



In the Matter of:

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

**ARB CASE NOS. 01-072
01-079**

**WILLIAM J. LANG LAND CLEARING, INC.,
SUBCONTRACTOR, et al.¹**

**ALJ CASE NOS. 98-DBA-1
through-6
DATE: September 28, 2004**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner/Respondent William J. Lang Land Clearing, Inc.:

Kraig M. Schutter, Esq., Masud, Gilbert & Patterson, P.C., Saginaw, Michigan

For Petitioner/Complainant Administrator, Wage and Hour Division:

Carol Arnold, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., Solicitor of Labor, U.S. Department of Labor, Washington, D.C.

For Prime Contractor John Carlo, Inc.

Ronald A. Denewith, Esq., Mark D. Sassak, Esq., Troy, Michigan²

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board pursuant to the statutory authority of the Davis-Bacon Act (DBA or the Act), 40 U.S.C.A. § 3141-3148 (West Supp. 2003), the Federal Aid Highway Act (FAHA), 23 U.S.C.A. § 113(a) (West 2001), the Airport and Airway Improvement Act (AAIA), 49 U.S.C.A. § 47112(b) (West 1997), the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C.A. §§ 3701-3708 (West Supp. 2004), and Reorganization Plan No. 14 of 1950, 5 U.S.C.A. App (West

¹ For brevity and future citation, the Board has modified the official case name as originally docketed. The official case caption is appended to this Final Decision and Order.

² John Carlo, Inc. filed only a notice of appearance, stating its intent to rely on the brief and statements of its subcontractor, William J. Lang Land Clearing, Inc. It reserved the right to file a reply brief but did not do so.

1996).³ Our jurisdiction to hear and decide appellate matters under these Acts is delegated to the Administrative Review Board (the Board) pursuant to the regulations at 29 C.F.R. Parts 5 and 7 (2004) and Secretary's Order (SO) 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).⁴

In this consolidated Final Decision and Order, we consider cross-Petitions for Review filed by the Administrator, Wage and Hour Division (the Administrator), and William J. Lang Land Clearing, Inc. (Lang). The parties seek the Board's review of a February 22, 2001 Decision and Order (D. & O.) and aspects of an April 9, 2001 Order and a May 25, 2001 Supplemental Decision and Order issued by a United States Department of Labor Administrative Law Judge (ALJ).⁵

ISSUES PRESENTED BY THE PETITIONS FOR REVIEW AND THE ALJ'S RULINGS

Lang appealed only the ALJ's ruling that, on the Kent County, Michigan contract, Lang improperly took prevailing wage credit for certain irregularly made cash payments in the form of checks paid to its employees. D. & O. at 24. Lang argued that these payments were properly creditable as either a fringe benefit payment for vacations or as a cash payment made in lieu of fringe benefits. *Id.* But the ALJ ruled that Lang could not

³ The DBA, formerly codified at 40 U.S.C.A. § 276a et seq. (West 2001), was revised without substantive change, effective August 21, 2002, and is now codified at 40 U.S.C.A. § 3141 et seq. Likewise, the CWHSSA (formerly 40 U.S.C.A. § 327 et seq.) is now found at 40 U.S.C.A. § 3702 et seq. Reorganization Plan No. 14 of 1950 centralized in the United States Department of Labor the Federal government's policy-making and enforcement authority for the DBA and its related Acts.

⁴ Prior to May 3, 1996, the Wage Appeals Board (WAB), our predecessor, rendered final agency decisions pursuant to the DBA. Under SO 2-96, 61 Fed. Reg. 19,978 (May 3, 1996), the Secretary of Labor established the Administrative Review Board and delegated to this Board jurisdiction to hear and decide administrative appeals arising under, inter alia, the DBA and numerous statutes requiring DBA compliance, collectively referred to as the Davis-Bacon Related Acts. *See* 29 C.F.R. § 5.1. SO 2-96 has been superseded by subsequent orders amending and updating the provisions relevant to the composition of the Board and its jurisdiction; however, the delegation with respect to the Act and its related Acts is essentially unchanged. The current delegation of authority is set forth in SO 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

