U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 August 2007

Case No.: 2006-DBA-00001

In the Matter of:

Disputes concerning the payment
of prevailing wage rates by:

PALISADES URBAN RENEWAL ENTERPRISES, L.L.P.,
Owner

DT ALLEN CONTRACTING CO., INC.,
DANIEL[1] T. ALLEN, PRESIDENT,
GREGORY ALLEN, VICE PRESIDENT,
Prime Contractors

A. MONTESINO ELECTRICAL CONTRACTING, INC.,
Subcontractor

NUCOR CONSTRUCTION, INC.,
Subcontractor

UNITED MECHANICAL CONTRACTORS, INC.
Subcontractor

Proposed debarment for labor standards
Violations by:

DT ALLEN CONTRACTING COMPANY, INC.
DANIEL T. ALLEN, PRESIDENT
GREGORY ALLEN, VICE PRESIDENT
Prime Contractor

With respect to Laborers and Mechanics employed
by the contractor on:

Jobsite: The Palisades/39th Street Housing,
Union City, New Jersey

[1] The caption was amended from David Allen to Daniel Allen at the hearing on November 14, 2006. (Tr. at 7).

Appearances:

Susan Jacobs, Esquire
Stacy Goldberg, Esquire
For the U.S. Department of Labor

Douglas F. Doyle, Esquire
Charles Shaw, Esquire
For Palisades Urban Renewal Enterprises, L.L.P.
DT Allen Contracting Co., Inc.
Daniel Allen
Gregory Allen

Paul Speziale, Esquire
For A. Montesino Electrical Contracting, Inc.

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER

This matter arises under the labor standards and prevailing wage provisions of the Davis-Bacon Act ("the Act"), 40 U.S.C. § 3141 *et seq.*, which requires that workers on government construction projects be paid not less than the minimum wages determined by the Secretary of Labor to be prevailing for corresponding work on similar projects in the area. Regulations, which implement the labor standards and prevailing wage provision of the Act can be found at 29 C.F.R. Parts 5 and 6.

PROCEDURAL HISTORY

The United States Department of Labor ("DOL") filed an Order of Reference on September 28, 2005. (ALJX1). The Office of Administrative Law Judge's Associate Chief Judge Thomas M. Burke issued a Pre-hearing Order on October 12, 2005. (ALJX2). On November 17, 2005, the Government filed its Pre-Hearing Exchange document stating the names of the persons alleged to have been underpaid and the nature of the alleged violations under the Act and other relevant information related to this case. (ALJX3). On December 12, 2005, Respondent filed his Pre-hearing Exchange document in response to the Government's Pre-hearing Exchange document. (ALJX4).

This case was assigned to me January 26, 2006. After several continuances, (ALJX6-ALJX14), a formal hearing was held on November 14 and 15, 2006 in New York, New York.[2] At that time, the parties were given the opportunity to examine witnesses and submit other

[2] The transcript of the hearing consists of 504 pages and will be cited as "Tr. at --."

evidence.[3] Following the formal hearing, the record was left open for sixty days after receipt of the transcript for the parties to submit briefs. (Tr. at 500). On May 21, 2007, the Government filed a Motion for Reconsideration of the exclusion of exhibit 42 and a Motion for Default Judgment against Respondent's United Mechanical Contractor's, Inc. ("United") and Nucor Construction, Inc. ("Nucor"). On June 5, 2007, I issued an Order granting Default Judgment against United and Nucor for failure to appear and participate in these proceedings.[4] On June 5, 2007, I also issued an Order denying the Government's Motion for Reconsideration and for briefs to be submitted on or before June 7, 2007. The parties' briefs were filed on June 7, 2007.[5]

This decision is rendered after careful consideration of the record as a whole, the arguments of the parties, and the applicable law.

ISSUES

The issues presented for resolution include:

1. Whether employees were misclassified and paid a wage rate other than the prevailing wage rate required under the provisions of the Act.

2. Whether Respondents DT Allen Contracting Co., Inc., Daniel Allen and Gregory Allen failed to make overtime payments, as alleged, in violation of the provisions of the Act.

3. Whether Respondents DT Allen Contracting Co., Inc., are strictly and jointly liable as prime contractor for the subcontractors A. Montesino Electrical Contracting, Inc. ("A. Montesino"), Nucor, and United's alleged failure to pay the prevailing wage rate required under the provisions of the Act.

4. Whether the circumstances warrant the requested relief of debarment of Respondents DT Allen Contracting Co., Inc., pursuant to C.F.R. § 5.12(a)(1).

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[3] I received fourteen ALJ exhibits as "ALJX1-ALJX14." (Tr. at 15). The Government submitted forty-three exhibits which I marked and received as "GX1-GX41," rejecting exhibits 17A and 42. (Tr. at 35, 38, 40-41, 43, 50-51, 53, 56-59, 61, 64-65, 85, 117, 120, 124, 126, 128-129, 131, 135, 326, 169, 171, 173-174, 176, 177, 200-201, 216-217, 221-222, 226-227, 230-231, 338-339, 344, 363, 459, 462, 468, 479-480). Respondent submitted one exhibit which I marked and received as "RX1." (Tr. at 435-436).

[4] Although Default Judgment has already been entered against Nucor and United, the back wages owed to their employees will be discussed in this opinion to the extent that it may affect DT Allen's liability as general contractor.

[5] The Government's brief will be cited as "GB at --." Respondent Palisade's Urban Renewal Enterprises and DT Allen Contracting Co., Inc.'s brief will be cited as "R1B at --." Respondent A. Montesino Electrical Contracting's brief will be cited as R2B at --."

SUMMARY OF THE EVIDENCE

This case involves a contract for the development and construction of an affordable housing single family residential unit at 3900 Palisades in Union City, New Jersey ("the project"). (Tr. at 31).

The 3900 Palisades Affordable Housing Project

In 1998, Gregory Allen, a principal member of the private development firm, GDA Affordable Housing ("GDA"), approached the Mayor of Union City, New Jersey and inquired if he could submit an application for funds to construct affordable housing, the purpose for which GDA was created. (GX8; Tr. at 36, 102, 372). Mr. Allen hired a housing consultant that specializes in preparing applications to submit to agencies, banks, and investors seeking funds to develop affordable housing projects. (Tr. at 375).

