Case No.: 2018-DBA-00005

In the Matter of:

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

ALLIANCE EXTerior CONSTRUCTION, INC.,
f/k/a ALLIANCE ROOFING & SHEET METAL, INC., a first tier subcontractor,

with respect to mechanics and laborers employed by a first-tier subcontractor, contracted by prime contractor Manhattan/Hunt, a Joint Venture on Contract No. N40080-13-C-0151 at the Ambulatory Care Center and Dental Clinic, Joint Base Andrews, Camp Springs, Maryland

APPEARANCES:

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Office of the Regional Solicitor
Philadelphia, PA
For the Complainant

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For the Respondent
DECISION AND ORDER


Procedural Background

The U.S. Department of the Navy contracted with Manhattan Hunt a Joint Venture ("Prime Contractor") to perform work on the Ambulatory Care and Dental Clinic at Joint Base Andrews in Camp Springs, Maryland ("Project"). Prime Contractor then subcontracted with Alliance Exterior Construction, Inc. f/k/a Alliance Roofing & Sheet Metal, Inc. to perform work on the Project. The Philadelphia office of the Wage and Hour Division, U.S. Department of Labor, ("Plaintiff") subsequently initiated a labor standards investigation of the Project. After completing the investigation, Plaintiff determined that Respondent violated several provisions of the above-listed statutes. A de novo hearing was held in Washington, D.C. on September 30, 2019, and continued on December 17-18, 2019. Joint Exhibits 1-5 were admitted into evidence. Administrator’s Exhibits 1-15, 18-23, and 25; and Respondent’s Exhibits 1-6 and 7-A were admitted into evidence. Eleven witnesses testified. The parties filed post-hearing briefs ("Resp. Brief" and "Admin. Brief") and reply briefs ("Resp. Reply Brief" and "Admin. Reply Brief") and the record closed on June 5, 2020.

Legal Framework

The Administrative Review Board ("ARB") has summarized the prevailing wage and overtime pay requirements of the DBA and the CWHSSA as follows:

The DBA requires that contractors and subcontractors on certain federal construction projects pay no less than the “prevailing wage” to the “laborers” they employ. 40 U.S.C.A. § 3142(a). The DOL’s Wage and Hour Division determines the prevailing wage rates for various job classifications and publishes these rates in documents known as “wage determinations.” 29 C.F.R. Part 1. The prevailing wage rates contained in the wage determinations derive from rates prevailing in the geographic area where the work is to be performed or from rates applicable under

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1 As a result of its investigation, Plaintiff concluded that Respondent failed to pay prevailing wage rates, fringe benefits, and overtime rates, resulting in back wages totaling $278,380.51. Plaintiff notified Respondent of the alleged violations by letter dated June 19, 2017 and provided an opportunity to request a hearing. Respondent contested Plaintiff’s findings and asserted that the “[s]ummary fails to give adequate notice of the factual or legal basis for the findings, in violation of [its] rights to due process . . . .” On May 22, 2018, the Arlington Office of the Regional Solicitor, U.S. Department of Labor, counsel for Plaintiff, filed an Order of Reference with the Office of Administrative Law Judges (“Office”), initiating the matter before this Office.

2 Plaintiff states in a prehearing filing that the Naval Facilities Engineering Command withheld $278,380.51 in contract funds from the Prime Contractor.

3 The following abbreviations are used in this decision: “Tr.” For the hearing transcript; “AX” for an Administrator’s Exhibit; “RX” for a Respondent’s Exhibit; and “JX” for a Joint Exhibit. The Administrator withdrew AX 16, 17, 24, and 26.
collective bargaining agreements. 40 U.S.C.A. § 3142(b); 29 C.F.R. § 1.3. Those rates are determined based on wages paid to the majority of laborers in corresponding classifications on similar projects in the area. See 29 C.F.R. § 1.2(a)(1). Contracts and subcontracts subject to the DBA must include a whole host of provisions detailing employers’ legal obligations, 40 U.S.C.A. § 3142(c); 29 C.F.R. § 5.5(a), including those related to prevailing wages. 40 U.S.C.A. § 3142(c)(1); 29 C.F.R. § 5.5(a)(1). DOL regulations also require that contracts and subcontracts subject to the DBA include provisions mandating that employers maintain proper payrolls and basic employee records. 29 C.F.R. § 5.5(a)(3).

The CWHSSA requires that contractors and subcontractors on federally assisted or insured construction contracts of at least $100,000 pay “time and a half” to all of their laborers and mechanics who work more than forty hours per week. 40 U.S.C.A. §§ 3702, 3701(b)(1)(B)(iii), 3701(b)(3)(A)(iii); 29 C.F.R. § 5.5(b). The CWHSSA is a DBRA, see 29 C.F.R. § 5.1(a)(3), although in contrast to most other DBRAs, it does not incorporate any of the specific labor standards from the DBA.


**Performance of jobs in more than one classification**

The regulations specify that “[l]aborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked” as long as “the employer’s payroll records accurately set forth the time spent in each classification in which work is performed.”

**Recordkeeping requirements**

Contractors and subcontractors are required to maintain “[p]ayrolls and basic records relating thereto . . . during the course of the work” for three years for all laborers and mechanics working onsite. The records must contain:

- the name, address, and social security number of each worker, his or her correct classification, hourly rates of wages paid (including rates of contribution or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 C.F.R. 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the

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4 “DBRA” refers to a “Davis-Bacon Related Act.”
labourers or mechanics affected, and records which show the anticipated or the actual cost incurred in providing such benefits.

29 C.F.R. § 5.5(a)(3)(i).

Apprentices and trainees

Employers may employ apprentices or trainees only under certain officially-sanctioned programs. Employers seeking to utilize workers developing skills may not unilaterally establish their own classification and wage scale. The regulations provide that:

Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

29 C.F.R. § 5.5(a)(3)(i); see P&N, Inc./Thermodyn Mechanical Contractors, Inc., ARB Case No. 96-116, 1994-DBA-72 (ARB Oct. 25, 1996) (it was improper for the employer to create, unilaterally, its own classification to use semi-skilled laborers to perform sheet metal work at a pay rate less than the sheet metal worker wage determination).

