits as part of the WH investigation. (Tr. 324-325).

Manganas is knowledgeable about the pay and fringe benefit requirements of the DBA. (Tr. 251-252, 303). Every contract he has had has been a federally funded project. (Tr. 286). He has been in business since he was 16 or 17 with his father and learned then to pay the higher of the prevailing wage rate or union wage and to pay union benefits. (Tr. 263, 303). Manganas admitted that by December 2012 or January 2013, he was aware the fringe benefits were due, but indicated that his company, Panthera was having financial difficulties, and he had some personal difficulties as well. (*Id.*, *see also* Tr. 261-262; 264-265, 271, 295-297, 318). Manganas acknowledged the late payment of the monies and that the union was entitled to the money it sued for, thus admitting the untimely payment of the monies due his employees. (Tr. 290). The fringe benefits that were due within 90 days of the certified payroll reports for 2012 and 2013 were not paid until a settlement was reached with the Union in 2015, making such payments late and in violation of the DBA requirements. As the fringe benefits were not timely paid, I find the Administrator has satisfied its burden to establish that Respondents violated the DBA and 29 C.F.R. 5.5(a)(1) by failing to pay Panthera employees the full prevailing wage rate, including \$8.90 in fringe benefits, for work performed on the George N. Wade Memorial Bridge.

## **2. Misclassification of Employees**

Likewise, I find Respondents violated the DBA and 29 C.F.R. 5.5(a)(4) by classifying journeyman workers as apprentices and paying them less than the full prevailing wage rate of \$28.05. As evidenced by the consent agreement executed between the Administrator and Eckman for monies due three Panthera employee's misclassified as apprentices rather than journeyman, the monies due have only recently, in 2016, been paid the employees, although the work was done in 2012-2013. I construe the consent agreement as a stipulation of the parties that the respondents violated the DBA by misclassifying three employees as apprentices rather than journeyman and underpaying each of them as a result. *See In the Matter of Ray's Lawn and Cleaning Services, Inc. and Howard Ray*, ARB No. 06-112, ALJ No. 2005-SCA-7, *supra*. Nevertheless, I will address the violation below.

It is noteworthy that the DBA does not permit an employer to unilaterally establish a classification based on its own perception of the skill of the employee or work to be performed. Rather there are certain procedures to be followed. *See, e.g.* 29 C.F.R. §§ 5.2, 5.5. Employees must be classified and paid according to the work they perform without regard to their level of skill. *Pythagoras General Contracting Corp.*, at 7 (ARB, Mar. 1, 2011) (citing 29 C.F.R. §5.5(a)(1)(i)). Relevant to this case, the DBA and regulations allow “bona fide” apprentices to be paid less than the full prevailing rate when the individual is enrolled in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau.... 29 C.F.R. § 5.2(n)(1), § 5.5 (a)(4). Contractors who wish to employ apprentices must “maintain written evidence of the registration of apprenticeship programs... [and] the registration of the apprentices. *Id.*, § 5.5(a)(3)(i). When these conditions are met, a contractor may pay a worker less than the full prevailing wage. *Id.*, § 5.5(a)(4).

A review of records provided by Panthera for workers registered as apprentices indicates there are no apprentice records for three painters, Christopher Cook, Ifrain Santana and Wesley Goncalves. (AX-7). Mr. Davis stated that the WH investigative records show the three employees were properly paid at the journeyman’s wage rate, then the hourly rate was reduced to an alleged apprentice rate and after about three weeks, the rate returned to the full journeyman rate. (Tr. 81). As a specific example, the records show employee Christopher Cook was paid the proper initial journeyman wage rate of \$28.05 per hour when he started in April, 2012, but his rate then dropped to \$19.46 per hour starting May 20, 2012 and later returned to a higher prevailing wage rate of \$29.95 per hour. (Tr. 83-84; AX-1, p. 13). For the four weeks Mr. Cook was paid as an apprentice and not journeyman, the liability was calculated as \$1,236.96 due Mr. Cook. (Tr. 84). The calculations for the remaining two employees misclassified as apprentices were done in a similar manner. (Tr. 84). During the 2012-2013 period, all three workers were paid as journeyman for a period of time, then as apprentices and then as journeymen painters again. (Tr. 274-277; AX-1, AX-9).

In determining the amount due for the three misclassified employees, Mr. Davis explained that in reviewing records obtained during his investigation, Mr. Marks found no records showing that any of the three identified employees were enrolled in a bona fide apprenticeship program, but did see apprenticeship records for other employees. (Tr. 82, 133-34, 166-67, 193-94, AX-7). Mr. Davis also reviewed the file looking for the employee names and apprenticeship records and found none. (Tr. 82-83). According to Mr. Davis, it is the lack of documents certifying them as apprentices that made WH determine they should have been paid as journeyman. (Tr. 166-67).

There is no evidence in the record indicating any of the three employees were ever registered apprentices. (AX-7). Despite the lack of evidence of registration as apprentices, Panthera paid the workers as apprentices for a period of time before returning them to full journeyman rates, and then failed to restore the wages due for the period of time they were incorrectly paid as apprentices. (Tr. 301). As a result, the WH investigator determined that Panthera underpaid the three employees in violation of the DBA, because being unregistered, they were entitled to the journeyman wage rate for the entire period worked. 29 C.F.R. §

5.5(a)(4)(i). Additionally, it appears that Manganas paid them as apprentices because, as he stated, “[t]hey did not have the skills of the painter. They were apprentices. They were beginners...and [he] did not want to pay the full painters rate so he made them apprentices.” (Tr. 275-77). Neither the DBA nor its regulations permit an employer to unilaterally determine the classification of its employees. Additionally, while Manganas maintained at the hearing that it is the Union’s responsibility to “file the papers” for apprenticeships for employees and send him the applicable papers, he admitted at hearing that he never saw apprenticeship papers for any apprentices. (Tr. 276). Neither Panthera nor any other respondent presented proof at hearing that the three employees at issue were ever registered apprentices. For these reasons, I find the three employees were entitled to be paid journeyman wages for their work on the Wade Bridge Project and Panthera’s failure to do so is a violation of the DBA.