A proposal was submitted by the developers of the project, Palisades Urban Renewal Enterprises ("PURE"), to receive funding from various sources. PURE consists of a joint venture partnership between GDA and Economic Development Corporation of Union City ("EDC"). (GX8; Tr. at 31, 36-37, 55, 99). The partnership agreement grants GDA the authority to supervise and oversee the project during construction, and EDC was to manage the property after it was completed. (GX8; Tr. at 100, 110). EDC is a 501(c)(3) tax exempt not-for-profit organization that builds affordable housing in Union City. (Tr. at 36-37, 97). Virgilio Cabello has been the president of EDC since 1997. (GX8; Tr.at 36-37, 97). EDC became involved in this project during April of 1999 because having a non-profit organization as part of the partnership enabled PURE to set aside funds from state low income tax credit programs and to receive extra points on applications for funding. (Tr. at 99, 102, 377-378). Mr. Cabello is the authorized signatory on behalf of PURE as part of his duties in this partnership. (Tr. at 110).

The City of Union City issued a resolution authorizing PURE's application for grants on January 5, 1999. The city approved applications for grants to both the New Jersey Department of Community Affairs and Hudson County Division of Housing and Community Development ("Hudson County Division") for funds from the HOME program. (GX1; Tr. at 35, 382-383). The New Jersey Department of Community Affairs is a state funded initiative from realty transfer taxes received by the state of New Jersey. In addition, PURE requested and received funding through the low income tax credit program. (Tr. at 31-32). The Richmond Group became an investor, purchasing low income tax credits to provide financing for the development of the project. (GX4; Tr. at 48, 394).

Susan Mearns has worked for Hudson County Division for 16 years. She began working there as Housing Programs Manager, designing and developing housing activities on behalf of the community. In August of 2001, Ms. Mearns replaced Fred Bado as Division Chief. Her responsibilities as Division Chief are to oversee and administer housing and community related activities that are funded by the United States Department of Housing and Urban Development ("HUD"), including the HOME program. (Tr. at 29-31). Ms. Mearns explained that the HOME program is a federal housing initiative from HUD. Through this initiative; funds appropriated by Congress may be invested in private, non-profit entities to develop affordable housing. (Tr. at 31,

33). In addition, Mr. Cabello explained that funds from the HOME program are used to fill in gaps when there are not enough sources of funds from low income housing tax credits. (Tr. at 105). To qualify for funds from the HOME program, a project is based on the income of the occupants and the cost of production. (Tr. at 34).

Hudson County Division prepared and sent a letter to PURE, dated August 30, 1999, approving their funds from the HOME program in the amount of $1,166,000.00. The purpose of this letter was to memorialize the project by detailing the amount of units, terms and conditions for the receipt of funds, general requirements to draw on the funds, and insurance and title requirements. (GX2; Tr. at 38, 75-76, 385). The letter also explained the HOME program regulations; specifically that PURE must submit "evidence of compliance with applicable Davis-Bacon wage rates, if applicable, including the incorporation of such wage rates into the construction contract." (GX2). Gregory Allen testified that he received this letter on behalf of PURE. (Tr. at 398). Ms. Mearns explained that this was included in the letter because under the HOME program all projects with eleven units or greater must comply with the Act and it was Hudson County Division's understanding that prevailing wage rages under the Act had to be paid on the project. (Tr. at 39, 41). However, she did acknowledge that this letter does not specify whether or not the Act applies. (Tr. at 75).

PURE responded in a letter, signed by Gregory Allen and dated September 21, 1999, acknowledging that, as the borrower, they "hereby agree to enforce Davis Bacon wage rates." However, Gregory Allen explained that he was unsure if the Act applied to the project since the prevailing wage determinations were not attached for his review. (GX3; Tr. at 400, 447). PURE prepared and sent a development budget dated October 11, 1999, which included costs incurred and paid by the developer and the HOME program. (GX4; Tr. at 42). The HOME program funds are structured as a loan and the mortgage note for the amount of $1,166,000.00 was signed on November 8, 1999. (GX5; Tr. at 49, 395-396). On November 22, 1999, Hudson County Division provided PURE with a payment of $992.641.00 (GX6; Tr. at 448-449).

PURE and DT Allen Contracting Co., Inc. entered into a construction contract for the project on November 3, 1999. (GX13; 107). This contract did not include a wage determination as required by the letter from the HOME program approving the funds. (GX2; GX13; Tr. at 447). In addition, the budget included for the project was for $4,684,150.00 and did not account for prevailing wages under the Act. (GX13; Tr. at 441). On January 27, 2000, PURE sent a letter to the New Jersey Department of Community Affairs informing them that DT Allen Contracting Co., Inc.was selected as the construction contractor for the project. (GX7; Tr. at 53). DT Allen Contracting Co., Inc. was formed by Daniel Allen, in 1984 and has evolved into a development construction company, including developing single family residential buildings. Gregory Allen is the vice-president of DT Allen Contracting Co., Inc. and has been employed by it since 1989. (Tr. at 53, 365-366). Prior to the project, DT Allen Contracting Co., Inc. had been contractor for two additional projects that were federally funded and subject to the Act. (Tr. at 55, 370-371).

On April 10, 2000, PURE and Hudson County Division entered into a regulatory agreement ("the contract"). (GX9; Tr. at 56, 104). The contract was drafted by Hudson County Division and Virgilio Cabello signed the agreement on behalf of PURE. (GX9; Tr. at 57). The contract restated the federal requirements that the borrower/developer was required to meet in

relation to the HOME program, but did not contain a wage determination. (GX9; Tr. at 57, 73, 104, 397). Gregory Allen testified that he signed the contract although there was no wage determination attached. (Tr. at 402).

The DOL Investigiation

Bruce Braverman, an investigator and team leader for the DOL since 1975, conducts investigations for the DOL. (Tr. at 160, 233-234). Responding to a complaint that carpenters were not being paid the prevailing wage rate, Mr. Braverman began an investigation of the project in 2000. (Tr. at 161, 235). The first step Mr. Braverman took was to collect documents, specifically the contract specifications, wage decision, and certified payrolls. (Tr. at 161). Mr. Braverman explained that he initially attempted to obtain these records from Hudson County Division, but when he was unable to do so he contacted DT Allen Contracting Co., Inc. to obtain the records needed. (Tr. at 163, 255, 261).

