



In the Matter of:

**Disputes concerning fringe benefit kickbacks,
the misclassification of employees and the
payment of prevailing wage rates by:**

ARB CASE NO. 99-039

ALJ CASE NO. 96-DBA-34

**KP & L ELECTRICAL CONTRACTORS, INC.,
Subcontractor,**

DATE: May 31, 2000

and

**CENTRAL ROCK MINERAL COMPANY, INC.,
Prime Contractor,**

**(With respect to laborers and mechanics employed
by KP & L Electrical Contractors under Project
Nos. KY 4-1 and KY 4-3 for the Bluegrass-
Aspendale project funded by the Department of
Housing and Urban Development)**

and

**JUDY CONSTRUCTION COMPANY,
Prime Contractor,**

**(With respect to laborers and mechanics employed
by KP & L Electrical Contractors under Grant
No. C210469-02 and Contract No. L34705 for the
Manchester Waste Water System Plant project and
the Bowling Green Municipal Utilities project both
funded by the Environmental Protection Agency)**

and

**GROT ELECTRIC, INC.,
Prime Contractor,**

**(With respect to laborers and mechanics employed by
KP & L Electrical Contractors under Contract No.
DLA 302-91-C-0121 for the Sharondale Defense
Logistics Agency Depot project funded by the**

Department of Defense)

and

**BUILDING CRAFTS, INC.,
Prime Contractor,**

**(With respect to laborers and mechanics employed
by KP & L Electrical Contractors under Contract
No 04-01-033681 for the Danville Water Treatment
Plant project funded by the Department of Commerce,
Economic Development Agency)**

and

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

**KP & L ELECTRICAL CONTRACTORS, INC.,
Subcontractor,**

and

**EDWARD COURTNEY AND KAREN COURTNEY,
Individually**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Robert J. Schumacher, Esq., *Schumacher & Booker, P.S.C., Louisville, Kentucky*

For the Respondent:

Leif G. Jorgenson, Esq., Paul L. Frieden, Esq., Steven J. Mandel, *U.S. Department
of Labor, Washington, DC*

FINAL DECISION AND ORDER

In 1992 the Wage and Hour Division of the Department of Labor initiated an investigation of KP&L Electrical Contractors and several other contractors concerning their compliance with labor standards under the Davis-Bacon Act (DBA), 40 U.S.C. §§276a to 276a-7 (1994), the U.S. Housing Act of 1937, as amended, 42 U.S.C. §1437j; the Public Works and Economic Development Act of

1965, 42 U.S.C. §322;^{1/} the Copeland Anti-Kickback Act, 40 U.S.C. §276c, and the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. §§327-332 (collectively “the Acts”). Following completion of the investigation and unsuccessful attempts to obtain compliance, in March 1995 the Division charged KP&L, its president Edward Courtney, and its secretary-treasurer Karen Courtney (collectively KP&L), with violations of the Acts and notified them of their right to an administrative hearing.

KP&L immediately requested a hearing pursuant to 29 C.F.R. §5.11(b)(2) (1999), and on June 7, 1996, the Regional Administrator of the Wage and Hour Division issued an Order of Reference referring this matter to the Office of Administrative Law Judges. 29 C.F.R. §§5.11(b)(3) and 6.30(a). Following the subsequent hearing, the Administrative Law Judge (ALJ) issued a Decision and Order finding in favor of the Division. Thereafter, KP&L sought review before the Administrative Review Board. We have jurisdiction over this matter under 29 C.F.R. §6.34.

BACKGROUND

In 1991 and 1992, KP&L held several government or government-assisted subcontracts including: a subcontract for electrical and lighting work at the Bluegrass-Aspendale low-rent housing community in Lexington, Kentucky, funded under the U.S. Housing Act of 1937; a subcontract to install street lights and metal poles at the Sharonville Defense Logistics Agency Depot in Hamilton County, Ohio; and a subcontract to install lighting for the renovation and expansion of the Bowling Green, Kentucky, Waste Water Treatment Plant funded under the Public Works and Economic Development Act of 1965.

The ALJ found that KP&L had violated the Acts by: inducing employees to make kickbacks of back wages; misclassifying workers as laborers when they performed electrician’s tasks; failing to pay employees at the prevailing rate for carpenters for shop work; failing to report all hours worked by several employees on the certified payrolls and paying those employees in cash at substantially below the prevailing wage; paying workers substantially below the prevailing wage for laborers, equipment operators and electricians; failing to pay workers for loading, transporting and unloading of supplies; failing to pay employees overtime pay for hours worked in excess of 40 per week; failing to pay prevailing wages by requiring employees to pay motel bills when working away from home; and failing to submit accurate and complete payroll records. Decision and Order (D. and O.) at 6-31.