Unlike the fringe benefits paid by Panthera as part of the 2015 settlement with the Union, as of the time of the hearing, the three men at issue had yet to be paid the monies due them for their work during the 2012 and/or 2013 time period, as journeymen rather than apprentices. Only recently, in October 2016, with the execution of the consent agreement between the Administrator and Eckman, were the monies to be paid. (*See* Consent Agreement). Eckman, as the prime contractor in this matter, was responsible for the proper payment of all prevailing wages and fringe benefits under the DBA and applicable regulations, including those not paid by its subcontractor, Panthera. *See*, 29 C.F.R. § 5.5 (a)(6). Although the consent agreement was executed between Eckman and the Administrator, it requires the three employees at issue to be paid the backwages due at the journeyman level due to Panthera’s failure to properly classify and pay the employees. The Consent Agreement further supports my finding that Cook, Santana and Goncalves were entitled to be paid journeyman wages for their work on the Wade Bridge Act, and by paying them at the lower apprentice rates, Respondents violated the DBA and 29 C.F.R. 5.5(a)(4).

### **3. Recordkeeping Violations**

At the beginning of the hearing, all parties agreed as to the issues for hearing. (Tr. 36-38). The Administrator did not at that time indicate that there was an alleged recordkeeping violation. (Tr. 36-38). Regardless, it appears that the recordkeeping allegation is included in the attachment to the Administrator’s Order of Reference and it therefore must be addressed. *See, Berbice Corporations and Mohamed Khaleel and Nancy Jean Khaleel*, 98 DBA -9 (ALJ, April 16, 1999), (finding that the Order of Reference determines the issues to be determined at hearing), (citing *see E.B. Fitzpatrick, Jr., Construction Corp.*, WAB Case No. 87-17 (July 9, 1987)); (*see also*, Exhibit A at pages 1-2, attached to Order of Reference, indicating requirement to “...maintain and preserve, for a period of three years, payroll and basic records for all laborers and mechanics working at the project site,” and to submit ... “a certified copy of all payrolls with the certification to affirm that the payrolls were correct and complete...,” under 29 C.F.R. §§5.5(a)(3)(i)and (ii)).

Under the DBA, payroll and time records must be maintained by the contractor during the course of the work for all laborers and mechanics working in the construction or

development of the project and for a period of three years thereafter. 29 C.F.R. §5.5(a)(3)(i)<sup>7</sup>. Specifically, the payrolls must contain:

[t]he name, address, and social security number of each such worker, his or her correct classification, hourly rate of wages paid (including...costs anticipated for bona fide fringe benefits...), daily and weekly number of hours worked, deductions made and actual wages paid.

29 C.F.R. §5.5(a)(3)(i). Additionally, as discussed above, apprenticeship records must be kept. *Id.* Each payroll submitted shall be accompanied by a “Statement of Compliance,” signed by the contractor, subcontractor, or his or her agent certifying that: (1) the payroll for the payroll period contains correct and complete information; (2) each laborer or mechanic has been paid the full weekly wages earned, without rebate, and that no impermissible deductions have been made; and (3) “each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or 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).

Mr. Davis testified to the relevant findings of the WH investigation. Mr. Davis stated that while the investigator, Mr. Marks found the information on Panthera’s certified payrolls regarding hours and days employees worked to be correct, the same payrolls also showed that the employer paid the fringe benefits on a timely basis. (Tr. 84-85, AX-9). The certified payrolls by Panthera also certified that certain employees were registered in a bona fide apprentice program. (Tr. 85-86; AX-9). Mr. Davis further indicated that records obtained during the investigation however, showed to the contrary, rather that the fringe benefits were not timely paid and for three employees paid as apprentices, there was no record of any of them registered in a bona fide apprentice program. (Tr. 77-79; 80-81; 82-83, 87-89; AX-1, AX-8, AX-9).

In sum, although Panthera certified payrolls indicating that wages and fringe benefit payments were made, it failed to timely pay the fringe benefits due some sixty-one employees and further underpaid the wages of three employees it misclassified as apprentices. The certified payrolls did not contain the correct classifications for at least three employees, nor did they contain the correct fringe benefit amounts paid after July 2012 and were therefore inaccurate. Accordingly, I find Respondents failed to comply with the recordkeeping requirements of 29 C.F.R. §5.5(a)(3)(i) and (ii), and as a result, violated the DBA.

### **C. DEBARMENT**

Under the Davis-Bacon Act, debarment is a “preventative, prophylactic tool for the enforcement of the Act.” *Phoenix Paint Co.*, WAB Case No. 87-08 (WAB, May 5, 1989). It is intended to be a remedial, rather than a punitive measure. *Palisades Urban Renewal Enter., LLP*, 2006-DBA-1 (ALJ, Aug. 3, 2007), *aff’d*, ARB Case No. 07-124 (ARB, July 30, 2009). If an individual is debarred, then his or her name is placed on a list and for a period of three years from the date of publication on the list, “any firm, corporation, partnership, or association in which the persons have an interest” are ineligible to enter into any contract subject to the Davis

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<sup>7</sup> My thanks to the Administrator, as counsel’s discussion with respect to the recordkeeping violation is thorough and succinct and largely adopted herein.

