

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 April 2017

Case No.: 2015-DBA-00006

In the Matter of

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

MILLER BUILDING GROUP
(Subcontractor to Barsto Construction)
First-Tier Subcontractor

and

JIMMIE MILLER
An Individual

With respect to laborers and mechanics
employed by the first-tier subcontractor
on Contract No. 084-35376 renovation of
Lucas Place Lofts in Kansas City, Missouri
Funds from the Department of Housing
and Urban Development

APPEARANCES:

For the Prosecuting Party, Administrator, Wage and Hour Division
M. Patricia Smith, Solicitor of Labor
Christine Z. Heri, Regional Solicitor
H. Alice Jacks, Associate Regional Solicitor
Justin H. Whitten, Attorney

For the Respondents, Jimmie Miller and Miller Building Group, Inc.
Pro Se

BEFORE: HON. TRACY A. DALY
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER

1. Jurisdiction and Procedural History. This case arises under the National Housing Act, 12 U.S.C. §1715c, as amended, a Davis-Bacon Related Act (DBA), 40 U.S.C. §276a, *et seq.*, and the applicable regulations, 29 C.F.R. Part 5, brought by the Administrator, Wage and Hour Division, United States Department of Labor against Respondents, Miller Building Group (MBG) and Mr. Jimmie Miller.¹ The matter was originated by an Order of Reference dated December 11, 2014. The issues raised by the parties could not be informally resolved, and the matter was referred to the Office of Administrative Law Judges (OALJ) for a formal hearing. The undersigned conducted a formal hearing on June 29, 2016 in St. Louis, Missouri and the parties were afforded a full opportunity to adduce testimony and offer documentary evidence.² Post-hearing briefs with legal analysis and factual arguments were filed by the Administrator on October 26, 2016 and by Respondents on October 25, 2016.³ Neither party filed a reply brief.

2. Statement of the Case.

The Administrator seeks to debar Respondents from government contracting for three years based on aggravated or willful violations of the labor standard provisions of the National Housing Act, a Davis-Bacon Related Act, in connection with the Lucas Place Lofts Renovation Project (the Project). Specifically, the Administrator alleges Respondents knowingly and willfully failed to remit the fringe benefit portion of the laborers' wages, falsified certified payroll forms, and falsified remittance reports. (APHB, pp. 1-2) In response, Respondents claim they did not commit fraudulent behavior or have ill intent. Respondents contend they corrected their mistakes as their financial means permitted and request "the court to show mercy" because they have completed other Davis-Bacon Act projects without committing violations. (RPHB, pp. 1-2)

3. Relevant Evidence. In making this decision, the undersigned reviewed and considered all reliable and material documentary and testimonial evidence presented by the Administrator and Respondents. The undersigned made all reasonable inferences to be drawn therefrom and resolved all issues of credibility. This decision is based upon the entire record.

a. Exhibits Admitted into Evidence. The undersigned fully considered the exhibits admitted during the hearing. However, as expressed to the parties during the hearing, only exhibit content directly cited in a post-hearing brief by specific exhibit and page number was considered material and relevant evidence. All other information contained in the exhibits, but not specifically cited in the briefs, was regarded as non-relevant background information for chronological context to cited relevant evidence. (Tr. pp. 15-16)

1) Administrator Exhibits. The Administrator offered 10 exhibits, which the undersigned

¹ Miller Building Group and Mr. Jimmie Miller are hereinafter jointly referred to as Respondents.

² Exhibits are marked as follows: AX for Administrator exhibits; RA, RB, and RX for Respondent exhibits. (Tr. p. 14) Reference to an individual exhibit is by party designator and page number (e.g. AX-1, p. 2). Reference to the hearing transcript is by designator Tr. and page number (e.g. Tr. p. 3).

³ Post-hearing briefs are marked as follows: the Administrator's post-hearing brief is APHB. Respondents' post-hearing brief is marked RPHB.

admitted into evidence. Each was admitted into evidence without objection. (Tr. pp. 10-11) The following exhibits contain directly material and relevant evidence on issues of fact and law in this case:

(A) The Prime Contract.

Barsto Construction, Inc. (Barsto) contracted for the demolition and renovation work of Lucas Place Lofts (the Project) with its owner, Lucas Place Lofts, LLC. (AX-1, p. 1) The Prime Contract provided that Lucas Place Lofts, LLC would pay Barsto \$13,002,990.00 for work on the Project. (AX-1, p. 6)

The Prime Contract provided the Project was assisted or insured by the United States. (AX-1, p. 13) The U.S. Department of Housing and Urban Development (HUD) insured the construction loan. (AX-1, p. 10) The minimum wage requirements were set pursuant to the labor standard provisions of the National Housing Act, 12 U.S.C. § 1715c. (AX-1, p. 13) The Prime Contract incorporated “The Prevailing Wage Determination MO120045 Modification Number 7, last published/modified on (date) July 6, 2012.” (AX-1, p. 3) The prevailing wage determination provided that building construction projects must pay common laborers in Jackson County, Missouri \$27.05 per hour and an additional fringe benefit of \$12.40 per hour. (AX-1, pp. 40-41)

(B) The Subcontract.

Respondents entered into a subcontract with Barsto for demolition work at the Lucas Place Lofts located at 323 West 8th Street, Kansas City, Missouri 64105 in Jackson County, Missouri. The subcontract was executed on October 9, 2012 and became effective as of September 21, 2012. (AX-2, p. 1) Under the terms of the subcontract, Barsto was to pay Respondents \$264,983.00. (AX-2, p. 2) The subcontract specifically incorporated the wage and labor policies contained in the Prime Contract. Mr. Miller signed the subcontract on behalf of MBG. (AX-2, pp. 5-6)

(C) Deposition of Mr. Robert Byron.

The parties deposed Mr. Robert Byron on November 6, 2015 in Kansas City, Missouri. (AX-3, p. 1) Mr. Byron is a senior project manager with Barsto. Mr. Byron stated he communicated to Mr. Miller that the Project was subject to Davis-Bacon Act requirements, as detailed in the construction documents. (AX-3, pp. 5-7) Mr. Byron did not recall speaking with Mr. Miller about any difficulties paying fringe benefits. However, Mr. Byron stated he eventually received an email from Mr. Leslie Williams and phone call from the local union informing him that Respondents had not paid fringe benefits to the laborers’ fund.⁴ (AX-3, pp. 8-10) Mr. Byron was aware that Respondents had some “cash flow problems.” (AX-3, p. 14)

(D) Deposition of Mr. Leslie Williams.

⁴ On April 8, 2013, Mr. Byron sent Mr. Richard Linsmeier, the Project’s superintendent, an email stating that he received a phone call from Mr. Leslie Williams at the union earlier that day that Respondents “were in the rear for about \$30,000 in benefits for the workers he had on site through February.” (AX-3, p. 9; AX-9)

The parties deposed Mr. Leslie Williams on November 6, 2015 in Kansas City, Missouri. (AX-4, p. 1) Mr. Williams is the vice president and field representative for the Kansas City Laborers' No. 264 and is a trustee of the laborers' health and welfare fund (the laborers' fund). (AX-4, p. 5) The fund handles health benefits for the union's active members and retirees. The laborers' health and welfare fund is administered by a third party entity referred to as "TIC" by Mr. Williams. (AX-4, p. 6)

Mr. Williams stated he met with Mr. Miller and signed a "one-job agreement" for the Lucas Place Lofts Project. In this agreement, Mr. Miller agreed to pay the union wage and union benefits to the laborers that Respondents employed to complete the Project. (AX-4, pp. 8-10) Mr. Williams gave Mr. Miller a sample of the union's remittance form when signing the agreement. Mr. Williams explained that contractors are required to submit the remittance form monthly to the union and keep track of the weekly hours worked by each laborer. When submitting the remittance reports to the union, contractors are also supposed to submit a check for the benefits that month. (AX-4, pp. 12-14)

Mr. Williams recalled that he spoke with Mr. Miller every week, often in person at the Project site. From November 2012 until April or March 2013, Mr. Williams believed that Respondents were paying the fringe benefits to the laborers' fund. Mr. Miller never told him Respondents were not paying the fringe benefits to the laborers' fund. (AX-4, p. 11) Mr. Williams explained that Respondents' failure to pay the fringe benefits caused some laborers' health insurance coverage to lapse. (AX-4, p. 18)

Mr. Williams recalled he began receiving phone calls from the Project's laborers complaining they were not receiving the fringe benefits from Respondents. Mr. Williams then contacted Mr. Miller, who stated Respondents were "trying to get the money together." Mr. Williams told Mr. Miller the fringe benefits must be paid immediately. (AX-4, pp. 20-23)

(E) Respondents' Certified Payroll Reports for the Project.⁵

In total, Respondents certified 24 weekly payroll reports for the Project ranging from the weeks ending on October 30, 2012 through April 9, 2013. As provided on the payroll reports, if the subcontractor pays the fringe benefits to the laborers in cash, then box 4(b) must be marked on the report. If the subcontractor pays the fringe benefits to an approved plan, rather than to the laborers directly, then box 4(a) must be marked on the report. On all certified payroll reports for the Project, Respondents marked box 4(a), indicating the fringe benefits were being paid to an approved plan, fund, or program. Mr. Miller signed 17 of the 24 certified payroll reports, numbers 8-24; Ms. Sheria Miller signed report numbers 1-7. The certified payroll reports contain a column titled "Fringe Rate." The rate listed in this column for all employees was "0.00" or blank on all certified payroll reports. (AX-5, pp. 1-64)

(F) Mr. Miller's Personal Interview Statement to Wage & Hour Division Investigator.