Mr. Braverman discovered that the prevailing wage determination was not included in the contract. (Tr. at 162, 257). He explained that he did not take action at that time because he was waiting to have the wage decision incorporated into the contract. (Tr. at 164). Mr. Allen testified that he first learned that the Act applies to this project in August of 2000 when Hudson County Division informed him that the wage determination was not incorporated into the contract. (Tr. at 401, 449).

On August 24, 2000, Gregory Allen sent a letter on behalf of DT Allen Contracting Co., Inc. to John Capazzi, the architecture for the project explaining that there may be a discrepancy in the wages paid and the prevailing wage required. (GX21; Tr. at 169, 463). Mr. Allen further stated that "it is our intention to have full compliance with Davis Bacon as well as other applicable regulations." (GX21; Tr. at 170). However, Mr. Allen testified that he did not contact Nucor and inform them that they were paying their employees below the prevailing wage rate. (Tr. at 464). Mr. Allen also sent a letter to Mr. Braverman on August 24, 2000, acknowledging that the Act applies and requesting a meeting. Mr. Braverman and Mr. Allen did not meet; however Mr. Braverman testified that he did go to DT Allen Contracting Co., Inc.'s offices during his investigation to review certified payrolls. (GX22; Tr. at 171-172, 264; 410). Gregory Allen also sent a letter to Mr. Braverman on August 25, 2000 stating that he "believe[s] we need to have a wage determination if one does not already exist," and requested a meeting. (GX23; Tr. at 172-173, 410).

Enrique Lopez-Mena is employed by the Wage and Hour Division of the DOL in Philadelphia, Pennsylvania as a regional wage specialist for the last one and one-half years. Prior to that, he worked as a compliance specialist in government contract sections for eleven years. His duties include reviewing government contract investigations to ensure that there is sufficient evidence to refer the case to the Solicitor's office to issue a charging letter and initiate a hearing. (Tr. at 302-303; 309). Mr. Lopez-Mena explained that when a wage determination is not included in a contract, the contracting agency, which is Hudson County Division in this case, is required to modify the contract to include the wage determination because it is responsible for including it in the original contract. (Tr. at 304, 307-308). In addition, the contract would be modified retroactively even if construction had already begun. (Tr. at 305).

Mr. Braverman then contacted Wayne Horbert, who oversees labor relations and housing projects in New Jersey and New York for HUD, and informed him that there was no wage determination and the contract should be modified. (Tr. at 162). Mr. Horbert sent a copy of the wage determination to DT Allen Contracting Co., Inc.to be incorporated into the contract. (GX24; Tr. at 175).

In the summer of 2000 Mr. Braverman went to the jobsite and asked Dan Hartigan, project manager for DT Allen Contracting Co., Inc., for copies of the certified payrolls for all of the employees. (Tr. at 163, 405). On August 25, 2000 Mr. Hartigan sent a memo informing the subcontractors for the project that DT Allen Contracting Co., Inc. needed their certified payroll reports on form WH-347. (GX16; Tr. at 123, 405, 450-451). Gregory Allen testified that he believed the memo was sent to all of the subcontractors on the project. (Tr. at 405).

Manny Montesino is president of A. Montesino, which specializes in electrical installation. (Tr. at 95, 114). He has been in business since 1991 and has ten employees. (Tr. at 137). DT Allen Contracting Co., Inc. hired him as a subcontractor to do electrical work on the project. (GX14; Tr. 114-115). He began working on the project without a written contract sometime in 2000 and stopped working on it May 6, 2001. (Tr. at 118). Mr. Montesino explained that he never signed a written contract with DT Allen Contracting Co., Inc. (GX15; Tr. at 121).

Mr. Montesino testified that he had been working on the project for approximately one month when he received the request for certified payrolls. Olga Pena handles the payroll for A. Montesino, so Mr. Montesino instructed her to provide Mr. Hartigan with the certified payrolls for the men on the jobsite. (Tr. at 124-125). He testified that he has worked on over 100 jobs and approximately five or six have involved prevailing wages. (Tr. at 137, 140). He explained that he has filled out certified payroll forms to comply with the Act before and has only done certified payrolls for state or federally funded jobs. (Tr. at 125, 140).

A. Montesino submitted certified payrolls and daily time sheets, which represent the amount of hours worked on the project, to DT Allen Contracting Co., Inc. (GX17; GX18; Tr. at 127-128, 156-157). In addition, Ms. Pena created a summary of the employees that worked on the project, including their hours worked and corresponding salary as of November 9, 2000. (GX19; Tr. at 129-130). Mr. Montesino testified that he was never informed that the wages included on the certified payrolls were inadequate under the Act. (Tr. at 156).

A. Montesino had three employees working on the project at the time. (Tr. at 127). Mr. Montesino explained that his employees on the project included electricians and helpers. (Tr. at 116). Mr. Montesino testified that he was never informed by DT Allen Contracting Co., Inc., or anyone that his employees on the 3900 Palisades project had to be paid prevailing wages. (Tr. at 135, 143). He testified that he contacted Mr. Hartigan after receiving the request for certified payrolls and asked whether he needed to pay prevailing wages. Mr. Hartigan informed him that DT Allen Contracting Co., Inc. was working it out with Hudson County Division. (Tr. at 141). He further testified that he was not aware of the prevailing wage rates as he never received a wage determination. (Tr. at 123, 155). Mr. Montesino explained that if he had been told of the prevailing wages he would have stopped working on the project, reevaluate the work, and done calculations to look into a change order. (Tr. at 135).

Mr. Montesino first learned of the prevailing wage when an investigation ensued. (Tr. at 136). Mr. Montesino also explained that he did not immediately begin paying back wages after he received a letter from the DOL, dated April 30, 2002, informing him that the Act applies. (ALJX1; Tr. at 152). He explained that he was not willfully refusing to pay, but that he did not pay the back wages because he understood that the issue was still being resolved with Hudson County Division. (Tr. at 154, 157).