Bacon Act or any of the associated statutes listed in 29 C.F.R. § 5.1; 29 C.F.R. 5.12(d)(1); 40 U.S.C. § 3144(b). ALJs and the Board have no discretion to impose a lesser period of debarment. *G&O General Contractors, Inc.*, WAB Case No. 90-35 (WAB, Feb. 19, 1991).

The Administrator is seeking debarment of Andrew Manganas, Panthera Painting, Inc., Justin Hauth, 446 Painting, and Bruce Roberts for a period of three years on the grounds that they willfully disregarded their obligations and violated the Davis-Bacon Act in 2012 and 2013 by failing to pay 61 employees proper fringe benefits while submitting certified payrolls stating that fringe benefits were being timely and properly paid, and by misclassifying three painters as apprentices rather than journeymen and underpaying them.<sup>8</sup>

Counsel for Panthera Painting, Inc. and Andrew Manganas and counsel for Justin Hauth and 446 Painting argue that debarment is warranted for contractors or subcontractors who are in “aggravated or willful violation of the labor standards,” as applied in *Facchiano Constr. Co. v. DOL*, however, debarment in that case was governed by 29 C.F.R. § 5.12(a)(1) because the violations were of Davis-Bacon related Acts. *Facchiano Constr. Co. v. DOL*, 987 F.2d 206, 213 (3d Cir. 1993). The “aggravated or willful violation” standard is explicitly applicable to “statutes listed in 29 C.F.R. § 5.1 other than the Davis-Bacon Act.” 29 C.F.R. § 5.12(a)(1) (emphasis added.) Instead, in cases arising under contracts covered by the Davis-Bacon Act, as here, § 5.12(a)(2) applies. *Id.*

29 C.F.R. § 5.12(a)(2) sets forth the standard for debarment in this case. It states that debarment is appropriate for “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.” 29 C.F.R. § 5.12(a)(2). The Administrative Review Board (“ARB”), its predecessor the Wage Appeals Board (“WAB”), and ALJs have interpreted what constitutes “disregarding obligations to employees.” Disregard for obligations under the Act has been interpreted as “beyond mere negligence” and “involving some element of intent.” *Sundex, Ltd.*, ARB Case No. 98-130, 1994-DBA-58 (ARB, Dec. 30, 1999), citing *Structural Concepts, Inc.*, WAB Case No. 95-02 (Nov. 30, 1995); *see also Berbice Corp.*, 1998-DBA-9 (ALJ, Apr. 16, 1999). However, violations of the Davis-Bacon Act alone “do not *per se* constitute a disregard of an employer’s obligations within the meaning of Section 5.12(a)(2).” *P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116, 1994-

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<sup>8</sup>The Administrator further asserts that respondents Panthera and Manganas were previously debarred, a factor to consider in whether to debar them here, however the evidence is somewhat inconclusive. WH ADD Davis stated that neither he nor Marks were aware of the prior investigation and recommended debarment until the matter was submitted to the regional office. (Tr. 89-90). When asked about AX-10, a record purportedly from sam.gov, a government website showing records of the previous debarment, Mr. Davis could not identify the record and indicated he was not familiar with nor had he seen the record, or an Order of Debarment. (Tr. 123-24). The sam.gov record is therefore of no value and of little weight in this proceeding. It is however more significant, that Manganas testified to receipt of the previous WH investigator’s findings from 2003 and the related letter that recommended his and Panthera’s debarment, indicating at the very least, Manganas was on notice that his actions could result in debarment. (Tr. 280; *see also* Tr. 98; AX-6). This constitutes constructive notice on part of Manganas and Panthera. (It is noted that Hauth started work at Panthera in 2004 and Roberts did not work for Panthera in 2004, but did work for Panthera from March 2010 to November 2013. (Tr. 20-21, 311, 354, 363)). Nevertheless, regardless of the previous investigation and whether respondents Manganas and Panthera were actually debarred, the violations committed from the 2012-2013 period at issue here alone, are sufficient to support a finding that respondents should be debarred.

DBA-72 (ARB, Oct. 25, 1996); *Berbice Corp.*, 1998-DBA-9 (citing *In the Matter of Mr. Paint, Inc., et al.*, 92- DBA-27 (ALJ, Mar. 31, 1995)).

In certain cases, the Board has recognized that proof of DBA violations, including misclassification of employees or failure to pay prevailing wages, plus submission of falsified certified payrolls creates a rebuttable presumption that the employer has disregarded Davis-Bacon Act obligations. *NCC Electrical Services, Inc.*, ARB Case No. 13-097 (ARB, Sept. 30, 2015) (Brown, Deputy Chief Admin. App. J., dissenting) (disagreed that summary judgement should be granted). Such a situation establishes a prima facie case that the violations were intentional and the burden then shifts to the employer “to come up with an explanation excusing its disregard of its obligations to its employees.” *Id.* at 15 (citing *In re R.J. Sanders*, WAB No. 90-25 (Jan. 31, 1991), *In re Phoenix Paint Co.*, WAB NO. 87-08 (May 5, 1989)).

**1. Manganas, Panthera Painting, Justin Hauth, 446 Painting and Bruce Roberts all may be debarred.**

Manganas is the president of Panthera and has been from 2010 until the present. (Joint Stipulation at ¶ 3). Manganas testified that he is the president of Panthera and its only officer. (Tr. 247). As president of Panthera, Manganas and Panthera can be debarred. 29 C.F.R. § 5.12(a)(2).

Although the record demonstrates that Hauth was not elected as vice-president, responsible officers and firms in which subcontractors have an interest can also be debarred. 29 CFR § 5.12(a)(2). Essential personnel who actively participate in a corporation’s daily operations during the violations period are considered to be officers responsible for a company’s violation. *Camilo A. Padreda Gen. Contractor, Inc., & Camilo A. Padreda*, WAB Case No. 87-01 (WAB, Aug 3, 1987).

