

Issue Date: 30 September 2020 U.S. Department of Labor Office of Administrative Law Judge

800 K Street, NW
Washington, DC 20001-8002
(202) 693-7300
(202) 693-7365 (FAX)
OALJ-DC-District@DOL.GOV



CASE NO.: 2017-DBA-00020

In the Matter of:

Disputes concerning payment of prevailing wage rates by:

**RUPPERT LANDSCAPE INC.,
d/b/a RUPPERT LANDSCAPING**

First-Tier Subcontractor

Respondent,

with respect to laborers employed by a first-tier subcontractor, contracted by Prime Contractor, Clark/Smoot/Russell, on Contract No. F11CC10350, in Washington, D.C., at the National Museum of African American History and Culture Project for the Smithsonian Institution

APPEARANCES:

Avni J. Amin, Esq.
LaShanta R. Harris, Esq.
U.S. Department of Labor
Arlington, Virginia
For the Administrator

Karen A. Doner, Esq.
Natalie Rainforth Poteet, Esq.
Doner Law
Tysons Corner, Virginia
For the Respondent

**BEFORE: CARRIE BLAND
Administrative Law Judge**

DECISION AND ORDER

This matter arises under Reorganization Plan No. 14 of 1950, 64 Stat. 1267, the Davis-Bacon Act (“DBA” or “the Act”), 40 U.S.C. § 3141, *et seq.*, and the Contract Work Hours and Safety Standards Act (“CWHSSA”), 40 U.S.C. § 3701 *et seq.* and the applicable regulations issued at 29 C.F.R. Parts 5 and 6. In accordance with the *Order of Reference* issued in the above-captioned case on June 13, 2017, this matter has been referred to the Office of Administrative Law Judges (“OALJ”) for a hearing pursuant to 29 C.F.R. § 6.30. The Order of Reference alleges that Respondents disregarded their obligations to their employees under the Davis-Bacon Act (“DBA”) and Davis-Bacon Related Acts (“DBRA” or “the Act”), 40 U.S.C. 276(a) *et seq.*, and committed violations of the labor standard provisions of the Contract Work Hours and Safety Standards Act (“CWHSSA”), 40 U.S.C. 327 *et seq.*, during the installation of prefabricated steps at the National Museum of African American History and Culture Museum in Washington, D.C.

Background

On July 6, 2011, the Smithsonian Institution entered into a \$290 million contract with prime contractor Clark/Smoot/Russell (“Clark”), for construction of the National Museum of African American History and Culture (“the museum” or “NMAAHC”) in Washington, D.C. JX 2.¹ Clark then entered into a subcontract agreement with Ruppert Landscape, Inc. (“Ruppert,” “Ruppert Landscaping,” or “Respondent”) in 2014. JX 3. Ruppert commenced work on the museum in December 2014, and began working on the stairs in July 2015. Tr. 15; 465. Craig Ruppert is Chief Executive Officer (“CEO”) of Ruppert Landscaping. JX 1.

The U.S. Department of Labor, Wage and Hour Division (“WHD”), conducted an investigation into Ruppert’s compliance with the DBA. On December 12, 2016, the Regional Administrator sent letters to the CEO of Ruppert Landscape, counsel for Ruppert, Clark, and the Smithsonian Institution.² The Administrator concluded that Ruppert: (1) failed to pay workers the proper wage rates; (2) failed to pay workers their proper fringe benefits; (3) misclassified marble/stone masons as skilled laborers; (4) failed to pay proper overtime rates. The Administrator computed back wages owed to 22 employees as \$57,129.94, for which Ruppert has failed to make restitution. The letters informed the Respondent of its right to request a hearing before OALJ.

On January 5, 2017, Respondent requested a formal hearing before OALJ. On June 13, 2017, WHD filed an Order of Reference with OALJ. I held a hearing in this case in Washington D.C. from August 28, 2018 to August 29, 2018. At the hearing, I admitted the following exhibits: Joint Exhibits (“JX”) 1–3 (Tr. 229; 130); JX 6–7 (Tr. 145, 155); Administrator’s Exhibits (“AX”) 1–2 (Tr. 349; 357); AX 4–5 (Tr. 229; 224); AX 7 (Tr. 224); Respondents Exhibits (“RX”) 1, 3, 8–10, 13, 16, 20–25, 26, and 27. (Tr. 271, 470, 518, 468, 267, 303). On

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

² These letters were forwarded to this Office and are contained in the case file.

December 12, 2018, I admitted AX 3 into the record.³ On May 6, 2019, I admitted RX 27⁴ and AX 6⁵ into the record and rejected RX 28.⁶ At that time the parties were ordered to submit post-hearing briefs. On June 5, 2019, the parties submitted their post-hearing briefs. I have considered the entirety of the record in rendering this decision.

ISSUES

1. Whether Respondent misclassified employees who constructed exterior stairs on the project as skilled laborers during the period of the investigation;
2. Whether Respondent should have classified employees who constructed exterior stairs on the project as marble/stone masons during the period of investigation and paid them a prevailing wage rate of \$46.87 per hour.
3. If the employees were misclassified, what percentage of the employees' work belongs in the Stone/Marble Mason wage rate classification;

Tr. 7–13.

³ Administrator's Exhibit ("AX") 3 is a Collective Bargaining Agreement ("CBA") between Bricklayers Allied Craftworkers Local 1 and Stone and Marble Masons (May 1, 2010 – April 30, 2013). During the hearing the Administrator moved to admit this exhibit, to which Respondent objected. Tr. 161–165. Respondent objected on the grounds that the document is not signed, it is outdated, and it is incomplete. *Id.* During the hearing, I found that the investigator laid a proper foundation authenticating the document and explained why it is unsigned. Tr. 163. The document was also found to fall within the correct date range. *Id.* Respondent was given the opportunity to cross-examine the witness as to any inconsistencies it believed remained in the witness's testimony. Tr. 242–372. Therefore, I admitted AX 3 via order on December 12, 2018.

⁴ Redacted versions of employee statements provided to the Department of Labor during investigation were admitted into evidence as RX 27. The Administrator objected to providing the identities of two of these witnesses, citing the informant's privilege. Respondent contended that as a matter of due process, the Administrator should be required to disclose the identities of these individuals, who are believed to have been included in the Administrator's back wages assessment, notwithstanding their statements that they did not perform any of the work in question. On December 12, 2018, I ordered the Administrator to submit the unredacted version of RX 27 to the court for *in camera* review. Thereafter, I performed *in camera* review of RX 27, and found that the names contained within RX 27 coincide with those individuals that appear in the back wage determination and calculations listed in AX 4 and AX 5, and ordered RX 27 admitted.

⁵ AX 6 includes interview statements of Ruppert employees taken in the course of investigation. Respondent objected to these statements on a number of grounds including hearsay, hearsay upon hearsay, untimely disclosure, and waiver or inapplicability of the informant's privilege. Tr. 176–194. I found that the proper foundation was laid for these statements. Further, as indicated numerous times during the hearing, the Administrative Procedure Act does not prohibit admission of hearsay evidence in administrative proceedings. *In re Saulsbury Enterprises and Robert J. Saulsbury* (1997) 56 Agric Dec 82. See also *Myers v. Secretary of Health & Human Services*, 893 F.2d 840 (6th Cir. Ky. 1990), *Richardson v. Perales*, 402 U.S. 389, 400; *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986). Respondent also objected based on untimely disclosure and waiver/inapplicability of the informant's privilege. On May 6, 2019, I found that Administrator's submission was timely and that the Administrator properly invoked the informant's privilege. Thus, I admitted AX 6.

⁶ I rejected RX 28 due to the prejudice to the Administrator caused by Respondent presenting the documents for the first time at the hearing.

STIPULATIONS

The parties stipulate, and I so find:

1. The Office of Administrative Law judges has jurisdiction over the instant case, which has been brought pursuant to the provisions of the Davis-Bacon Act (“DBA”) and Contract Work Hours and Safety Standards Act (“CWHSSA”), 40 U.S.C. § 3141 *et seq.*; 40 U.S.C. § 3701 *et seq.*
2. The Wage and Hour Division’s investigation of Respondent’s alleged violations of 40 U.S.C. § 3141, *et seq.*, and 40 U.S.C. § 3701, *et seq.*, covered the period of December 8, 2014 to April 24, 2016 (“period of investigation”).
3. Respondent provides services in the areas of landscape construction, landscape management, and nursery services.
4. On July 6, 2011, the NMAAHC entered into a \$290,000,000 contract with Clark/Smoot/Russell, the prime contractor on this project for construction at the NMAAHC.
5. Ruppert began work at the NMAAHC on December 18, 2014.
6. The subcontract between Ruppert and Clark/Smoot/Russell included General Wage Decision Number DC100004, dated September 9, 2011, as well as General Wage Decision Number DC100001, dated September 9, 2011.
7. Each of the employees for whom the Administrator is seeking back wages was employed by Respondent at some point during the period of investigation.
8. The following eight employees worked on the stairs on this project: Ismael Acosta; Rodrigo Acosta; Juan Bautista; George Fuentes; Manuel Gonzalez Casimiro; Eder Pimental-Ramirez; Efrain Zavala; and Luis Zavala.

Tr. 13–18.

Summary of Testimonial Evidence

Rodrigo Acosta (Tr. 29–60): Rodrigo Acosta testified that he is currently employed at Ruppert. *Id.* at 31. He testified that he had worked at Ruppert for five years, the last three as an Assistant Field Manager, and prior to that as a Crewmen and Laborer for two years. *Id.* He stated that he believed he began working on the NMAAHC project in April 2015. *Id.* at 32. He testified that he worked eight hours a day, five days a week and sometimes on Saturdays. *Id.* He stated that he typically worked eight hours when he worked on Saturdays. *Id.*

Mr. Acosta testified that the work Ruppert was hired to do on the project was “outdoors, granite, grading, planting on the steps — the stairs.” *Id.* He stated that he installed granite, bricks, and the steps along with planting and grading/leveling. When asked about the work he did with respect to the steps, he replied “[t]he layout, we started with that. We prepared the mortar, the installation, and then the grouting, and the cleaning.” *Id.* at 33. He testified the steps were made out of “precast”. *Id.* When asked to testify what they were actually made of he replied “I think it’s mortar as well.” *Id.* He could not recall the exact month he began working on the steps. *Id.* He thought work concluded on the overall project in April 2016, but he believed work concluded on the steps in November 2015. *Id.* at 33–34. He testified that he would write down his daily schedule while working on the project using a little book that the company gave him for that purpose. *Id.* at 34. When asked where the book was, he said “I might still have it at home, but I might no longer have it because a lot of time has gone by.” *Id.*

Mr. Acosta estimated it took about a month to build the west side stairs, and then a little more than a month to build the east side stairs due to “problems[,]” and thus he worked on the stairs for a little more than two months every day for eight hours until they were finished. *Id.* at 34–35. He testified that there were stairs on the southern side which he did not work on. *Id.* at 34.