The Wage and Hour Division conducted an investigation of Respondents concerning the Project. Mr. Miller provided a statement on April 17, 2013. Mr. Miller admitted to Investigator

⁵ Respondent also submitted these records marked as RB-2.

Marburgh that Respondents did not pay fringe benefits to the laborers' fund. Mr. Miller stated Respondents had been submitting monthly remittance reports to the laborers' fund detailing the number of hours each laborer worked. Mr. Miller indicated he had spoken with Mr. Williams at the union and offered to pay the past due fringe benefits after Respondents received funds owed to them by Barsto. (AX-6, p. 1)

(G) Wage & Hour Division Compliance Action Report and Narrative Report for Prior Investigation.

Prior to MBG's formation, Mr. Miller was the president and owner of Miller Contracting Services, Inc. (MCS). (Tr. pp. 101) MCS was awarded a subcontract to perform work for the U.S. Air Force at the Scott Air Force Base from August through December 2009. The contract was subject to the Davis-Bacon Act and contained a prevailing wage determination. (AX-8, pp. 1, 4)

The Wage and Hour Division conducted an investigation of MCS in connection with the Scott Air Force Base project. The Compliance Action Report found MCS committed one violation for misrepresenting or falsifying certified payroll reports and 16 violations for the failure to properly pay fringe benefits. (AX-8, p. 2) The investigation found that the prime contractor discovered that MCS did not pay the respective fringe benefits to a union fund, as MCS declared on its certified payroll reports. The investigation further found MCS improperly paid prevailing wage rates to its employees. (AX-8, p. 6)

A final conference was held on April 28, 2011, in which Mr. Miller agreed to future compliance by paying prevailing wage rates and fringe benefits. Ms. Sheria Miller also attended the final conference. (AX-8, p. 7) The report recommended debarment for MCS and Mr. Miller because MCS "knowingly submitted false certified payrolls" and the "certified payrolls consistently reflected inaccurate pay to the employees on both the prevailing wage and fringe benefits." (AX-8, p. 9)

(H) Letter from Barsto to Subcontractors Regarding Davis-Bacon Act Compliance.

On October 29, 2012, Barsto sent all Project subcontractors, including Respondents, a letter that included a copy of the Davis-Bacon Acts Compliance. The letter referenced the requirement to file weekly certified payroll reports and included a copy of the U.S. Housing and Urban Development guide to prevailing wage requirements. On behalf of Respondents, Mr. Miller signed this document, which verified his receipt and understanding of the Davis-Bacon Act wage requirements for the Project. (AX-9, p. 1)

(I) Respondents' Monthly Remittance Reports to the Laborers' Fund.

Mr. Miller completed and signed three monthly remittance reports for December 2012 and January and February 2013, indicating Respondents were remitting \$5,812.22, \$10,686.03, and \$15,221.88 respectively to the laborers' fund. The form provided that it must be submitted by the tenth of the month following the month covered by each report. The form directed to mail a check and a copy of the report to the Greater Kansas City Laborers Fund. The reports detail each

laborer's name, social security number, pay period, and total hours worked during the applicable month. (AX-10, pp. 1-3)⁶

2) Respondent Exhibits. Respondents offered two exhibits at the hearing, which the undersigned admitted into evidence without objection from the Administrator. (Tr. pp. 14-15) The undersigned also allowed Respondents to submit evidence post-hearing. (Tr. p. 187) These exhibits were subsequently admitted into evidence post-hearing without objection from the Administrator. The following exhibits contain directly material and relevant evidence on issues of fact and law in this case:

(A) Project Agreement Between Respondents and Laborers' Union No. 264.

On November 20, 2012, Mr. Miller, on behalf of Respondents, executed and signed a document styled "Project Agreement" for the Project in which Respondents agreed to be "bound by the prevailing wages, fringes and conditions in the area" and "to be bound by the terms of the current collective bargaining agreement" with the union. Respondents further agreed "to be bound by all subsequent collective bargaining agreements between the Association and the unions entered into effective during the term of this Project Agreement." (RB-1, p. 1)

(B) Proposed Joint Payment Agreement.

On November 20, 2012, Mr. Miller signed and dated a document styled as a "Joint Payment Agreement" on MBG letterhead. The document identified the following parties: Barsto as the General Contractor; MBG as the Subcontractor; Laborers' Local Union #264 as the Supplier; and Lucas Place Lofts as the Project.

The document further provided: "For the purpose of obtaining credit accommodations from the above named Supplier, the Subcontractor asks the General Contractor to make checks in payment of sums due to the Supplier on the above referenced Subcontractor payable jointly to Subcontractor and Supplier." It provided lines for the general contractor's signature; however, Barsto did not sign the proposed joint payment agreement. (RB-2, p. 1)

(C) Authorization for Payment of Back Wages.

On June 12, 2013, Mr. Miller signed a document styled "Authorization for Payment of Back Wages." This document, prepared by the Wage and Hour Division, authorized Barsto to make back wage payments on behalf of Respondents in the amount of \$62,126.24 for work performed at the Project. Mr. Miller confirmed that he understood that the U.S. Department of Labor would disburse the funds to 20 of Respondents' employees to satisfy the wage underpayments. (RB-5, pp. 6-7)

⁶ The Administrator's exhibits contain three remittance reports that MBG sent to the laborers' fund. Respondents' exhibits have six remittance reports sent to the laborers' fund included in their exhibits. In comparing the remittance reports in the two exhibits, the amounts of payments supposedly being remitted do not match, even though they are for the same months and project. None of Respondents' remittance reports are signed, but the Administrator reports are signed by MBG. See RB-3 and AX-10.

(D) Joint Payment Agreements and Documentation from Other Respondent Projects.

The undersigned permitted Respondents to submit post-hearing evidence to support their claim there was a “joint check arrangement” between Respondents and Barsto. (Tr. pp. 171, 187) Respondent submitted 13 exhibits marked as RX.

RX-1 contains a document on MBG letterhead styled “Joint Payment Agreement” between MBG, and a general contractor, Bruce Unterbrink Construction, Inc. for the “Choate Mental Health” project. The document was dated and signed on January 12, 2015 by Mr. Miller for MBG and Mr. Unterbrink for the general contractor. The document also contains a signature block for the local labor fund entity; however, a representative for the local labor fund entity did not sign the agreement. (RX-1, p. 1)

RX-1 also contains a document on MBG letterhead styled “Joint Payment Agreement” MBG, and a general contractor, Path Construction, for the “UIUC Multiple Restroom Renovation” project. The document was dated and signed on February 18, 2015 by Mr. Miller for MBG and contains an illegible signature for the general contractor. The document also contains a signature block for the local labor fund entity; however, a representative for the local labor fund entity did not sign the agreement. (RX-1, p. 2)

Additionally, RX-1 consists of four one-page documents on McGrath & Associates, Inc. (McGrath) letterhead, each titled “Joint Payment Agreement.” The general contractor is identified as McGrath and the subcontractor is identified as MBG for the “BJH – 8800/8900 Patient Division” project. The supplier is identified as a local labor fund entity. The documents are identical except for the payment amounts and dates. Each document contains signature blocks for the supplier, subcontractor, and general contractor. The subcontractor and general contractor signature blocks are signed on all documents. The supplier’s signature block on all documents is unsigned. The first agreement is for \$340.14 and the second is for \$4,772.76 respectively; both are dated August 31, 2012 and signed by McGrath and Mr. Miller. The third and fourth agreements are for \$362.09 and \$5,800.70 respectively; both are dated October 31, 2012 and signed by Ms. Sheria Miller on November 1, 2012. There is signature for McGrath, but no date. (RX-1, pp. 3-6) Pages 3-6 of RX-1 correspond to RX-13, which contains four images of checks issued by McGrath made jointly payable to MBG and a local labor fund entity in the following amounts: 1) \$340.14 on August 31, 2012; 2) \$4,772.76 on August 31, 2012; 3) \$362.09 on November 1, 2012; and 4) \$5,800.70 on November 1, 2012. (RX-13, pp. 1-4)

RX-2 contains six check images issued by Bruce Unterbrink Construction, Inc. made payable to MBG and a laborer fund entity for the “Lewis & Clark Trimpe” project. The checks range from June 23, 2015 until August 17, 2015. The record does not contain a corresponding Joint Payment Agreement for which these checks were issued. (RX-2, pp. 1-6)

RX-3 contains one check image issued by Tarter Construction, LLC made payable only to a local labor fund entity for the “Normal Senior Center” project. The check is dated March 20, 2015. The record does not contain a corresponding Joint Payment Agreement for which this check was issued. (RX-3, p. 1)

RX-4 contains three check images issued by Core Construction Services of IL, Inc. made payable to MBG and a local labor fund entity for the “UIUC Par Renovation” project. The checks range from June 4, 2015 until June 11, 2015. The record does not contain a corresponding Joint Payment Agreement for which these checks were issued. (RX-4, pp. 1-3)