On November 13, 2009, Hauth signed the subcontract between J.D. Eckman, Inc. and Panthera as vice-president, on behalf of Panthera. (AX-4; Tr. 352). Manganas and Hauth testified that Hauth signed the subcontract at the direction of Manganas. (Tr. 249, 306, 352). Hauth denies he was vice-president, but at the same time, argues that his title of vice-president is a “joke,” a title without any power; Hauth asserts he did not have the authority to be held responsible for Panthera failing to follow the requirements of the DBA. (Tr. 352, 372-73). Contrary to Manganas’ and Hauth’s assertions that Hauth had no authority, the record shows that Hauth had significant responsibilities in managing the operations for Panthera and was essential to the operation of Panthera, and therefore, was a responsible officer of Panthera who may be debarred pursuant to 29 CFR § 5.12.

Testimony revealed that Hauth was generally in charge of quality control matters, EEO, some Equal Employment, environmental conditions, the site-specific environmental plan, training for the lead standard, personal air monitors, management for the projects, ordering materials, (though Manganas specified paint quantities), and related compliance for Panthera. (Tr. 308-09, 319). In a sworn statement for OSHA, Hauth admitted to the title of vice-president and said that the position was not official, but admitted that he was second in command for the

office work. (Tr. 373). Although he did not have authority to hire or fire employees, or to control the operations of Panthera, Hauth had an essential supervisory role in the daily operations of the Wade Bridge project. (Tr. 363). Hauth managed the materials, was initially onsite at the Wade Bridge once a week, verified documents and did some quality control on the Wade Bridge project. (Tr. 310, 364). On the Wade Bridge project, Hauth managed everything through Manganas while Manganas was in Harrisburg and Hauth remained behind in the Canonsburg office. (Tr. 310). Manganas relied on Hauth, acknowledging that he trusted Hauth to take care of any matters he said he would. (Tr. 319-20).

The April 16, 2013 amended subcontract also demonstrates that Hauth was a responsible officer, or at the very least, had functional authority and significant responsibility as essential personnel for Panthera. (AX-4). Exhibit A of the amended subcontract between Eckman and Panthera specified that Hauth was required to be onsite at the Wade Bridge project two to three days per week until the paperwork was completed and then onsite as needed. (AX-4, Tr. 366). The “Outstanding Paperwork” listed in Exhibit A includes a “Punchlist” noting some items were on there since April 2012; Payrolls from December 2012 to present (were) due immediately; Waste pickups and delay costs, and a request for Panthera to provide a list of equipment rentals for a few months. (AX-4, 4/16/13 subcontract at 10). Although Hauth denied any role in payroll, it appears from the subcontract and various related paperwork requirements that he was at least on notice that there was a delay in Panthera’s payrolls. (Tr. 353, 366; AX-4, Exhibit A). Only Manganas and Hauth are specifically mentioned by name as personnel required to be onsite at the Wade Bridge project, which further supports that Hauth was essential. (AX-4). Exhibit A also notes that a Project Manager will be provided by Eckman, but does not mention any particular manager by name, which further supports that Hauth (and Manganas) were responsible officers of Panthera, while people working in other capacities were less vital to the undertaking. (AX-4). Hauth’s testimony also supports this; Hauth testified that Eckman wanted him onsite to monitor various problems and quality control problems in 2012 and 2013, the time the violations were taking place. (Tr. 364; 367). Hauth verified documents and did some quality control at the site. (Tr. 364). Hauth also had a company vehicle and every superintendent had one. (Tr. 307). Thus, only employees with seeming authority appear to have been provided a company vehicle.

Because the record shows that Hauth was a responsible officer of Panthera, with functional authority and an essential role in daily operations of Panthera during the violation period, even though he may not have had an elected position as vice-president, he is a responsible officer able to be debarred as contemplated in 29 CFR § 5.12(a)(2). Hauth is currently the owner and president of 446 Painting. (Tr. at 356). As owner, Hauth has an interest in 446 Painting and therefore 446 Painting can also be debarred as contemplated in 29 CFR § 5.12(a)(2).

Bruce Roberts argued that essentially he only performed actions as directed by Manganas and had no authority. Manganas testified that Roberts was not an officer, he prepared payroll at his direction and did not tell Roberts to pay fringe benefits or include it in the total he provided to Roberts. (Tr. 248, 288). However, the record indicates that although Roberts may not have had decision making power, it is undisputed that he prepared payroll for several years and prepared certified payroll from August 29, 2010 through July 7, 2013. (Tr. 60; AX-9). Roberts was knowledgeable enough about Panthera’s payroll that he often provided assistance to the

union counsel during the lawsuit between the union and Panthera. (TR 59-60). Because Roberts prepared the payroll and certified compliance with the DBA during the time period of the violations, he too is a responsible officer as contemplated in 29 CFR § 5.12(a)(2).

## **2. Manganas, Hauth and Roberts have knowledge or are deemed to have knowledge of the DBA.**

The ARB has determined that an experienced federal contractor is presumed to know the requirements of the DBA. *Phoenix Paint Co.*, WAB No. 87-08 (May 5, 1989) ("There has to be a presumption that the employer who has the savvy to understand government bid documents and to bid on a Davis-Bacon Act job knows what wages the company is paying its employees and what the company and its competitors must pay when it contracts with the federal government"); *Ray Wilson Co.*, ARB Case No. 02-086. "Blissful ignorance," being unaware of the law, wages paid, or bookkeeping, is not a defense to debarment. *Cody Zeigler*, ARB Case Nos. 01-014, 01-015; *P & N Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116; *L.T.G. Constr. Co.*, WAB Case No. 93-15; see *Pythagoras Gen. Contracting Corp.*, 2005-DBA-14; *Berbice Corp.*, 1998-DBA-9; see also *Fontaine Bros., Inc.*, ARB No. 96-162, ALJ No. 94-DBA-48 (ARB, Sept. 16, 1997).