He stated that the work involved the use of power tools, including a mixer drill to mix the grouting and a hammer drill to chip off the concrete when it was too high. *Id.* at 35–36; 56. He personally did not use the hammer drill or the mixer drill. *Id.* at 51; 56. Mr. Acosta testified that his work on the steps included cleaning the steps, grouting, setting precast stairs, and carrying the precast steps down in order to place them. *Id.* He was then asked whether working on the steps actually involved working with concrete, to which he answered “[n]o,” however he then stated that he thought the steps were made out of “concrete or mortar. It’s a special material I think.” *Id.* at 36. However, he stated that when he worked on the west side steps they had to use a cutting saw because the steps were a little short, and he believed he did personally perform this task. *Id.* at 55. He testified that mortar is different from concrete, and that the mortar he was mixing was to install the bricks of the steps. *Id.* at 36.

When asked how much he was paid per hour during the period he worked on the steps, and only on the steps, he responded “I think it was somewhere between 24 or 26. I don’t know exactly. I can’t remember exactly.” *Id.* He later agreed that he was paid at a rate of \$26 per hour for all work performed on the steps. *Id.* at 55–56. He stated he was paid a different rate when he worked as an operator, and that this was the only other rate he was paid at for the work he did at the museum. *Id.* at 40.

Mr. Acosta stated his supervisor on the project was Brad Matthews, and that Mr. Matthews was on site every day. *Id.* Mr. Acosta testified that Mr. Matthews discussed compensation with him during the course of their work. *Id.* at 40–41. Mr. Acosta related that Mr. Matthews said “[t]hey would always give us the amount that would be given to us. The pay. Paid. (sic)” *Id.* at 41. He stated that Mr. Matthews did not specify the exact amount he would be paid for his work on the steps, but that it was explained that he would be paid 24 to 26 dollars an hour for the work on the steps, because it was a “skilled job.” *Id.* Mr. Acosta testified that he

understood what “skilled job” meant “because when you work at jobs for the government, they pay a different amount.” *Id.*

Mr. Acosta stated that he worked with “Cesar Zavala, Luis Zavala, Ismael Acosta, George Fuentes, Ernesto Zavala, Manuel Gonzalez, Efrain Zavala, and other people who have left, Jhery Acosta, and that’s all.” *Id.* He stated Jhery Acosta worked on the steps for a short while but no longer works at the company. *Id.* at 42. He testified that Eric Harmon and Guillermo Bolanos also worked on the steps, and that Erwin Acosta worked on them for one day. *Id.* He could not “remember well” anyone else working on the steps. *Id.* He testified that Luis Zavala worked less time than him overall on the steps. *Id.* Mr. Acosta stated Luis Zavala’s duties were to “get the installation of the steps and the layout of the steps.” *Id.* at 43. He testified Cesar Zavala spent a month and a half working on the steps and had the same duties as Luis Zavala. *Id.* at 43–44.

He testified that George Fuentes also worked with him on the steps every day for about a month and a half, starting about two weeks after he started. *Id.* at 45. He stated that Mr. Fuentes would bring the steps, mix the mortar, and install the grout. *Id.* Mr. Acosta worked on the steps for one day on the west side, helping to bring the steps over and make and prepare the mortar. *Id.*

Mr. Acosta testified that Erik Hartman worked on the steps with him for about a month, and is no longer with the company. *Id.* at 46. Mr. Hartman started working on the steps when building of the east side steps began. *Id.* When building the east side steps, work did not occur every day due to problems with the concrete. *Id.* Mr. Hartman brought the steps, mixed grout, and cleaned. *Id.* at 47. Mr. Acosta believed Mr. Hartman worked on the south side stairs as well, among other people. *Id.* at 51.

He stated that he thought he worked with Guillermo Bolanos on the steps for about a week, but also worked on the south side stairs (which Mr. Acosta did not work on). *Id.* at 47–48. During the week they worked together Mr. Bolanos was in charge of placing the steps and also mixed, grouted, and cleaned. *Id.* at 48–49.

Mr. Acosta thought he only worked on the steps with Jhery Acosta for one week, on the east side. Jhery Acosta’s duties were preparing the mixture and bringing the steps. *Id.* at 49. Mr. Acosta thought he worked on the steps with Efrain Zavala every day for a month on the west side steps in July or August of 2015. *Id.* at 49–50. His duties were preparing the mixture and bringing the steps over as well. *Id.* at 50. Mr. Acosta was unaware if he was paid as an operator at the same time he was working on the steps. *Id.* at 51.

Mr. Acosta agreed that he spent about one-third of his time on each task he performed: mixing mortar, carrying and placing the steps, and grouting and cleaning the steps. *Id.* at 52–53. This included actually performing the aforementioned tasks and supervising. *Id.* at 53. However, he agreed that he did not have any documentation to show that that was the actual split of the work on the project, and that the splits would differ depending on the worker, as “there were only two or three of us who actually did the installation.” *Id.* at 57. He agreed that he, Luis Zavala, and Cesar Zavala spent the majority of their time on installation. *Id.* at 59–60.

Luis Zavala (Tr. 68–82): Mr. Zavala testified that he is currently employed with Ruppert and had worked there for ten to eleven years at the time of the hearing. *Id.* at 69. He places bricks and plants. *Id.* He recalled working on the project at the NMAAHC but could not recall the exact start date, only that he believed he began working on it in 2015. *Id.* at 69–70. He stated that he worked on the layout and placing of the steps, but seldom cleaned and grouted. *Id.* at 70; 78. He believed he was paid at a rate of roughly \$26.40 for work on the steps. *Id.* His supervisor was Brad Matthews, who was on site every day of the project. *Id.* at 71. Mr. Zavala stated that he did not discuss compensation with Mr. Matthews, except that Mr. Matthews “said that every area had different prices.” *Id.* He stated he was paid other rates for non-step building tasks. *Id.*

He testified that he worked with Ismael Acosta and Rodrigo Acosta on the installation of the steps and that he also worked more generally with Juan Bautista and Eder Pimental. *Id.* at 72. He did not recall working with Jhery Acosta. *Id.* at 73. He recalled working with an Erik, but could not remember his last name. *Id.*

Of the employees that he worked with, their primary duties were mixing and putting the grout in the joints of the steps, and “bringing them close to the area where they were to be installed.” *Id.* at 74. Those who applied the grout were the ones who installed the steps, and then two or three people would help clean the steps. *Id.* at 76. He agreed that in erecting the steps the whole team spent one-third of time mixing the mortar, roughly one third carrying and installing the steps, and cleaning and grouting one-third “more or less.” *Id.* at 77. His duties were to layout and the placement of the steps. *Id.* at 78. Layout being a precursor to building the steps. *Id.*

Ernesto Zavala (Tr. 82–88): Mr. Zavala testified that he is currently employed with Ruppert Landscaping in his fifth year of employment at the time of the hearing. *Id.* at 82–83. He has been an assistant field manager since about October 2016 and prior to that he was a crewman for two and a half years. *Id.* at 83. He recalled working on the NMAAHC project mixing cement, moving stones, planting, installing granite, and helping to distribute plants and leveling. *Id.* Mr. Zavala worked on the stairs at the project, mixing and carrying stones approximately fifteen days. *Id.* at 83; 87. He had worked with concrete before, however he could not name the exact material the steps were made out of, but they called it “precast.” *Id.* at 84. His rate during the period he worked on the steps was \$15.85. *Id.* Brad Matthews supervised him on the project, and they did not discuss compensation. *Id.* He worked with Rodrigo Acosta, George Fuentes, Roberto Martinez, and Luis Zavala on the steps. *Id.* at 85–86. Ismael Acosta was present. *Id.* at 85. He remembered Jhery Acosta being there a while, but could not recall if he did the installation. *Id.* He believed Juan Bautista did work on the steps, but was not entirely sure. *Id.* He thought Erik Hartman performed work on the steps. *Id.* at 85–86. He thought Cesar Zavala was there for a couple days then was moved. *Id.* at 85. He believed Efrain Zavala worked on the steps. *Id.* Rodrigo Acosta, Luis Zavala, and Ismael Acosta were in charge of installing the steps. *Id.* He was not working in the step installation area when cleaning was performed. *Id.* at 87.

Manuel Gonzalez Casimiro (Tr. 89–104): Mr. Gonzalez testified that he is currently employed by Ruppert Landscaping and has been for the last four years as a laborer at the time of the hearing. *Id.* at 90. He recalled working on the NMAAHC project in 2015. *Id.* He worked on the curb, gravel, planting, and the steps. *Id.* at 91. He did not recall the rate he was paid for working on the steps. *Id.* His supervisor was Brad Matthews, and they did not discuss compensation. *Id.* at 92–93. He recalled working with Erwin Acosta and Ernesto Zavala, but did not recall working with Jhery Acosta. *Id.* at 92–94. He recalled working with Ernesto Alvarez Casimiro for a short time on the steps. *Id.* at 94. He stated that Erik Hartman and Cesar Zavala did work on the steps, but that he personally did not see them working on the steps. *Id.* at 94–95. He could not recall working with Juan Barahona, Mario Bethencourt, Jose Lopez, Roberto Martinez, Jose Quintanilla Andrews, Darryl Robinson, or Guillermo Bolanos on the steps. *Id.* He recalled working with George Fuentes on the steps. *Id.* at 97.