Hudson County Division did not learn that the contract did not contain a wage determination until the complaint was made. They prepared a wage determination for the project on September 7, 2000 to incorporate into the contract. The wage determination was signed by Fred Bado and sent to Gregory Allen on behalf of DT Allen Contracting Co., Inc. (GX10; Tr. at 58-59). Ms. Mearns testified that this was Hudson County Division's method of notifying Gregory Allen that Davis-Bacon wages had to be paid on the project. (Tr. at 86). Mr. Allen testified that he received the wage determination from Mr. Bado in September of 2000 and asked Mr. Hartigan to distribute a copy to all of the subcontractors. (Tr. at 449-450).

After receiving all of the certified payrolls, Mr. Hartigan sent them to DT Allen Contracting Co., Inc.'s main office in Oakland. (Tr. at 455-456). On October 17, 2000, Gregory Allen, on behalf of DT Allen Contracting Co., Inc., sent Mr. Braverman copies of the certified payrolls. He also acknowledged receiving the prevailing wage decision and indicated his intent to comply and incorporate it into the contract. Mr. Allen also requested a meeting with Mr. Braverman to discuss his responsibilities and requirements. (GX24; Tr. at 175-176). Mr. Braverman received certified payrolls for DT Allen Contracting Co., Inc., Nucor, United, and A. Montesino. (GX17; GX26; GX27; GX28; Tr. at 176, 178, 344 459). However, Mr. Braverman testified that he did not receive a full set of certified payroll records of DT Allen Contracting Co., Inc., and had to request them a number of times, but he did eventually receive all of the records for DT Allen Contracting Co., Inc. and the subcontractors. (Tr. at 177-178). Mr. Braverman then reviewed the certified payrolls and compared them to the wage determination. (Tr. at 164).

Mr. Braverman also conducted employee interviews with the help of a spanish interpreter, Juan Perez. (Tr. at 237-238). He explained that he interviewed approximately ten of the employees who were not being paid prevailing wages. (Tr. at 269). He testified that he visited the job site several times, where four times he found the site unattended and four to six times he observed the employees at work. (Tr. at 243-244). Mr. Braverman stated that the employee interviews contributed in four or five of the re-classifications he made when he computed the back wages discussed below. (Tr. at 269).

Back Wage Computations

As of March 2001, DT Allen Contracting Co., Inc. and Hudson County Division had still not amended the contract. (Tr. at 262). Therefore, Mr. Braverman determined that DT Allen Contracting Co., Inc., A. Montesino, Nucor, and United committed prevailing wage violations and overtime violations. (Tr. at 202). He computed the back wages owed based on comparing the wage decision with the certified payrolls records. (GX10; GX17; GX26; GX27; GX28; Tr. at

201-203, 218, 223). Mr. Braverman summarized his computations for each contractor/subcontractor as follows:

D.T. Allen Contracting:

Prevailing Rate Computations						
Employees showed on certified payrolls	Beginning work week – end work week	Work classification	Number of hours worked	Rate paid per hour	Rate due from wage decision per hour	Wages due
Fabian Ortiz	4/29/00-6/30/01	Carpenter	2172.5	$15.00	$39.60	$53,443.50
Chris Petrich	9/9/00-7/28/01	Carpenter	1583	$15.00	$39.60	$38,941.80
Juan Dedio Gaspar	10/7/00-7/28/01	Laborer	642.5	$15.00	$15.97	$623.23
					Total Due:	$93,008.53
Overtime Computations						
Fabian Ortiz	9/16/00-2/17/01	Carpenter	38	$7.50	$13.73	$236.74
Chris Petrich	9/9/00-7/28/01	Carpenter	54.5	$7.50	$13.73	$339.54
					Total Due:	$576.28

(GX10; GX26; GX33; Tr. at 203-216).

Mr. Lopez-Mena explained that the DOL makes the final decision when there is a dispute regarding classification. (Tr. at 313). He further explained that if an employee provides work under two classifications, the contractor may segregate the different types of work by the number of hours worked and pay two different wage rates. However, if they do not segregate the types of work, they must pay the higher wage rate for all of the hours worked. (Tr. at 306). To determine how an employee is classified, one must first look at the wage determination to find where the wage rates are coming from. If the rates are taken from a collective bargaining agreement then you look at that, which will describe the types of work an employee classified under that type of job performs. (Tr. at 315, 317-318).

Mr. Braverman explained that he determined the classifications for DT Allen Contracting Co., Inc. employees based on job site observations and interviews. Mr. Braverman testified that he witnessed Mr. Ortiz doing carpentry work, such as cutting and Mr. Petrich was observed using carpentry tools. (Tr. at 205-207, 241). In addition, he interviewed them both and they both described their job duties as carpenter's duties using the "tools of the trade." Mr. Braverman explained that once tools of the trade are in their hands, the employees are carpenters and not laborers. (Tr. at 207, 209-210). Furthermore, Mr. Braverman testified that being a carpenter doesn't require a certain skill level, but does involve hammering, nailing, cutting with saws, using levels, using power tools, using nail funs, and using circular saws. Mr. Braverman also explained that a laborer does clean up work, does not use the "tools of the trade," and carries

materials. (Tr. at 242-243). Determining how many laborers are needed vary from job to job and trade to trade. (Tr. at 275).

Accordingly, Mr. Braverman changed Mr. Ortiz and Mr. Petrich's classification from laborers, as they were listed on the certified payrolls, (GX26), to carpenters. (GX33; Tr. at 211). Gregory Allen testified that he believes that the employees were incorrectly re-classified as carpenters as he had never seen them performing carpentry work and they were hired as laborers to clean up, stop traffic, and load materials. (Tr. at 415, 419-422). Mr. Allen further explained that DT Allen Contracting Co., Inc. employee's were only on site as laborers to ensure that the site was maintained in a safe and efficient manner. (Tr. at 471). However, he did testify that these employees may have performed carpentry tasks, such as cut studs for framing and exterior framing. (Tr. at 480-482). He believes, based on the classification of all three employees as laborers, he only owes back wages of $4,266.06. (GX26; RX1; Tr. at 424).

In addition, Mr. Braverman testified that the rate due was taken from the wage decision rate for carpenters and laborers in Hudson County. (GX10; GX33; Tr. at 212-214). Mr. Braverman stated that he arrived at the wages due by subtracting the rate paid from the rate due and then multiplying the difference by the total number of hours worked. (Tr. at 214).