Wage rates and union classifications

Where previous wage rates are based upon a collective bargaining agreement, proper classification of duties under the Wage Determination must be determined by the area of practice of the unions that are parties to the agreement.

Abhe & Svoboda, Inc., ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to -27 (ARB July 30, 2004), recon. denied (ARB Oct. 15, 2004), aff’d Abhe & Svoboda, Inc. v. Chao, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), aff’d, 508 F. 3d 1052 (D.C. Cir. 2007). Additionally, the use or type of tools that a worker uses is not determinative of the classification. Abhe & Svoboda, Inc. (“the rate to be paid for particular tasks is the rate found to be prevailing in the locality for that work, regardless of what tools the workers use.”).

Legal burdens

The Administrator has the initial burden of establishing the prima facie claim that Respondent’s employees worked on the Project and were not properly compensated. See Cody Zeigler, Inc., 1997-DBA-17 (ALJ Apr. 7, 2000), aff’d in relevant part, ARB Case Nos. 01-014 and 01-015 (ARB Dec. 19, 2003). However, if the records of the employer are “inaccurate or inadequate and the Administrator has no adequate substitute, the evidentiary principles enunciated in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) will apply.” Interstate Rock Products, Inc., 2013-DBA-10 at 25 (ALJ Dec. 4, 2014), aff’d, Interstate Rock Products, Inc., ARB No. 15-024 (ARB Sept. 27, 2016). Under the Mt. Clemens Pottery Co. standard, the Administrator meets his burden if he shows that employees performed work that they were improperly
compensated for “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 Pottery Co.*, 328 U.S. at 687.

If the Administrator meets his initial burden, the burden shifts to Respondent, who must establish, by a preponderance of the evidence:

the precise amount of work performed or . . . evidence to negate the reasonableness of the inference to be drawn from the evidence. If the employer fails to produce such evidence, the court may then award damages . . . even though the result be only approximate.

*Id.* at 687-88. *See also Cody Zeigler, Inc.; Pythagoras General Contracting Corp.*, ARB Nos. 08-107, 09-007, ALJ No. 2005-DBA-14 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011) (“The Department of Labor may rely on representative employees’ testimony to establish a prima facie case of a pattern or practice of violations. Once a pattern or practice is established, the burden shifts to the employer to rebut the occurrence of violations or to show that particular employees do not fit within the pattern or practice.”).

The ARB acknowledges the challenges of establishing the amount of back wages owed where records are inaccurate or inadequate. Precise details regarding hours and tasks on specific dates are often lost to workers’ memories in the months and years after the completion of a project, at times well before the matter reaches hearing. A showing of the exact amount of uncompensated work is not required; the initial burden is met by showing improper compensation for work performed plus sufficient evidence to support an inference of the amount and extent of the work. *See Thomas & Sons Building Contractors, Inc.*, 1996-DBA-37 (ALJ Feb. 17, 2000), *aff’d*, ARB Case No. 00-050 (ARB Aug. 27, 2001) (applying *Mt. Clemens Pottery Co.*, 328 U.S. 680, and not requiring “the precise extent of uncompensated work,” but merely “sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference”; *see also Pythagoras General Contracting Corp.*, 2005-DBA-14 (ALJ June 4, 2008), *aff’d*, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011); *Dumarc Corp.*, Case No. 2005-DBA-7 (ALJ Apr. 27, 2006) (holding that because accurate payroll records were not maintained by Respondent, an ALJ may properly “rely on the testimony of witnesses to assess and reconstruct the hours worked”).

The ARB has approved of the award of back pay to employees that have not testified “based upon the representative testimony of a small number of employees.” *Interstate Rock Products, Inc.*, ARB No. 15-024, ALJ No. 2013-DBA-10 at 27 (ARB Sept. 27, 2016).

**Standard of Review**

The ALJ conducts a de novo review of the record. The regulation provides the following:

The decision of the Administrative Law Judge shall include findings of fact and conclusions of law, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record. Such decision shall be in accordance with the regulations and rulings contained in part 5 and other pertinent
parts of this title. The decision of the Administrative Law Judge shall be based upon a consideration of the whole record, including any admissions made in the respondent’s answer (response) and § 6.32 of this title. It shall be supported by reliable and probative evidence.

29 C.F.R. § 6.33(b)(1).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I base my decision on all of the evidence, relevant controlling statutory and regulatory authority, and the arguments of the parties.\(^5\)

**Stipulations**

1. The Office of Administrative Law Judges has jurisdiction over this case, which has been brought pursuant to the provisions of the Davis-Bacon Act (“DBA”), 40 U.S.C. § 3141 et seq., and the Contract Work Hours and Safety Standards Act (“CWHSSA”), 40 U.S.C. § 3701 et seq.


3. Respondent is a commercial contractor specializing in solar, roofing, waterproofing, windows, curtainwall, and exterior metal wall panels.

4. On October 29, 2012, the Department of Navy awarded a contract worth over $224,689,517.00 to Manhattan Hunt a Joint Venture (“Manhattan Hunt”) for construction of an ambulatory care center and dental clinic at Joint Base Andrews in Prince George’s County, Maryland.

5. On July 18, 2013, Manhattan Hunt entered into a subcontract with Respondent for $4,029,000.00 to install a new roof insulation and sheet metal panels at Joint Base Andrews (hereinafter the “Project”).

6. The subcontract between Alliance and Manhattan Hunt included and incorporated General Wage Decision No. MD120082 (September 21, 2012).

7. The subcontract between Alliance and Manhattan Hunt incorporated language required by the DBA, CWHSSA, and the regulations issued thereunder.

