



In the Matter of:

**Disputes concerning the payment of prevailing wage rates and overtime pay:**

**ARB CASE NO. 00-050**

**ALJ CASE NO. 96-DBA-37**

**THOMAS & SONS BUILDING CONTRACTORS, INC., Contractor,**

**DATE: August 27, 2001**

**Petitioner,**

**and**

**ZAGARI & SONS CONSTRUCTION CORP., Subcontractor, JOSEPH ZAGARI, President**

**Proposed debarment for labor standards violations by:**

**ZAGARI & SONS CONSTRUCTION CORP. and JOSEPH ZAGARI, President**

**With respect to laborers and mechanics employed by the subcontractor on Contract No. F28609-90-D-0010 and Contract No. F28609-93-D-0009 at McGuire Air Force Base, Wrightstown, New Jersey.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For Petitioner Thomas & Sons Building Contractors:*

*James H. Thomas, President, Thomas & Sons Building Contractors, Lakehurst, New Jersey*

*For Respondent Wage and Hour Administrator:*

*Mary J. Rieser, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., U.S. Department of Labor, Washington, D.C.*

## FINAL DECISION AND ORDER

This proceeding commenced with the issuance of charging letters signed in May and June, 1996, by the Wage and Hour Administrator, U.S. Department of Labor (“Administrator”) to Joseph Zagari and Zagari & Sons Construction Corporation (collectively, “Zagari”) and Thomas & Sons Building Contractors, Inc. (“Thomas & Sons”). The charging letters resulted from a Wage and Hour Division investigation into Zagari’s wage payment practices on a federal construction project at McGuire Air Force Base (“AFB”), Wrightstown, New Jersey. The investigation found that Zagari had failed to pay its employees the prevailing wage and fringe benefits required under the Davis-Bacon Act, as amended, 40 U.S.C. §276a *et seq.* (1994) (“DBA”), and overtime required under the Contract Work Hours and Safety Standards Act, 40 U.S.C. §327 *et seq.* (1994) (“CWHSSA”).<sup>1/</sup> In addition, the investigation found that Zagari had falsified payroll records in violation of 29 C.F.R. §5.5(a)(3) (2000). Accordingly, the Administrator requested the Air Force, as the contracting agency, to withhold payment of funds due and owing to the prime contractor, Thomas & Sons, in order to secure the payment of the back wages owed on the project.

Zagari and Thomas & Sons denied the charges, and the matter was referred to an Administrative Law Judge (“ALJ”) for hearing pursuant to 29 C.F.R. §§5.11(b), 5.12 and 6.30 (2000). Following the hearing, the ALJ issued a Decision and Order on February 17, 2000, (“D&O”) in which the ALJ concluded that Zagari failed to pay the prevailing wage and required overtime on the McGuire AFB contracts and falsified certified payroll records, and that these actions constituted a disregard of Zagari’s obligation under the DBA. D&O at 9-11. The ALJ ordered that the contracting agency turn over to the Administrator the withheld funds for distribution to Zagari’s former underpaid employees. In addition, the ALJ ordered debarment of Zagari for a three-year period in accordance with 40 U.S.C. §276a *et seq.*

Thomas & Sons timely petitioned the Administrative Review Board for review of the ALJ’s D&O, challenging the ALJ’s determination of the back wages found due and owing. We have jurisdiction of Thomas & Sons’ petition under 29 C.F.R. §6.34 and 29 C.F.R. Part 7. Because Zagari has not appealed the ALJ’s order of debarment nor otherwise appeared before the ARB in this matter, the only issues before the Board on appeal are those raised by Thomas & Sons, including whether the evidence of record supports the ALJ’s determination that Zagari failed to pay the applicable prevailing wage and overtime on the McGuire AFB contracts to its employees, and that Thomas & Sons was responsible for the payment of those wages as the prime contractor.

## BACKGROUND

Thomas & Sons entered into two federally-funded contracts with the U. S. Air Force for the construction and repair of concrete sidewalks, pads, and curbs at McGuire AFB in New

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<sup>1/</sup> The CWHSSA is one of the Davis-Bacon *Related Acts*. See 29 C.F.R. §5.1 (2000).