A. Montesino:

Prevailing Rate Computations						
Employees showed on certified payrolls	Beginning work week – end work week	Work classification	Number of hours worked	Rate paid per hour	Rate due from wage decision per hour	Wages due
Carlos Alpizar	9/29/00-10/13/00	Electrician	96	$16.00	$47.20	$2,995.20
Ramon Fernandez	8/25/00-1/12/01	Electrician	510	$15.50	$47.20	$16,167.00
Juan Gonzalez	10/27/00-12/08/00	Electrician	45	$10.00	$47.20	$1,674.00
Nelson Gonzalez	1/21/00-1/21/00	Electrician	2	$15.00	$47.20	$64.40
Jose Hernandez	12/01/00-1/12/01	Electrician	208	$26.00	$47.20	$4,409.60
Marco Luna	10/06/00-1/12/01	Electrician	192	$13.50	$47.20	$6,470.40
Carlos Marino	7/14/00-11/01/00	Electrician	454	$12.50	$47.20	$15,753.80
David Marrero	12/22/00-12/29/00	Electrician	48	$15.00	$47.20	$1,545.60
Jorge E. Marrero	10/27/00-10/27/00	Electrician	8	$9.50	$47.20	$301.60

Ignacio Maure	9/15/00-10/27/00	Electrician	264	$11.86[6]	$47.20	$9,329.76
Jose Maure	11/17/00-11/17/00	Electrician	8	$21.00	$47.20	$209.60
Alejandro Menedez	12/01/00-12/08/00	Electrician	32	$19.50	$47.20	$886.40
Janoy Molina	9/29/00-10/27/00	Electrician	96	$10.00	$47.20	$3,571.20
Oxel Portilla	11/22/00-12/15/00	Electrician	64	$11.50	$47.20	$2,284.80
Florencio Sandoval	8/4/00-8/4/00	Electrician	2	$15.00	$47.20	$64.40
Henry Sandoval	11/22/00-1/12/01	Electrician	160	$9.00	$47.20	$6,112.00
Johny Santos	10/27/00-10/27/00	Electrician	8	$9.75	$47.20	$299.60
Remigio Siquenza	10/6/00-10/13/00	Electrician	47	$8.75	$47.20	$1,807.15
Horace Thorton	1/21/00-1/21/00	Electrician	12	$18.00	$47.20	$350.40
Rolando Yera	7/14/00-8/18/00	Electrician	88	$17.00	$47.20	$2,657.60
					Total Due:	$76,954.51

(GX10; GX17; GX35; Tr. at 218-220).

Mr. Braverman explained that he determined the classifications for A. Montesino employees based on the records obtained and observations on the job site. (Tr. at 219). In addition, Mr. Braverman testified that the rate due was taken from the wage decision rate for electricians in Hudson County. Mr. Braverman stated that he arrived at the wages due by subtracting the rate paid from the rate due and then multiplying the difference by the total number of hours worked. (GX10; GX35; Tr. at 220). Mr. Allen computed the amount of back wages owed to A. Montesino employees based on the original classifications, which total $42,043.91. (GX17; RX1; Tr. at 433).

Nucor:

Prevailing Rate Computations						
Employees showed on certified payrolls	Beginning work week – end work week	Work classification	Number of hours worked	Rate paid per hour	Rate due from wage decision per hour	Wages due
Rafael Pichardo	6/7/00-9/13/00	Carpenter	276	$16.00	$39.60	$6,513.60
Jesus E. Diaz	6/7/00-9/20/00	Carpenter	334.5	$16.00	$39.60	$7,894.20
Marcos	6/7/00-9/6/00	Carpenter	131.5	$16.00	$39.60	$3,103.40

[6] This rate reflects $0.86 in fringe benefits paid per hour. (Tr. at 219).

Saminaugo						
Angel Bazurto	7/12/00-9/6/00	Carpenter	251.5	$16.00	$39.60	$5,935.40
Antonio Gutierrez	7/12/00-9/6/00	Carpenter	237.50	$16.00	$39.60	$5,605.00
Abel Menendez	7/12/00-9/20/00	Carpenter	224	$16.50	$39.60	$5,174.40
Miguel Menendez	7/12/00-8/9/00 8/23/00-9/13/00	Carpenter	200 112.5	$15.00 $16.00	$39.50	$7,575.00
Idelso Sabori	7/12/00-8/9/00 9/6/00-9/6/00	Carpenter	200 30	$15.00 $16.00	$39.50	$5,628.00
Lidio Zabala	9/6/00-9/20/00	Carpenter	67.5	$16.00	$39.60	$1,593.00
					Total Due:	$49,022.00

(GX10; GX27; GX29; GX37; Tr. at 223-225).

Mr. Braverman explained that he determined the classifications for Nucor employees based on the certified payroll records, other employee records, and employee interviews. (Tr. at 223-224, 362). In addition, Mr. Braverman testified that the rate due was taken from the wage decision rate for carpenters in Hudson County. (GX10; GX37; Tr. at 224). Mr. Braverman stated that he arrived at the wages due by subtracting the rate paid from the rate due and then multiplying the difference by the total number of hours worked. (Tr. at 225). Mr. Allen testified that the amount of back wages owed to Nucor employees based on the original classifications total $26,336.20. (GX27; RX1; Tr. at 430). However, Mr. Allen did not personally observe Nucor employees at work on the site. (Tr. at 470).

United:

Prevailing Rate Computations						
Employees showed on certified payrolls	Beginning work week – end work week	Work classification	Number of hours worked	Rate paid per hour	Rate due from wage decision per hour	Wages due
Joel Chaviano	2/27/00-10/29/00 7/16/00-7/16/00	Plumber	504 32	$18.75 $17.50	$45.13	$14,179.68
Juan A. Prieto	7/16/00-10/29/00	Laborer	480	$15.75	$15.97	$105.60
Saul Rodriguez	7/23/00-8/8/01 7/16/00-7/16/00	Plumber	1000 40	$19.25 $17.50	$45.13	$26,985.20
Carlos Lorenzo	7/1/01-7/8/01	Laborer	80	$13.15	$15.97	$225.60
					Total Due:	$41,496.08

(GX10; GX28; GX30; GX39; GX41; Tr. at 227-230).