RX-5 contains three check images issued by Bruce Unterbrink Construction, Inc. made payable to MBG and a local labor fund entity for the “Choate Mental Health” project. The checks range from March 5, 2015 until April 28, 2015. It appears that check images for this project correspond to the Joint Payment Agreement included in RX-1 because the same project name is identified. (RX-5, pp. 1-3)

RX-6 contains multiple pages of check images issued by Holland Construction Services, Inc. made payable to MBG and a local labor fund entity for the “May Apartments” project. The checks range from February 5, 2015 until February 18, 2016. The record does not contain a corresponding Joint Payment Agreement for which these checks were issued. (RX-6, pp. 1-96)

RX-7 contains eight check images issued by Korte & Luitjohan Contractors, Inc., made payable to MBG and a local labor fund entity for the “Six Mile Library” project. The checks range from January 2, 2014 until January 30, 2014. The record does not contain a corresponding Joint Payment Agreement for which these checks were issued. (RX-7, pp. 1-8)

RX-8 contains eight check images issued by Holland Construction Services, Inc. made payable to MBG and a local labor fund entity for the “Belleville Memorial Hospital” project. The checks range from May 13, 2014 until May 28, 2014. The record does not contain a corresponding Joint Payment Agreement for which these checks were issued. (RX-8, pp. 1-8)

RX-9 contains four check images issued by Core Construction Services of IL, Inc. made payable to MBG and a local labor fund entity for the Camp Lincoln #3 project. The checks range from February 2013 until April 2013. The record does not contain a corresponding Joint Payment Agreement for which these checks were issued. (RX-9, pp. 1-4)

RX-10 contains five check images issued by R.D. Lawrence Construction Company, Ltd. made payable to MBG and a local labor fund entity for the “Logan Correctional” project. The checks range from August 6, 2015 until November 24, 2015. The record does not contain a corresponding Joint Payment Agreement for which these checks were issued. (RX-10, pp. 1-5)

RX-11 contains six check images issued by Poettker Construction made payable to MBG and a local labor fund entity for the “Wal-Mart St. Charles” project. The checks range from November 22, 2013 until April 25, 2014. The record does not contain a corresponding Joint Payment Agreement for which these checks were issued. (RX-11, pp. 1-6)

RX-12 contains two check images issued by River City Construction made payable to MBG and a local labor fund entity for the “CUMTD (Mass Transit)” project. The checks range from March 1, 2016 until March 15, 2016. The record does not contain a corresponding Joint Payment Agreement for which these checks were issued. (RX-12, pp. 1-2)

b. Testimonial Evidence. The undersigned fully considered the entire testimony of every witness who appeared at the hearing. These witnesses provided, in pertinent part, the following relevant testimony:

1) Mr. Cleveland Marburgh.

Mr. Marburgh is an Investigator for the Wage and Hour Division, U.S. Department of Labor. Mr. Marburgh has worked as a Wage and Hour Investigator for 41 years and has completed approximately 20 or 30 Davis-Bacon investigations during his career. Mr. Marburgh explained that investigations may arise out of a specific complaint or a periodic check on a particular business. At the request of HUD, Mr. Marburgh conducted an investigation of Respondents. The investigation of Respondents did not arise from any specific complaint made to HUD. (Tr. pp. 27-30) Mr. Marburgh was randomly assigned to investigate Respondents for the Project. (Tr. p. 35)

Mr. Marburgh testified that Respondents perform general construction, demolition, and cleanup work. During the initial phase of the investigation, Mr. Marburgh spoke with Mr. Miller several times and held an initial conference by telephone. Mr. Marburgh learned that Mr. Miller was the owner of Miller Building Group. The investigation ranged from October 2012 through April 2013. (Tr. pp. 31-32)

Specifically, Mr. Marburgh investigated a project in which Respondents subcontracted to provide cleanup, demolition, and general construction to renovate apartments or lofts in Jackson County, Missouri for Barsto, the Prime Contractor. Initially, Mr. Marburgh held an initial conference and requested information about Respondents' business. He requested and obtained certified payroll records, interviewed employees, and obtained the subcontract between Barsto and Respondents. (Tr. pp. 33-36)

Mr. Marburgh stated the Prime Contract, the contract between HUD and Barsto, was a Davis-Bacon Act stipulated contract, and included a prevailing wage determination. Each subcontractor received a copy of the prevailing wage determination, as required by the Davis-Bacon Act. Mr. Marburgh explained the prevailing wage determination was correctly calculated based on the Project's relevant time period and specific geographic location. (Tr. pp. 39-41)

Respondents hired laborers to complete their subcontracted portion of the Prime Contract. The subcontract required Respondents to pay the laborers mandatory fringe benefits in the amount of \$12.40 per hour. The subcontract referenced Davis-Bacon Act regulations and incorporated the requirements set forth in the Prime Contract. Mr. Miller signed the subcontract on behalf of Respondents. However, Mr. Marburgh did not request Mr. Miller to verify his signature on the subcontract. (Tr. pp. 41-44)

Mr. Marburgh sent Respondents a letter requesting authorization to allow Barsto to pay the past due fringe benefits because Mr. Miller stated Respondents could not pay the fringe benefits. Mr. Miller returned the signed document to Mr. Marburgh. (Tr. pp. 44-45) Mr. Marburgh also collected and reviewed payroll records obtained during the investigation, which is common during these investigations. (Tr. pp. 45, 47) On certified payroll records, a subcontractor must

indicate whether it has paid fringe benefits directly to the employees or to a third-party entity. On Respondents' certified payroll records, Respondents "checked the box" that indicated they paid the fringe benefits to an approved third-party fund. Either Mr. Miller or his wife, Ms. Sheria Miller, personally signed the certified payroll records on behalf of Respondents.⁷ Mr. Marburgh explained that Mr. Miller's wife identified herself as Respondents' bookkeeper during the investigation and was responsible for keeping employees' time and managing payroll records. (Tr. pp. 48-50)

Mr. Marburgh testified the fringe benefits for the laborers were supposed to be paid to the laborers' fund. During the final two months of the investigation, an individual from the union contacted Mr. Marburgh and informed him that no fringe benefits had been paid to the laborers' fund for the Project. The employees that Mr. Marburgh interviewed during the investigation each believed Respondents were paying the fringe benefits into the laborers' fund. Mr. Marburgh stated there was no reason to doubt the employees until he received the phone call from the union stating it had not received any funds for fringe benefits from Respondents. (Tr. pp. 51-52)

Respondents' certified payroll reports indicated that all benefits were paid to the laborers' fund without exception. Mr. Marburgh took a statement from Mr. Miller by telephone regarding the nonpayment of fringe benefits to the laborers' fund, and Mr. Miller agreed Respondents would make payments to the laborers' fund in the future. After Barsto paid Respondents, then Mr. Miller agreed to pay the delinquent funds to the laborers' fund. Mr. Marburgh believed that Mr. Miller was aware of the obligation to pay fringe benefits because he spoke to him about delinquent payments and Mr. Miller stated he intended to pay them. (Tr. pp. 52-54)

During the investigation's closing conference, Mr. Marburgh explained that Mr. Miller's signature on the certified payroll records, which indicated Respondents were remitting funds for the fringe benefits to an approved fund, which they were not, could be considered falsification. As a result, after fully reviewing the case, Mr. Marburgh recommended debarment. Mr. Marburgh testified he later became aware of a previous investigation into Mr. Miller and his former business; however, he was not the investigator assigned to the previous investigation of Mr. Miller or MCS. (Tr. pp. 54-57)

Mr. Marburgh explained there were approximately six to eight other subcontractors involved with the Prime Contract for this Project. Each Prime Contract subcontractor was independently investigated by the Wage and Hour Division. Mr. Marburgh did not compare investigations and does not know the results of the other subcontractor investigations. However, Mr. Marburgh occasionally coordinated with the Prime Contract investigator. (Tr. pp. 58-59)

During the closing conference, Mr. Marburgh and the Lead Investigator advised Barsto that Respondents had not and could not pay the fringe benefits to the laborers' fund and advised Barsto that it was also responsible for paying the fringe benefits. Mr. Miller participated in the closing conference by telephone and Mr. Marburgh advised him on the results of the investigation. (Tr. pp. 59-61)

⁷ In this Decision and Order, Ms. Sheria Miller is also referred to as Ms. Sheria Liddell. At the time of the hearing, Ms. Liddell was no longer married to Mr. Miller, and had presumably changed her last name to reflect her change in marital status.