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\(^5\) In *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curiam), the Administrative Review Board (“ARB”) noted that an administrative law judge (“ALJ”) need not include a summary of the record in the Decision and Order, as it is assumed that the ALJ reviewed and considered the entire record in making his or her decision. The ARB stated that what is more helpful for its review of whether the ALJ’s findings of fact are supported by substantial evidence of record is a tightly focused set of findings of fact. Accordingly, in this Decision and Order I focus specifically on findings of fact pertinent to the issues in dispute. I have, however, reviewed and considered the *entire* record.
8. During the period of investigation, some of the employees at issue performed Roofing work, including but not limited to laying insulation, laying rolls, torching down materials to waterproof it and installing pavers.

9. During the period of investigation, some of the employees at issue performed Sheet Metal work, including but not limited to installing metal panel roofing systems, metal soffit panels, fascia panels, trim work, angling and smoothing panels, hanging and screwing single handed panels.

10. During the period of investigation, some of the employees at issue moved materials, handled materials, staged materials, and cleaned up materials.

11. Each of the employees for whom the Administrator is seeking back wages was employed by Respondent at some point during the period of investigation.

**Background**

Unless otherwise noted, the following background information is not in dispute and constitutes findings of fact.

The Administrator contends that $282,143.82 in back wages are due to 54 employees for work performed during the period of investigation. (AX-4; Admin. Brief at 1). The bulk of these back wages are a result of the Administrator’s assertion that: (i) Respondent misclassified roofers and sheet metal workers as laborers; (ii) Respondent misclassified sheet metal workers as roofers; and (iii) the associated overtime and fringe benefit pay that would be associated with the amended classifications. See AX-4. Representatives of the Roofers’ and Sheet Metal Workers’ unions testified that their unions claimed authority over cleanup and handling of roofing and sheet metal materials, respectively. (Tr. 94, 104).

**The Wage Decision**

General Wage Decision No. MD120082 (September 21, 2012) (“Wage Decision”) includes the following entry:

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LABO0710-008 04/01/2010
LABORER: Common or General……$ 15.45 5.41
LABORER: Mason Tender –
Cement/Concrete…………………..$ 16.61 5.41
LABORER: Pipelayer……………….$ 16.61 5.41
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JX-4 at K-L. The Wage Decision also states:

6 The Administrator reclassified all laborers as roofers or sheet metal workers.
Union Identifiers

An identifier enclosed in dotted lines beginning with characters other than “SU” denotes that the union classification and rate have found to be prevailing for that classification. Example: PLUM0198-005 07/01/2011. The first four letters, PLUM, indicate the international union and the four-digit number, 0198, that follows indicates the local union number or district council number where applicable, i.e., Plumbers Local 0198. The next number, 005 in the example, is an internal number used in processing the wage determination. The date, 07/01/2011, following these characters is the effective date of the most current negotiated rate/collective bargaining agreement which would be July 1, 2011 in the above example.

JX-4 at N-O.

I find Laborers’ Union 710 to be specified in the Wage Decision and the General Laborers’ prevailing wage rate to be based on that rate. See JX-4 at K-L, N-O.

Initial Burden

As described above, the Administrator has the initial burden of proving that Alliance Exterior employees worked on the Project and were not properly compensated. If the records of Alliance Exterior are inaccurate or inadequate and the Administrator has no adequate substitute, the Administrator meets the burden by showing that employees performed work that they were improperly compensated for “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 Pottery Co., 328 U.S. at 687. The Administrator has satisfied the initial burden to establish a prima facie case.

Some of Respondent’s records are inaccurate and some employees performed work that they were improperly compensated for.

Both parties agree that some of Respondent’s records are inaccurate, although they disagree about whether any employees were underpaid and the extent and nature of the errors. While the Respondent contends that inaccuracies are de minimis, the Administrator posits deeper flaws. (Resp. Brief at 21 n.4, 38; Admin. Brief at 1).

Timesheets

Several witnesses suggested that the timesheets they signed were either blank or incomplete. (Tr. 22-23 (Nicholas Silwonuk); Tr. 65 (Christopher Olson)). Michael Adams, Respondent’s Secretary/Treasurer, testified that Respondent kept track of time on paper timesheets

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7 The parties apparently disagree over whether the Laborers’ Union CBA is specified in the Wage Determination, Respondent asserting that it is, (Resp. Reply Brief at 5), and the Administrator insisting that it is not, (Admin. Reply Brief at 3-4). The Administrator states: “unlike for the skilled trades rates, Wage Decision No. MD120082 did not utilize union rates or practices for its ‘laborer’ categories.”
that the foreman was responsible for recording time on at the end of each day, (Tr. 242), but that the foremen timesheets (AX-11) were “pretty bare bones,” reporting number of hours, name of person, job, and classification. Mr. Adams explained that the foremen each keep a journal with more detail on the day. “[M]ost of the guys generally are going to be recording more information on what they did during the day and who was there with them and how they broke it down.” (Tr. 248). Mr. Adams stated that “company policy is that they’re to get the guys to sign off on the timesheets at the end of the day when they filled in their time so they can check off this is my time; no, I don’t have any accidents; yes, I agree.” Mr. Adams stated that he had not heard of “anybody doing it other than” the company policy except that he “heard of people getting the timesheets done the next day, the next morning, saying, hey, you know, I was dead tired,fell asleep when we got in the truck at the end of the day.” Mr. Adams stated that he had not “ever received a complaint” that workers were asked to sign blank timesheets. (Tr. 253).

I find that, although Respondent’s policy was for employees to sign completed timesheets each day, that often did not happen. As Respondent points out, asking employees to sign blank timesheets does not establish that Respondent was improperly accounting for their time. (Resp. Brief at 31). However, it is an indication that Respondent did not always keep contemporaneous time records.

Employee testimony

Three employees (Nicholas Silwonuk, Ruben Trevizo, and Justin Abrams) credibly testified that they performed work as roofers or sheet metal workers but believed that they were not compensated correctly for it.