Mr. Braverman explained that he determined the classifications for United employees based on the certified payroll records, other employee records, and employee interviews. (Tr. at 228, 362). Mr. Braverman stated that a plumber uses wrenches and pipe cutters, installs fixtures and pipes, uses a pipe threading machine and a pipe-cutting machine, whereas a laborer carries material and cleans up the site. (Tr. at 251-252). In addition, Mr. Braverman testified that the rate due was taken from the wage decision rate for plumbers and laborers in Hudson County. (GX10; GX39; Tr. at 228). Mr. Braverman stated that he arrived at the wages due by subtracting the rate paid from the rate due and then multiplying the difference by the total number of hours worked. (Tr. at 229). Mr. Allen computed the amount of back wages owed to United employees based on the original classifications, which total $331.20. (GX28; RX1; Tr. at 429). However, Mr. Allen did not personally observe United employees at work on the site. (Tr. at 470).

After determining the amount of back wages owed, Mr. Braverman prepared a summary of unpaid wages on a WH-56 form for each company in May of 2006. (GX34; GX36; GX38; GX40; Tr. at 217, 222, 226, 231). At that time, Mr. Braverman sent a report to the DOL's regional office indicating the prevailing wage violations. The contract was not modified to incorporate the prevailing wage determination at any time during Mr. Braverman's investigation. (Tr. at 165-166).

Revising the Contract and Seeking Compensation

PURE and Hudson County Division entered into a revised contract on May 15, 2001. (GX11; Tr. at 60-61). The purpose of the revised contract was to incorporate the wage determination into the documents for the entire project. (GX11; Tr. at 63, 106, 112). Virgilio Cabello signed the document on behalf of PURE. (GX11). On May 11, 2001, Gregory Allen, on behalf of PURE, sent a letter to Mr. Bado informing him that he received Mr. Bado's letter regarding the amended contract but had not yet received a copy from Mr. Cabello. In addition, Mr. Allen informed Mr. Bado that he and his staff would execute the contract as soon as they received it, even in Mr. Allen's absence. (GX12; Tr. at 484-485). Mr. Lopez-Mena testified that after the contract was amended, it was DT Allen Contracting Co., Inc.'s responsibility, as general contractor, to pay the prevailing wages, retroactively to employees at the site. (Tr. at 307, 323-324).

During the project, neither PURE nor DT Allen Contracting Co., Inc. indicated that they needed additional funds to cover the cost of prevailing wages. In addition, they did not request that the contract be amended to incorporate the prevailing wages listed in the wage determination prior to the investigation. (Tr. at 65-66). Gregory Allen received a letter from the Wage and Hour Division of the DOL, dated April 30, 2002, informing him that he was found in violation of the Act and ordering him to pay back wages. (ALJX1; Tr. at 408). Mr. Allen spoke with Mr. Lopez-Mena in June of 2002 and Mr. Lopez-Mena informed Gregory Allen that they had a right to submit a change order at any time. Mr. Allen explained that a change order is the process to request payment for the difference in the wages paid and the prevailing wage when the prevailing wage determination is left out of a contract. (Tr. at 311, 314, 411).

Ms. Mearns testified that she recalled that there was an issue regarding DT Allen Contracting Co., Inc. submitting a change order. (Tr. at 70, 73). She received a copy of a letter

from DT Allen Contracting Co., Inc. to Mr. Lopez-Mena at the DOL; however she does not remember the details beyond communicating with DOL on this matter. (Tr. at 70-71, 89). Ms. Mearns explained that DT Allen Contracting Co., Inc. thought it had a right to request a retroactive amendment to the contract to receive compensation for the back wages owed. (Tr. at 71-72). Ms. Mearns further testified that it has never submitted a change order. (Tr. at 88). Furthermore she explained that she never met with Gregory or Daniel Allen regarding a change order to incorporate the extra costs for prevailing wages; however she recalls receiving letters from Daniel Allen requesting meetings on the issue of being compensated. (Tr. at 87, 91).

When Ms. Mearns was notified that there was a wage dispute on the project, the DOL requested that she withhold $58,300 of the funds. (Tr. at 88). Mr. Allen explained that he has not paid the back wages because he did not want to compromise his right to appeal the violation determination. He also did not pay the back wages because he did not want that to adversely affect his right to submit a change order. Mr. Allen testified that if it is determined that he must pay the back wages he will then submit a change order to make up the difference. (Tr. at 414). In addition, Mr. Allen testified that he did not submit a change order yet because he wanted to allow the DOL to determine the necessary steps throughout the process and it did not make sense to make a request until he knew what the final amount owed would be. He further explained that he never had any intention to deny payment for the back wages owed. (Tr. at 436-437).

DISCUSSION

The Act provides that all Government construction contracts in excess of $2,000 performed within the United States shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics based upon a specified schedule furnished by the Secretary of Labor ("Secretary"). This schedule is based upon wages determined by the Secretary to be prevailing for corresponding workers on similar projects in the area in which the work is to be performed. 40 U.S.C. § 3142(a)-(b). The language and legislative history of the Act show that it was not enacted to merely benefit contractors, but rather to protect their employees from being paid substandard wages by fixing a floor under wages on Government projects. *United States v. Binghamton Const. Co., Inc.*, 347 U.S. 171, 177 (1954); *Bldg & Const. Trades' Dept., AFL-CIO v. Martin*, 961 F.2d 269, 271 (D.C. Cir. 1992); *Bldg & Const. Trades' Dept., AFL-CIO v. Donovan*, 712 F.2d 611, 614 (D.C. Cir. 1983); *Carpet Linoleum and Resilient Tile, etc. v. Brown*, 656 F.2d 564, 565 n.1 (10th Cir. 1981).

The Secretary is responsible for making the final determination concerning rates of pay and classifications of employees on each project. *Nello L. Teer Company v. United States*, 348 F.2d 533, 539 (1965); *Plumbers Local Union No. 27*, ARB Case No. 97-106 (ARB, July 30, 1998).