Mr. Marburgh has never seen a contract between a prime contractor and a subcontractor that provides for the obligation to pay fringe benefits to remain with the prime contractor. Mr. Marburgh explained that subcontracts typically require the subcontractor to pay the prevailing wages and fringe benefits. The subcontractor is required to send weekly certified payroll declarations to the prime contractor. (Tr. pp. 62-64)

During the investigation, Mr. Marburgh spoke with approximately six to eight of Respondents' employees. On the day of Mr. Marburgh's on-site visit, he spoke with each laborer individually. Each laborer believed the fringe benefits were being paid to the laborers' fund. Mr. Marburgh later received a phone call from the union and was informed Respondents had not paid the fringe benefits. He also learned one specific laborer lost his insurance coverage due to the non-payment. The union requested Mr. Marburgh to expedite the investigation. The union spoke with Mr. Miller several times about the non-payment of fringe benefits. (Tr. pp. 64-67)

Mr. Marburgh recalled that Mr. Miller understood it was Respondents' obligation to pay the fringe benefits to the laborers' fund during the initial conference. Mr. Marburgh specifically recalled asking Mr. Miller if he knew he was required to pay the fringe benefits and Mr. Miller affirmatively replied. Mr. Miller never told Mr. Marburgh that he believed Barsto was obligated to provide the fringe benefits under the terms of the contract. Mr. Miller revealed during the investigation that he was aware the fringe benefits were not being paid. At some point during the investigation, Mr. Miller indicated Respondents could not pay the fringe benefits because Barsto owed them money. Respondents never made any payments for fringe benefits to the laborers' fund. Mr. Miller never said or implied to Mr. Marburgh that he believed that Barsto would pay the fringe benefits to the laborers' fund. (Tr. pp. 67-70)

Mr. Marburgh explained he did not identify any past investigations or violations by Mr. Miller when he first checked with the regional Wage and Hour Division office. Mr. Marburgh did not realize until the end of the investigation that Mr. Miller's prior business had been investigated for Davis-Bacon Act violations because the business name had changed since the prior investigation. Mr. Marburgh then told Mr. Miller that debarment may be possible. (Tr. pp. 72-74)

During Mr. Marburgh's initial conversation with Mr. Miller, Mr. Miller did not mention the concept of a "joint check arrangement" with Barsto. Mr. Marburgh did not identify any evidence that Barsto and Respondents were joint employers. (Tr. pp. 77-79)

Later in the investigation, Mr. Miller explained to Mr. Marburgh that Barsto was delinquent in making subcontractor payments to Respondents. Mr. Miller explained to Mr. Marburgh this was the reason Respondents had not made payments for fringe benefits. However, during the initial conference, Mr. Miller stated Respondents were paying the fringe benefits directly to the laborers' fund. (Tr. pp. 81-84) Although Mr. Miller told Mr. Marburgh he had been in contact with the union directly about the nonpayment of the fringe benefits, Mr. Miller did not tell Mr. Marburgh that payment for the fringe benefits would be made via a "joint check arrangement." If this were the case, Mr. Marburgh would have contacted Barsto and requested payment. (Tr. p. 86)

Mr. Miller eventually signed an agreement indicating Respondents would allow Barsto to pay the owed fringe benefits. Barsto eventually paid the fringe benefits because it was obligated to pay if Respondents did not pay. Barsto and Respondents could be debarred if the fringe benefits were not paid because Barsto remains responsible for each subcontractor. Mr. Marburgh never received any verified information that Barsto was delinquent in making payments to Respondents for completed work. (Tr. p. 87)

Investigators always ask about prior investigations into businesses. If a business has a past history of violations, then it is more likely subject to debarment. (Tr. pp. 88-89) Mr. Marburgh could not specifically recall the nature of the former investigations and violations involving Mr. Miller; however, he agreed to pay all required payments at the conclusion of the prior investigation. (Tr. pp. 91-93)

The union called Mr. Marburgh on several occasions to express the importance of paying the fringe benefits. For example, the union called Mr. Marburgh to tell him that a laborer's wife who was being treated for cancer had her insurance rejected for nonpayment. (Tr. p. 90) Although Mr. Miller told Mr. Marburgh that Barsto owed Respondents money, he never told him that Barsto owed them money to pay fringe benefits. (Tr. p. 91)

2) Mr. Jimmie Miller.

Mr. Jimmie Miller is the President and owner of Miller Building Group, Inc. In November 2011, Respondents entered into a subcontract with Barsto in Kansas City, Missouri. Mr. Miller testified that during a pre-construction meeting he knew the project was a "Davis-Bacon prevailing wage project." During this meeting, Mr. Miller signed a "Union Contract Agreement" with Kansas City Laborers 264 in Kansas City. This enabled Respondents to secure union laborers needed to complete the Project. Under the terms of the subcontract, Barsto paid Respondents monthly. (Tr. pp. 23-24)

Mr. Miller explained that Respondents paid wages directly to the laborers. Mr. Miller believed that payments for the laborers' fringe benefits were being paid by Barsto via a "joint check" based upon a prior agreement between Respondents and Barsto. (Tr. pp. 25-26)

Mr. Miller is the owner of MBG, which was formed in June 2010. Before owning MBG, Mr. Miller was the President of Miller Contracting Services (MCS), which was formed in 1994. MBG and MCS both performed demolition work. (Tr. pp. 101-103)

Mr. Miller submitted a bid to Barsto to perform work on the Lucas Place Lofts Project. In the subcontract between MBG and Barsto, Mr. Miller acknowledged that Respondents would abide by the prevailing wage requirements. (Tr. p. 103)

Prior to work beginning on the Project, Mr. Miller recalled he attended a pre-construction meeting with a representative from Barsto where they discussed the Project was a Davis-Bacon project. Mr. Miller testified that during this meeting Barsto conveyed to all subcontractors that

this was a prevailing wage project, which required the submission of certified payroll records. Mr. Miller testified he understood the meaning of this specific requirement. (Tr. pp. 103-105)

Mr. Miller testified he worked on Davis-Bacon Act projects prior to the Project and understood how to complete certified payroll reports. Mr. Miller explained he was aware that Respondents were obligated to indicate on the certified payroll reports how they were paying the required fringe benefits. (Tr. p. 105) Before the Project, Mr. Miller had paid fringe benefits pursuant to a collective bargaining agreement with a union. Mr. Miller understood there was a prevailing wage and fringe benefit component under the collective bargaining agreement with the union. Before work on the Project began, Mr. Miller knew Respondents would be required to pay the prevailing wage rate to the laborers. He was also informed of this requirement during his initial meeting with Barsto. (Tr. pp. 106-107)

Mr. Miller elected to enter into an agreement with the local laborers' union so Respondents could use their trained laborers for the Project. Mr. Miller testified he understood this required Respondents to pay a prevailing wage and fringe benefits to the laborers. Mr. Miller recalled that he signed a document in which Barsto specifically informed all subcontractors that compliance with the Davis-Bacon Act was required, which included prevailing wage requirements and the obligation to complete certified payroll reports. (Tr. pp. 107-111)

Mr. Miller testified his signature appeared on the certified payrolls and understood Respondents were obligated to submit certified payroll reports every week during which laborers worked on the Project. Mr. Miller admitted he indicated on the certified payroll reports that Respondents were paying the fringe benefits to an approved plan, fund, or program. Mr. Miller did not indicate on the payroll reports that Respondents paid the fringe benefits directly to the laborers in cash. Mr. Miller explained the fringe benefits were to be paid monthly to the laborers' fund, but certified payroll reports must be submitted weekly to Barsto. (Tr. pp. 111-114)

Respondents began work on the Project in October 2012. Respondents received full payment from Barsto in October, November, and December 2012 and January 2013. Respondents did not receive full payment from Barsto in February or March 2013 due to incomplete work and discrepancies with Barsto. (Tr. pp. 114-115)

Mr. Miller testified he was required to remit the fringe benefits to the laborers' fund on a monthly basis. Because the Project began in October 2012, Mr. Miller understood he was required to remit fringe benefits to the laborers' fund beginning in November 2012 and continuing until the Project's completion. Mr. Miller admitted Respondents never sent any money to the laborers' fund for fringe benefits at any point during the Project. (Tr. pp. 116-117)

Mr. Miller stated he sent a "joint check agreement" or joint payment arrangement to Barsto. Mr. Miller spoke with the project manager and on-site superintendent about "doing a joint check for the contributions for the members of Local 264. And it was wrote by – they told us to write the agreement, they'll sign off on it. They never signed off on our agreement." (Tr. p. 117) Mr. Miller drafted this agreement for "Barsto to sign off on agreeing that they were on our behalf doing dual checks to the Laborers Union 264 every month. So we submitted this. We never got a signature from them in reference to agreeing with their signature that they would do this." (Tr. p.