Jersey. Both contracts incorporated by reference the labor standard provisions of the Davis Bacon Act, the U.S. Department of Labor Regulations at 29 C.F.R. Part 5, and the Contract Work Hours and Safety Standards Act. The first contract, in the approximate amount of \$341,865, was awarded to Thomas & Sons in July of 1990. Attached to the contract was Wage Determination NJ 89-2 (Aug. 31, 1989), which specified a prevailing hourly rate of \$21.01 for heavy and highway laborers (including a basic hourly wage of \$16.15 and fringe benefits of \$4.86). The second contract, in the approximate amount of \$452,456, was awarded in September of 1993. It was subject to Wage Determination NJ 93-2 (Sept. 29, 1993), which specified a prevailing \$26.70 hourly rate for heavy and highway laborers (basic hourly wage of \$19.65 plus fringe benefits of \$7.05). Thomas & Sons subcontracted most of the work performed under the two contracts to Zagari. D&O at 2-3.

Pursuant to the Wage and Hour investigation initiated in the Fall of 1994, the investigator<sup>2/</sup> obtained copies of Zagari's certified payroll records for the time period in question from McGuire AFB. Administrator's Exhibit ("CX")-6. The certified records showed that Zagari's employees were paid \$19.00 an hour throughout the project. CX-6. See D&O at 5. In comparing the certified records with Zagari's "home payroll records," which had been maintained by Joseph Zagari and his wife, the investigator found that many of the entries for gross and net pay on the certified records did not correlate to the corresponding gross and net pay in the home records. D&O at 5. Because Zagari's home payroll records did not indicate the hourly rate paid to its employees or the number of hours worked each day and/or week, D&O at 8, and because the records upon which the home payroll were based had been lost and/or destroyed, D&O at 9, the investigator had to reconstruct both the actual rate of pay and the number of hours worked by Zagari's employees on the McGuire AFB job. In doing so, the investigator relied upon both the certified and home payroll records to determine the names of all of Zagari's employees, and the certified payrolls to determine the employees who worked on the McGuire jobsite and the weeks that those employees worked on the project. From Zagari's certified and home payroll records, and interviews of Zagari employees, the investigator determined the total number of hours worked on the jobsite, including overtime, and the gross wages that the employees were actually paid. Finally, the investigator calculated the amount of back wages owed each employee by subtracting the gross wages determined to have been actually paid from the gross amount that should have been paid based upon the applicable Wage Determination.<sup>3/</sup> The investigator concluded that a total of \$143,192.96 was due and owing Zagari's former employees. CX-14.<sup>4/</sup>

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<sup>2/</sup> The investigation was conducted by a compliance officer for the Southern New Jersey District Office, Wage and Hour Division, Department of Labor.

<sup>3/</sup> See D&O at 5-8 for a detailed discussion of the investigator's methodology in reconstructing Zagari's payroll records and for computing the amount of back wages owed Zagari's employees.

<sup>4/</sup> The ALJ stated the underpayment amount as \$143,362.96. See D&O at 3. This appears to be a clerical error, as we can find no support in the evidentiary record for the slightly variant figure used by the ALJ.

## THE ALJ's DECISION

The ALJ concluded that Zagari had disregarded its obligations to its employees under the McGuire AFB contracts by failing to pay prevailing wages, fringe benefits and required overtime over a three-year period. D&O at 12. He also concluded that Zagari had knowingly falsified the certified payroll records submitted to the Air Force. *Id.* The ALJ reached these conclusions based upon the results of the investigation described above, the credible and corroborating testimony of former Zagari employees, and the failure of Zagari to offer any verifiable explanation of the discrepancies between the certified and home payroll records.

In reaching his conclusions, the ALJ found that the evidence upon which the investigator relied in reconstructing the hours worked and computing the back wages and fringe benefits owed under the DBA and CWHSSA had “an *indicia* of reliability and accuracy,” D&O at 9, and that Zagari’s employees’ testimony at hearing that they were not paid the prevailing wage “was fully consistent” with the investigator’s findings and reconstructed payroll. *Id.* Accordingly, the ALJ held that the employees met their burden under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), “by producing sufficient evidence to show they performed work for which they were improperly compensated.” D&O at 9. By contrast, the ALJ found that Zagari had failed to meet its burden of proof under *Mt. Clemens Pottery Co.* “of demonstrating the precise number of hours worked or of presenting evidence to negate the reasonableness of the inference to be drawn from the employee’s evidence.” *Id.*

## DISCUSSION

In reviewing the ALJ’s decision, the Board (as the designee of the Secretary) acts, pursuant to the Administrative Procedure Act, with “all the powers [the Secretary] would have in making the initial decision . . .” 5 U.S.C. §557(b) (1994). *See also* 29 C.F.R. §7.1(d). Thus, the Board reviews the ALJ’s findings of fact and conclusions of law *de novo*. *Star Brite Construction Co.*, ARB No. 98-113, ALJ No. 97-DBA-12, slip op. at 4-5 (ARB June 30, 2000); *Sundex, Ltd.*, ARB No. 98-130, ALJ No. 94-DBA-58, slip op. at 4 (ARB Dec. 30, 1999).