The record reflects that Manganas and Panthera were investigated for failing to pay prevailing wage rates, misclassifying employees, paying journeyman workers as apprentices, failing to pay the correct overtime rates and submitting falsified payroll records in 2003. (AX-6). Minimally, Manganas has been aware of the requirements of the DBA since the 2003 investigation because he responded to the investigation findings. (AX-6). Although Manganas and Panthera disputed at hearing and in their Pre-Hearing Statement, dated May 2, 2016, whether Panthera was debarred following the 2003 investigation, Panthera has previously admitted to being debarred in 2004.<sup>9</sup> Panthera Painting, Inc.'s Response to Notice of Docketing at no. 9.C. In addition to calling into question the reliability of all testimony by Manganas, this prior debarment, or even as Manganas maintains, the knowledge that he could have been debarred in 2004, also points to Manganas having knowledge of the DBA requirements.

Regardless, Manganas prior experience with DBA contracts, is sufficient to establish that he has knowledge of the DBA requirements. Significantly, Manganas testified he is familiar with the requirements of the DBA and explained prevailing wage rates, fringe benefits and apprenticeship. (Tr. 259, 275-6, 303). He stated that he started in the contracting business when he was 16 or 17, working with his father, and learned then to pay the higher of the prevailing wage or union wage and to pay union benefits. (Tr. 303). This testimony, the prior investigation into similar DBA violations and the knowledge that at the very least, he could have been debarred in 2004 demonstrate that Manganas actually knew the requirements and obligations under the DBA.

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<sup>9</sup> Manganas testified that he had a contract in 2004, but did not specify when it was awarded. (Tr. 281). He also testified that he had contracts after 2004, but did not specifically testify to the time period from 2004 until 2007, when the debarment would have been effective. (Tr. 281). Again the testimony regarding the prior 2004 debarment is somewhat inconclusive and inconsistent.

Although Justin Hauth testified that he was not responsible for payroll at the Wade Bridge project, he has demonstrated that he is an experienced government contractor and is therefore presumed to have knowledge of DBA requirements. (Tr. 310). He has been engaged in federal and state contracting projects for about twelve years, eight with Panthera and four as owner of his own painting company. Hauth, Manganas' son-in-law, began working for Manganas at Panthera in 2004 and worked at Panthera until the middle of 2013. (Tr. 363). After that time, he started his own painting company, 446 Painting. (Tr. 356). He testified that he has performed four or five federal highway contracts of the 15 or 16 projects he has had since beginning 446 Painting. (Tr. 369). As the former vice-president and a responsible officer who has been working within the federal requirements of government contracts for the past twelve years, and who is knowledgeable enough to be running his own business as a federal contractor, Justin Hauth is deemed to have knowledge of the DBA's requirements and the obligations under the Davis-Bacon Act.

Moreover, Hauth gained necessary experience at Panthera, enabling him to start his own company, 446 Painting, similar that of Panthera. Hauth and 446 Painting work in the energy field, the pipeline industry, and do commercial and industrial painting. (Tr. 369). They now do work for PennDOT. (Tr. 358). The PennDOT work is done pursuant to a "conditional prequalification," which means that he has to recertify his superintendents' names, number of employees, he will be running the jobs, and Andrew Manganas or Manganas' employees will not be on his projects. (Tr. 358). Hauth identified a copy of the prequalification letter and the first condition is that he cannot work for Andrew Manganas or Panthera Painting.<sup>10</sup> (Tr. 359). While he testified his wife helped him initially, Hauth now certifies the payroll at 446 Painting (Tr. 356). Given that Hauth's only prior related work was for Panthera, named corporate officer or not, he clearly gained enough experience through his work in the daily essential operations of Panthera to start his own company, to perform work similar to that done by Panthera and take responsibility for his own company. This further supports that Hauth has knowledge, either actual or constructive, of the DBA and its requirements.

Roberts prepared certified payroll. As the person signing the certified payroll, he was representing Panthera and attesting that it was in compliance with the DBA. As the person in charge of preparing and certifying Panthera's payroll on the Wade Bridge project beginning in 2010, Bruce Roberts is deemed to have knowledge of the DBA requirements and the obligations under the Davis-Bacon Act.

#### **a. False payroll records**

Falsifying certified payrolls and payroll records has been held to be a sufficient basis for debarment. *P & L Fire Protection, Inc.*, 1994-DBA-66 (ALJ, May 15, 1997); *Dumarc Corp.*, Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006). A consistent pattern of underpayment of wages and subsequent falsification of records also constitutes disregard of obligations under the Act. *G&O*

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<sup>10</sup> Hauth is required to update and certify the conditional prequalification quarterly and has been complying since June 2013. (Tr. 360). According to Hauth, since June 2013, Manganas and Panthera have not participated or entered into any state-supervised, state funded or federally funded construction contracts or subcontracts between 446 and Pennsylvania. (Tr. 360). In 2014, Hauth worked with Manganas on a private project, a parking garage. (Tr. 360-361). He does not intend to work with Manganas or Panthera on any of his government contracts in the future. (Tr. 361).

*Gen. Contractors, Inc.*, Case No. 86-DBA-88 (ALJ, July 10, 1990) (citing *Phoenix Paint Co.*, WAB Case No. 87-8 (May 5, 1989)).