118) Mr. Miller conceded that if Barsto never signed the agreement, then there was no effective and valid agreement between Respondents and Barsto. Mr. Miller testified that because Barsto is a nonunion contractor, it was not obligated to sign the agreement. However, Mr. Miller further explained that Barsto knew that Respondents, as their subcontractor, needed its support. (Tr. p. 119)

Mr. Miller personally wrote the language contained in the proposed “joint payment arrangement.” Based on his past experience, Mr. Miller believed that prime contractors commonly enter into similar arrangements with subcontractors. Mr. Miller spoke with Mr. Byron about the proposed agreement and believed Barsto would agree to its terms. If executed, Mr. Miller believed Barsto “would cut a check – they would cut a two-party check.” Mr. Miller thought that, if executed, the agreement would place responsibility on Barsto and Respondents to “make sure that the contributions are being paid via dual check to the laborers’ union” To pay the fringe benefits, Mr. Miller believed Barsto would issue a “two-party check” payable to both Respondents and the laborers’ fund. Then, Mr. Miller believed Respondents would endorse the check and forward it to the laborers’ fund. (Tr. pp. 120-125)

Mr. Miller acknowledged that Barsto did not send Respondents two-party checks to forward to the laborers’ fund. Mr. Miller explained he “didn’t really check on it because [he] was on the job working” and his wife was submitting the certified payroll reports to Barsto. Mr. Miller testified he did not become aware that Barsto had not signed the joint payment agreement or forwarded checks for the fringe benefits until the fourth month into the Project. According to Mr. Miller, Mr. Byron continued to tell him that he “was going to get with his boss . . . to agree to sign off on the agreement.” (Tr. pp. 125-127)

When Mr. Miller realized Barsto was not sending the joint checks, he again spoke with Mr. Byron because Mr. Miller believed Barsto was holding a portion of the funds owed to Respondents to pay the fringe benefits. Mr. Miller testified the checks that Respondents were receiving from Barsto were not for the full amount. Mr. Miller acknowledged that Mr. Byron never specifically informed him that Barsto agreed to the joint payment agreement. (Tr. p. 127)

Mr. Miller recalled discussing the joint payment arrangement with Barsto at the time they signed the subcontract and also in January 2013. Mr. Miller wanted Barsto to agree to this arrangement so Respondents could “just focus on doing the work” and because they did not have the cash flow to make timely fringe benefit payments to the laborers’ fund. However, Mr. Miller conceded that Barsto paid Respondents amounts that allowed them to pay laborers the prevailing wage rate and fringe benefits. (Tr. p. 128)

Mr. Miller testified he knew Barsto was not sending checks for the fringe benefits pursuant to the proposed joint payment agreement because Respondents were not receiving checks from Barsto to endorse. Mr. Miller sent Barsto several emails expressing his concerns about paying the fringe benefits and received one or two responses from Mr. Byron. In one response, Mr. Miller testified that Mr. Byron informed him that Barsto would not agree to the proposed joint payment arrangement. Afterwards, Mr. Miller verbally told Mr. Byron that he needed Barsto to give Respondents the funds for fringe benefits withheld by Barsto. (Tr. pp. 131-132)

Mr. Miller acknowledged the “fringe rate” amount was blank on the certified payroll reports for each laborer. Mr. Miller’s wife generated the certified payroll reports, but Mr. Miller claimed he never viewed that section of the certified payroll reports. Mr. Miller did not know why this column of the certified payroll report was blank. (Tr. pp. 133-135) However, Mr. Miller stated that if the box indicating the fringe benefits were paid to an approved plan or fund was unmarked, then Respondents would not receive payment for work from Barsto. Mr. Miller conceded he knew the box was improperly marked, but knew that neither Respondents nor Barsto were remitting the fringe benefits to the laborers’ fund. (Tr. p. 136)

In addition to sending the certified payroll reports to Barsto weekly, Respondents were required to file a monthly remittance report with the laborers’ fund indicating the amount paid for fringe benefits for each month. However, despite the remittance form’s directive to send a check when filing the remittance report, Respondents did not send a check with the remittance report. Mr. Miller testified spoke with Mr. Williams at the union several times and explained Barsto would send a two-party check. However, there was no indication of this arrangement on the monthly remittance reports. (Tr. pp. 138-140)

After completing the Project, Respondents subcontracted for another Davis-Bacon Act project in Edwardsville, Missouri for the May Apartments project where the prime contractor and Respondents used a joint payment arrangement to pay fringe benefits. Before the Project in 2010, Respondents subcontracted for another project where the prime contractor and Respondents used a joint payment arrangement to pay fringe benefits. For these projects, Respondents received a check from the prime contractor for fringe benefits. Respondents would then endorse the check and forward it to a union fund. (Tr. pp. 140-142)

In June 2010, Mr. Miller disbanded his former company, MCS, due to outstanding tax liabilities. (Tr. pp. 144-147) Since MBG has become operational, Mr. Miller has used the joint payment arrangement with prime contractors to pay the fringe benefits on nearly every job. Respondents have completed approximately 15 or 20 projects. All of Respondents’ projects have been subject to the Davis-Bacon Act requirements. (Tr. pp. 147-148)

Based on a past investigation of MCS by the Department of Labor, Mr. Miller conceded that he was aware and on notice that MBG was obligated to pay fringe benefits on Davis-Bacon Act projects. (Tr. pp. 151-152)

Mr. Miller clarified that when he uses the term “joint check,” he means joint payee, meaning Barsto would issue the check to both Respondents and the laborers’ fund. (Tr. p. 153)

Mr. Miller knew the fringe benefits were not being paid because he never received any checks from Barsto in the format in which he wanted them to be issued. (Tr. p. 154)

In December 2012, Respondents completed and sent a monthly remittance report to the laborers’ fund indicating \$5,810.22 was being sent to cover the fringe benefits. Mr. Miller testified he knew, at the time he completed this report, that Barsto was not paying the fringe benefits. Mr. Miller acknowledged the remittance report did not indicate the funds were

contingent on an agreement with Barsto. Mr. Miller also conceded the February 2013 remittance report sent to the union fund did not include payment for fringe benefits. (Tr. pp. 156-158)

Mr. Miller testified that Mr. Byron's deposition testimony in which he stated that Mr. Miller never told him that Respondents were unable to pay the fringe benefits without the joint payment arrangement was not true. Mr. Miller stated he verbally told Mr. Byron in November 2012 that Respondents were unable to pay the fringe benefits without the joint payment arrangement. (Tr. pp. 163-164) Mr. Miller reiterated that Mr. Byron was aware that Respondents were not paying the fringe benefits. (Tr. p. 165)

Mr. Miller testified the Project began in late October 2012. Respondents received the first payment from Barsto at the end of November 2012. Barsto withheld 10 percent of the amount owed to Respondents for "retention purposes" and to ensure Respondents' work was fully complete at the end of the Project. Mr. Miller confirmed that Barsto paid Respondents the full amount for wages and fringe benefits, and only withheld 10 percent for "retainage." (Tr. pp. 166-168)

3) Ms. Sheria Liddell.

Ms. Sheria Liddell was formerly married to Mr. Jimmie Miller. During the time Respondents completed work on the Project as a Barsto subcontractor, Ms. Liddell testified she worked as MBG's office manager and prepared the certified payroll reports. Ms. Liddell still holds this position and performs these duties for MBG. (Tr. pp. 175-176)

Ms. Liddell testified she was aware the Davis-Bacon Act applied to the Project and she prepared the 24 certified payroll reports. (Tr. pp. 176-177) Ms. Liddell stated the "fringe rate" provided in the certified payroll reports was listed as \$0.00 for each laborer. However, she explained that when using the QuickBooks software, she mistakenly placed the fringe amounts in the "Other" column. The "Other" column was "where the fringe benefits were taken out of the checks" and also included deductions from a worker's pay for local taxes (1% of gross earnings), laborer's stamps (\$1.00 per hour), and laborer's dues (3% of gross earnings). (Tr. pp. 177-179)

Ms. Liddell did not recall when Respondents received the first payment from Barsto. Ms. Liddell recalled Respondents were required to pay the laborers weekly. She explained that before receiving the first payment from Barsto, Respondents had to advance the money to pay the laborers out of MBG's operating fund. Barsto did not remit a "startup" payment to MBG. (Tr. pp. 179-180)

Ms. Liddell testified she withheld the fringe benefits from the laborers' paychecks during the entire period of the contract with Barsto when certifying the payroll reports. (Tr. pp. 180-181) Ms. Liddell explained she did not remit funds to the laborers' fund for the fringe benefits because Respondents "didn't have the money." After Barsto began paying Respondents for completed work, Ms. Liddell believed the amounts included funds for prevailing wages and fringe benefits, minus funds withheld for retainage. She further explained "cash flow issues" prevented payments to the laborers' fund for fringe benefits, rather than retainage funds withheld by Barsto. (Tr. pp. 181-182)

Ms. Liddell recalled that Mr. Miller instructed her not to make payments to the laborers' fund for fringe benefits due to the joint checking arrangement with Barsto. Ms. Liddell believed that Barsto "would be writing joint checks for the benefits." Ms. Liddell never received notification from Barsto that specified a portion of Respondents' payments would be withheld and directly paid to the laborers' fund for fringe benefits. (Tr. pp. 182-183)

Ms. Liddell clarified Mr. Miller's testimony that since 2012, MBG has completed approximately 15 or 20 projects. However, only three or four of those projects were Davis-Bacon Act projects. (Tr. pp. 184-185) Ms. Liddell recalled that MBG used a joint payment arrangement for all of its former Davis-Bacon Act projects. (Tr. p. 186)

4. Applicable Law and Case Analysis. 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 the opposing party 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. v. Admin, Wage & Hour Div.*, ARB Nos. 08-107, 09-007, ALJ No. 2005-DBA-14, slip op. at 9 (ARB Feb. 10, 2011) (as reissued Mar. 1, 2011) (the Administrator has the initial burden of "establishing that the employees performed work for which they were improperly compensated"; the burden then shifts to Respondent "to come forward with evidence of the precise amount of work performed or with evidence to negate[e] the reasonableness of the inference to be drawn from the employees' evidence"); *Ray Wilson Co.*, ARB No. 02-086, ALJ No. 2000-DBA-14 (ARB, Feb. 27, 2004) (Respondent has the burden to rebut Department's proof of extent and amount of violations); *Thomas & Sons Building Contractors, Inc.*, ARB No. 00-050, ALJ 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").

a. Credibility Analysis. The undersigned 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, the undersigned took into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record. 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. *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. *Administrator v. Groberg Trucking, Inc.*, ARB No. 03-137, ALJ No. 2001-SCA-22 (ARB, Nov. 30, 2004) (citing *Sundex, LTD.*, ARB No. 98-130 (ARB, Dec. 30, 1999)).