⁵ The D. & O. contains all of the substantive rulings that the parties variously challenge on appeal to the Board. The April 9, 2001 Order directed the parties to reach mutual agreement as to the amount of back wages due for one category of violations that the ALJ found Lang had committed. In the Supplemental Decision and Order, the ALJ determined \$17,140.73 as the amount of back wages due for this violation.

receive prevailing rate credit for these cash payments under either theory. First, the ALJ ruled that the payments were not creditable as vacation fringe benefits because the payments were not made on a regular (at least quarterly) basis as required by an applicable Department of Labor regulation. *Id.* The ALJ secondly rejected these payments' creditability as "additional cash payments made in lieu of benefits" (allowable under the terms of another regulation). The ALJ concluded that these amounts could not be credited as "in lieu" cash payments because the payments were not calculated on an hourly basis and paid weekly, as required by regulation. *Id.* Below in our discussion, we affirm the ALJ's conclusions that these payments were not properly creditable against Lang's prevailing wage obligations under the DBA.

The Administrator appealed three issues.⁶ First, the Administrator petitions for review of the ALJ's ruling that Lang properly took prevailing rate credit for meals and lodging costs that Lang provided for employees when they were working on projects outside of their daily home commuting area. The ALJ concluded that Lang's payments for its employees' meals and lodging costs were bona fide fringe benefits "because they provided a benefit to the employee." D. & O. at 18. The ALJ further based this ruling on his conclusion that the payments were creditable as DBA prevailing fringe benefit payments because they "created a tax benefit for Lang employees." *Id.* Also, the ALJ ruled that payment of these meals and lodging costs "qualifies as a creditable cash payment toward satisfying the hourly wage rate . . ." *Id.*

Secondly, the Administrator appeals the ALJ's conclusion that the DBA prevailing rate credit that Lang took for health insurance fringe benefit premiums was proper. The DBA credit Lang claimed was based on a single, hourly "across-the-board" average health insurance fringe benefit rate for all of Lang's employees, regardless of the actual cost of health insurance provided individual employees. The average rate figure was calculated on an annual basis, while Lang made its health insurance premium payments on a monthly basis. Lang's averaged (or blended) rate applied to all employees

⁶ In the ALJ proceeding, the Administrator also contended that Lang committed another type of violation by underpaying fringe benefits to Laborers working on the Kent County project. *See Stmt. for the Adm. in Support of Pet. for Rev.* at 14. The ALJ ruled that these Laborers had not been underpaid, because "Lang has more than satisfied [its prevailing rate obligations] with the other fringe benefits provided for on this job including meals and lodging, health insurance, and the retirement benefits that Lang has stipulated it will pay in this case." D. & O. at 25. The Administrator did not appeal the specific ruling that Lang properly compensated Laborers on the Kent County project. We will assume in this decision that the question whether the Kent County project Laborers were properly paid is yet before us on appeal. We base this presumption on the fact that the Administrator's appeal regarding Lang's payments for meals and lodging and health insurance premiums are properly before us and that our decision and order regarding those issues will apply equally to the Kent County project Laborers.

regardless whether Lang actually paid an insurance premium for more expensive family or less expensive individual coverage on a particular employee's behalf. Lang's averaged rate for DBA credit of its blended health insurance rate also included premium payments Lang allegedly made during waiting periods when employees were ineligible for coverage. The Administrator here, as below, contends that Lang's hourly DBA credit for its health insurance payments should be based on the amount of actual insurance premiums paid each month on an employee-by-employee basis. Moreover, the Administrator contends that Lang should not receive prevailing rate credit for premium payments Lang allegedly made during periods of employee ineligibility.

Third, the Administrator seeks review of the ALJ's ruling that Lang properly classified and compensated its employees who used certain pieces of construction power equipment as Power Equipment Operators (Group IV) (Group IV Operators). This subclassification was the lowest paid of four subclassifications in the overall Power Equipment Operator classification as listed in the prevailing wage determination applicable to each of the respective contracts. The Administrator charged below (and argues in this appeal) that Lang should have classified these employees as Power Equipment Operators (Group I) (Group I Operators), which was the highest paid subclassification within the overall classification of Power Equipment Operators.