While falsifying documents qualifies as disregarding obligations, the acts “need not be the equivalent of intentional falsification for it to qualify as disregard of its DBA obligations.” *NCC Electrical Services, Inc.*, ARB Case No. 13-097. There need not be willful violation as described in 29 C.F.R. §5.12(a)(1), “intentional failure to look at the law is sufficient” to warrant debarment under the DBA. *Id.* Conduct showing an intent to evade statutory responsibility or purposeful lack of attention to statutory responsibility also warrants debarment. *L.T.G. Constr. Co.*, WAB Case No. 93-15, (Dec 30, 1994). Additionally, “underpayment of wages and falsification of records are serious violations of law, fully justifying debarment.” *Sundex, Ltd.*, ARB Case No. 98-130.

In *NCC Electrical* for example, NCC classified several employees as “apprentices” and paid them as “laborers,” but did not operate a DOL certified apprenticeship program during the project. *NCC Electrical Services, Inc.*, ARB Case No. 13-097. No one at NCC verified whether the people designated as “apprentices” in payroll were part of any apprentice program. *Id.* The president and owner certified that the “apprentices” were enrolled in a bona fide apprenticeship program, but did not check the legal obligations under the Davis-Bacon Act or verify the truth of the certification. *Id.* The employer later amended the certified payrolls, but continued to pay the “apprentices” as laborers. *Id.* The ARB upheld debarment, stating that “intentional failure to look at the law” is sufficient to be disregard of Davis-Bacon Act obligations. *Id.* As discussed above, respondents violated the recordkeeping provisions of the DBA. Such violations support that respondents may be debarred.

#### **b. Blissful ignorance**

The Board has repeatedly held that “blissful ignorance,” i.e. being unaware of the law, wages paid, or bookkeeping, is not a defense to debarment. *Cody Zeigler*, ARB Case Nos. 01-014, 01-015;; *P & N Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116; *L.T.G. Constr. Co.*, WAB Case No. 93-15; *see Pythagoras Gen. Contracting Corp.*, 2005-DBA-14; In fact, failure to be aware of the DBA requirements and to ensure compliance and record keeping has been held to constitute disregard of obligations. *Ray Wilson Co.*, ARB Case No. 02-086 (vice-president of company was debarred when he did not read DBA provisions in contract with prime contractor and did not comply with DBA because he was unaware of its requirements); *see also Integrated Res. Mgmt., Inc.*, ARB No. 99-119, ALJ No. 1997-SCA-14, (ARB, June 27, 2002); *C.f. Administrator, Wage and Hour Div. v. Stuart A. Jackson*, ARB Case No. 00-068, ALJ No. 1999-LCA-0004 (Apr. 30, 2001).

The ARB upheld debarment for the president of a company when the president was aware of the prevailing wage requirements, but did not have direct knowledge of the wages being paid to employees, the type of work they were performing or the substance of the certified payroll records, and several employees had been misclassified. *Pythagoras Gen. Contracting Corp.*, 2005-DBA-14. The ALJ reasoned that debarment was appropriate for the president because he was “a responsible individual involved in the management of the company who disregarded his obligations to his employees” by failing to examine the wages paid, the work performed or the accuracy of certified payroll records. *Id.* The ARB has also upheld debarment

where the company president misclassified workers, failed to keep records, had received recommendations on how to correct recordkeeping problems, and had prior similar DBA violations. *Berbice Corp.*, 1998-DBA-9. The president in that case argued that he had in good faith attempted to comply and had not understood the obligations under the DBA. *Id.* There, the ALJ found debarment to be warranted, stating that if the employer “did not know their true obligations under the DBA, their lack of knowledge was the result of a conscious effort to remain uninformed.” *Id.* As discussed below, neither Hawth nor Roberts can defend against debarment due to ignorance of the law.

### **c. No avoiding responsibility**

Corporate officers also cannot avoid debarment by placing the blame for DBA violations on business associates or employees. *Miller Insulation*, WAB No. 91-38 (WAB, Dec. 30, 1992); *See, e.g., Marc S. Harris, Inc.*, WAB Case No. 88-40 (WAB, Mar. 28, 1991); *Marques Enterprises d/b/a Lisbon Contractors, Inc.*, WAB Case No. 91-34 (WAB, Sept. 29, 1992). The owner of a company is responsible for all the acts of the company and cannot take cover behind the actions of his partners, agents, representatives, employees, or inexperienced representatives. *Camilo A. Padreda Gen. Contractor, Inc., & Camilo A. Padreda*, WAB Case No. 87-01 (WAB, Aug 3, 1987). For example, a company owner who claimed to be unaware that the DBA applied, whose partner negotiated the contract and whose partner was responsible for bookkeeping was debarred because his lack of this knowledge was “grossly negligent,” and constituted “complete disregard” of his obligations to his employees; debarment was upheld. *P.J. Stella Constr. Corp. & My Glass Co.*, WAB Case No. 80-13 (WAB, March 1, 1984). As discussed below, respondents cannot escape debarment by blaming others for their violations.

### **3. Manganas, Hawth and Roberts disregarded their obligations and will be debarred.**

The payroll records each include a certification which states that payrolls are correct and complete, the wage rates are not less than the applicable wage, the classification of workers is accurate, any apprentices are duly registered in a bona fide apprenticeship program with a state apprenticeship agency or DOL, and, fringe benefits are paid to either a plan, fund or program or paid in cash. (AX-9); 29 C.F.R. § 5.5. Likewise Mr. Davis testified that the fringe benefits must be paid by 90 days from certification and it is common for weekly payroll to be prepared prior to actual submission of contributions to a health and welfare fund. (Tr. 203-4, 213).