Nicholas Silwonuk testified that he was hired as a laborer but that he did sheet metal work and believes that he was paid incorrectly for it. He stated: “we would do installation and then when we would see our timesheets it wouldn’t say that we did like the full amount. It would just be like whatever breadcrumbs they wanted to throw you.” He detailed that “at first it started out I was just getting” the laborer rate “[a]nd then they felt like it was a privilege to get your mechanic pay.” (Tr. 24-25). Mr. Silwonuk stated that he “was trained how to do everything,” including the installation of metal roof panels, and that he worked on sheet metal installation. (Tr. 13-15). Mr. Silwonuk described the installation process. (Tr. 17-21).

On cross-examination, Mr. Silwonuk was presented a statement with his signature stating “I think they pay me as a sheet metal when I am installing sheet metal panels, soffit panels, and gutters.” (Tr. 31). In response, Mr. Silwonuk stated that he did not remember signing a previous statement with the Department of Labor that stated he “was paid, but not to the full extent.” (Tr. 31). Mr. Silwonuk detailed that he spoke to several people in management, Bruce Chapman and Mike Silveski, about what he believed were false paychecks, but “[t]hey would just tell you to go to work.” (Tr. 34). Mr. Silwonuk also clarified that, although he did not have previous sheet metal experience, he was being trained by Respondent. (Tr. 39). I find his description of sheet metal installation detailed and his testimony credible, though vague, in spite
of the previous statement with his signature. Mr. Silwonuk’s testimony is bolstered by the testimony of Bruce Chapman, Respondent’s general superintendent, (Tr. 322), overseeing all field operations. (Tr. 323). Although Mr. Chapman denies that Mr. Silwonuk ever complained to him about working at a higher skill level than what he was being paid for, (Tr. 327), he corroborates Mr. Silwonuk’s assertion that Mr. Silwonuk was being trained as a sheet metal worker.

Q: Mr. Chapman, on this project, could a laborer have done roofing or sheet metal work?

A: They could have. . . . We have to build our personnel because it’s hard to find good help. So we like the guys to learn. And of course, they come and ask if they can get the mechanic’s scale. And I tell them all, come on, guys, learn it, buy your tools, get with the foreman and say you want to get into it. So that’s where the split time comes in, too. We try to teach them so we can build them to be better mechanics, or eventually move into foremen because it’s better for us the more they know. So to answer your question, they should get something when they’re learning. And one of our policies is always give more, never less, just because they’re out there in the climate, the weather, the hot, the cold. And so we do a lot of things to make sure that we cover the men.

...Q: So if I understand your testimony correctly, if someone started as a laborer and did sheet metal or roofing work on the project, they would be paid at the roofer or sheet metal rate for that number of hours?

A: That duration of time, however – we don’t micro – we don’t break it up into small chunks, you know, 15-minute chunks. We try to break it up in an hour or two, something that makes a difference.

...Q: If I understand your testimony, a worker would have to do 1 or 2 or more hours of sheet metal or roofing work even though they were a laborer to get paid at that rate. Did I summarize your testimony correctly?

A: Yeah, typically. In the beginning, they make a lot of mistakes. So, you know, they’re cutting a miter, something that takes – so a lot of times we’ll give them snips and say practice. And they usually mess it up and we end up throwing that 10 foot of metal away and then we ring more out. But we have to get them there somehow.

(Tr. 333-34).

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8 I note the unusual wording of the sentence at issue and also that the statement later states: “I just recently got back from the Ft. Meade job and all I was doing was installing sheet metal panels on the walls which are made of aluminum and I was mostly paid as a laborer on that job. They pay this way on all of their scale jobs.”
Q: If you give an employee some snips and say go practice on some sheet metal, are you – you’re paying them as a laborer for that time?

A: It depends whether they did it or not. If they cut it right, then they’re probably going to get mechanic pay. I leave it up to the foremen in the field, and they have a real good – you know, their crews are built over time, so they have a good relationship with their men.

(Tr. 335).

Ruben Trevizo testified that he was hired as a laborer but that he did roofing work at Joint Base Andrews with a crew of 12 or 15 people. (Tr. 44-45). Mr. Trevizo testified that he did not do any sheet metal work. (Tr. 46). I note that Mr. Trevizo’s Interview Statement dated December 13, 2016 states that, on one occasion, he spent three hours installing sheet metal but was paid as a sheet metal mechanic for only one hour. (AX-25, B-17-B (unredacted)). He testified that his crew spent about two hours a day picking up trash. (Tr. 48). Mr. Trevizo described the work as “straight roofing mechanic work. Because all we did was install and install and install. And it was a new project, so it was a lot more mechanic pay than labor pay.” (Tr. 50). Mr. Trevizo states that “more than half of the time” he was getting paid as a laborer. (Tr. 51). Mr. Trevizo stated that when he’s worked on government scale jobs for other employers, “[y]ou get paid as a laborer when you’re picking up trash and bringing materials” and “you get paid [the] mechanics’ [rate] once we actually install the roof.” (Tr. 51). Mr. Trevizo states that he complained to management about being underpaid, speaking with Mark Tazio and Bruce Chapman, “and they told me whatever the foreman writes for us is the hours we get paid. That was out of his hands, and the foreman was taking care of that.” (Tr. 54). Mr. Trevizo detailed that “on the days it rained, we went and we’d have a couple hours there, just picking up trash and culling material,” which he understood as mechanic work, not laborer work. (Tr. 55).

Christopher Olson testified that he was hired as a roofer and “pretty much did just the sheet metal work.” (Tr. 60, 61). He described working on “the soffit, the fascia, the side of the paneling,” using “metal breaks, snips, rivet guns,” tape measures, and drills; and installing both large panels and gutters and downspouts. (Tr. 61-62). Mr. Olson testified that they would clean up “whatever mess we made” at the end of the day, which took “anywhere from a half an hour to an hour,” and that the cleanup was not limited to their trash, but “was any trash that was on the job site.” (Tr. 63). Mr. Olson ultimately testified that his paystub did not match up with what he worked “all the time” and that he did not think he was getting paid sheet metal scale for all the hours he worked with the sheet metal. However, it took some time to get to this answer:

Q: Do you think you were getting paid sheet metal scale for all the hours you worked with the sheet metal?
A: Oh, yeah. I mean, that’s how it’s supposed to be.
Q: Is that how it was?
A: No, I can’t really tell you that.
Q: Okay.
A: Because I don’t know. I mean, I’d hope so but I don’t think so.
He then explained that “the foreman was shady” and not “an honest guy,” “not allowing us to sign in . . . and sign out on our timesheets” and “he would steal from the employees.” Mr. Olson stated that “he stole a drill from me” and that “he used to steal food out of our lunchboxes.” (Tr. 68).