The ALJ also concluded that KP&L should be debarred from federal and federally-assisted construction contracts under both the Davis-Bacon Act and the Davis-Bacon Related Acts standards for debarment. In so ruling, he rejected KP&L’s argument that the passage of a significant amount of time between the violations and the decision should militate against debarment. He found that KP&L’s “egregious and systematic violations” weighed heavily against relieving it of the debarment sanction. Finally, the ALJ made clear that the debarment order applied to both Edward Courtney and Karen Courtney, finding that Karen Courtney was involved in the kickbacks and the submission of falsified payroll records. D. and O. at 31-33.

^{1/} The Housing Act and Public Works Act are both Davis-Bacon Related Acts.

DISCUSSION

The ALJ carefully examined and weighed the record evidence and made extensive findings of fact. We have reviewed his thorough decision as well as KP&L's challenges to it and conclude that the decision is correct with regard to the facts as well as the law. Therefore, we adopt the ALJ's decision in full and append it to our decision.^{2/} We briefly discuss two timeliness issues raised by KP&L before the ALJ and again on review.

First, KP&L contends that this proceeding is barred by the statute of limitations in the Portal-to-Portal Act, 29 U.S.C. §255, which provides:

Any action . . . for unpaid minimum wages [or] unpaid overtime compensation . . . under the . . . Bacon-Davis Act [sic] (a) . . . may be commenced within two years after the cause of action accrued and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

Since the Order of Reference was issued in 1996, four years after the alleged violations, Petitioners argue this proceeding was not timely filed.

^{2/} We emphasize that in the course of fact-finding the ALJ made demeanor-based credibility determinations regarding several key witnesses, including the employee witnesses and company president Edward Courtney. The ALJ repeatedly found the employees' testimony "credible and consistent," and discredited the testimony of Edward Courtney, among other reasons, because Courtney admitted having requested his employees to sign false affidavits to thwart a state overtime investigation. Specifically with respect to the kickback allegation, the ALJ found that several employees cashed their back pay checks and either gave the money to Edward Courtney or placed the money on Edward Courtney's desk. Edward Courtney denied requesting or receiving any money from employees who were given back pay checks but did not explain why he kept the cash placed on his desk. The ALJ did not credit Edward Courtney's denials and found the employees' testimony "credible and consistent . . . with each other." D. and O. at 8. In addition, Karen Courtney did not testify, and KP&L did not rebut the testimony that she participated in the kickbacks.

An ALJ's demeanor-based credibility determinations are entitled to great weight, and "the Board will not reverse credibility determinations where they are not clearly erroneous." *Wayne J. Griffin Electric, Inc.*, WAB Case No. 93-05 (Oct. 29, 1993) slip op. at 6, citing *Milnor Construction Corp.*, WAB Case No. 91-21 (Sept. 12, 1991); *NLRB v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983) (contrasting exceptional weight accorded to ALJ credibility findings that rest on demeanor with lesser weight accorded to credibility findings based on other aspects of testimony, such as internal discrepancies or witness self-interest).

The courts as well as the Wage Appeals Board have consistently held that the statute of limitations in the Portal-to-Portal Act is not applicable to administrative proceedings such as this. Thus, in *Ball, Ball and Brosamer, Inc.*, WAB Case No. 90-18 (Nov. 29, 1990), *rev'd on other grounds, Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994), the Wage Appeals Board explained:

[T]he Board has consistently held that the Portal-to-Portal Act does not apply to administrative proceedings under the Davis-Bacon Act. See, e.g., *Martell Construction Co., Inc.*, WAB Case No. 86-26 (July 10, 1987), at pp. 2-3 and cases cited therein. In so holding, the Board explained in *Martell*, the Board has followed the Supreme Court's ruling in *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59 (1953), that an administrative proceeding is not an "action" within the meaning of the statute of limitations under the Portal-to-Portal Act.

Ball, Ball & Brosamer, slip op. at 17-18. See also Glenn Electric Co. Inc., v. Donovan, 755 F.2d 1028, 1034 n.7 (3d Cir. 1985) (because "Secretary's enforcement action has been entirely administrative . . . the limitations provisions of the Portal-to-Portal Act do not apply . . ."); *M. A. Bongiovanni, Inc.*, WAB Case No. 89-DBA-101, Apr. 19, 1991 (same).^{3/}

Second, KP&L argues that the three year and seven month time span between the Wage and Hour Division's October 1992 "notice of issues" and its June 1996 Order of Reference to the Office of Administrative Law Judges prejudiced it in its defense of the charges. KP&L asserts that the employee witnesses' memories had faded and their testimony at the hearing in 1997 conflicted with written statements they gave in 1992 soon after the events at issue in this case.