On the step project, Mr. Gonzalez mixed mortar, moved the steps, grouted, and cleaned the steps after grouting them. *Id.* at 98. He did not recall what he was paid for these duties. *Id.* He agreed that one-third of the time was spent mixing mortar, one-third of the time was spent moving or carrying the steps and placing them, and one-third of the time was spent grouting and cleaning them. *Id.* at 100. He recalled that he personally spent ten percent of his time working on the stairs grouting. *Id.* at 102–03. He spent most of his time preparing the mortar and grouting the joints. *Id.* at 104.

Ismael Acosta (Tr. 105–19): Mr. Acosta testified that he is currently employed with Ruppert and has worked there for five years as a landscaper at the time of the hearing. *Id.* at 105–106. He recalled working on the steps of the NMAAHC project. *Id.* at 106. He stated the steps were made of “special concrete molds.” *Id.* at 107. He was paid “26-something” per hour. *Id.* His supervisor on the project was Brad Matthews and that when Mr. Matthews spoke about compensation he “told us that the pay would be a little higher than the ones who were there on the steps...No. Higher than other jobs.” *Id.* at 107. He testified that Ernesto Zavala, Erik Hartman, Jhery Acosta, Jose Lopez, Roberto Martinez, and Cesar Zavala all at some point worked on the stairs. *Id.* at 108–10. He could not recall Juan Barahona working on the stairs, but there were two or three more people than the ones he recalled. *Id.* at 109. He did not know who Mario Bethencourt was. *Id.* He did not recall if Jose Quintanilla or Darryl Robinson worked on the stairs. *Id.* at 110.

Mr. Acosta, in describing working on the steps, said “we placed the pieces that come (sic). The base is first laid, the mortar, and then the grading⁷.” *Id.* at 111. He would both put down mortar and sometimes mix it. *Id.* at 114–15; 117. He agreed that the team spent one-third of the time mixing mortar, one-third of the time was spent moving or carrying the steps and placing them, and one-third of the time was spent grouting and cleaning them. *Id.* at 116. He agreed that he personally spent “almost the same” amount of time doing the three aforementioned tasks, but that he spent more time placing the steps, so the one-thirds breakdown would be inaccurate as to him. *Id.* at 116–18.

⁷ It was later clarified by the interpreter that he was actually referring to grouting. *Id.* at 112.

Angela Lim (Tr. 120–406): Ms. Lim testified that she is currently employed at the Department of Labor, Wage and Hour Division as a Wage and Hour Specialist. *Id.* at 120. She has held that title since January of 2018. *Id.* After graduating with a bachelor’s degree in 2009 and joining the Department of labor in 2012, she received “four different sets of training that was provided to the Wage and Hour investigators by the Wage and Hour Division: Basic I, Basic II . . . a supplementary Basic II training, and . . . a separate training for Section 14(c) of the Fair Labor Standards Act. *Id.* at 121–22. Overall, in her time with Wage and Hour she has completed an estimated 291 cases, and she estimated eighty-eight of those would be Davis-Bacon and Davis-Bacon related cases. *Id.* at 122.

She testified that she was the investigator in the Ruppert matter. *Id.* She was assigned to investigate whether employees working on the steps were misclassified as skilled laborers after the Foundation of Fair Contracting contacted the District Director at the Baltimore District Office. *Id.* at 123. Ms. Lim was then directed to look at Joint Exhibit 2, the prime contract between the contracting agency, the Smithsonian Institution, and the prime contractor. *Id.* at 125. She explained how the contract helped her to make a determination that the Davis-Bacon Act applied to the contract. *Id.* at 125–26.

Ms. Lim was then directed to look at Joint Exhibit 3, the subcontract agreement between Clark and Ruppert. *Id.* at 129. She explained how it shows that the Contract Work Hour Safety Standards Act and the Davis-Bacon Act were incorporated from the prime contract. *Id.* at 130.

The period of investigation was from December 8, 2014, to April 24, 2016, and focused on the installation of the precast steps at NMAAHC. *Id.* at 131. She stated that the time period of investigations is based on the time “in which we receive a complaint,” as well as the law under which the investigation is conducted. *Id.* at 147.

On January 15, 2016, Ms. Lim conducted a site visit to gain a better understanding of the work being performed at the museum. *Id.* at 133–34. She spoke with Shaun Snodgrass, the project manager, who stated that employees working on the steps were classified under the skilled laborer classification after Ms. Lim had observed two employees, Guillermo Bolanos Collin and Erik Hartman, working on the steps. *Id.* at 134; 136.

Subsequent to her investigation she reviewed depositions my Mr. Tuzzolino and Mr. Matthews, through which she learned that:

[A]lthough during the investigation it was my finding that all the duties that were related to the installation of the steps were classified under the skilled laborers classification, that might not actually be true. During the investigation, I received an email from Ms. Rainforth stating that the employees performing the work on the step or the installation of the steps were performing four duties: first, mixing mortar, second, placing the steps—she said concrete steps as well as brick pavers; third, grouting the joints; and then cleaning after they have grouted the joints. So it was my understanding that all those duties were classified under the skilled laborers classification. However, after reviewing the deposition, it is my understanding that there may be duties out of those four duties that were provided

to me before that were not actually classified, therefore paid under the skilled laborers classification; there (sic) may have been compensated at a lower rate.

Id. at 135.

Ms. Lim was then directed to look at Joint Exhibit 6, which contains five photographs of the employees working or standing on the steps. *Id.* at 139. These photographs were received as part of the investigation and show the steps at the museum. *Id.* at 145. She was next handed Joint Exhibit 7, which contains the relevant wage determinations applicable to the work being performed on the steps under contract between Clark and Ruppert. *Id.* at 149–50. She noted that the wage determination classified the stair-building employees under the skilled laborer classification. *Id.* at 150. When asked if the employees were using power tools with respect to the stairs, Ms. Lim responded, “[y]es. They were using power tools when they were cuttings the steps.” *Id.* at 150. However, she did not agree that they were performing any other task discussed that was within the skilled laborer classification. *Id.* at 150–51. She testified that at the close of her investigation she did find the classification of those who worked on the steps as skilled laborers was inaccurate. *Id.* at 151. Instead, Ms. Lim found from the investigation that those employees who worked on the installation of the steps should have been classified as marble/stone masons, another classification listed in the wage determination. *Id.* She read the description under marble/stone mason that she found relevant, “[i]ncluding pointing, caulking, and cleaning of all types of masonry, brick, stone and cement, except pointing, caulking, cleaning of existing masonry, brick, stone and cement restoration work.” *Id.* at 151–52. She testified that the precast stairs were made out of concrete or cement. *Id.* at 152. She agreed that Ruppert’s employees were pointing, caulking, and cleaning when they installed the precast cement or concrete stairs. *Id.* at 153. She explained how the unique union identifier number listed in the description showed that the hourly rate afforded marble/stone masons is based on the collective bargaining agreement of the Marble Stone Mason Union of Local 2. *Id.* at 153–54.

Ms. Lim was then presented with Administrator’s Exhibit 3, which contains the collective bargaining agreement she had received from BAC Local 1. *Id.* at 156. She explained that she:

[G]ot a copy of the collective bargaining agreement from the International Union of Bricklayers and Allied Craftworkers. They actually merged with the D.C. Chapter of Marble and Stone Mason Union, so they actually contain a different union identifier, but they provided me with the copies of their, I guess, merger agreement that showed that this union or this union identifier now belongs— belongs to the BAC, which is short for Bricklayers and Allied Craftworkers Union, Local 1.

Id. at 155. She believed the merger occurred in the 1990s. *Id.* at 156. She explained that marble/stone mason classification contained the date May 1, 2011, and thus the classification fell under this particular collective bargaining agreement, which was effective May 1, 2010 to April 30, 2013. *Id.*

Ms. Lim read the relevant portions of the collective bargaining agreement that applied to the work that was being done by Ruppert’s employees:

Stone masonry, for the purposes of this agreement shall be defined as follows: Section A, the laying of rubble work, with or without mortar, setting all cut stone, marble, slate, flagstone or other stone domestic products for use on the exterior, or in the interior of any building or structure designated by the architect as/or customarily called stone in the building trading, cutting all shoddies, broken ashlar or random ashlar that is roughly dressed upon the beds, joints, or reveals and the cutting of drafts for plumbing purposes . . . and the cleaning and cutting of joints and the pointing of all stone work. All of the said operations shall apply to work on buildings, sewers, bridges, railroads and other structures of any kind, whatsoever, either of a public or private nature.

It is specifically understood that the applied definitions shall include the cutting, setting and pointing of cement blocks, and all artificial stones, slate or marble and kindled products, either interior or exterior when required to be set by the usual method or custom of stone mason or marble setter. The erection of all precast floors and cast partition walls . . . the perching, cleaning, pointing and caulking shall also be included in the above definition.

Id. at 157–59.

She stated that there were tasks contained within this definition that were relevant to what the workers were doing. *Id.* at 159. Including, ‘the cleaning and cutting of joints and the pointing of all stone work.’ *Id.* at 158–59. She noted that the covered area of the CBA was Washington D.C. *Id.* at 160.

Ms. Lim explained that the acknowledgement and authorization portion of the CBA was not complete, because her office does not expect to receive a signed or executed copy. *Id.* at 160. This is because they are looking for the collective bargaining agreement applicable to the wage determination, not one that is applicable to the union or union and the contractor. *Id.* at 160–61. She agreed that the copy of the CBA she received is a complete copy. *Id.* at 161.

Subsequently, Ms. Lim contacted a different union, the Laborers International Union of North America (LINUA), and discussed with them the work Ruppert employees performed. *Id.* at 167. They informed her the work performed was covered by the marble/stone mason classification. *Id.*

She was next presented with Administrator’s Exhibit 6, which contains statements from two union employees. *Id.* at 169–70. On March 25, 2016, she telephonically interviewed Pedro Clavijo. *Id.* at 180. Mr. Clavijo stated that he witnessed employees of Ruppert performing work at NMAAHC. *Id.* at 181. He noted that he saw Manuel Gonzalez doing the work of stone mason finisher, and spoke to Rodrigo Acosta and Cesar Zavala. *Id.* at 181. Mr. Clavijo stated that employees were performing stone mason work, but also some were performing stone mason finisher work as well. *Id.* at 182. Based on his conversation with employees, they were paid rates of less than \$20 per hour. *Id.* at 183. Ms. Lim also telephonically interviewed Nino Cruz.