I find that Mr. Olson’s testimony is not very credible or persuasive. He equivocated on the question of whether he was paid sheet metal scale, first answering “yeah,” followed by “I can’t really tell you,” and “I’d hope so but I don’t think so,” before ultimately concluding that his paystub did not match up with the hours he worked. See Tr. 67.

Justin Abrams testified that he worked on the project putting on sheet metal panels, downspouts, and gutters. (Tr. 75-77). He explained that “every once in a while” his crew “would lend a hand unloading material or we would lend a hand . . . [with] a top gravel system.” Mr. Abrams clarified that “[m]ainly, we were always on the [sheet metal] crew.” (Tr. 77). Mr. Abrams stated that “[w]hen brought to the attention about the scale . . . it was more of we were always told we weren’t allowed to receive the full day of scale wage. Apparently, it had to be divided on how many men were on the job.” (Tr. 81). Mr. Abrams stated that “it was mostly [foreman] Jamie [Evans] told us it had to be divided.” (Tr. 82). Mr. Abrams further stated that he had worked on other government wage contract jobs for Respondent and that “each job that we had been on that there was a scale wage present, that was the answer we would receive. That it always had to be divided by who was there.” (Tr. 82).

Mr. Abrams contended that he was able to recall the amount of time spent on laborer versus sheet metal work because, “[f]or the most part of our day, it was particularly just sheet metal work, between panels, downspouts, gutters, fascia panels, soffit panels. That was our direct job to do there.” (Tr. 84). Mr. Abrams stated that “if it would rain, we would spend [the day] underneath the roof, inside the facility, trying to cut soffit panels or cut angles into anything that we would need.” He also stated that “there were days that it would rain where we would have to move some things. And we would be able to get up on the roofs.” Material loading or cleanup “wasn’t an all-day thing. The material would come, but it wouldn’t take all day to move it. It would be, you know, a few hours here or there. And then we would get back to installing . . . .” (Tr. 85). Mr. Abrams emphasized that he “might not remember [a specific day], but for the majority of the time it was always we were on the roof installing panels or doing some sort of sheet metal. A lot of the other days [the] material wouldn’t come out. We didn’t really have a lot of days that the materials would come. It would be a main part of day – you know, it would be a few hours.” (Tr. 86.) Mr. Abrams clarified that “[w]e would spend our last half hour doing like a housekeeping to make sure all of our materials [were] picked up,” and that “[t]here was never a full day where it was cleaning all day.” (Tr. 86, 87). Mr. Abrams testified that there were days he worked on underlayment, which was installation of an ice and water shield membrane underneath the roof panels. (Tr. 87).

Mr. Abrams explained that he was fired by Respondent after not being able to make it into work following a snowstorm. (Tr. 88).

Investigator Dilshad Yasin testified that there were discrepancies between Respondent’s internal payroll ledger and the certified payrolls and highlighted several examples in AX-5. For the pay period ending August 8, 2015, Justin Abrams was classified as a roofer on Respondent’s certified
payroll, but the payroll ledger shows that he was paid at the laborer rate. (Tr. 175-176.) For the pay period ending November 7, 2015, Sezar Lizama was classified as a roofer on Respondent’s certified payroll with an hourly rate of $35.58, but the payroll ledger reflects that he was paid at the hourly rate of $20.86. (178-179.) AX-5 highlights additional examples of discrepancies between certified payroll and the payroll ledger. There are several more examples in the calculations for Ronnie Raynor, Jr. (AX-5; Tr. 293-294).

Michael Adams, Respondent’s Secretary/Treasurer testified that Nick Silwonuk didn’t have any experience with sheet metal and “the idea that Jamie [the foreman] would have let him get within 10 feet of a piece of metal is ridiculous.” (Tr. 279). Mr. Adams stated:

I think Jamie kind of liked him. During the course of employment, I think he . . . tried to teach him some stuff. But even by the time he left, he was not a sheet metal mechanic and had maybe a couple of tools of his own, maybe.

(Tr. 279-80). In contrast, James (“Jamie”) Evans testified that Mr. Silwonuk did not do any measuring of sheet metal. Mr. Evans stated that he may have “occasionally, on that whole job, maybe” done some installing, “[b]ut to say he’s an installer and it’s a daily thing, absolutely not. He was a laborer.” (Tr. 355).

The Administrator has Presented Sufficient Evidence to Show, in Part, the Amount and Extent of the Work Performed

The parties both agree that Respondent employed each employee for whom the Administrator is seeking back wages. Wage and Hour Investigator Dilshad Yasin explained the entries in AX-4, the Administrator’s Summary of Back Wages, and the spreadsheet of back wage calculations in AX-5 used to produce AX-4. (Tr.157-179.) AX-5 is a 67-page document calculating back wages separately for each employee by listing each day worked; number of hours worked each day; the Administrator’s labor classification; the wages, overtime, and fringe benefits paid by Respondent; the prevailing wages, overtime, and fringe benefits due; and the difference in back wages due.

Reclassification of all laborers

The Administrator reclassified all workers as roofers or sheet metal workers. Although I find that Respondent has established a prima facie case for reclassifying all instances of laborer work, this finding is based on the inaccuracy of Respondent’s records. Furthermore, I find that the Administrator has not established that all work done on the Project by Respondent is properly classified as roofer or sheet metal work in the first instance.