In their respective discussions, we address the Administrator's issues on appeal. There, we reverse the ALJ's ruling that Lang's payments for employees' meals and lodging outside of their home community were creditable against DBA prevailing wage requirements as either fringe benefit or cash payments. We also reverse the ALJ's ruling that Lang properly calculated DBA credit for health insurance payments by using an average rate for all employees regardless of premium amounts actually paid and by including amounts allegedly paid during periods of non-coverage. Finally, we reverse the ALJ's ruling that Lang properly classified and compensated its power equipment operators as Group IV Operators rather than as Group I Operators.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction, inter alia, to hear and decide appeals taken from ALJs' decisions and orders concerning law and fact questions arising under the DBA and the numerous related Acts incorporating DBA prevailing wage requirements. *See* 29 C.F.R. §§ 5.1, 6.34, 7.1(b).

In reviewing an ALJ's decision, the Board acts with "all the powers [the Secretary of Labor] would have in making the initial decision" 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 7.1(d) ("In considering the matters within the scope of its jurisdiction the Board shall act as the authorized representative of the Secretary of Labor. The Board shall act as fully and finally as might the Secretary of Labor concerning such matters."). Thus, "the Board reviews the ALJ's findings of fact and conclusions of law de novo." *Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 00-050, ALJ No. 96-DBA-37, slip op. at 4 (ARB Aug. 27, 2001), *order denying recon.*, slip op. at 1-2 (ARB Dec. 6, 2001). *See also* *Cody-Zeigler, Inc.*, ARB Nos. 01-014, 01-015, ALJ No. 97-DBA-17, slip

op. at 5 (ARB Dec. 19, 2003); *Sundex, Ltd. and Joseph J. Bonavire*, ARB No. 98-130, ALJ No. 1994-DBA-58, slip op. at 4 (ARB Dec. 30, 1999) and cases cited therein.

In addition, the Board will assess any relevant rulings issued by the Administrator to determine whether they are consistent with the Act and its implementing regulations, and are a reasonable exercise of the discretion delegated to her to implement and enforce the Act and its related statutes. *Miami Elevator Co.*, ARB Nos. 98-086/97-145, slip op. at 16 (Apr. 25, 2000), *citing Department of the Army*, ARB Nos. 98-120/121/122 (Dec. 22, 1999) (under the parallel prevailing wage statute applicable to federal service procurements, the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C.A. §§ 351-358 (West 1987); *see also Cody-Zeigler, Inc.*, slip op. at 5. The Board generally defers to the Administrator as being "in the best position to interpret those rules in the first instance . . . , and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside." *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), *citing Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *see also Cody-Zeigler, Inc.*

BACKGROUND

The general factual background giving rise to this dispute is relatively straightforward and undisputed. We recount it here briefly. Facts that may be specific to a particular fringe benefit or the power equipment classification issue are presented in those respective sections of our Discussion, *infra*.

Lang is a Michigan corporation located in Bearton, Michigan, and is engaged in the business of land clearing, primarily in Michigan. D. & O. at 7. Lang was the subcontractor for land clearing under six prime contracts subject to the DBA's prevailing wage requirements by virtue of receiving Federal financial assistance pursuant to the FAHA or AAIA. *Id.* Lang's contracts were also subject to the CWHSSA, which requires contractors to pay laborers and mechanics time and one-half their basic hourly rates of pay for all hours worked in excess of 40 during a week.

The prime contracts and Lang's subcontracts also contained and were subject to one of two wage determinations, listing various classifications of construction employees and the respective wage and fringe benefit rates that were required to be paid pursuant to the Act. Wage Determination No. MI960007 - ENG10324F was applicable to Lang's subcontracts with Peters Construction Co., Zito Construction Co., John Carlo, Inc., and Dan's Excavating, Inc. Wage Determination No. MI950007 - ENG10324F applied to the subcontract with Kamminga and Roodvoets, Inc. Stipulated Exhibits (Stip. Exs.) A-F. Both wage determinations contained several extensively detailed general categories of construction and the four subclassification groups of Power Equipment Operators under the general construction category for heavy, highway and airport construction. *Id.*

Central to the misclassification dispute are the wage determinations' listings for "POWER EQUIPMENT OPERATORS: AIRPORT, BRIDGE & HIGHWAY

CONSTRUCTION,” under which higher basic hourly wage rates were required for Group I Operators than for Group IV Operators. The wage determinations required that Group I and Group IV Operators were to be paid the same amounts of fringe benefits.