1) Mr. Cleveland Marburgh.

In applying the above applicable law to this case, the undersigned found Mr. Marburgh's

testimony to be generally credible. His demeanor was straightforward and forthright and there were no apparent inconsistencies in his testimony. He has been an investigator for the Wage and Hour Division for 41 years and has completed approximately 20-30 Davis-Bacon Act investigations during his career. In this case, Mr. Marburgh completed a thorough and detailed investigation of Respondents' business practices. He obtained all necessary documents, spoke with Mr. Miller on several occasions, and interviewed Respondents' employees.

2) Mr. Jimmie Miller.

The undersigned found Mr. Miller's testimony only partially credible. In reaching this conclusion, the undersigned noted a number of inconsistencies in his testimony. Some illustrative, non-inclusive examples include Mr. Miller's inconsistent excuses for Respondents' failure to remit payment for fringe benefits to the laborers' fund. First, and most extensively, Mr. Miller testified that Respondents did not pay the fringe benefits because he believed Barsto would issue a joint check payable to MBG and the laborers' fund to cover the fringe benefits. Mr. Miller acknowledged this was his belief, despite the fact Barsto never signed the proposed joint payment arrangement and never issued checks to MBG for endorsement. This explanation is contradicted by Mr. Marburgh, who testified that Mr. Miller never told him about his belief that Barsto would issue joint checks to cover the fringe benefits. Mr. Miller's failure to convey this belief to Mr. Marburgh at any point during the Wage and Hour investigation of this claim significantly undermines his credibility and casts doubt on whether Mr. Miller truly subjectively believed Barsto would issue joint checks to cover the fringe benefits. Next, Mr. Miller testified he believed Barsto was withholding a portion of monthly funds for completed work owed to Respondents to cover the fringe benefits. However, Mr. Miller then conceded that, under the terms of the subcontract, the rate Barsto paid Respondents included amounts for the prevailing wages and fringe benefits. Mr. Miller later explained that any amounts Barsto withheld from Respondents were for "retainage" purposes. Additionally, Mr. Miller attempted to justify the failure to pay the fringe benefits was due to cash flow problems. Mr. Miller's inconsistent statements significantly detract from the weight to be accorded to his credibility.

3) Ms. Sheria Liddell.

The undersigned found Ms. Liddell's testimony moderately credible. Although Ms. Liddell appeared truthful and forthright during her testimony, her credibility is diminished by the fact that she did not appear to fully demonstrate an understanding of the term fringe benefits. Ms. Liddell is MBG's bookkeeper and created the certified payroll reports by using QuickBooks. The certified payroll reports contain a column titled "Fringe Rate." The fringe rate listed for all employees on all reports is either "\$0.00" or blank. Initially, Ms. Liddell denied placing the zeros in the "Fringe Rate" column, and testified this was the result of QuickBooks creating the report. She testified that she placed the fringe benefits portion in the column titled "other" deductions. This statement implies that Ms. Liddell believes that fringe benefits represent amounts that are deducted from an employee's pay, rather than an amount that is paid in addition to an employee's regular prevailing wage. However, Ms. Liddell later testified she purposefully withheld the fringe benefits because Respondents lacked the ability to pay for them. Specifically, she explained that Mr. Miller instructed her not to remit fringe benefits to the laborers' fund due to the joint checking arrangement with Barsto. Ms. Liddell's testimony indicates either a lack of

understanding of the term fringe benefits or contradictory statements concerning why they were not paid. In either event, her inaccurate testimony diminishes the weight to be accorded to her credibility.

b. Purpose of Davis-Bacon and Related Acts. The Davis-Bacon Act is designed to give local laborers and contractors a fair opportunity to participate in federal building programs, to protect the employees of government contractors from substandard wages, and to promote the hiring of local labor rather than cheap labor from distant sources. *United States v. Binghamton Constr. Co.*, 347 U.S. 171, *reh'g. denied*, 347 U.S. 940 (1954); *see also L.P. Cavett Co. v. U.S. Dep't of Labor*, 101 F.3d 1111 (6th Cir. 1996).

c. Coverage and the Applicable Prevailing Wage. The labor standards provision at issue in this case is found in the National Housing Act. *See* 12 U.S.C. § 1715c (2012). The Davis-Bacon Act requires that contractors and subcontractors on certain federal construction projects pay no less than the “prevailing wage” to the “mechanics” and “laborers” they employ. 40 U.S.C. § 3142(a) (2012). The Department of Labor’s Wage and Hour Division determines the prevailing wage rates for various job classifications and publishes these rates in documents known as “wage determinations.” 29 C.F.R. Part 1 (2012). The prevailing wage rates contained in the wage determinations derive from rates prevailing in the geographic area where the work is to be performed or from rates applicable under collective bargaining agreements. 40 U.S.C. § 3142(b); 29 C.F.R. § 1.3. Contracts and subcontracts subject to Davis-Bacon must include a whole host of provisions detailing the employers’ legal obligations including those related to prevailing wages. 40 U.S.C. § 3142(c); 29 C.F.R. § 5.5(a). Department of Labor regulations also require that contracts and subcontracts subject to Davis-Bacon include provisions mandating that employers maintain proper payrolls and basic employee records. 29 C.F.R. § 5.5(a)(3).

As one of the many Davis-Bacon Related Acts, the National Housing Act requires the application of many of the labor standards provisions of Davis-Bacon (including the Davis-Bacon prevailing-wage requirements) to certain construction contracts that are financed by mortgages insured by the United States. *See* 12 U.S.C. § 1715c(a) (requiring contractors to “certify[] that the laborers and mechanics employed in the construction of the dwelling or dwellings or the housing project involved have been paid not less than the wages prevailing in the locality in which the work was performed for the corresponding classes of laborers and mechanics employed on construction of a similar character, as determined by the Secretary of Labor, in accordance with [provisions of the Davis-Bacon Act]”). Contracts subject to the National Housing Act are subject not only to the same Davis-Bacon Act prevailing wage requirements but also to the extensive regulations the Department of Labor has promulgated to implement Davis-Bacon. *In Re: Coleman Constr. Co.*, ARB No. 15-002, ALJ No. 2013-DBA-004, slip op. at 10 (ARB June 8, 2016); *see also* 29 C.F.R. §§ 5.1(a)(4), 5.5(a).

HUD insured the construction loan for the Project at issue in this case, pursuant to the National Housing Act. The Project’s prime contract and subcontract incorporated the labor standards of the National Housing Act. Thus, the Project was covered by a Davis-Bacon Related Act, and Respondents were subject to the Davis-Bacon Act prevailing wage requirements and the implementing regulations. Respondents employed laborers to perform demolition and renovation work in Jackson County, Missouri. The Department of Labor’s prevailing wage determination at

the time of the Project was MO120045 Modification No. 7, and it required the basic hourly wage of \$27.05 per hour and an additional fringe benefit of \$12.40 per hour. (AX-1, pp. 3, 41) Respondents do not contest that the Davis-Bacon Act or National Housing Act requirements are applicable to the Project in this case.

d. Requirement to Pay Prevailing Wages and Fringe Benefits. A contractor or subcontractor may elect to pay the fringe benefit portion of a laborer's pay in cash or directly to the laborer. 40 U.S.C. § 3142(d); 29 C.F.R. § 5.31(b)(3). In addition, a contractor or subcontractor may elect to pay irrevocably the fringe benefit portion of a laborer's pay to a trustee or this person. 40 U.S.C. §§ 3141(2)(B)(i), 3142(d); 29 C.F.R. §§ 5.26, 5.31(b)(2). The Act specifically requires contractors or subcontractors to make unconditional payment "at least once a week . . . [for] the full amount accrued at time of payment" to all laborers employed directly on the site of work. 40 U.S.C. § 3142(c)(1); *see also* 29 C.F.R. 5.5(a)(1)(i) (requiring all laborers to be paid "unconditionally and not less often than one week . . . the full amount of wages and bona fide fringe benefits . . . due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor . . .").

A contractor or subcontractor must maintain, and submit for each week of work, payrolls that provide, among other information, the name, classification, and the hourly rates of wages paid, including fringe benefit contributions. 29 C.F.R. § 5.5(a)(3). The contractor or subcontractor must sign a "statement of compliance" on each payroll certifying "each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract." 29 C.F.R. § 5.5(a)(3)(ii)(B)(3).