### I. Zagari’s Debarment

The Davis-Bacon Act, which applies specifically to construction contracts entered into directly by the United States or the District of Columbia, mandates a three-year debarment for “persons or firms . . . found to have *disregarded their obligations* to employees and subcontractors.” 40 U.S.C. §276-2(a) (emphasis added). The debarment procedures for violations of the DBA are found at 29 C.F.R. §5.12(a)(2). “Disregard for obligations” under the Act has been interpreted to mean a level of culpability beyond mere negligence, involving some element of intent. *Structural Concepts, Inc.*, WAB No. 95-02 (Nov. 30, 1995). However, once a violation is established, the standard for debarment is a “bright line” test, *i.e.*, a three-year debarment period is mandatory, without consideration of mitigating factors or extraordinary circumstances. *G & O General Contractors, Inc.*, WAB No. 90-35 (Feb. 19, 1991).

In addition to the *statutory* debarment requirement of the Davis-Bacon Act, the Labor Department's regulations include a separate *regulatory* debarment provision for violations of the Davis-Bacon *Related Acts* (listed at 29 C.F.R. §5.1) including CWHSSA. The regulatory debarment mechanism for violations of the Related Acts provides that:

Whenever any contractor or subcontractor is found . . . to be in *aggravated or willful violation* of the labor standards provisions of any of the applicable statutes listed in section 5.1 other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years . . . to receive any contracts or subcontracts subject to the Davis-Bacon or Related Acts.

29 C.F.R. §12(a)(1)(emphasis added).<sup>5/</sup>

The ALJ held that Zagari should be debarred for failing to pay prevailing wages and overtime, and for submitting falsified certified payrolls, concluding that the violations constituted a “disregard of obligations” – the debarment standard under the DBA. D&O at 12. Since Zagari did not petition for review of the ALJ’s decision, the ALJ’s debarment order has not been challenged, and we treat the ALJ’s order debaring Zagari & Sons and Joseph Zagari pursuant to the Davis-Bacon regulations (29 C.F.R. §6.35) as final.<sup>6/</sup>

## **II. Thomas & Sons’ challenge to the ALJ’s decision on the merits and the Administrator’s calculation of back wages owed**

As the ALJ recognized, the principles enunciated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), governing resolution of claims for unpaid wages under the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* (1994), apply to the instant case, including the parties’ respective burdens of proof. *See, e.g., Trataros Construction Corp.*, WAB No. 92-03 (Apr. 28, 1993). Under these principles, the Administrator has the burden of establishing that the

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<sup>5/</sup> The Secretary of Labor’s authority to institute debarment by regulation has been upheld based on the CWHSSA’s structure and legislative history. *See Sharipoff dba BSR Co.*, 88-SCA-32, slip op. at 2 n.3 (Sec’y Sept. 20, 1991) *citing Janik Paving & Constr., Inc.*, 828 F.2d 84, 91 (2d Cir. 1987).

<sup>6/</sup> The ALJ did not distinguish between the “disregard of obligations” standard for debarment under the Davis-Bacon Act (governing prevailing wage and record-keeping violations) and the “aggravated or willful” standard under the CWHSSA (for overtime violations). This omission is not consequential in this case, however, because the penalty for the DBA violations (wage underpayments, record-keeping violations) brings us to the maximum debarment penalty of three years that could possibly result under CWHSSA.

employees performed work for which they were improperly compensated. The Administrator has carried 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. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

328 U.S. at 687-688. *Accord Joseph Morton Co.*, WAB No. 80-15 (July 23, 1984). As the Third Circuit (in which the instant case arises) has explained:

In the absence of adequate employer records of employees' wages and hours . . . the solution is not to penalize the employees by denying recovery based on an inability to prove the extent of undercompensated work, but rather to allow the employee or the Secretary to submit sufficient evidence from which violations of the Act and the amount of an award may be reasonably inferred.

*Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1297 (3d Cir. 1991).

Although the Administrator thus has the burden of establishing that the employees performed work for which they were improperly compensated, where the employer has not maintained adequate records as required by law or is otherwise unable to establish the precise amount of work performed, the Administrator must only "show the amount and extent of that work as a matter of just and reasonable inference." *Mt. Clemens Pottery*, 328 U.S. at 687.