For wage rates based on a collective bargaining agreement, the classification of specific tasks for a Wage Determination are based on the practice of the unions subject to the agreement. See Abhe & Svboda, Inc., ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to -27 (ARB July 30, 2004), recon. denied (ARB Oct. 15, 2004), aff’d Abhe & Svboda, Inc. v. Chao, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), aff’d, 508 F. 3d 1052 (D.C. Cir. 2007).
The Administrator relies on testimony from representatives of the Roofers’ and Sheet Metal Workers’ Unions, (Tr. 94, 104; Admin. Brief at 18-24), and cites Whiting-Turner/Walsh, 2015-DBA-014, slip op. at 52, n.22 (ALJ Oct. 19, 2017), Admin Brief at 23. Respondent avers that cleanup and handling of materials should be classified as laborer work, based upon the General Laborer description in the Laborers’ Local Union 710 CBA scheduled increase for 2012 and testimony of Alliance Secretary/Treasurer Michael Adams and General Superintendent Bruce Chapman regarding their understanding of unionized contractor classification practices in the area.

The Administrator did not submit sufficient evidence to establish the prevailing practice. Although a limited area practice survey may have been sufficient to identify the proper classification, the survey performed in this case was too limited. The Administrator failed to include the union that Respondent contended would take authority for many of the tasks at issue, a union also specified in the Wage Decision, and whose CBA lists material handlers (except tenders) and cleanup as General Laborer duties in the scheduled increase for 2012, (RX-2).9

Michael Adams, Respondent’s Secretary/Treasurer, testified that the investigator told him at the final conference “that he recognized that there was laborer work that took place on that job. He wasn’t able to easily identify it and break it out, and so he just reclassified everybody to skilled labor.” (Tr. 241.) Investigator Yasin testified that he told Mr. Adams that possibly, if Respondent had brought in a separate crew to do cleanup and material handling, they could have been classified as Laborers, but that “in this case . . . these were the same employees that were actually performing the installation work. So they were moving material and then installing the material. So regardless of when they did it, it’s the same workers.” (Tr. 220).

Bruce Chapman, Respondent’s General Superintendent, estimated that the percentage of laborer work on the project was about 60% and the remaining 40% of work hours would have been split between roofing and sheet metal work. (Tr. 333).

Mr. Yasin testified that he spoke to 15 or 20 out of the 54 workers that were determined to be owed back wages, and based upon employee interviews, timesheets, certified payrolls, and other documents, extrapolated to the other workers. (Tr. 226-228).

* * *

Based on the above, there may be a dispute between the Laborers’, Sheet Metal Workers’, and Roofers’ Unions about the proper classification over the tasks of cleanup and material handling. However, based on the inaccuracy of Respondent’s records, the reclassification of all laborer work was a reasonable approximation at this initial stage.

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9 Given this finding, that the Administrator did not submit sufficient evidence to establish the prevailing practice, it is unnecessary for me to address Respondent’s argument that “[t]he Administrator failed to provide adequate notice of the standard of conduct applicable to Alliance, causing ‘unfair surprise’ in violation of Executive Order 139892, and violating Alliance’s right to due process of law.” See Resp. Brief at 38-40.
Respondent’s Rebuttal Arguments

As explained above, if the Administrator meets the initial burden, the burden shifts to Alliance Exterior to provide evidence of “the precise amount of work performed” or “to negate the reasonableness of the inference to be drawn from the evidence.” If Alliance fails to meet this burden, it is appropriate to award damages, “even though the result be only approximate.” Mt. Clemens Pottery Co., 328 U.S. at 687-88.

As discussed above, Respondent’s records contain inaccuracies and misclassifications. Those inaccuracies are serious enough to render Respondent’s records insufficient to establish the precise amount of work performed. Although the inaccuracy of Respondent’s records make it difficult to use those records to establish the precise amount of work performed, in weighing Respondent’s records, along with the other exhibits and testimony, I find that Respondent has produced enough evidence to negate the reasonableness of several of the Administrator’s inferences.

Underlayment work

James Brown, representative of the Local 30 Roofers’ and Waterproofers’ Union, testified that underlayment falls under the roofers’ jurisdiction. (Tr. 96). Thomas Killeen, representative of the Sheet Metal Workers’ Local Union 100, testified that roofers or sheet metal workers “can do” the underlayment, depending on “what the specs call for and [what] the contract calls for.” (Tr. 102, 103, 112). Mr. Killeen was not familiar with the specs in Respondent’s project. (Tr. 112). Michael Adams, Respondent’s Secretary/Treasurer contends that jurisdiction over underlayment is “a black and white issue” because the Roofers’ union claims it and the Sheet Metal Union “doesn’t even make any reference to it whatsoever.” (Tr. 261). Mr. Adams described underlayment as:

a system, it’s either thermal and/or water barrier, that is underneath another system . . . . [There is] rigid insulation. And . . . at Joint Base Andrews, there was a waterproofing membrane, it’s actually a self-adhered membrane, peel-and-stick, that provides the primary waterproofing for that roof system.

(Tr. 262). Mr. Adams contends that handling and moving of rigid board insulation that took place as part of the underlayment is material handling and is properly classified as laborer work, and that if it is not laborer work, it is roofing work because “there’s no sheet metal involved.” (Tr. 263-64).

Respondent has rebutted the Administrator’s classification of underlayment work as falling under the sheet metal classification.

Metal flashing, gutters, and downspouts

I find that the installation of metal flashing, gutters, and downspouts is sheet metal work. See Tr. 102 (testimony of Thomas Killeen, representative of the Sheet Metal Workers’ Local Union 100).
Work on rainy days

The calculation of back wages is necessarily approximate in situations where records have not been accurately kept. See Pythagoras General Contracting Corp., 2005-DBA-14 (ALJ June 4, 2008), aff’d, ARB Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (errata issued Mar. 3, 2011). I find that Respondent has not presented enough evidence to demonstrate that its employees did not perform roofing and sheet metal activities on rainy days.