The Administrator alleges from October 2012 through April 2013, Respondents failed to pay fringe benefits for the Project's laborers to the laborers' fund. The Administrator further contends that Respondents' failure to pay the fringe benefits is evidenced by the testimony taken in this case, certified payroll records, and weekly remittance reports that Respondents sent to the laborers' fund. (APHB, pp. 5-7) Respondents argue they "corrected [their] mistakes immediately, as [their] financial means allowed." (RPHB, pp. 1-2)

Mr. Marburgh, an investigator for the Wage and Hour Division, was randomly assigned to investigate Respondents' compliance with the Davis-Bacon Act for the Project. During Mr. Marburgh's investigation, he received a call from the laborers' union and was informed that Respondents were not paying the fringe benefits to the laborers' fund for the Project as indicated on Respondents' monthly remittance reports. Although Respondents sent monthly remittance reports to the laborers' fund, Mr. Marburgh testified that Respondents did not include a check for the fringe benefits when filing the remittance reports. Mr. Marburgh stated in his interview notes that Mr. Miller admitted Respondents did not pay the fringe benefits to the laborers' fund.

Mr. Williams, the vice president and field representative for the local union confirmed Mr. Marburgh's findings. During his deposition, Mr. Williams stated that he and Mr. Miller signed an agreement in which Respondents agreed to pay benefits to the laborers employed to complete the Project. Mr. Williams explained the contractor must send remittance reports to the laborers' fund detailing each laborer's weekly hours and the amount remitted for benefits. Ultimately, Mr.

Williams learned that Respondents were not paying fringe benefits until a laborer called to tell him his health insurance benefits lapsed.

In addition, Mr. Miller admitted that Respondents indicated they were paying fringe benefits to the laborers' fund on the remittance reports by marking box 4(a), but Respondents never issued a payment for fringe benefits to the laborers' fund at any point during the Project. Mr. Miller also conceded that Barsto nor MBG were remitting payments for fringe benefits to the laborers' fund because Respondents were not receiving joint checks issued by Barsto for endorsement. Furthermore, Ms. Liddell, who completed the certified payroll reports, testified that Respondents withheld the fringe benefits during the entire course of the Project. She explained Respondents did not remit payments for fringe benefits because they "didn't have the money," despite the fact the subcontractor payments that Barsto made to MBG included amounts for prevailing wages and fringe benefits. Ms. Liddell further stated that "cash flow issues" prevented Respondents from making payments for fringe benefits. In fact, Mr. Miller specifically told Ms. Liddell not to remit payments to the laborers' fund for fringe benefits.

As discussed above in detail, Respondents never remitted the \$12.40 per hour for fringe benefits for each laborer to the laborers' fund for the Project. The fringe benefits were not paid until after the Project was completed. On June 12, 2013, approximately two months after the Project was completed, Barsto and Respondents executed an authorization for the payment of back wages. This authorized Barsto to make the back wage payments on behalf of Respondents in the amount of \$62,126.24.

Accordingly, because Respondents did not remit payment for fringe benefits for the Project, the undersigned concludes the Administrator satisfied its burden to establish that Respondents violated the National Housing Act, a Davis-Bacon Related Act.

e. Debarment. "The legal standards for debarment under the Davis-Bacon Act are different from the legal standards for debarment under Davis-Bacon Related Acts." *In Re: Coleman Constr. Co.*, ARB No. 15-002, ALJ No. 2013-DBA-004, slip op. at 16 (ARB June 8, 2016); *see also* 29 C.F.R. § 5.1 (listing the Davis-Bacon Related Acts). Davis-Bacon prohibits federal contracts from being awarded to such persons "until three years have elapsed from the date of publication of the list" established by the General Comptroller. 40 U.S.C. § 3144(b)(1). In contrast, the National Housing Act, a Davis-Bacon Related Act under which this case is being brought, does not include a debarment provision. Rather, the Department of Labor regulations, duly promulgated pursuant to Reorganization Plan No. 14 of 1950, provide for debarment for violations of a Related Act. Although similar to the Davis-Bacon Act language, the relevant regulatory language applicable to Related Acts is not identical. The relevant provision prohibits the awarding of federal contracts to contractors or subcontractors "found . . . to be in *aggravated or willful violation*" of the labor standards provisions of a Davis-Bacon Related Act and imposes debarment "for a period not to exceed 3 years." 29 C.F.R. § 5.12(a)(1) (emphasis added); *see also* 29 C.F.R. § 5.12(d). This includes the debarment of individual responsible officers of contractors and subcontractors. *Facchiano Const. Co., Inc. v. U.S. Dep't of Labor*, 987 F.2d 206, 213-214 (3d Cir. 1993); *see also Pythagoras Gen. Contracting Corp. v. Admin, Wage & Hour Div.*, ARB Nos. 08-107, 09-007, ALJ No. 2005-DBA-14, (ARB Feb. 10, 2011) (as reissued Mar. 1, 2011) (company president was also debarred as he had "constructive knowledge" that

Respondent's employees were misclassified for wage payment purposes and his certified payroll records were not corrected to comply with the Act's requirements).

“In other words, debarment under the Davis-Bacon Act differs from debarment under Related Acts in two substantive ways: First under Davis-Bacon, the standard for debarment is relatively low—a mere ‘disregard[ing]’ of one’s obligations suffices—whereas under Related Acts such as at issue here, the standard for debarment is a tad more stringent—one has to have been in ‘aggravated or willful violation’ of the relevant labor standards provisions. Second, the Davis-Bacon Act and implementing regulations *mandate* a three-year period of debarment, whereas under a Related Act, the regulations provide for a debarment period ‘not to exceed 3 years.’” *In Re: Coleman Constr. Co.*, ARB No. 15-002, ALJ No. 2013-DBA-004, slip op. at 17 (ARB June 8, 2016) (emphasis added in original).⁸

The Board has noted that “in common usage the word ‘willful’ is considered synonymous with such words as ‘voluntary,’ ‘deliberate,’ and ‘intentional.’ . . . [I]t is generally understood to refer to conduct that is not merely negligent.” *Cody Zeigler Inc. v. Admin., Wage & Hour Div.*, ARB Nos. 01-014, -015, ALJ No. 1997-DBA-017, slip op. at 31 (ARB Dec. 19, 2003) (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)); *accord A. Vento Constr.*, WAB No. 87-51, slip op. at 7 (holding that “aggravated or willful” violation of a Related Act includes “intentional, deliberate, knowing violations of the Act”). The Board has also explained that a “willful violation encompass[es] intentional disregard, or plain indifference to the statutory requirements.” *Pythagoras Gen. Contracting Corp. v. Admin, Wage & Hour Div.*, ARB Nos. 08-107, 09-007, ALJ No. 2005-DBA-14, slip op. at 19-20 (ARB Feb. 10, 2011) (as reissued Mar. 1, 2011) (citations omitted).

Although the regulation appears to afford some discretion about the length of debarment, Board precedent holds that once the Administrator shows that a violation is “aggravated or willful,” debarment should be for the full three years except in “extraordinary circumstances.” *In Re: Coleman Constr. Co.*, ARB No. 15-002, ALJ No. 2013-DBA-004, slip op. at 19 (ARB June 8, 2016) citing *A. Vento Constr.*, WAB No. 87-51, slip op. at 5 (“unless a case presents extraordinary circumstances, an order imposing a three-year debarment period is warranted under the provisions governing debarment for ‘aggravated or willful’ violations of the labor standards provisions of the Related Acts.”); *id.* at 14 (“The Board . . . concludes that ‘aggravated or willful’ violations of the labor standards provisions of the Related Acts warrant an order imposing a three-year debarment period absent extraordinary circumstances.”).

The Administrator contends that debarment is warranted in this case because Respondents knowingly and willfully failed to remit fringe benefits to the laborers’ fund and falsified certified

⁸ 29 C.F.R. § 5.12(a)(1); *see generally Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 00-050, ALJ No. 1996-DBA-037, slip op. at 4-5 (ARB Aug. 27, 2001); *A. Vento Constr.*, WAB No. 87-51, slip op. at 5-7 (WAB Oct. 17, 1990); *see also P&N Inc./Thermodyn Mech. Contractors, Inc.*, ARB No. 96-116, ALJ No. 1994-DBA-072, slip op. at 4 (ARB Oct. 25, 1996) (distinguishing between the standards under the Davis-Bacon Act and those under Related Acts and applying the laxer standard under the Davis-Bacon Act because that case involved violations of both Davis-Bacon and a Related Act); *cf. Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 1997-SCA-020, slip op. at 9 (ARB Apr. 30, 2001) (explaining a similar distinction in debarment standards between Davis-Bacon Related Acts and the Service Contract Act).

payroll reports for this Project. (APHB, pp. 11-13) Respondents argue a three year debarment period would be too “harsh” under the circumstances presented in this case. (RPHB, p. 1)

Respondents certified 24 weekly payroll reports to Barsto ranging from October 30, 2012 through April 9, 2013 for the Project. Mr. Miller signed 17 certified payroll reports on behalf of Respondents; Ms. Liddell signed the other seven reports. On each of the certified payroll reports, Mr. Miller or Ms. Liddell marked box 4(a), which indicated Respondents were paying the fringe benefits to an approved plan, fund, or program. However, as discussed above in detail, Respondents never made payments for fringe benefits at any point during the Project to the laborers’ fund, despite the unequivocal declaration on each certified payroll report. Mr. Miller testified that if a payroll report did not specify the manner in which Respondents paid the fringe benefits, then Barsto would not pay Respondents for any completed work for that month. Mr. Miller acknowledged that although box 4(a) was marked, he knew that neither Respondents nor Barsto were remitting payment for fringe benefits to the laborers’ fund. Accordingly, the undersigned finds that Respondents purposefully, knowingly, and willfully falsified each certified payroll report for the Project, and such conduct justifies debarment. *See, e.g., In re Star Brite Constr. Co.*, ARB No. 98-113, ALJ No. 1997-DBA-012, slip op. at 6 (ARB, June 30, 2000) (underpayment of prevailing wages coupled with the submission of certified payrolls “falsified to feign compliance with the DBA prevailing wage requirements”); *In re Sundex, Ltd.*, ARB No. 98-130, slip op. at 6-7 (underpayment of wages, coupled with failure to keep accurate records and the submission of falsified payroll records to conceal fact that prevailing wages were not paid held to constitute “serious violations of law, fully justifying debarment”).