I. Misclassification

Employees are to be classified and paid according to the work they perform, without regard to the level of skill required. 29 C.F.R. §5.5(a)(1); *Fry Brothers Corporation*, WAB Case No. 76-06 (June 14, 1977). In addition, the equipment used in the work that is performed governs rather than the skill or experience required. *Framlau Corp.*, WAB Case No. 70-05 (WAB, April

19, 1975), as cited in, *Batteast Construction Company*, WAB Case No. 83-12 (WAB, June 22, 1984). In order to comply with the Act, workers must be classified according to the classifications used in the locality in which the contract is performed. *Emerald Maintenance, Inc. v. U.S.*, 925 F.2d 1425, 1427 (Fed. Cir. 1991) *citing Building & Construction Trades's Dept. AFL-CIO v. Donovan*, 712 F.2d 611, 614 (D.C. Cir. 1983) and *Johnson-Massman, Inc.*, 96-ARB-118 (ARB, 1996). It is incumbent upon the contractor to be certain that its employees were properly classified when performing a job where the Act applies. By misclassifying and underpaying workers, respondents proceed at their own peril. *The Matter of Tele-Sentry Security*, WAB Case No. 87-43 (WAB, June 7, 1989).

The Secretary of Labor may obtain back wages for non-testifying employees where the record and testimony of witnesses establishes that they are entitled to compensation. *See, In the Matter of Structural Services*, WAB Case No. 82-13 (WAB, June 22, 1983). *See also, Matter of Schnabel Associates, Inc.*, WAB Case No. 89-18 (WAB, June 28, 1991); and, *M.G. Allen and Associates*, 29 WH Cases (BNA) 374 (1988) *citing both Structural Services* and *Anderson v. Mt. Clemens Potter Co.*, 328 U.S. 680, 66 S.Ct. 1187 (1946). Likewise, it is permissible to award back wages where no employees have testified. *B&B Contractors*, WAB Case No. 89-04 (WAB, 1991).

Respondent DT Allen Contracting Co., Inc. argues that Mr. Braverman incorrectly re-classified two of its employees, Mr. Petrich and Mr. Ortiz, from laborers to carpenters. (R1B at 38). DT Allen Contracting Co., Inc. argues that Mr. Petrich and Mr. Ortiz were hired as laborers to pick up materials, load materials, and clean up. (R1B at 38-39). I find Mr. Braverman's testimony that he observed these employees using the tools of the carpentry trade to be credible as it is based on his personal observations as well as interviews with these two employees. Respondent DT Allen Contracting Co., Inc. argues that Mr. Braverman's observations are not persuasive as he only observed and interviewed the employees once. (R1B at 39). However, Respondent, Gregory Allen, admitted that those employees may have performed carpentry tasks, such as cutting studs for framing, thus providing further credibility to Mr. Braverman's testimony.

Respondent DT Allen Contracting Co., Inc. also argues that Mr. Braverman incorrectly re-classified two of United's employees, Mr. Chaviano and Mr. Rodriguez, from helpers, which is the same as a laborer, to plumbers. (R1B at 40). In addition, Respondent DT Allen Contracting Co., Inc. asserts that Mr. Braverman incorrectly re-classified Nucor employees from laborers to carpenters. (R1B at 41). Again, I find Mr. Braverman's testimony that he observed these employees using tools of the trade to be credible. He based his testimony on personal observations, interviews with employees, and a review of the records provided to him. Moreover, I note that Mr. Allen did not personally observe the United or the Nucor employees at work, yet he is asserting, without any support, that Mr. Braverman's observations and re-classifications are incorrect.

Respondent DT Allen Contracting Co., Inc. is also asserting that Mr. Braverman's re-classification of A. Montesino employees is incorrect. (R1B at 42-43). However, I find Mr. Braverman's testimony to be credible for the same reasons discussed above. He relied on the

records provided, personal observations of these employees using the tools of the trade, and interviews with employees.

Accordingly, the Government has persuasively established that the work performed by the Respondents' employees and those of its subcontractors was exactly the type of work performed under the job that Mr. Braverman classified them as. In addition, the testimony of Mr. Braverman, the DOL investigator, concerning his calculations of back wages due was based on the Respondents' certified payroll submissions and are readily verifiable. I find those calculations and summaries reliable, correct, and appropriate, and I adopt them.

II. The Contracting Agency's Responsibility to Provide Prevailing Wages to the General Contractor

Respondents' argue that it was the contracting agency, Hudson County Division's duty, not its own, to ensure appropriate, accurate, and unambiguous wage determinations were included in the contract and therefore Hudson County Division is responsible for compensating the general contractor for the back wages owed. (R1B at 23-25; R2B at 6-7). Pursuant to 29 C.F.R. § 5.5(a)(1), it is the contracting agency's responsibility for ensuring that the contract includes the appropriate prevailing wage determination for each of the various classes of mechanics and laborers predicted to be needed for the contract. This procedure serves to assist contractors to comply with the Act.

Furthermore, the contracting agency may incorporate the prevailing wage decision retroactively to the beginning of construction; however the contractor is to be compensated for any increase in wages resulting from the change. The regulations further explain that the method used to adjust the contract price "should be in accordance with applicable procurement law." 29 C.F.R. § 1.6(f). The evidence establishes that requesting a change order is the proper method to receive compensation for the difference in wages paid and the prevailing wages owed. However, the evidence further shows Respondents have not, at any time, filed a change order requesting to be compensated.

Respondents also argue that DT Allen Contracting Co., Inc. and his subcontractors were not aware that prevailing wages under the Act applied to the project. (R1B at 24; R2B at 6). However, I find that the testimony of the Ms. Mearns, Mr. Braverman, and Mr. Allen together with the documentary evidence and unambiguous language of the contracts, which include straight-forward provisions relating to the Act's requirements, leave no doubt that DT Allen Contracting Co., Inc. was properly informed of the responsibilities under the Act. Furthermore, I find that Mr. Montesino was given notice that the Act applied to the project when he was instructed to submit certified payrolls. Mr. Montesino testified that he only uses certified payrolls on state or federally funded projects.

III. Prime Contractor Liability for Violations of its Subcontractors

It is well settled that a prime contractor is responsible for the back wages due employees of its subcontractor under the Act, and is responsible for ensuring that all persons engaged in performing the duties of laborer or mechanic on the construction site receive the appropriate

prevailing wage rate. 29 C.F.R. §§ 5.5(a)(2), 5.5(a)(6); *Kos Kam, Inc.*, WAB Case No. 88-29 (WAB, Mar. 15, 1991); *Northern Colorado Constructors*, WAB Case No. 86-31 (WAB, Dec. 14, 1987); *Tap Electrical Contracting, Inc., & Calcedo Corp. & Expert Electric Inc.*, WAB Case No. 84-1 (WAB, Mar. 4, 1985); *In re Simpson Construction Co.*, 24 WH 484 (1979). As the prime contractor, it is thus clear that DT Allen Contracting Co., Inc. is also responsible for the wage underpayments by its subcontractors, A. Montesino, Nucor, and United.