Respondent contends that no roofing work occurred on rainy days. However, I find that assertion to be contradicted by Mr. Adams, Respondent’s Secretary/Treasurer as well as employee testimony indicating that skilled work sometimes occurred in rain and snow, such as the cutting of sheet metal, Tr. 85. Mr. Adams testified that the industry standard is that no roofing can occur in the rain. (Tr. 257). He discussed an exception in his exception log (RX-6) – Justin Abrams for the week of December 6, a day where four hours were reclassified from laborer to roofer. Mr. Adams refers to the timesheet from that day, which states “rain,” and Mr. Adams points out that, “other than the foreman, who’s allowed to classify himself differently, every single person on the timesheet is laborer because it was raining. All they did was stuff other than skilled work that day.” (Tr. 258). Mr. Adams further states that the foreman classified himself as a roofer for four hours, reflecting roofing onsite, and another four hours in the shop by himself under the laborer rate after sending the other workers home. (Tr. 258-59). The foreman’s four hours of roofing contradicts Respondent’s contention that no roofing work occurred on rainy days.10

Self-reported laborers

Respondent objects to any reclassification of self-reported laborers. (Tr. 264-266). However, self-reporting a labor classification does not guarantee its accuracy. Rather, it reflects the workers’ understanding of how a type of work should be reported.

Laborers being trained in skilled work

Plaintiff has established that workers hired as laborers were sometimes trained in skilled work – and that it was Respondent’s general policy not to pay these trainees at the skilled rate until they had reached a certain level of proficiency. See Tr. 333-35 (testimony of Bruce Chapman). I find that Respondent’s practice was in violation of the regulations. See 29 C.F.R. § 5.5(a)(3)(i); P&N, Inc./Thermodyn Mechanical Contractors, Inc., ARB Case No. 96-116, 1994-DBA-72 (ARB Oct. 25, 1996) (finding it was improper for the employer to create, unilaterally, its own classification to use semi-skilled laborers to perform sheet metal work at a pay rate less than the sheet metal worker wage determination).

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10 Mr. Adams discussed his creation of RX-6, a log with an example of exceptions to the investigator’s reclassifications. (Tr. 255-256). However, his log assumes that roofing and sheet metal work could not happen on rainy days, rather than establishing that it did not.
I further find that it is impossible to identify with specificity the affected employees and the hours worked from the record before me.\textsuperscript{11}

**Back Wage Calculations**

Although Plaintiff has established that Respondent misclassified some workers, exactly how the investigator applied the information from the employee interviews to their working hours and classifications is unclear. Even less clear is how the information was extrapolated to the remaining workers. Given the combination of the inaccuracies in Respondent’s records and classifications and Plaintiff’s failure to meet its burden, and based on all the evidence, I find it appropriate, in general, to credit 60\% of the employees’ time to laborer work; 20\% to roofing work; and 20\% to sheet metal work.\textsuperscript{12,13} However, as discussed below, I find that the testimony of Ruben Trevizo; Nicholas Silwonuk; and Justin Abrams warrant different estimates of back wages\textsuperscript{14}; and I find that David Austin should not have been reclassified.

**Ruben Trevizo, Nicholas Silwonuk, Justin Abrams, and David Austin**

I find Mr. Trevizo’s testimony credible and find that his proper classification is as a roofer during installation periods and as a laborer during periods of material handling and picking up trash. I credit Mr. Trevizo’s estimate of two hours a day of trash pickup. I find that Mr. Trevizo did not spend time doing sheet metal work.\textsuperscript{15}

I find Mr. Silwonuk’s testimony credible. He describes a period of time as a laborer and a transition to increasing hours as a sheet metal worker. Accordingly, I find it appropriate to credit 40\% of his time as a laborer and 60\% of his time as a sheet metal worker.\textsuperscript{16}

\textsuperscript{11}Although AX-25 contains employee interviews, those interviews are extremely redacted. Respondent also has not provided accurate, detailed records capable of establishing the hours spent training employees in skilled work.

\textsuperscript{12}I allocated 60\% of both the overtime and regular hours at the laborer rate; 20\% at the roofer rate; and 20\% at the sheet metal rate.

\textsuperscript{13}In six out of the 54 employees for whom Plaintiff seeks back wages, this estimate does not result in back wages owed. Those employees, Gustavo Chavira-Diaz; James Evans; Jose Gonzalez; Scipio Jones; Bruce O’Keefe; and Francisco Utrera-Carmona, are not listed on the chart below because they are not owed back wages. David Austin, whose hours were calculated as a Laborer, is also removed from the chart because calculating his wages under the Laborer rate does not result in back wages owed.

\textsuperscript{14}Although Christopher Olson provided testimony that indicated a different breakdown of classifications in reference to his hours, as discussed above, I do not find him to be a credible witness. Accordingly, I find it appropriate to apply the 60%/20%/20\% breakdown to calculate his back wages.

\textsuperscript{15}In order to calculate Mr. Trevizo’s back pay, based on his testimony, I allocated two hours per day (44 days) to trash cleanup at the laborer rate and credited the rest at the roofer rate. I then calculated the percentage of the total hours that were at the laborer rate, 11.5\%, ((88/764) x 100), in order to credit 11.5\% of the overtime hours at the laborer overtime rate and the rest at the roofer overtime rate.

\textsuperscript{16}In calculating Mr. Silwonuk’s overtime pay, I used the same 40%/60\% breakdown.
Justin Abrams also offered credible testimony. He worked mainly on sheet metal. Based on his testimony, I credit 30% of his time as a laborer and 70% of his time as a sheet metal worker.

Mr. Adams credibly testified that David Austin is a truck driver who worked as a full-time driver and may have done some “incidental unloading of the truck.” (Tr. 266.) I find that all of David Austin’s hours were properly classified by Respondent as Laborer rather than as Sheet Metal worker.