Our predecessor, the Wage Appeals Board, held that four factors should be weighed to determine if a contractor's rights have been violated because of a delay in holding a hearing in an enforcement action: 1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of his right to a hearing; and 4) prejudice to the defendant. *Public Developers Corp.*, WAB Case No. 94-02 (July 29, 1994), slip op. at 9, summarizing the holdings in *Barker v. Wingo*, 407 U.S. 514 (1972), and *United States v. \$8,850*, 461 U.S. 555 (1983). With respect to the fourth factor, the WAB pointed out that "a respondent 'must show actual prejudice, not just allege potential prejudice.'" *Public Developers Corp.*, slip op. at 14, quoting *Tom Robb, Inc.*, WAB Case No 94-03 (June 21, 1994). These principles were reaffirmed by this Board in *Bill J. Copeland*, ARB Case No. 97-064, ALJ Case No. 96-DBA-18 (Oct. 31, 1997).^{4/} We do not address the first three of the *Barker*

^{3/} *L.P. Cavett Co. v. United States Dept of Labor*, 101 F.3d 1111 (6th Cir. 1996), cited by KP&L, is not to the contrary. In that case, the court held that "situs of work" rules applicable under the Davis-Bacon Act apply to cases arising under the Federal-Aid Highway Act, a Davis-Bacon Related Act, 101 F.3d at 1116, but did not address applicability of the Portal-to-Portal Act statute of limitations to administrative enforcement proceedings.

^{4/} In *Bill J. Copeland* the ALJ dismissed the case without a hearing because he determined that
(continued...)

factors because we conclude that KP&L has not established actual prejudice as a result of the passage of time.

KP&L has not pointed out any particular instances in the record to support its contention that employee witnesses contradicted their own prior written statements (which were in the record for the ALJ to examine), or refused to testify because of lost memory. Nor has KP&L alleged, much less demonstrated, that critical witnesses were made unavailable because of the passage of time. And KP&L was well aware of the particulars of the allegations against it long before it received the Division's March 1995 notification, as the correspondence in the record makes clear. KP&L has argued only generally that "it is impossible to require Appellants to present a defense to statements directly in conflict with written statements given contemporaneous to the original investigation."^{5/} Petition for Review at 17. Such generalized claims of prejudice simply do not suffice.

We conclude that KP&L has not made a showing of actual prejudice under *Public Developers* and *Bill J. Copeland* sufficient to justify dismissal of this proceeding for delay.

^{4/}(...continued)

Copeland was prejudiced by "the extreme and inexcusable administrative delay in bringing this matter to a hearing." ALJ Decision and Order, Jan. 28, 1997, slip op. at 17. On review the Board found that the Administrator's unwarranted delay, combined with the undisputed fact that Copeland was unable to conduct prehearing discovery with former complaining employees who were not certified to be witnesses at the hearing, was prejudicial to Copeland with regard to their claims. Therefore, the Board barred recovery for their potential claims against Copeland, and the Order of Reference with regard to the claims of those claimants was dismissed. The Board remanded the remainder of the case to the ALJ for a hearing on the merits and, if violations were found, for a determination whether Copeland was prejudiced in his defense and whether that prejudice was directly attributable to the administrative delay.

^{5/} In fact, KP&L could have used such claimed inconsistencies between the prior written statements of the employee witnesses and their testimony at the hearing to impeach them. KP&L failed in this endeavor because, whatever the claimed weaknesses of the employee testimony, the ALJ did not find the contrary testimony of Edward Courtney to be believable. *See, e.g.*, D. and O. at 8, as to kickbacks; D. and O. at 14 and 16, as to paying employees off the payroll in cash; D. and O. at 22, as to loading, unloading and travel time; D. and O. at 30, as to the lack of credibility of Edward Courtney's statement that he believed the Sharonville project was not covered by the Davis-Bacon Act.

CONCLUSION

The relief ordered by the ALJ at pp. 33-34 of the Decision and Order is adopted. In addition, KP&L Electrical Contractors, Inc., Edward Courtney and Karen Courtney shall be debarred pursuant to 29 C.F.R. §5.12(a) for a period of three years and shall be ineligible to receive any contract or subcontract subject to any of the statutes listed in 29 C.F.R. §5.1 during that period.

SO ORDERED.

PAUL GREENBERG

Member

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member