The evidence introduced by the Administrator establishes that Zagari's employees performed work on the McGuire AFB project for which they were not paid the prevailing wage rate, fringe benefits or overtime compensation to which they were entitled. The Administrator provided this evidence through the detailed testimony of the investigator about the methodology used in reconstructing the number of hours worked and the actual rate of pay received by the employees, which was corroborated by the testimony and written statements of several of Zagari's former employees. The ALJ found the testimony of the investigator and the employees to be credible. This evidence clearly establishes that Zagari, in the performance of the McGuire AFB contracts, failed to pay its employees the prevailing wage, fringe benefits and overtime pay required under the Davis-Bacon Act and the CWHSSA. Thus, we conclude that the Administrator satisfied his initial burden of establishing, by just and reasonable inference per *Mt. Clemens Pottery*, that Zagari's employees had performed work for which they were not properly compensated.

On the other hand, Zagari and Thomas & Sons failed to carry their burden of negating the inferences properly drawn from the Administrator's evidence. Despite Thomas & Sons' arguments on appeal, before the ALJ neither Zagari nor Thomas & Sons produced any records or other evidence as to the actual number of hours Zagari's employees worked on the McGuire AFB project. Thomas & Sons argues that the two sets of payroll records – the certified payrolls and the “home” payroll – reflect the fact that Zagari performed work for various contractors during the time period in question with the certified payrolls maintained for the McGuire AFB contracts, and the home payroll maintained for non-Davis-Bacon work. The argument fails because Zagari did not introduce any documentary evidence of specific non-Davis-Bacon contracts or of specific workweeks and hours worked on the other contracts. Notwithstanding the fact that Joseph Zagari personally recorded the number of hours worked by the employees at the McGuire AFB projects, Zagari failed to produce any records of the hours worked on the projects other than the certified payroll records. *See* D&O at 9. Joseph Zagari admitted at the hearing that he had no records for the non-Davis-Bacon work, and asserted that the records of hours worked by his employees on the alleged non-Davis-Bacon work got mixed up with the McGuire AFB records, T. 3/3/99 at 305, 307, 318, 326 and 350, while the underlying records of the hours his employees worked on the various contracts (namely Joseph Zagari's daily notes) were either destroyed or discarded. *Id.* at 271; 317-319. *See* D&O at 9. Joseph Zagari's credibility, the ALJ found, was undermined with regard to the foregoing by his assertion that the instant case was the first time he had ever had a problem with a government contract. That statement was contradicted by the testimony of another Wage and Hour investigator that Zagari had falsified payrolls and failed to pay the prevailing wage on another federally-assisted contract. D&O at 8, 11; T. at 248-50. At the same time, evidence Zagari did produce – namely the certified payroll records showing that Zagari paid their employees \$19.00 per hour throughout the project – merely lends further support to the Administrator's case, because the prevailing rates on the two contracts required minimum hourly payments of \$21.01 and \$26.70, respectively.

Thomas & Sons' additional evidentiary arguments are equally unpersuasive. Thomas & Sons argues that the ALJ ignored the testimony of an Air Force contract inspector who visited the project each day and testified that he saw Zagari employees working for other contractors or on projects other than the McGuire AFB project during the 1991 to 1994 time period. However, a careful examination of the inspector's testimony reveals that he could not specify the workweeks in which this took place, which employees were involved, or how many hours they worked on these other projects. *See, e.g.*, T. 5/19/99 at 412-413. Thomas & Sons also complains that the ALJ ignored the testimony of an accountant who, Thomas & Sons asserts, testified that she could find no basis for the Wage and Hour investigator's reconstruction of hours worked and his calculation of back pay. However, contrary to Thomas & Sons' argument, our review of the record does not show that the accountant testified as to the hours worked on the McGuire AFB contracts.<sup>7/</sup>

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<sup>7/</sup> Indeed, the accountant testified that it was impossible to tell from the home payroll records which men worked on which jobs, but only that the employees were paid. T. 5/19/99 at 549. In any event, while the ALJ may not have commented directly on the accountant's testimony in his decision, (continued...)

Thus, we agree with the ALJ that Zagari, and Thomas & Sons, failed to meet their burden under *Mt. Clemens Pottery* of demonstrating the “precise amount of work performed or [of providing] evidence to negative the reasonableness of the inference to be drawn” from the Administrator’s evidence. 328 U.S. at 688. In the absence of such evidence, the ALJ was correct in concluding, as does this Board, that Zagari failed to pay its employees the proper prevailing wage rates, fringe benefits and overtime pay under the McGuire AFB contracts in the amount as determined by the Administrator to be due and owing.