Id. at 184. He too visited the site and observed the work. *Id.* He stated that the Ruppert employees installing the steps were performing stone mason work. *Id.* at 185.

Ms. Lim was then given pages 1–3 and page 6 of Administrator’s Exhibit 6, which contains statements taken from two Ruppert employees. *Id.* at 187–88. The Administrator then moved to admit the statements without having Ms. Lim testify to them.⁸ *Id.* at 190.

Ms. Lim reviewed certified payroll records during her investigation. *Id.* at 194–95. She explained why she reviewed them:

Certified payroll records or the review of certified payroll records is also part of a routine investigation or a routine procedure during an investigation of government contracts. Certified payroll records, a lot of times are the only places where the employers segregate or note the classifications, as well as where it is that employees receive compensation under those classifications. But I did also review the time sheets, the in-house payroll records, in addition to reviewing the certified payroll records.

Id. at 195. She compared a sample of the time sheets and in-house payroll and found that there was “no reason to believe that the certified payroll records were incorrect.” *Id.*

She explained how she used the certified payroll records to calculate back wages, “I extracted all the hours that these employees were compensated under the skilled labor classification. My back wages were based on those hours the employees received compensation for under the skilled labor classification.” *Id.* at 196. Her methodology focused only on the skilled labor certification that appeared in the certified payroll because Ms. Rainforth informed her that employees classified under the skilled labor certification would have performed one or more of the duties involved in building the steps. *Id.* Furthermore, during her site visit, “Mr. Snodgrass stated that those employees working on the steps were classified under the skilled laborers classification.” *Id.*

She explained that the marble/stone mason classification is the correct classification of the step work because “[t]hese employees—so duties that these employees performed on the installation of the steps are covered by the collective bargaining agreement that is linked to the marble stone mason classification under the wage determination that’s applicable to the contract on which these employees perform work.” Thus, she concluded that:

It was my finding that Ruppert failed to pay its employees working on the installation of the steps the minimum wage rate that’s required by the Davis-Bacon Act. So when the Davis-Bacon Act speaks about the minimum wage, it’s including the hourly rate that’s required by the classification under which these are performing work, as well as the fringe benefits.

Id. at 198.

⁸ See *supra* note 5.

Additionally, Ms. Lim found a recordkeeping violation, because the employees performed the work under separate classifications, and it was Ruppert's responsibility to keep records of the segregation of the hours that the employees performed under multiple classifications. *Id.* at 199. She stated that Ruppert was also required to keep those records on a daily and weekly basis. *Id.* Ms. Lim said that the material that the precast stairs were made out of did not need to be made out of marble or stone to fall under the marble/stone mason classification, as the collective bargaining agreement specifies that cement can be included. *Id.* at 200. Furthermore, the wage determination states that the material type "includes all types of masonry, brick, stone and cement." *Id.* at 200-01.

Both during and subsequent to her investigation, Ruppert did not provide any records of which specific employees worked on the steps. *Id.* at 201-02. No records were provided that showed whether Ruppert segregated the tasks associated with the work on the steps. *Id.* at 202. She was not provided with, and was unaware of, any records that showed a breakdown of the tasks related to the work the employees performed on the steps. *Id.* Ruppert did not provide, nor is she aware of, records showing the time employees spent performing the individual tasks associated with the steps. *Id.* at 202-03.

Ms. Lim concluded that, "since the duties these employees performed fell under multiple classifications, Ruppert should have segregated the hours that these employees performed on the different classifications. Those records[,]" according to Ms. Lim, "Ruppert is required to keep daily, as well as weekly, records showing the segregation of the hours spent in each classification." *Id.* at 203-04.

Ms. Lim found that twenty-two employees worked on the steps and were classified as skilled laborers, thus she computed back wages for twenty-two employees. *Id.* at 204. She concluded that these twenty-two employees were performing four tasks: mixing mortar, placing the precast steps, grouting the joints, and then cleaning after employees had finished grouting. *Id.* at 205. She agreed that at no point during her investigation did anyone from Ruppert indicate that there was work associated with the steps that wasn't classified under the skilled laborer definition. *Id.* She concluded that, "[i]f there had been a correct record or accurate record segregating the hours that these employees performed on the installation of the steps, depending on the duties that they performed, certain time could have been classified under the skilled laborers classification, and the other hours should have been classified under the marble stone mason classification." *Id.* at 207. Ms. Lim determined that only the mixing of mortar should have been classified under the skilled labor classification, whereas the other duties (laying of precast concrete steps, grouting the joints, and cleaning after grouting the joints) should have been classified under the marble/stone mason classification. *Id.* at 207-08. Due to a lack of an accurate record segregating the hours that the employees performed the various tasks, she testified, she based her "findings on the information that was provided by Ruppert's attorneys, as well as the records that I received during the investigation, as well as other interview statements that I have taken." *Id.* at 208.

Ms. Lim was directed to look at Administrator's Exhibit 7, which contains certified payroll records that she received from Ruppert. *Id.* at 209-10. She explained how she used the

skilled labor classification codes listed next to the names of workers to calculate back wages. *Id.* at 210–11.

She was next directed to look at Administrator’s Exhibit 5, which contains the spreadsheets she made to compute the back wages for the twenty-two employees she deemed owed back wages. *Id.* at 212. She explained how to read the spreadsheet and use it to calculate the back wages of individual employees. *Id.* at 212–14.

Ms. Lim was then directed to look at Administrator’s Exhibit 4, which contains the WH-56, the summary of unpaid wages. *Id.* at 225. She created the summary, which provides the list of employees who are due back wages as a result of the investigation and the laws under which the investigation was conducted. *Id.* at 226.

She was then directed to look at Joint Exhibit 1, which is the charging letter that was sent to Ruppert. *Id.* at 229.

In the course of her investigation Ms. Lim conducted a limited area practice survey, contacting unions to obtain copies of their collective bargaining agreements, rather than a full area practice survey, which she explained she would conduct when multiple unions claim the same work under their collective bargaining agreements or when work classifications are owned by both unions as well as non-unions. *Id.* at 244–45. A full area practice survey was requested by Ruppert, however she found that a full area practice survey was not required. *Id.* at 246–247. She explained why she conducted a limited area practice survey:

Because the rates that we were looking at under the classifications that were listed on the applicable used determinations, they’re both union rates. So, I contacted both unions and there was no dispute in regard to who claimed the work. There was a very (sic) distinction on which of the tasks that the employees performed on the installation of steps was claimed by one union versus the other union. I was able to confirm that information with the union. I was able to obtain copies of the collective bargaining agreements from the other—one of the unions who was able to provide those copies; therefore, I didn’t feel that it was required to conduct a full area practice survey since there was no dispute.

Id. at 252–53.

She further testified that she did not believe she was required to contact the regional office before conducting an area practice survey, as generally the regional wage specialist (RWS) is not contacted when conducting an area practice survey. *Id.* at 253–54.

Ms. Lim was then directed to look at Respondent’s Exhibit 26, which contains the Field Office Handbook (“FOH”). *Id.* at 254–55. She was directed to read from page 15F05-1, Subsection B, “[b]efore any area practice survey is started, the RWS must be contacted.” *Id.* at 255–256. She then stated that “I would say if the guidance states that something must be done, then I would say it’s mandatory language.” *Id.* at 256. She reiterated that it was not office practice to contact the RWS, and that she doesn’t actually know who the RWS is. *Id.*

Ms. Lim stated that she did not consider the carrying of the steps explicitly as a stand-alone activity and did not ask questions in regard to it as they were not among the list of duties Ms. Rainforth provided. *Id.* at 260. Therefore, she could not ascribe an amount of time that would have been spent carrying the steps, though she agreed with the assertion that “it’s common sense that someone is carrying the steps to be installed, whether it’s the person doing the installation or someone else.” *Id.* at 261–62. She thought that the carrying of the stairs would fall under common general laborer rate. *Id.* at 274.

Ms. Lim was then directed to look at page 15F05-2, number 6, of the FOH. *Id.* at 262. It states that when conducting a limited area practice survey to resolve the classification of workers one will examine the classification practices of contractors who perform the work in question on similar construction projects that were conducted in progress in the same area during the year preceding the contract in question. *Id.* at 262–63. She stated she did not follow the aforementioned procedure. *Id.* 263. Nor did she speak to the union about the work conducted in the prior year, because she “didn’t feel it was necessary since the collective bargaining agreement provided all the details that are listed under Section 6 of this of FOH.” *Id.* at 265. She did, however, speak with Clark who mentioned that there was another contractor, Rugo Stone, which was performing work where they had classified employees as marble/stone masons. *Id.* at 265–266. Ms. Lim however, only learned that they worked with stone, and nothing else of their work. *Id.* at 266. She did not contact them because she did not feel the need to. *Id.* at 278.

Ms. Lim was then directed to look at page 15F05-2, 7(a), when asked which parties, “all of the parties agree[,]” was referring to, she stated, “I would interpret that as the unions. Well I guess it depends on the circumstances. But if I’m contacting only the unions because that’s what I’ve determined during the investigation, then it would be the unions. If they agreed to the proper classifications, then the area practice has been established. However, if there’s a dispute and we need to get further information then it would be whoever was contacted, they would be the parties. So, I don’t think there’s one answer to that question.” *Id.* at 271–72.

She was then directed to look at subparagraph 7(b), which states:

However, if all parties do not agree, i.e., jurisdictional dispute between two unions, or management does not agree with the union, or where non-union rates in the wage determination may apply, and the practice among non-union contractors in the area varies, it will be necessary to determine by a full area practice survey which classification actually performed the work in question.