Panthera’s certified payroll of record began with the week ending February 28, 2010 and ended with the week ending July 7, 2013.<sup>11</sup> (AX-9). Every payroll of record certifies that Panthera is compliant with the DBA. (AX-9). However, Davis testified that Panthera was not meeting its pension obligations beginning around July 2012. (Tr. 195). Manganas testified that he learned that the DOL had “an issue” between November 2012 and January 2013 and around

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<sup>11</sup> Christina Hawth, secretary, certified the first eighteen certified payrolls, from February 28, 2010 until June 27, 2010. (AX-9). Following those, Bruce Roberts, secretary, certified the next six, from July 4, 2010 to August 16, 2010. (AX-9). Christina Hawth then then certified payrolls numbered 24-26, August 8 2010 to August 22, 2010, and did not certify any more payrolls. (AX-9). Bruce Roberts certified payrolls numbered 27-168, from August 29, 2010 until July 7, 2013, the last certified payroll of record. (AX-9).

that same time the union audited. (Tr. 270-71). Following a lawsuit by the union and the investigation by the DOL, Panthera paid the union \$208,000, for the pension and excluding apprenticeship, which is the approximate amount described in the DOL investigation. (Joint Stipulation; Tr. 273). Manganas testified that the union was entitled to this money, he was aware that Eckman was not making fringe benefits payments, was aware that he was having problems complying with DBA requirements. (Tr. 290, 293).

Following problems with the work on the Wade Bridge project, Panthera was required a to redo 75% of the Wade Bridge Project, cover the costs and Manganas was required to be on the project jobsite beginning around May or June 2010. (Tr. 255, 257). Manganas testified that he was in Harrisburg at the jobsite from spring to fall of 2012 and spring to summer of 2013. (Tr. 264-265). He testified that in the fall of 2012, Panthera did not have the funds to finish the Wade Bridge project, so Panthera and Eckman entered into the 2013 amended subcontract, which provided that Eckman pay. (Tr. 265). Manganas stated that Eckman paid payroll, some invoices and taxes, but did not pay insurance, fringe benefits, and some invoices. (Tr. 267). Manganas expected Eckman to make payments as agreed in the 2013 amended subcontract, including fringe benefits. (Tr. 270). However, Davis testified that the investigator examined payrolls individually and determined that after July 2012, no hours were reported to the union and fringe benefits were not paid or not paid in full. (Tr. 77-79).

Manganas testified that he attempted to check the status of the payments; he testified that he called Eckman to check on the status of the payments and that Eckman said they would be paying. (Tr. 293-94). However, he did not contact the DOL when he was having problems complying with the DBA, nor did Manganas resubmit corrected certified payrolls when he became aware of being noncompliant with the DBA. (Tr. 294). Manganas further maintained that it was Eckman's responsibility to pay fringe benefits because of the amended subcontract. (Tr. 295). Nevertheless, despite being aware both that Eckman was not paying the fringe benefits and that he was struggling to comply with the DBA requirements, Panthera continued to submit certified payrolls attesting that all DBA requirements were being met. Blaming the failure to pay fringe benefits on Eckman, however, cannot absolve Manganas of his responsibility to follow the DBA and his failure to ensure that payments were being made while continuing to certify that all payments were being made shows purposeful lack of attention to compliance and serious disregard of his obligations. *L.T.G. Constr. Co.*, WAB Case No. 93-15; *Miller Insulation*, WAB No. 91-38; *P.J. Stella Constr. Corp. & My Glass Co.*, WAB Case No. 80-13; *Padreda*, WAB Case No. 87-01.

Manganas implied throughout his testimony that the responsibility to pay Panthera employees lay with Eckman because of the 2013 amended subcontract. (Tr. 295). However, Manganas indicated that he maintained control of the payroll even after the amended subcontract provided funds from Eckman. Manganas testified that the foreman called in the times, Manganas put in the rates, then gave the information to Roberts or someone who does payroll, then Roberts certified it and workers were paid. (Tr. 250-251). During the times in the Wade Bridge project when he was onsite in Harrisburg, he would get the daily timesheets and fax them to Roberts with instructions to make the payroll. (Tr. 258). As discussed above, the owner of a company cannot take cover behind the actions of other business associates. *Padreda*, WAB Case No. 87-01; *Miller Insulation*, WAB No. 91-38. Manganas, as president and owner of Panthera, is

responsible for all acts of the company and cannot evade responsibility by attempting to shelter behind Eckman's agreement in the amended subcontract. *Padreda*, WAB Case No. 87-01.

Manganas also testified that he did not review certified payrolls before they were submitted when he was in Harrisburg monitoring the project. (Tr. 259, 263). Here, like *Pythagoras*, Manganas is aware of the prevailing wage requirements. *Pythagoras Gen. Contracting Corp.*, 2005-DBA-14. Unlike that case, Manganas had the direct knowledge of the hours and wages to be paid to employees because he maintained control over the specifics of payroll, but similar to *Pythagoras*, Manganas failed to examine the accuracy of his certified payroll records and the wages paid by Eckman. *Id.* Thus, Manganas disregarded his obligations to his employees by failing to examine payroll records and ensure that Eckman was correctly compensating Panthera's employees.

Additionally, the record shows that various apprentices were employed on the Wade Bridge project. (AX-7). However, the record also shows that three workers were listed and paid as apprentices at various times, but Panthera's records do not include apprenticeship paperwork for these three apprentices. (AX-7). Davis testified that the lack of certification that the three individuals were apprentices means that they should be paid as journeymen. (Tr. 167). These three workers were initially paid as journeymen for a week, then were paid as apprentices for a few weeks, slightly different amounts of time for each worker, and then Manganas started paying all three as journeymen again. (Tr. 301). Manganas attempted to explain the lack of apprenticeship certification. For two workers, Santana and Goncalves, Manganas testified that he contacted Roberts, who contacted the union in Jacksonville to put them into union. (Tr. 275). He testified that the third misclassified worker, Cook, had told Manganas that he was an apprentice, then Manganas checked with the business agent, who told him the worker was not an apprentice and changed his rate, but Manganas did not make up his pay. (Tr. 301).