The case law also supports the conclusion that A. Montesino, Nucor, and United, as subcontractors, are also responsible for failing to pay the prevailing wage rate to their employees pursuant to the Act.[7] *Ray Wilson Co.*, ARB Case No. 02-086 (ARB, Feb. 27, 2004); *Arliss D. Merell, Inc.*, 1994-DBA-000041 (ALJ, Oct. 26, 1995) (subcontractors were found to be jointly and severally liable for the unpaid wages and fringe benefits owed to their former employees).

IV. Debarment

The standard for debarment under the Act is set forth in the regulations at 29 C.F.R. § 5.12(a)(2), which provides in pertinent part:

> In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any, who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible persons or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provision of the [Act].

Debarment has consistently been found to be a remedial rather than punitive measure so as to encourage compliance and discourage employers from adopting business practices designed to maximize profits by underpaying employees in violation of the Act. *See, United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990); *S.A. Healy Co. v. Occuptational Safety and Health Review Comm'n*, 96 F.3d 906, 911 (7th Cir. 1996); *Minor Construction Co.*, 1995-DBA-00042 (ALJ, June 12, 1997). Debarment is an appropriate compliance tool because it discourages attitudes that violations of the Act will not be detected, and if they are, that said violations will be lightly treated by requiring only a confession of violation and restitution of back pay. *Phoenix Paint Co.*, WAB Case No. 97-8 (WAB, May 5, 1989).

Violations of the Act do not *per se* constitute a disregard of an employer's obligations within the meaning of Section 5.12(a) so as to result in automatic debarment. *Miller Insulation Co.*, WAB Case No. 91-38 (WAB, Dec. 30, 1992). To support a debarment order, the evidence must establish a level of culpability such as "aggravated or willful" and beyond mere negligence

[7] *See infra* note 4.

or inadvertent behavior. *A. Vento Construction*, WAB Case No. 87-51 (WAB, Oct. 17, 1990). Allowing violations to persist can constitute evidence of intent to evade or a purposeful lack of attention to a statutory responsibility in support of debarment. *P&N Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116 (ARB, Oct. 25, 1996).

In *A. Vento Construction*, the Wage Appeals Board explained that "[a]ctions typically found to be 'aggravated or willful' seem to meet the literal definition of those terms – intentional, deliberate, knowing violations of the Act." Furthermore, in *Hugo Reforestation, Inc.*, ARB Case No. 99-003, the Administrative Review Board adopted the Supreme Court's standard for establishing willful conduct under the Fair Labor Standards Act in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), which requires establishing that the "employer [knew] or showed reckless disregard for the matter of whether its conduct was prohibited by statute."

I find that the Government has failed to establish that DT Allen Contracting Co., Inc., Gregory Allen, and/or Daniel Allen acted in an aggravated or willful manner when they failed to pay the prevailing wages pursuant to the Act. Since he was notified that the contract did not include a prevailing wage determination, Gregory Allen communicated his intent to comply with the Act and attempted to schedule meetings with the investigator to discuss his responsibilities several times to no avail. Furthermore, Mr. Allen explained that he did not pay the back wages owed after the wage decision was incorporated into the contract because he did not agree with the computed amounts the DOL was claiming he owed, and he was unsure whether paying the wages out of his own pocket would compromise his rights to challenge that amount, request a change order, or appeal the DOL's decision.

In addition, Mr. Allen has expressed his full intent to cooperate and follow the necessary steps to pay whatever amount it is determined that he owes. Accordingly, I find this explanation, in conjunction with the objective evidence, to be persuasive and credible in showing that these parties did not have the requisite intent required to order debarment.

ORDER

It is hereby ORDERED:

(1) Respondents Palisades Urban Renewal Enterprises, L.L.P., DT Allen Contracting Co., Inc., Daniel Allen, and Gregory Allen are liable for payment of back wage amounts to the employees of DT Allen Contracting Co., Inc., herein specified, in the total amount of $93,008.53.

(2) Respondents Palisades Urban Renewal Enterprises, L.L.P., DT Allen Contracting Co., Inc., Daniel Allen, and Gregory Allen are liable for payment of back wage amounts for overtime to the employees of DT Allen Contracting Co. Inc, herein specified, in the total amount of $576.28.

(3) Respondents DT Allen Contracting Co., Inc., Daniel Allen, and Gregory Allen, as prime contractor, are jointly and severally liable for payment of back wage

amounts to the employees of subcontractor, A. Montesino Electrical Contracting Inc., herein specified, in the total amount of $76,954.51.

(4) Respondents DT Allen Contracting Co., Inc., Daniel Allen, and Gregory Allen, as prime contractor, are jointly and severally liable for payment of back wage amounts to the employees of subcontractor, Nucor Construction, Inc., herein specified, in the total amount of $49,022.00.

(5) Respondents DT Allen Contracting Co., Inc., Daniel Allen, and Gregory Allen, as prime contractor, are jointly and severally liable for payment of back wage amounts to the employees of subcontractor, United Mechanical Contractors, Inc., herein specified, in the total amount of $41,496.08.

(6) Respondent A. Montesino Electrical Contracting, Inc. is liable for payment of back wage amounts to the employees of A. Montesino Electrical Contracting, Inc., herein specified, in the total amount of $76,954.51.

(7) The funds presently withheld by the Hudson County Division of Housing and Community Development, as the contracting agency for the construction of the project, shall, to the extent of the Respondents' liability, be released to the United States Department of Labor, to be distributed by the Department of Labor to the specified employees. Such amounts shall be credited against the liabilities of the Respondents specified herein.

A

RALPH A. ROMANO
Administrative Law Judge

NOTICE OF APPEAL

Any party dissatisfied with this decision may appeal it within forty (40) days from the date of this decision by filing a Petition for Review with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Francis Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, under 29 C.F.R. § 6.34 and 29 C.F.R. Part 7. Such filing will have the effect of making this decision inoperative unless and until the Administrative Review Board either declines to review the decision or issues an order affirming the decision. 29 C.F.R. § 6.33(b)(1).