Id. at 272. She was unsure what exactly the term “management” referred to, and when asked if that referred to non-unions, responded, “I can’t answer that question. I don’t—I have no idea what that refers too.” *Id.* at 273. She reiterated that she did not feel a full area practice survey was necessary in this case. *Id.* at 273–74.

She was then directed to look at Administrator’s Exhibit 6, which contains the statement of Nino Cruz. *Id.* at 274. Upon reading Mr. Cruz’s statement, which she drafted, she admitted in regards to the carrying of the steps that “[w]ell, this doesn’t specifically talk about—this just

talks about duties of a stone mason helper. But I guess, yeah, I should have applied common sense and said—thought that that could have been a duty that these employees could have been performing.” *Id.* at 275–76.

Ms. Lim was then presented with Exhibit 27, which contains two redacted statements of Ruppert employees dated April 9th, and July 6th, 2018. The April 9th statement read, “I did not really work on the steps. I was around the area but I only did landscaping.” *Id.* at 300. When asked whether that individual was listed on the WH-56, Ms. Lim responded, “I would assume so, but like I mentioned, without looking at the full interview statement, I wouldn’t be able to confirm that statement.” *Id.* at 301. The July 6th statement read, “I worked on landscaping. I didn’t work on the steps.” *Id.* Ms. Lim could not recall who might have given that statement, but presumed that they were also listed on the WH-56. *Id.* at 301–02. Ms. Lim did not believe that she had spoken to any individuals not listed on the WH-56. *Id.* at 302. Later, she agreed that she gave more weight to the unredacted statements taken during the investigation “because that was closer to the work that was being performed, employees tend to remember . . . when the work is being performed or shortly after the work was performed in regard to the specific duties that they performed.” *Id.* at 396.

Ms. Lim believed that she had seen the breakdown of hours that Ruppert provided that is attributable to the steps on the project. *Id.* at 303. She could not recall the exact number of hours in the breakdown. *Id.* She had reason to dispute the total amount of hours listed, 1278.8, stating:

[T]his is a set of records that was not provided the (sic) investigation It’s my understanding that these records were provided as part of settlement purposes, so I was not given the opportunity to ask relevant questions in regard to these records; therefore, I have no idea when they were created, how they were created, for what purposes they were created other than that it was provided to me that they were provided—they were created for budgeting purposes. I don’t know who created them. And I don’t know what is included in the installation of the steps.

Id. at 304.

She stated she reviewed the single job production detail reports and that she compared them to the certified weekly payroll reports, however this was not a part of her investigation. *Id.* She could not concluded based on these records that there were individuals who are part of the summary of unpaid wages who did not perform work attributable to the 1278.8 hours, because she did not know what duties are referred to when the production reports talk about steps. *Id.* at 304–05.

Ms. Lim was asked if she agreed that four employees not included on the certified payroll as working on the stairs, Juan Barahona, Mario Bethencourt, Jose Quintanilla, and Ismael Rivas, did work on the stairs. She responded that it was her understanding that they did and that all employees that were classified under the skilled labor classification on the certified payroll records worked those hours on the steps. *Id.* at 322–23. She based this on Ms. Rainforth’s email

and the review of the certified payroll records. *Id.* at 324. However, Ms. Lim understood that there was a possibility that tasks unrelated to the steps were billed at the skilled labor rate. *Id.* at 329. Ms. Lim stated she was unaware of a myriad of activities not related to the steps that workers performed that were classified under the skilled labor rate. *Id.* at 330. Her understanding was that during the entire 16 month period, to the extent that skilled labor hours appeared on weekly certified payrolls, they were attributable to the stairs. *Id.* at 331.

Ms. Lim had no reason to dispute that Ruppert commenced working on the stairs on July 20, 2015, and no basis to dispute a completion date of March 10, 2016. *Id.* at 332. She had no way to confirm that the workers were pulled off the projection due to breaks in PEX heat tubing for one week on August 30, 2015 and due to railing sub conflicts between September 14, 2014 and January 3, 2016. *Id.* at 332–33. Ms. Lim did not actually ask for specific start and stop dates for the step project. *Id.* at 333.

Ms. Lim was then directed to turn her attention to Joint Exhibit 7, which contains the wage determination. *Id.* at 339. She agreed that the review of the wage determination coupled with review of the collective bargaining agreements were essentially the basis for her conclusion that the workers should have been classified as marble/stone masons. *Id.* at 339–40. When asked if she considered the bricklayer classification she responded “[y]es and no” because “this classification does not contain any of the duties.” *Id.* at 340. She ultimately concluded that the bricklayer collective bargaining agreement was not applicable to the workers. *Id.* at 342.

She was next directed to view Administrator’s Exhibit 1, which contains the collective bargaining agreement between Chesapeake Council of Employers and Bricklayers and Allied Craft Workers and Local 1. *Id.* This agreement was effective from May 3, 2009, to April 30, 2012. *Id.* at 343–44. Ms. Lim agreed that this agreement was applicable to stone masons as well as bricklayers. *Id.* at 344–45. However, Section 2 states that “this agreement shall not cover—stone mason work within the D.C. Chapter of the union, except as set forth in the attached addendum, VII, to this agreement, dated January 31, 2008. The excluded work shall be covered by the union’s—stone mason agreement for the D.C. Chapter of the union.” She believed that at the time she read Section 1 and 2, that she noticed Addendum VII was not included. *Id.* at 345. She did not request the addendum because she “did not think that is was relevant because during my conversation with the . . . president of the union he informed me that . . . this CBA is not applicable to the work that was being performed by the employees of Ruppert” and that the other CBA (AX3) was applicable to the work performed by the Ruppert employees. Tr. 346. Furthermore, the International Union of Bricklayers and Allied Craftworkers claims both stone/marble masons and bricklayers, and thus Ms. Lim felt that “they’re experts on determine (sic) whether Ruppert employees performed the work under the bricklayer’s classification according—in accordance with their CBA, or the stone marble mason classification, in accordance with their CBA.” *Id.* at 347–48.

Ms. Lim was then asked to look at Administrator’s Exhibit 2, which contains the Collective Bargaining Agreement between Chesapeake Counsel of Employers of Bricklayers and Bricklayers & Allied Craftworkers, Local 1, effective May 3, 2015 to April 29, 2017. *Id.* at 349. She agreed that this agreement stated that it supersedes and replaces all prior agreements. *Id.* at

350. This agreement also referred to the fact that it does not cover stone mason work reflected in Addendum IV to it. *Id.* at 351.

She was next directed to look at Administrator's Exhibit 3, which contains the CBA between Bricklayers & Allied Contractors, Local 1 and Stone and Marble masons, effective May 1, 2010 to April 30, 2013. *Id.* at 358. She agreed that this was the collective bargaining agreement she relied upon along with the wage determination to conclude that marble/stone mason was the correct classification. *Id.* at 359. She stated that pointing, according to a Google search, is grouting and not setting. *Id.* She did not recall asking the union what "pointing" meant. *Id.* at 360. She testified it was her understanding that concrete and cement are the same thing, based on Google research. *Id.* at 360–61. She was not aware that cement is an ingredient in concrete, and that concrete contains other ingredients, in addition to cement. *Id.* at 361. Moreover, she believed that the steps were a form of cement block as listed in the definition of "stone work" under the CBA. *Id.* at 361–62. She also believed that the work performed fell under the definition at subsection B.2, because they were "performing part of the building work that was made out of concrete, and they were performing pointing and cleaning." *Id.* at 363. She thought "Section D" contained applicable language as well. *Id.* She agreed that Ruppert was not contracted to actually erect the building, but that "they were performing work on a building of the museum, which is 'building.'" *Id.* at 364.

She was then again directed to look at Joint Exhibit 7, which contains the wage determination. *Id.* at 364. She recalled that she had previously admitted that the employees used power tools, and admitted that under the skilled labor category power tool operator is listed. *Id.* at 365–367. When questioned as to why someone who uses power tools would not fall under skilled labor, and subsequently why she found that everyone working on the steps was misclassified as skilled labor, she responded:

Oh, so when employees are classified under the skilled laborers classification for operating power tools or small machine operating, it's . . . when their entire duty is operating power equipment

So, for example, let's say that you have employees performing work in demolition and all they're doing is working with power tools, then of course they would fall under the skilled laborers classification. But if it's related to other jobs, of course we would look at what's covered by the collective bargaining agreement and whether or not they're not spending, you know, half of their day cutting the steps only, versus it's, you know, part of their work of setting the stone.

Id. at 367.

When asked whether she would, under the above circumstance, allocate the portion of work done with the steps to the skilled labor classification, she responded:

Well, like I mentioned, it would depend on my conversation . . . with the union to see what kind of work is covered or what kind of work they would claim, because a lot of times they would say that, oh, any work that's incidental to the work that's

covered by the collective bargaining agreement, such as cutting or cleaning afterwards, that could be covered by that collective bargaining agreement; therefore, those employees should be classified and compensated under that classification. Also, depending on the time these employees spend, and also whether or not the employer has segregated the hours that these employees were performing those duties.

Id. at 368.

She spoke to the union for skilled laborers, LINUA, who informed her that the work of mixing mortar would be claimed by the union, but they did not have a collective bargaining agreement specific to this work. *Id.* at 368–369. However, she did receive their handbook. *Id.* at 369. She agreed that the mixing of mortar was properly classified as skilled labor. *Id.* at 369.

She did not have sufficient information to confirm or deny whether all of the work done in connection to the stairs could be allocated into one-third time blocks. *Id.* at 372. And she was not aware of any records that show this time allocation. *Id.* at 380.

Erwin Acosta (Tr. 407–10): Mr. Acosta testified he was currently employed with Ruppert landscaping and had been for the last five years and five months as a laborer/crewman. *Id.* at 408. He recalled working on the NMAAHC project from June to December 2015. *Id.* He recalled the stairs being built, but stated in relation to them that he “only loaded the material and that’s all” from the truck to the area near the stairs. *Id.* at 408–09. He stated that he did not work on the steps at all. *Id.* at 409.

Jose Lopez (Tr. 410–12): Mr. Lopez testified he was currently employed by Ruppert and had been for the last fourteen years as a laborer and a driver. *Id.* at 410. He recalled working on the NMAAHC project for six hours as a laborer. *Id.* at 410–11. When asked if he worked on the stairs at all he responded, “[n]o.” *Id.* at 411.