Manganas testified that he did not intentionally misclassify the individuals as apprentices and believed them to be apprentices with the appropriate training in place, further noting that, "They [did not] have the skills of the painter. They were apprentices. They were beginners," suggesting he unilaterally chose the classification for the three individuals at issue. (TR 275). He further laid the responsibility on the union, stating he "believed we also sent payment to the union for the apprenticeship for them" and the "union did not file the papers." (TR 274). Manganas also testified that he thought it took two or three months to get apprenticeship papers and that he did not think any of the workers were working for two or three months. (TR 276). He stated that he never saw any apprenticeship papers for any of the apprentices employed on the project. (TR 276). Nevertheless, all the certified payrolls indicate that all apprentices are registered in a bona fide apprenticeship program, but the lack of certification for Cook, Santana and Goncalves demonstrates that these workers were not registered in a bona fide apprenticeship program. Manganas failed to verify that the workers he was paying as apprentices were part of a bona fide apprenticeship program and thus disregarded his DBA obligations. This shows the same type of purposeful lack of attention to compliance with DBA requirements shown in Manganas' attempt to lay responsibility to pay fringe benefits on Eckman.

On its face, when Manganas was aware that Panthera was not compliant with the DBA and continued to certify that it was compliant, this was an intentional, willful falsification of

records and sufficient alone for debarment. *P & L Fire Protection, Inc.*, 1994-DBA-66. Thus, this factor alone is sufficient to debar Manganas and Panthera. However, additional factors also show that Manganas disregarded his DBA obligations and therefore Manganas and Panthera must be debarred. Manganas' failure to review the certified payrolls, to review and verify apprenticeship papers, to verify that all payments were made, or to correct the payrolls when he became aware he was not in compliance, disregards the obligations under the DBA and Manganas and Panthera must therefore be debarred. *NCC Electrical Services, Inc.*, ARB Case No. 13-097.

As described above, blissful ignorance is not a defense to debarment. *Cody Zeigler*, ARB Case Nos. 01-014 and 01-015. Failure to be aware of the DBA requirements and to ensure compliance and recordkeeping constitutes disregard of obligations. *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14. In signing the subcontract, Hauth warranted that he and Panthera are familiar with the terms of the contract, including DBA requirements, even though he testified that he did not actually read the contract. (AX-4; Tr. 356). As vice-president with an essential role in the day-to-day management and supervision of the company, his obligations included awareness and compliance with DBA requirements. His failure to read the contract is no defense to debarment. *Cody Zeigler, Inc.*, ARB Case Nos. 01-014 and 01-015. Similar to the vice-president in *Ray Wilson* who was debarred, Hauth did not read the DBA provisions in the contract and did not ensure compliance; therefore, Hauth has disregarded his obligations under the DBA. ARB Case No. 02-086. Consequently, Hauth must also be debarred. Hauth currently operates his own painting company, 446 Painting. (Tr. 356). Because this is a company in which Hauth has an interest, 446 Painting must also be debarred. 29 C.F.R. § 5.12(a)(2).

Roberts was the individual signing the certified payroll, representing Panthera and attesting it was compliant with the DBA. Though he initially had no knowledge that monies were unpaid, he was in contact with Eckman about the failure to pay and continued to still warrant that Panthera was in compliance with the DBA on the certified payroll. (TR 344; AX-9). Despite his position preparing certified payroll, by his questions and witness' responses at hearing, Roberts appeared to have little understanding of the DBA requirements. However, blissful ignorance is not a defense to debarment. *Cody Zeigler, Inc.*, ARB Case Nos. 01-014 and 01-015. An argument that Roberts was unaware of DBA requirements is insufficient to prevent debarment. *L.T.G. Constr. Co.*, WAB Case No. 93-15. Not having an understanding of what certified payroll means in his position in charge of preparing the payroll demonstrates a reckless failure to look at the law. When combined with the falsified payrolls he signed, this demonstrates a clear disregard for his and Panthera's obligations under the Act sufficient to debar Bruce Roberts. *NCC Electrical Services, Inc.*, ARB Case No. 13-097; *L.T.G. Constr. Co.*, WAB Case No. 93-15; *Sundex, Ltd.*, ARB Case No. 98-130.

Upon review, it is determined that the Administrator has met his burden to show that Andrew Manganas, Justin Hauth, and Bruce Roberts disregarded their obligations to their employees. The violations described above also demonstrate that the Respondents knew or had reckless disregard for their responsibilities under the Davis-Bacon Act. As Andrew Manganas, Justin Hauth, and Bruce Roberts committed willful violations of the DBA and disregarded their obligations within the meaning of 29 C.F.R. § 5.12(a)(2), Andrew Manganas, his company

Panthera Painting, Inc., Justin Hauth, his company 446 Painting, and Bruce Roberts are debarred for a period of three years.

### **CONCLUSION**

Thus, the Respondents are found to have committed violations of the DBA. The violations include failure to pay the prevailing wage rate including fringe benefits, and misclassification of journeyman employees as apprentices. All monies owed have been paid. Respondents, Andrew Manganas, Panthera Painting, Inc., Justin Hauth, 446 Painting, and Bruce Roberts are debarred for a period of three years.

### **ORDER**

Accordingly, it is hereby ORDERED that Andrew Manganas, Panthera Painting, Inc., Justin Hauth, 446 Painting, and Bruce Roberts be DEBARRED under 29 C.F.R. § 5.12(a)(2) of the regulations implementing the Davis-Bacon Act for a period of three years.

NATALIE A. APPETTA  
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](mailto: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.