Respondents failed to show that a period of debarment for less than three years is justified based on any extraordinary circumstances presented in this case. Mr. Miller testified he believed that Barsto was paying the fringe benefits to the laborers’ fund pursuant to a joint check agreement between Respondents and Barsto. However, later in his testimony, Mr. Miller conceded he knew Barsto was not remitting payment to the laborers’ fund for fringe benefits because Respondents were not receiving checks from Barsto for endorsement. Specifically, Mr. Miller testified: “I knew approximately a couple months into the [P]roject - - because I worked on the [P]roject every day - - that benefits wasn’t getting paid, you know, in reference to our - - my conference with Barsto about doing two-party checks.” (Tr. pp. 155) Mr. Miller also acknowledged that Barsto never signed the joint check agreement and, thus, there was no effective joint payment agreement between Barsto and Respondents. Thus, Mr. Miller cannot claim that he credibly believed the fringe benefits would be paid to the laborers’ fund from a source other than MBG.

Additionally, Mr. Miller’s testimony at the hearing is inconsistent with statements made to Mr. Marburgh during the investigation and to Mr. Williams. For example, Mr. Marburgh testified that Mr. Miller never told nor implied to him that he believed that Barsto would remit payment for fringe benefits to the laborers’ fund pursuant to a joint payment arrangement. Specifically, when Mr. Marburgh questioned Mr. Miller about the delinquent payments during the investigation, Mr. Miller acknowledged the fringe benefits payments were delinquent and that Respondents intended to pay them after receiving their monthly subcontractor payment from Barsto. During his deposition, Mr. Williams stated that after he contacted Mr. Miller about the delinquent fringe benefit payments, Mr. Miller stated that Respondents “were trying to get the

money together,” and made no mention of a joint payment arrangement with Barsto. Mr. Williams and Mr. Miller spoke to each other weekly during the Project and Mr. Miller never told Mr. Williams that Respondents were not making fringe benefit payments to the laborers’ fund due to a joint payment arrangement with Barsto. However, at the hearing, Mr. Miller extensively testified that he believed Barsto would make the fringe benefit payments to the laborers’ fund pursuant to a joint payment arrangement.

The evidence also makes clear that the monthly subcontractor payments Respondents received from Barsto included funds to cover the laborers’ prevailing wages and fringe benefits. Mr. Miller testified that Respondents began work on the Project in October 2012, and received full payment from Barsto in October, November, and December 2012 and January 2013, subject to 10 percent withheld for retainage. Because Respondents received full payment from Barsto for at least the first four months of the Project, which included amounts to cover the prevailing wage and fringe benefits, Respondents’ failure to remit the fringe benefits to the laborers’ fund was unreasonable.

Respondents further argue the use of the proposed joint payment arrangement between Respondents and Barsto is a customary practice in the industry. Respondents claim they commonly execute similar agreements for other projects. In support of this assertion, Respondents submitted 13 exhibits purportedly documenting other joint payment arrangements and the corresponding check images. Of these exhibits, the Administrator contends the only documents relevant to establish Respondents’ alleged customary joint payment arrangement practice are documents that were created prior to (or at the very latest, during) the time of the Project at issue in this case. (APHB, pp. 14-16) RX-1 contains four documents styled “Joint Payment Arrangement” between Respondents and McGrath & Associates, Inc. (McGrath). Both parties signed these documents. McGrath sent four checks payable to both MBG and a local union fund between August 2012 and November 2012. RX-9 contains four check images issued by Core Construction Services of IL, Inc. made payable to both MBG and a local union fund between February and April 2013. However, the record does not contain a corresponding joint payment arrangement executed by the parties for the project with Core Construction. These are the only two possible examples in the record of joint payment arrangements that could establish this was a customary practice for Respondents prior to beginning work on the Project in this case.

Two additional joint payment arrangements executed by Respondents and Bruce Unterbrink Construction and Path Construction are detailed in RX-1. These documents were executed in January and February 2015, respectively, after the completion of the Project. Although it is unclear based on the lack of organization of Respondents’ exhibits, it appears these joint payment agreements correspond to the check images contained in RX-5 and RX-4, respectively, because they identify the same project name. The check images for both of these projects are made payable by the respective general contractor to both MBG and a specific local union fund. The remaining nine exhibits contain check images with checks payable to MBG and a specific local union fund; however, they also only document projects that occurred after Respondents completed work on the Project in this case. Accordingly, there is minimal evidence that Respondents used this type of joint payment agreement with other general contractors prior to or during the Project. Rather, the record demonstrates that joint payment agreements between a

general contractor and Respondents only may have become a common or desired business practice after Respondents completed work on the Project.

Furthermore, it is clear that Mr. Miller possessed the requisite experience and awareness that Respondents were obligated to remit payment to the laborers' fund for fringe benefits for the Project. For example, Mr. Miller signed the subcontract on behalf of Respondents, which specifically incorporated the prevailing wage determination contained in the Prime Contract. In October 2012, Barsto sent MBG, and all other Project subcontractors, a letter informing them of the requirement to pay the prevailing wages and certify payroll reports. Mr. Miller signed this document, which specifically confirmed his understanding of the wage requirements for the Project. In November 2012, Mr. Miller signed a Project Agreement on behalf of Respondents with the laborers' union in which Respondents agreed to be bound by the prevailing wage determination and fringe benefits in the specific locality. Mr. Marburgh testified that Mr. Miller received a copy of the prevailing wage determination at the beginning of the Project. Based on his conversations with Mr. Miller, Mr. Marburgh recalled that Mr. Miller understood Respondents were obligated to pay fringe benefits during the initial conference of the investigation. In addition, Mr. Miller is an experienced subcontractor and has been in the demolition and renovation business since he founded MCS in 1994. Mr. Miller also testified that he has completed various other projects subject to the Davis-Bacon Act requirements.⁹ Mr. Miller was also aware of the applicable requirements based on the Wage and Hour Division's past investigation into MCS, where it was found Mr. Miller and MCS committed 16 violations for the failure to pay prevailing wages to employees. Perhaps most importantly, Mr. Miller's testimony demonstrated Respondents knew of their obligation to pay fringe benefits to the laborers' fund, and Respondents knew Barsto was not remitting payments for fringe benefits pursuant to the proposed, unsigned joint payment arrangement.

In summary, the undersigned concludes nothing in the record demonstrates the "extraordinary circumstances" necessary to warrant a debarment of less than three years. Absent such an evidentiary showing, the undersigned is bound to apply the regulations to the facts of this case. The totality of the evidence in this case establishes that Respondents knowingly and willfully falsified certified payroll reports to Barsto indicating that Respondents were paying the fringe benefits to an approved plan, fund, or program. Respondents also submitted monthly remittance reports to the laborers' fund without including payment for the amount owed for fringe benefits. Based on Mr. Miller's testimony, he could not have credibly believed that Barsto was submitting payment for fringe benefits directly to the laborers' fund because Barsto never signed the joint payment arrangement, nor did Barsto send checks to Respondents for endorsement.

In addition to MBG, Mr. Miller, in his individual capacity, must also be debarred. Mr. Miller was the primary person to act on MBG's behalf throughout the Project. As such, the violations are effectively his and his alone.

⁹ Mr. Miller testified that all of Respondents' projects have been subject to Davis-Bacon Act requirements. (Tr. pp. 147-148) However, Ms. Liddell testified that only three or four of the past 20 projects that Respondents completed have been subject to Davis-Bacon Act requirements.

5. Ruling and Order. Miller Building Group, Inc. and Mr. Jimmie Miller are debarred from receiving any contracts or subcontracts subject to any of the statutes listed in 29 C.F.R. § 5.1, including the Davis-Bacon Act itself, for three years from the date the Comptroller General publishes their names on the list of ineligible contractors and subcontractors pursuant to 29 C.F.R. § 5.12(a)(1).

SO ORDERED this day at Covington, Louisiana.

**TRACY A. DALY
ADMINISTRATIVE LAW JUDGE**

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within forty (40) days of the date of issuance of the administrative law judge’s decision. See 29 C.F.R. § 6.34. The Petition must refer to the specific findings of fact, conclusions of law, or order at issue. See 29 C.F.R. § 6.34.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file

an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

When a Petition is timely filed with the Board, the administrative law judge's decision is inoperative until the Board either (1) declines to review the administrative law judge's decision, or (2) issues an order affirming the decision. See 29 C.F.R. § 6.33(b)(1).

At the time you file the Petition with the Board, you must serve it on the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. See 29 C.F.R. § 6.34.