Brad Matthews (Tr. 412–44): Mr. Matthews testified that he was currently employed by Ruppert Landscaping and had been for the last thirteen years. *Id.* at 413. His title at the time was project manager and he had been in that role for two years. *Id.* Prior to that he was a senior field manager for ten and a half years, and this was his role during the NMAAHC project. *Id.* As a senior field manager, he made sure products were delivered on time, ordered materials, organized the job, and managed subcontractors. *Id.* at 413–14. He was on the job site every day. *Id.* at 435. Mr. Matthews would decide, after the bidding process, which classification is going to apply to what types of work. *Id.* at 417. He was also responsible for keeping a record of the tasks each employee performed on site. *Id.* at 418. Each day, he would take the paper or Day-Timer that the hours were wrote down on and input that data into the payroll system. *Id.* He stated he was no longer in possession of the Day-Timer. *Id.* at 433.

When employees mixed mortar, he classified them as common or general laborer. *Id.* at 422. When they were laying or installing steps, he classified them as skilled laborer. *Id.* When carrying steps, he classified them as common or general laborer. *Id.* at 422–423. For pointing or grouting, he classified them as skilled laborer. *Id.* at 423. He classified employees when they

were cleaning joint two ways, “some of the cleaning as skilled and some of it went to general cleaning that . . . had to be done before we would grout.” *Id.* Examples of general cleaning would include sweeping and prepping the area, whereas cleaning under the skilled labor classification would be sponging up after grouting. *Id.* at 423–24.

However, during his deposition prior to the hearing, Mr. Matthews stated that grouting and cleaning would have been classified under “labor mason tender.” *Id.* at 428–429. He stated that his answer changed because “[w]e have gone back and I’ve actually read through the wage scales and realized that I made a mistake, and it should have been common or general, what I really marked them down. And I was going off recollection of, you know, time that I entered three years ago. So, I was off by, you know, because from what I saw, those two lines are side by side to each other.” *Id.* at 430.

He agreed that with respect to all of the work that was done on the stairs, that mixing mortar took about one-third of the time. *Id.* at 436. With respect to carrying the precast steps, he “could say that that’s split between the laying and the actual carrying . . . cut that in half, and you would get a, you know, direct split of that of a sixth of the time.” *Id.* He agreed that carrying and setting combined comprised a third of the overall time. *Id.* He stated that cleaning and grouting each took one-sixth of the time and combined to form one-third of the time spent. *Id.* at 437. He based this on the fact that it is what he saw every day and what he wrote down every day. *Id.* at 440.

James Tuzzolino (Tr. 446–517): Mr. Tuzzolino stated that he had been employed as a branch manager with Ruppert Landscaping since January 2014. *Id.* at 447. As a branch manager, he oversees all aspects of business, employees, different departments, and quality. *Id.* He testified that he would visit the NMAAHC stairs project site “probably once a week” and also observe different “groups of my guys working.” *Id.* at 489–90. Therefore, he lacked firsthand knowledge of exactly what workers were doing on days he was not there. *Id.* at 491. However, he did have firsthand knowledge of the step work from the days he visited. *Id.* at 494. He participated in reviewing the wage scale and the scope of the work that is being estimated and bid on during the bid process. *Id.* He testified that when employees mixed mortar and carried steps they were classified as common general laborers. *Id.* at 448. When employees were laying steps, grouting joints, and cleaning joints they were classified as skilled laborers. *Id.* at 448.

Mr. Tuzzolino testified that 1,278.8 hours were spent on the various tasks discussed with respect to the stairs. *Id.* at 453. He based this on data from the “LSI system” which is a system Ruppert uses to track hours on every single project on a day-to-day basis. *Id.* at 453–454. Mr. Tuzzolino stated that “the entire site is in the certified payroll record. Every guy that stepped foot on the job site that day is in that report” and that if someone was not listed on it in a particular week then “[t]hey were not on site.” *Id.* at 461–462.

He testified that work on the steps took sixteen weeks in total but was nonconsecutive due to issues that had to be corrected in the process of building the northeast stairs. *Id.* at 463; 465.

Mr. Tuzzolino agreed that the breakdown of worked performed on the stairs could be broken down into a third, a third, a third, or a third and one-sixth, one sixth, one sixth, one-sixth. *Id.* at 470. He testified that he believed that over the course of the sixteen weeks of step construction, he visited the site between eight and ten times. *Id.* at 472. When there, he observed employees mixing mortar, carrying steps, and installing steps. *Id.* at 472–73. He could not recall if he saw employees grouting steps. *Id.* at 473. He based his estimate of the breakdown on “experience, historical data; this is how we build jobs. So we go off previous jobs of where we have these similar tasks and we know how long it takes to do things. I mean, that’s why we’re a successful business. I’ve observed other companies, too, doing the same work, actually on the job site as well.” *Id.* When asked if Rugo was doing the same work he stated “[t]hey were doing more intricate work, more detailed work with granite. But you can—the process of mixing the mortar, you know, someone installing, stuff like that, again it’s—there was a process and task that each—to build it.” *Id.* at 473–74. He agreed that the work with granite was stone mason work and stated the work was “very, very intricate” and involved vertical and horizontal granite. *Id.* at 474.

When asked if he considered the installation of the concrete precast steps to be intricate, he responded “[n]o” and then compared the work the steps entailed to the work Rugo did, stating, “they’re just laying the same piece over and over. [Rugo] had granite that was various sizes numbered for each position on the walls. They had wall ties. You know, it was—angle iron. It’s very intricate what they did. And the horizontal work they did, water feature, they did granite benches that’s—it’s a lot more intricate. It takes a lot more skill.” *Id.*

He testified that Juan Barahona, Mario Bethencourt, Jose Quintanilla, and Ismael Rivas were not involved in the construction of the steps based upon his review of the certified payroll records. *Id.* at 475.

Mr. Tuzzolino was asked if there was a difference between concrete and cement, and he responded that cement is but one component of concrete, which also includes “[g]ravel, water sand, et cetera.” *Id.* At 476. When asked if concrete is the same as stone, he responded “I wouldn’t say that, no. Stone is a natural stone.” *Id.* At 476. He further explained that builders often use an artificial stone made to look like real stone. *Id.* He was unaware of concrete being considered artificial stone. *Id.* At 477. He was asked what a cement block is and explained that a cement block is, in layman’s terms, the familiar block you see used for building foundations and elevator shafts. *Id.* He stated the precast steps were not cement blocks. *Id.* Mr. Tuzzolino was then asked to define pointing:

Q. What does—what is “pointing”?

A. Point to me is essentially—they use it in the installation of brick terms. Sometimes like flagstone, too. It will be just pointing of the joints. You could—you don’t really point up tile. The stairs weren’t really pointing up, it’s more grouting. So there’s—

Q. Grouting is not exactly the same thing as pointing?

A. No. You grout tile. You know, the stairs had a grout joint. Pointing is more—you can—they're similar but they're not exactly the same.

Q. So the more accurate term to describe work with respect to the precast steps would be grouting; is that correct?

A. Yeah. I mean, that's what they call it, is grouting the joints.

Q. Okay.

A. Some people would probably say pointing. Grouting same. But—

Q. Do you have an understanding of what pointing and cleaning of buildings built of stone, brick or concrete would apply to?

A. That's, to me, that's cladding on a building. That's the façade. That's essentially a brick building. They go and point all the brick and clean the brick. Typically, they clean it with an acid wash or something like that after they're done.

Id. at 476-478.

He agreed that approximately eight categories of tasks that did not involve construction of steps were billed at the skilled labor rate. *Id.* at 479. He stated that 2800 hours were not spent building the steps based on the job summary reports, and the total hours spent on the installation of the steps was “within the 1278 hours.” *Id.* at 480–81.

Summary of Documentary Evidence

Joint Exhibits

- JX 1: Determination Letter dated December 9, 2016
- JX 2: Contract between Clark/Smoot/Russell and NMAAHC
- JX 3: Contract between Clark/Smoot/Russell and Respondent
- JX 6: Five Photographs of Employees Working on Steps
- JX 7: General Wage Decision No. DC100004 (September 9, 2011)

Administrator Exhibits

- AX 1: CBA between Chesapeake Counsel of Employers and Bricklayers and Bricklayers & Allied Craftworkers, Local 1, Collective Bargaining Agreement
- AX 2: CBA between Chesapeake Counsel of Employers and Bricklayers and Bricklayers & Allied Craftworkers, Local 1, Collective Bargaining Agreement, dated May 3, 2015-April 29, 2017

- AX 3: CBA between Bricklayers & Allied Craftworkers, Local 1 and Stone and Marble Masons, May 1, 2010–April 30, 2013
- AX 4: Summary of Unpaid Wages
- AX 5: Spreadsheet of Back Wage Calculations
- AX 6: Employee Interview Statements
- AX 7: Certified Payroll Records

Respondent’s Exhibits

- RX 1: Administrator’s Response to Respondent’s First Set of Interrogatories (dated Mar. 15, 2018).
- RX 3: NMAAHC Egress Stair Breakdown
- RX 8: Declaration of Cesar Zavala
- RX 9: Declaration of Eder Pimentel Ramirez
- RX 10: Declaration of Efrain Zavala
- RX 13: Declaration of George Fuentes
- RX 16: Declaration of Juan Bautista
- RX 20: Single Job Production Detail and Certified Payroll Reports (Weeks ending in 7/5/15, 7/19/15, and 7/26/15)
- RX 21: Single Job Production Detail and Certified Payroll Reports (Weeks ending in 8/2/15, 8/9/15, and 8/16/15)
- RX 22: Single Job Production Detail and Certified Payroll Reports (Weeks ending in 8/23/15 and 8/30/15)
- RX 23: Single Job Production Detail and Certified Payroll Reports (Weeks ending in 9/13/15, 1/10/16, 1/17/16, and 1/24/16)
- RX 24: Single Job Production Detail and Certified Payroll Reports (Weeks ending in 1/31/16 and 2/14/16)
- RX 25: Single Job Production Detail and Certified Payroll Reports (Weeks ending in 2/28/16 and 4/10/16)
- RX 26: DOL Wage and Hour Field Office Handbook
- RX 27: Statements of Two Ruppert Landscaping Employees

FINDINGS OF FACT

1. On July 6, 2011, the Smithsonian Institution entered into a \$290 million contract with Clark, for the construction of NMAAHC in Washington DC. JX 2; Tr. 14. Subsequently, on or about March 18, 2014, Clark and Respondent entered into a Subcontract Agreement (“the contract”). JX 3; Tr. 129. Respondent was to provide paving and landscaping services, including the building of exterior precast stair treads. Tr. 14–15; AX 3; JX 7. The parties stipulated that the contract was subject to the Davis-Bacon Act, and that Wage Determinations DC100001 and DC 100004 applied to the contract. Stip. 1; Stip. 6.