### ADDITIONAL ISSUES

On appeal Thomas & Sons raises several additional arguments that, it is claimed, warrant reversal of the ALJ’s decision. Thomas & Sons argues that the ALJ failed to give any weight to allegations of bribery of the investigator, and alleges that an *ex parte* contact between the ALJ and one of the witnesses occurred after the hearing. We find Thomas & Sons’ charge that the Wage and Hour investigator solicited a bribe to be wholly unsubstantiated by the record, and thus dismiss the assertion out of hand.<sup>8/</sup>

Similarly, we reject Thomas & Sons’ assertion of an improper *ex parte* contact by the ALJ with a witness. We find no evidence of such conduct in the record before us, and Thomas & Sons has provided no specifics, by way of affidavit or otherwise, that would indicate what witness was involved in this alleged contact, when it occurred, or what was discussed, let alone how such a contact, assuming it had occurred, may have affected the ALJ’s decision.

Finally, Thomas & Sons complains that the prevailing wages applicable to the two McGuire AFB contracts were improperly derived because they were based entirely on the union wages in the area rather than on a wage survey. This amounts to a request for review of the wage determinations, which is not properly before us absent a timely request for review and reconsideration by the Wage and Hour Administrator under the 29 C.F.R. Part 1 regulations and a timely appeal to this Board. *See* 29 C.F.R. §§1.8, 1.9 (2000). It is well established that the appropriate time to raise objections to a wage determination is prior to contract award. *See, e.g., Dick Enterprises, Inc.*, ARB No. 95-046A (Dec. 4, 1996); *Warren Oliver Co.*, WAB No. 84-08, slip op. at 6 (Nov. 20, 1984) and cases cited therein.

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<sup>7/</sup>(...continued)

the ALJ did indicate during the hearing that the weight to be accorded the accountant’s testimony was “very much of an open question.” T. 642.

<sup>8/</sup> While we would view such a charge with concern if it were substantiated, it likely would have no impact on our resolution of the underlying question before us in this case, *i.e.*, whether the workers on Thomas & Sons’ McGuire AFB contracts received their proper pay, and whether Zagari submitted accurate payroll data.

## CONCLUSION

The Davis-Bacon Act provides, in relevant part:

[T]here may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

40 U.S.C. §276a(a). Thomas & Sons, as the prime contractor on the McGuire AFB projects, is properly held responsible for compliance by Zagari, its subcontractor, with the Davis-Bacon Act and CWHSSA contract requirements, and thus is responsible in the instant case for the payment of the back wages determined to be due and owing Zagari's employees. *Silverton Construction Co.*, WAB No. 92-09 (Sept. 30, 1992); *All Phase Electric Co.*, WAB No. 85-18 (June 18, 1986); *Tap Electrical Contracting*, WAB No. 84-1 (Mar. 4, 1985). See 29 C.F.R. §5.5(a)(6).

Accordingly, it is **ORDERED** that:

1. The contracting agency, McGuire AFB, shall turn over to the Administrator, to the extent of its liability, the sums withheld under both contracts with Thomas & Sons;
2. The Administrator shall pay, out of monies withheld by the contracting agency from Thomas & Sons under the contracts herein at issue, back wages due all former Zagari employees it has identified;
3. Any sums specified for payment to an identified employee which are not paid to said employee or his or her legal representative within a reasonable time not to exceed one year from this Final Decision because of inability, after reasonable diligence and with the full cooperation and assistance of Thomas & Sons and Zagari, to locate the employee or his or her legal representative, shall be deposited in the Treasury of the United States; and

4. The Administrator shall transmit the names of Zagari & Sons Construction Corporation and Joseph Zagari to the Comptroller General for placement on the list of persons and firms ineligible to receive government contracts or subcontracts for a period of three years.<sup>9/</sup>

**SO ORDERED.**

**PAUL GREENBERG**  
Chair

**E. COOPER BROWN**  
Member

**RICHARD A. BEVERLY**  
Alternate Member

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<sup>9/</sup> Inasmuch as Zagari & Sons Construction Corporation and Joseph Zagari, its President, did not appeal the ALJ's Decision and Order of February 17, 2000, it may be the case that the Administrator has already referred their names to the Comptroller General. *See* 29 C.F.R. §§6.33-6.35. Should such referral have already occurred, this aspect of our order is necessarily rendered moot.