**Wage Chart**

<table>
<thead>
<tr>
<th>Employee</th>
<th>Total Wages Earned</th>
<th>Wages Paid</th>
<th>Total Wages Due</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michael Barnette</td>
<td>105.76</td>
<td>86.56</td>
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<tr>
<td>Manuel Barrientos Perez</td>
<td>18,575.31</td>
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<tr>
<td>Jack Bauer</td>
<td>5,117.19</td>
<td>3,633.77</td>
<td>1,483.42</td>
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<tr>
<td>Jonathan Bradley</td>
<td>1,708.12</td>
<td>1,162.04</td>
<td>546.08</td>
</tr>
<tr>
<td>Paul Burnham</td>
<td>90.65</td>
<td>75.00</td>
<td>15.65</td>
</tr>
<tr>
<td>Ralph Burnham</td>
<td>337.17</td>
<td>325.93</td>
<td>11.24</td>
</tr>
<tr>
<td>Sergio Chavira-Diaz</td>
<td>15,182.23</td>
<td>10,502.71</td>
<td>4,679.52</td>
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<tr>
<td>Roberto Diaz</td>
<td>105.76</td>
<td>73.01</td>
<td>32.75</td>
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<td>Robert Dudley</td>
<td>2,311.68</td>
<td>2,187.46</td>
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<td>Robert Funk III</td>
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<td>15,758.32</td>
<td>2,184.84</td>
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<tr>
<td>Sadith Garcia</td>
<td>1,207.93</td>
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<td>110.68</td>
</tr>
<tr>
<td>Rafael Garcia-Rodriguez</td>
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<td>Lawrence Garrison, Jr.</td>
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<td>Tony Harrison, Sr.</td>
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<td>1,283.92</td>
<td>334.18</td>
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<tr>
<td>Santiago Hernandez</td>
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<td>73.01</td>
<td>32.75</td>
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<tr>
<td>Norman Hicks</td>
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<td>266.70</td>
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<tr>
<td>Ignacio Jaimes-Ruiz</td>
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<td>Jason Kleppin</td>
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<td>26,282.39</td>
<td>2,771.54</td>
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<tr>
<td>Danie Laughlin</td>
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<td>Kevin Lester</td>
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<tr>
<td>Sezar Lizama</td>
<td>241.74</td>
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<tr>
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<td>5,473.11</td>
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<tr>
<td>Michael Mullins, Jr.</td>
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<tr>
<td>Edgar Ojeda</td>
<td>241.74</td>
<td>166.88</td>
<td>74.86</td>
</tr>
</tbody>
</table>

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17 A table with the prevailing rates and the employee regular and overtime hours is appended.

18 Total wages earned includes the prevailing wage, health and welfare benefits, and overtime pay.

19 The total hours worked, including overtime hours, as well as the wages already paid, were taken from AX-5.

20 Total wages due are calculated by subtracting the wages already paid by Respondent from the wages due.
<table>
<thead>
<tr>
<th>Employee Name</th>
<th>Hours Worked</th>
<th>Overtime Hours</th>
<th>Total Due</th>
</tr>
</thead>
<tbody>
<tr>
<td>Christopher Olson</td>
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<tr>
<td>Joshua Pena</td>
<td>16,589.69</td>
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<td>5,111.47</td>
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<td>Jonathan Place</td>
<td>10,304.348</td>
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<td>Michael Quiles-Torres</td>
<td>2,566.948</td>
<td>1,785.56</td>
<td>781.388</td>
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<tr>
<td>Miguel Ramos</td>
<td>27,096.865</td>
<td>18,801.42</td>
<td>8,295.445</td>
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<tr>
<td>Ronnie Raynor, Jr.</td>
<td>32,397.711</td>
<td>22,164.62</td>
<td>10,233.091</td>
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<tr>
<td>Bradley Richardson</td>
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<td>4,537.06</td>
<td>1,991.63</td>
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<tr>
<td>Scott Richardson</td>
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<td>18.72</td>
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<tr>
<td>Ivan Rodriguez</td>
<td>5,999.89</td>
<td>3,367.07</td>
<td>2,632.82</td>
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<tr>
<td>Orlando Romero</td>
<td>330.82</td>
<td>317.61</td>
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<td>Otoniel Sanchez</td>
<td>18,020.32</td>
<td>12,500.14</td>
<td>5,520.18</td>
</tr>
<tr>
<td>Joaquin Teran Jaimes</td>
<td>17,688.76</td>
<td>15,572.05</td>
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<tr>
<td>Ruben Trevizo-Teran</td>
<td>22,763.72</td>
<td>9,108.52</td>
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<td>Isaac Tsakalos</td>
<td>3,626.16</td>
<td>2,503.20</td>
<td>1,122.96</td>
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<td>Michael Westray</td>
<td>749.09</td>
<td>566.67</td>
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<td>Edward Wetzel</td>
<td>6,199.47</td>
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<td>1,859.44</td>
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<td>Glenard Wetzel</td>
<td>1,964.17</td>
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<td>Brock Wilbur</td>
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<td>John Yard</td>
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<td>Aaron Zareski</td>
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<td>Justin Abrams*</td>
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<tr>
<td>Nicholas Silwonuk III*</td>
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<td>Ruben Trevizo Jr.*</td>
<td>26,529.09</td>
<td>16,466.55</td>
<td>10,062.54</td>
</tr>
</tbody>
</table>

* The wages of Justin Abrams, Nicholas Silwonuk III, and Ruben Trevizo, Jr. were calculated based on their specific testimony, as described above.

**ORDER**

Based on the above, Respondent owes $132,644.80 in back wages for violations of the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act owed to the individuals and in the amounts set forth in the chart above. Upon this Decision and Order becoming final, funds withheld from the prime contract by the Naval Facilities Engineering Command on behalf of the Wage and Hour Division are authorized for release and distribution to the affected employees and funds in excess of the back wages due shall be disbursed in accordance with the prime contract.

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21 Complainant has not requested interest on the back wages.
SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

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

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. See 29 C.F.R. § 6.34.

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/EFILE.DOL.GOV.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.
If you file your appeal online, no paper copies need be filed with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

Filing Your Appeal by Mail

Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.