2. Respondent commenced work at NMAAHC on December 18, 2014. Stip. 5. At some point during the period of investigation, December 8, 2014 to April 24, 2016, Respondent began and completed work on the precast stairs. Tr. 131. Employees who worked on the exterior stairs installed prefabricated steps. *Id.* at 32; 151–152. Employees working on the steps

were classified as either Skilled Laborers or Common/General Laborers, when workers mixed mortar and carried steps they were classified as Common/General Laborers and when they did all other tasks related to the stairs, they were classified as Skilled Laborers. *Id.* at 422; 448.

3. The contract between Ruppert and Clark incorporated General Wage Decision No. DC100004, which included the different worker classifications. JX 7. The relevant classifications, descriptions, rates, and fringes from the Wage Determination are as follows:

Classification	Rates	Fringes
MARB0002-004 05/01/2011 MARBLE/STONE MASON: INCLUDING pointing, caulking and cleaning of All types of masonry, brick, stone and cement EXCEPT pointing, caulking, cleaning of existing masonry, brick, stone and cement (restoration work)	\$32.88	\$13.99
SUDC2009-003 05/19/2009 LABORER: Common or General	\$13.04	\$2.80
LAB00657-015 06/01/2010 LABORER: Skilled FOOTNOTE: Potmen, power tool operator, small machine operator, signalmen, laser beam operator, waterproofer, open caisson, test pit, underpinning[sic], pier hole and ditches, ladders and all work associated with lagging that is not expressly stated, strippers, operator of hand derricks, vibrator operators, pipe layers, or tile layers, operators of jackhammers, paving breakers, spaders or any machine that does the same general type of work, carpenter tenders, scaffold builders, operators of towmasters, scootcretes, buggymobiles and other machines of similar character, operators of tampers and rammers and other machines that do the same general type of work, whether powered by air, electric, or gasoline, builders of trestle scaffolds over one tier high and blasters, power and chain saw operators used in clearing, installers of well points, wagon drill operators, acetylene burners and licensed powdermen, stake jumper, structural demolition.	\$20.71	\$5.97

Id.

4. During the investigation the Wage and Hour Division obtained a copy of the Stone and Marble Masons and Pointers, Cleaners and Caulkers of the Washington, D.C. Area Collective Bargaining agreement. Tr. 155–159; AX 3. It defines stonemasonry as follows:

(A) The laying of rubble work, with or without mortar; setting all cut stone, marble, slate, flagstone or other stone domestic products for use on the exterior or in the interior of any building or structure designated by the architect as or customarily called stone in the building trade; cutting all shoddies, broken ashlar or random ashlar that is roughly dressed upon the beds, joints or reveals . . . and the cleaning and cutting of joints and the pointing of all stone work. All of the said operations shall apply to work on buildings, sewers, bridges, railroads, or other structures of any kind whatsoever, either of a public or private nature.

It is specifically understood that the above definition shall include the cutting, setting and pointing of cement blocks and all artificial stone, slate or marble and kindled products, either interior or exterior, when required to be set by the usual method or custom of stonemason or marble setter. The erection of all pre-cast floors and cast partition walls, the parching, cleaning, pointing and caulking shall also be included in the above definition.

(B) The work of stonemasonry shall also include pointing, caulking and cleaning which shall consist of, but not be limited to, the following work procedures and installation of the following materials:

- (1) The pointing, caulking, and cleaning of all types of masonry, caulking of all window frames encases in masonry or brick, stone or cement structures, including all grinding and cutting out on such work and all sand blasting, steam cleaning and granite work. . . .

AX 3. Furthermore, Ms. Lim testified that a representative from BAC Local 1 stated that the CBA applied to the work performed on the steps. Tr. 160; 163.

5. The parties stipulated that the following eight employees did work on the steps: Ismael Acosta, Rodrigo Acosta, Juan Bautista, George Fuentes, Manuel Gonzalez Casimiro, Eder Pimental-Ramirez, Efrain Zavala, and Luis Zavala. Stip. 8.

6. Those workers who did perform work on the steps, grouted, set, and cleaned the precast stairs when they performed the installation of the stairs. Tr. 33; 45; 48–49; 70; 78; 98; 116; 423. These workers used power tools. *Id.* at 35–36; 56. When installing the steps, the workers did not perform the tasks of cutting and pointing.

7. The stairs the workers set were described as being made out of “precast concrete.” *Id.* at 107. As Mr. Tuzzolino noted, concrete consists of cement, gravel (or some other aggregate material), and water.

8. Cement is a component of concrete. Cement is not equivalent to concrete. Concrete is not equivalent to stone. Concrete is not a form of artificial stone.

9. In the course of her investigation, Ms. Lim contacted LINUA and discussed with them the tasks she believed, based upon her own observations and research, the employees performed. A LINUA employee told her, based on her description, that the work performed was covered by the marble stone/mason classification. *Id.* at 167.

10. In the course of her investigation, Ms. Lim performed telephonic interviews with two Local 1 field representatives, Pedro Clavijo and Nino Cruz. Mr. Clavijo stated that employees were performing stone mason work, but also some were performing stone mason finisher work as well. *Id.* at 182. Mr. Cruz stated the Ruppert employees installing the steps were performing stone mason work. *Id.* at 185.

11. In the course of her investigation, Ms. Lim chose to conduct a limited area practice survey, rather than a full area practice survey, because she felt she was not required to perform a full area practice survey. *Id.* at 244–245; 252–253. Ruppert requested she perform a full area practice survey. *Id.* at 246–247. The Field Office Handbook states:

However, if all parties do not agree, i.e., jurisdictional dispute between two unions, or management does not agree with the union, or where non-union rates in the wage determination may apply, and the practice among non-union contractors in the area varies, it will be necessary to determine by a full area practice survey which classification actually performed the work in question.

RX 26. Despite management (Ruppert) not agreeing with the unions' interpretation that the work being performed was that of a marble/stone mason, Ms. Lim did not conduct a full area practice survey. *Id.* at 273–274.

12. In performing her limited area practice survey, Ms. Lim ignored instructions listed in the Field Office Handbook, because she did not feel they were necessary. *Id.* at 262–265. Ms. Lim, when told by Clark that another contractor, Rugo Stone, had workers performing tasks classified under the marble/stone classification, did not reach out to Rugo Stone because she did not feel the need to. *Id.* at 278.

13. The Wage and Hour Division's Field Office Handbook states that “[b]efore any area practice survey is started, the RWS [regional wage specialist] must be contacted.” *Id.* at 255–256. Ms. Lim did not contact the RWS. *Id.* at 254.

14. Ms. Lim, in the course of her investigation, relied upon the text of the collective bargaining agreement and wage determination to come to her conclusion that marble/stone mason was the correct classification. *Id.* at 359. Her research into the definition of the term “pointing” was comprised of a Google search, and she did not ask the union what “pointing” meant. *Id.* at 360. She believed concrete was equivalent to cement, and in researching this, based her findings off of a Google search. *Id.* at 360–361.

15. Mr. Tuzzolino visited the site between eight and ten times over the course of the step installation and observed the step workers performing their various tasks. *Id.* at 472–473.

16. Mr. Tuzzolino also observed the work performed under the marble/stone mason classification by Rugo Stone’s workers. *Id.* at 473–474.

17. The work performed by Rugo Stone involved the installation of both vertical and horizontal granite. It required a higher level of skill than the work performed by Ruppert’s workers, as various sizes of granite had to be installed in multiple positions, while Ruppert’s workers laid the same object over and over to create the stairs. *Id.* at 474.

18. Pointing is the installation of brick or stone items in a vertical fashion, to include the erection of the cladding or façade of a building, such as the brick exterior of a building. *Id.* at 476–478.

19. Grouting is the installation of items, such as tile, that include a grout joint. Grouting and pointing are not equivalent terms. *Id.*

20. Because of Mr. Tuzzolino’s knowledge, experience, and expertise, I find his testimony to be more credible than that of Ms. Lim.

APPLICABLE LAW

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

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

A general contractor is responsible for ensuring that all persons engaged in performing the duties of a “laborer” or “mechanic” on the construction site receive the appropriate prevailing wage rate, irrespective of any contractual relationship alleged to exist or not to exist between the contractor and such persons. *Arliss D. Merrell, Inc.*, 1994-DBA-00041 (ALJ Oct. 26, 1995); 29 C.F.R. §§ 5.2(o), 5.2(i), 5.5(a)(2), 5.5(a)(6). Where laborers and mechanics perform work in more than one work classification, they may be compensated at the established rate for each classification for the time worked therein, provided that “the employer’s payroll record accurately set forth the time spent in each classification in which work is performed.” 29 C.F.R. § 5.5(a)(1)(i). This requires contractors to keep accurate payroll records that sufficiently and accurately demonstrate that workers were paid prevailing wages and fringe benefits for all compensable work. 29 C.F.R. § 5.5(a)(3)(i).

The Administrator has the initial burden of proving that employees performed work on the project for which they were improperly compensated. *See, e.g., Cody Zeigler, Inc.*, 1997-DBA-00017 (ALJ Apr. 7, 2000), *aff’d in relevant part*, ARB Case Nos. 01-014, 01-015 (ARB Dec. 19, 2003); *Pythagoras Gen. Contracting Corp.*, 2005-DBA-00014 (ALJ June 4, 2008), *aff’d*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011). The Administrator carries his burden if he proves that the employees have “in fact performed work for which [they were] improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” *Mt. Clemens Potter Co.*, 328 U.S. at 687-88.

