U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

DELFOUR, INC., General Contractor
JAD, LTD.
GAETANO P. DELUCA, President

ARB CASE NO. 96-186

(ALJ CASE NO. 94-DBA-50)

DATE: May 28, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Delfour, Inc, JAD, Ltd. and Gaetano DeLuca (Petitioners) filed a petition for review of the Administrative Law Judge's (ALJ) Decision and Order of July 31, 1996 (D. & O.), 29 C.F.R. § 6.34 (1996), finding that Petitioners failed to pay prevailing wage rates and misclassified workers under the Davis-Bacon and Related Acts (DBRA), 29 C.F.R. § 5.1, failed to pay overtime as required by the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327, 333 (1988), and failed to keep accurate records and submitted falsified records under those acts. The Administrator of the Wage and Hour Division of the Department of Labor sought over $42,000 in back wages for four employees as well as the debarment of Petitioners from the award of further government contracts. The ALJ reduced the amount of back pay due because of "inaccuracies" resulting from estimates and assumptions made by the Wage Hour investigator, D. & O. at 21, and awarded some $24,000 in back pay, *id.* at 23; he also held that Petitioners should be debarred for three years. *Id*.

Petitioners excepted to the D. & O. on several grounds: that this proceeding is barred by the two year statute of limitations in 29 U.S.C. § 255 (1988); that the ALJ's findings of fact on the number of days and number of hours worked by the Petitioners' employees are erroneous and not supported by a preponderance of the evidence; and that the ALJ improperly bases his findings on certain documents that should have been excluded from the record.

Petitioners held two government construction contracts[1/] and the Administrator alleged Petitioners violated the labor standards provisions of the above laws under both, a contract with the Postal Service for repair, remodeling and reconstruction at several postal facilities in the Boston

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[1/] Delfour, Inc. was the contractor listed on each contract and each was signed by Gaetano Deluca as Vice President of Delfour. Deluca testified that Delfour was a general contractor and JAD supplied labor to Delfour. T (transcript of hearing) 668-69. Although Deluca testified that he had no role in JAD, T. 671, the certified payrolls submitted by JAD were all signed by Deluca. C-6 and 10. We find that Delfour, JAD and Deluca were all jointly responsible for compliance with the DBRA and CWHSSA.

metropolitan area performed during 1992, C (Administrator's Exhibit) 8, and a contract with the Department of Veteran's Affairs for renovation of an animal holding facility at the VA Medical Center in Boston performed during 1993, C-1.

Motion to Dismiss

Petitioners moved to dismiss this proceeding on the grounds that it is barred by the statute of limitations in 29 U.S.C. § 255(a) requiring that "any action . . . to enforce any cause of action . . . under . . . the Bacon-Davis Act [sic] . . . shall be forever barred unless commenced within two years after the cause of action accrued . . . ." The ALJ denied that motion in an order of July 14, 1995 and we agree with the ALJ that an "action" governed by the limitations period in 29 U.S.C. § 255 refers to a civil action in court, not an administrative proceeding. *See, e.g., Glenn Ellen Electric, Co., Inc. v. Donovan*, 755 F.2d 1028, 1034 n.7 (3d Cir. 1985) "Inasmuch as the Secretary's enforcement action [under a Davis-Bacon Related Act] has been entirely administrative, i.e. neither complaint nor counterclaim filed, the limitations provisions of the Portal-to-Portal Act do not apply even if the Act is construed as governing the Davis-Bacon Related Acts. *See Ready-Mix Concrete Co. v. United States*, 130 F. Supp. 390, 393, 131 Ct. Cl. 204(1955) (withholding actions by the government are not subject to the Portal-to-Portal Act);" *M.A. Bongiovanni, Inc.*, Case No. 89-DBA-101 (Sec'y Dec. Nov 2, 1990), slip op. at 4; ALJ Order Denying Motion to Dismiss at 4-5, and cases discussed therein; *see also* Rules 2 and 3, Federal Rules of Civil Procedure (1997) ("There shall be one form of action to be known as 'civil action,' [and] [a] civil action is commenced by filing a complaint with the court.")

Merits

Department of Labor regulations require contractors to submit certified payrolls for each workweek under covered contracts containing the name, address, social security number, correct classification, hourly rates of wages paid, daily and weekly number of hours worked, deductions made and actual wages paid for all laborers and mechanics. 29 C.F.R. § 5.5(a)(3). The payrolls for Petitioners' Postal Service contract do not include any classifications of the workers for different work performed, the different applicable hourly rates, or the daily hours worked, but show all workers as laborers working at one hourly rate. C-6. Similarly, the payrolls for the VA contract do not include the classifications for different work performed or the applicable hourly rates, rather, all workers are listed as laborers for all work weeks and only one hourly rate is shown. C-10. Deluca conceded that the payrolls for the VA contract do not show the different trades in which the workers performed work. T.681.