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

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

DISCUSSION

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

In this case, the Administrator determined that the Ruppert workers were not paid the proper wages based on an investigation that Respondent "misclassified workers as Skilled Laborers . . . when it should have classified workers as Marble/Stone Masons" Adm'r Br. at 1. This determination was based on the language of the Wage Determination, the CBA of the International Union of Bricklayers and Allied Craftworkers, and the statements of union representatives. *Id.*

Respondent asserts that the workers were not misclassified, and that the Skilled Labor Classification was proper, and thus the Administrator has failed to meet its burden. Resp't Br. at 1-2; 10. Respondent further asserts that Wage and Hour Division's investigation was woefully inadequate, so as to prevent the Administrator from establishing a prima facie case. *Id.* at 11.

Accordingly, in order to determine whether the Administrator has met his initial burden of proof that the employees in question were improperly compensated, I must determine the appropriate classification for said employees and, specifically, whether the work, or some of the work, they performed at the NMAAHC project should have been classified as "MARBLE/STONE MASON," as set forth in the Wage Determination.

The Administrator Has Failed to Carry its Burden

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

The Ruppert Workers Did Not Perform the Tasks of a Marble/Stone Mason

A "worker's classification depends upon the tasks he performs and the tools he uses." *See Dumarc Corp.*, 2005-DBA-00007, at 22 (ALJ Apr. 27, 2006); *see also Double Eagle Constr., Inc.*, 1993-DBA-00014, at 8 (ALJ June 13, 1994) ("Employees are to be classified and paid according to the work they perform. . . ."); *Johnson-Massman, Inc.*, ARB Case No. 96-118 (Sept. 27, 1996) ("Exact delineation of the duties laborers may perform and the tools they may utilize is a matter defined on a case by case basis. . . ."). According to the Wage Determination, the work of a Marble/Stone Mason includes "pointing, caulking and cleaning of all types of masonry, brick, stone and cement[.]" excluding restoration work. JX 7. The collective bargaining agreement defines stonemasonry work as well, and includes tasks such as "setting all cut stone, marble, slate, flagstone, or other stone domestic products for use on exterior or in the interior of any building or structure designated by the architect as or customarily called stone in

the building trade . . . cutting, setting, and pointing of cement blocks and all artificial stone, slate or marble and kindled products, either interior or exterior.” AX 3.

The stairs the workers set were described as being made out of “precast concrete.” Tr. 107. The CBA that is incorporated into the wage determination describes stonemasonry as including “[t]he pointing, caulking, and cleaning of all types of masonry.” AX 3. None of the testimony precisely defines what masonry itself is, merely the work typical of a marble/stone mason. However, almost all definitions are quite broad.⁹

However, the Ruppert workers did not perform the tasks of marble/stone masons when they grouted, set, and cleaned the precast stairs. This is true even if one considers the precast concrete stairs to be “concrete block[,]” “artificial stone[,]” or a form of “masonry.” For each of the aforementioned materials, both the wage determination and the CBA explain that the work must involve “pointing, caulking, and cleaning.” However, the workers in this case did not point, caulk, and clean, they *grouted* and cleaned. Tr. 33; 45; 48–49; 70; 78; 98; 116; 423.

I find Mr. Tuzzolino’s explanation that “grouting” and “pointing” are not the same task to be credible, especially since he noted that the stairs have “joints” that are for grouting, rather than pointing. Tr. 476–78. Neither the CBA nor the Wage Determination include the terms grout or grouting in their explanations of the classification of marble/stone mason or description of the work of stonemasonry. Although Ms. Lim claimed that a Google search revealed to her that pointing is equivalent to grouting, Tr. 359–360, I have found Mr. Tuzzolino’s testimony on this issue to be more credible and thus afford it more weight in explaining whether pointing and grouting are in fact the same task.

Neither does the act of setting/placing/installing the precast steps fall under the definition of stonemasonry. The CBA’s definition of stonemasonry includes the “setting of all cut stone, marble, slate, flagstone, or other stone domestic products for use on the exterior or in the interior of any building or structure designated by the architect as or customarily called stone in the building trade.” However, the precast steps were made of concrete, which is not stone, as noted by Mr. Tuzzolino.

The CBA later notes that “it is specifically understood that the above definition shall include the cutting, setting, and pointing of cement blocks and all artificial stone, slate or marble and kindled products, either interior or exterior, when required to be set by the usual method or custom of stonemason or marble setter.” Once again, the act of setting the steps alone does not allow the work performed to reach the level of the stone/marble mason classification. The definition includes both the cutting and pointing of materials, and the workers did not perform the tasks of cutting and pointing; they set, grouted, and cleaned the precast steps, rather than cut, set, and point. They did not perform the activity elucidated by the CBA. Therefore, even if one concludes that the precast concrete stair treads fall under the definition of “cement blocks” or

⁹ “Masonry, the art and craft of building and fabricating in stone, clay, brick, or concrete block. Construction of poured concrete, reinforced or unreinforced, is often considered masonry.” *Masonry*, Encyclopedia Britannica, <https://www.britannica.com/technology/masonry>. “Something constructed of materials used by masons.” *Masonry*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/masonry>.

“artificial stone[.]” the workers on the project did not perform the tasks required “by the usual method or custom of stonemason or marble setter.”

The Credibility of Mr. Tuzzolino and The Prosecuting Party’s Ineffectual Case

Ms. Lim did speak with union officials, from both BAC Local 1 and LINUA, who agreed that the work Ms. Lim described fell under the Marble/Stone Mason classification. However, none of these union officials testified at the hearing and thus their opinions are hearsay. *See* Fed. R. Evid. 801(c). “It is well established that hearsay evidence is admissible in administrative proceedings arising under prevailing wage statutes.” *In the Matter of: Charles Saunders, an Individual d/b/a Am. Shamrock Bldg. Maint.*, BSCA No. 92-31 (May 27, 1993). However, how much weight I afford hearsay statements is a matter within my discretion. Here, the investigator contacted the union officials by phone. Tr. 167; 180. In the case of the LINUA official, she only discussed with the official the work she had seen listed in an email from Ms. Rainforth. *Id.* at 167. In the case of Pedro Clavijo, he visited the site a couple times when they were setting the steps and gave a brief statement as to what he saw and his belief that “[t]he duties of a stone mason are the installation and filling the joints.” AX 6; Tr. 180–183. She also telephonically interviewed Nino Cruz of Local 1, who had also visited the site. Tr. 184–185. Ms. Lim could not recall asking the union officials what “pointing” meant. Tr. 360. I afford the hearsay statements of these union officials little weight, as none testified at the hearing. Additionally, the LINUA contact did not appear to see the worksite, and the Local 1 Field Representatives saw it a limited number of times.

I feel it is important to stress the significance of Mr. Tuzzolino’s credibility, based on his expertise and experience, to the outcome of this case, and contrast that with the lack of expertise brought to bear by the prosecuting party. The Administrator had every opportunity to offer expert testimony to discuss and explain how the language of the CBA and the wage determination described the work Ruppert’s employees were performing. They did not. This is despite Ms. Lim having contacted union officials.

Instead, critically, the investigator relied on her own interpretation of the CBA and Wage Determination, Google searches, and the hearsay statements of union officials who were not subject to cross-examination. Ms. Lim could have conducted deeper research and investigation by, for example, conducting a full area practice survey rather than a limited area practice survey. But she did not, despite her own organization’s handbook instructing her to do so if there was a disagreement between the union and management. Even worse, Ms. Lim’s limited area practice survey did not examine the classification practices of contractors who performed the work in question on similar construction projects that were conducted in the same area during the year preceding the contract in question, as the Field Office Handbook instructs. She did not even speak to the union about the work conducted in the prior year, because she felt all she needed to rely on was her textual analysis. Clark even told Ms. Lim about another contractor, Rugo Stone, who was performing work classified under the Marble/Stone Mason designation, but Ms. Lim did not feel the need to contact Rugo Stone. In contrast, Mr. Tuzzolino had observed the work of Rugo Stone, meaning the basis for his knowledge comports more with Department’s Field Office Handbook on this issue than Ms. Lim’s. To reiterate, the extent of Ms. Lim’s “investigation” of the classification component of this case was limited to her interpretation of the collective

bargaining agreement and the wage determination, Google searches, and a handful of phone calls; and this is not conjecture, she agreed with that assessment. Tr. 339–340. Her limited research on the issue was simply not enough. The Administrator, in prosecuting the case, could have worked to make up for the lack of investigation in regards to this issue by qualifying an expert for testimony. They did not, and so the Administrator did not meet its burden to prove that Ruppert’s workers were engaging in the activities described by the wage determination and the CBA.

In contrast, Mr. Tuzzolino has years of experience in the construction industry and was able to, *inter alia*, discuss the differences between the work Rugo Stone did and the work Ruppert did. Ruppert was able to offer the credible testimony of Mr. Tuzzolino, and, tellingly, he is the *only person* out of multiple witnesses called during a hearing that produced voluminous pages of testimony to credibly explain what “pointing” is. Mr. Tuzzolino was able to describe the difference between concrete and cement, and how cement is a component of concrete, whereas Ms. Lim assumed they were the same thing. Ms. Lim’s Google searches and her reading of the text of the CBA and Wage Determination cannot stand up to Mr. Tuzzolino’s testimony based on years of work and expertise.

CONCLUSION

The Ruppert workers who installed the steps cannot be classified as marble/stone masons because they performed none of the tasks associated with that classification. Because the Administrator has failed to prove that the workers “in fact performed work for which [they were] improperly compensated[,]” *Mt. Clemens Potter Co.*, 328 U.S. at 687–88, the Administrator has failed to carry its burden to show that they were misclassified.

Accordingly, the Administrator’s Claim against Respondent is **DENIED**.

SO ORDERED.

CARRIE BLAND
District Chief Administrative Law Judge

Washington, D.C

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.