The dispute here centers on how many hours the four workers actually worked on these government contracts and the answer to that question requires resolution of direct conflicts in the testimony and exhibits presented by Petitioners and the Administrator. The certified payrolls submitted by Petitioners, for example, show that the workers never worked a full 40 hour week on the Postal Service contract but generally worked 25.5 or 26 hours a week, occasionally working as much as 31 hours a week. C-10. Similarly, the certified payrolls for the VA contract show that the workers never worked a 40 hour week but their hours varied from 26.5 a week to as little as 5 hours a week. C-6. Deluca testified that on the VA job, the agency did not always make the work space

available which significantly limited the number of hours of work. T. 601-604. In addition, Deluca estimated, based on his experience as a masonry contractor, that a task of laying block on the VA project would only have taken two or three days, not 20 days as the employee testified. T. 591-95. On the Postal Service jobs, Deluca testified there were 12 days when the men did not work at all. T. 606.

Three of the workers testified that they each usually worked a full eight hour day, five days week. D. & O. at 8-12. They also explained that they performed work in several different trades, such as masonry, painting, carpentry and plastering, although the payrolls only listed them as laborers. *Id.* One of the workers kept a diary of his work at the VA project which also showed that on most days he worked eight hours. C-4. The contract officer on the VA project established a daily log for Delfour's employees to sign in and out which also showed that the workers usually worked eight hours every day. C-2. Based on his observations of the work site, information provided by the VA engineering office and the log, the contracting officer testified that the men usually worked a full eight hour day from January to mid-April 1993.

The Wage and Hour investigator did not accept the certified payrolls as accurate summaries of the hours worked because the workers told her they worked more hours, statements supported by the daily log. In addition, she concluded the payrolls were inaccurate in other respects because they did not show all the trades in which the employees performed work and, on the Postal Service projects, the payrolls did not provide the daily hours worked. D. & O. at 12-13. She reconstructed the hours and trades worked from employee interviews, the sign-in log, and the employee diary. She computed back wages due for underpayment for the number of hours worked, for paying for all work at the laborer's rate, and for failure to pay overtime. D. & O. at 13-14.

After Deluca testified that there were at least 12 days that the employees did not work on the Postal Service contract and that work on that project ended in May 1992, not July, the Wage and Hour investigator recalculated back pay. She explained that Deluca's own calculation gave Delfour too much credit against her original computation because he credited a full day's pay for days not worked when her original calculation had only charged Delfour for the difference between what the employees were paid and the Davis-Bacon prevailing rate. *See, e.g.,* T. 795-97; 808-813, and compare R-27, 28, 29 and 30 with R-27c, 28c, 29c and 30c.[2/]

The ALJ carefully considered all the testimony and exhibits and found that the investigator "did a thorough job," the employees were "credible," and the VA contracting officer's testimony was consistent with employee testimony on the number of hours worked. D. & O. at 19. Applying the principles in *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946), the ALJ found that back pay is due but concluded that there were some inaccuracies in the investigator's calculations because they were based on estimates and assumptions about total hours worked and applicable wage rates. R. D. & O. at 20-21. For those reasons, he recommended that the investigator's computation of back pay be reduced by 50 per cent for the Postal Service contract and 10 per cent for the VA project. *Id.* The ALJ also found that Petitioners "disregarded their obligations to employees" by

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[2/] In addition, the investigator did not credit Delfour with some small payments to employees such as reimbursement for gas.

failing to pay them the applicable hourly rates and by failing to keep complete and accurate records. He recommended that Petitioners be debarred from receiving government contracts for three years. D. & O. at 22-23.

Petitioners attack the ALJ's findings of fact as erroneous and not supported by the record. As noted above, the crucial questions in this case turn on a resolution of conflicts in witness testimony and, as the former Wage Appeals Board held

> [t]he ALJ is in the unique position to judge the quality of testimony and the demeanor of witnesses during a hearing. In the absence of clear error on the part of an ALJ, the Board is reluctant to set aside credibility resolutions and factual findings and the weight [] accorded to the record evidence.

Milnor Construction Corporation, WAB Case 91-21 (Sept. 12, 1991), slip op. at 4.

Petitioners also assert that some of the documentary evidence relied on by the ALJ, the log directed to be kept by the VA contracting officer, was shown to have been fabricated, thus undermining the entire basis of his findings. We note first that Petitioners base this assertion on two reports by a handwriting expert submitted after the close of the hearing. The reports are not in the form of affidavits and, of course, the Administrator did not have an opportunity to cross examine the expert. In any event, even if the daily log had been excluded, we find that there was ample evidence in the record to support the ALJ's findings.

The record in this case has been reviewed and we find that it fully supports the ALJ's findings, conclusions and order and we adopt them. D. & O. at 23-24.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member