As the land clearing subcontractor on the various projects, Lang employed laborers and mechanics to remove trees, stumps and underbrush to prepare forested land for subsequent construction of projects such as roadways and road improvements, an airport runway extension, and pavement. D. & O. at 4-5, nn. 1, 3-7. Lang performed the six subcontracts over the course of approximately two years during which it employed approximately 22 employees. D. & O. at 7.

A Wage and Hour Division Investigator (the Investigator) examined Lang’s performance on the six contracts in the autumn of 1996. D. & O. at 7. The Investigator concluded that Lang committed three types of DBA fringe benefit violations. The first concerned Lang’s practice of taking DBA credit for meals and lodging it provided employees on jobs outside regular, daily commuting distance from their homes. Almost all of Lang’s land clearing projects were located outside daily commuting distance from Lang’s employees’ home community of Gladwin County, Michigan. D. & O. at 10, 20.

Lang required its employees to travel to obtain and to keep their jobs. *See* D. & O. at 11-12 (ALJ’s Findings of Fact, testimony of employees Rosa, Strangler, Cameron). Most of Lang’s land clearing projects took place “a considerable distance from Bearton and all Lang employees were told upon hire that their meals and lodging would be provided on these away sites.” *Id.*; Hearing Transcript (Tr.) at 633 (William Lang). Lang furnished shared motel rooms (and meals) for its workers on these out-of-town jobs with two to three employees ordinarily staying in one room. *Id.*

Because of the long distances involved in commuting to and from its jobs, Lang did not give its employees a choice to return to their homes each night after the end of the workday and commute back the following day. Rather, Lang expected the employees to stay in the provided motel rooms located nearby the distant projects. Lang’s workers stayed in motels five nights per week, from Monday night through Friday night. It was too expensive for Lang to hire and train local employees at each new location in the state where there was a job.

The Administrator alleged another fringe benefit violation because Lang used an annual across-the-board average of its health insurance premium payments to compute a single hourly amount that Lang then used as the amount of hourly credit to take for monthly health insurance fringe benefit premiums for all its employees, regardless of their type of coverage. Specifically, Lang totaled the amount spent on health insurance for all employees and divided that amount by the total number of hours worked by the employees. Lang then computed a single average amount to take as its credit for all employees, regardless whether they had family or individual coverage. *Id.* at 9-10. Lang used the same average rate amount as the credit it took for employees in probationary waiting periods prior to the beginning of actual coverage. The Investigator recalculated the health insurance credit for each employee by dividing the premium paid on each

individual worker's behalf by the number of hours actually worked by that employee. The Investigator recalculated the amounts of health insurance credits because Lang paid higher premiums for workers with families than for single workers. Moreover, all employees did not work the same number of hours. Finally, the Investigator's recalculation of the health insurance credits served to correct the alleged error arising from Lang taking fringe benefit credit for employees during periods when they were not yet covered by health insurance.

The Investigator charged Lang with another DBA fringe benefit violation because it allegedly underpaid its Kent County Airport employees by taking an improper DBA prevailing rate credit for bonus payments made by checks to the affected employees. *Id.* at 11. Lang characterized these payments as a vacation fringe benefit provided "to meet a deficiency in the DBA fringe benefit requirement on this job." *Id.* Lang sporadically made these disputed cash payments by check to the employees. Lang made three cash payments to the affected employees during the summer of 1995 and a fourth payment in December 1995. *Id.*

In addition to the fringe benefit violations, the Investigator concluded that Lang misclassified its power equipment operators as lower-paid Group IV Operators rather than as Group I Operators. Based on her review, the Investigator found that Lang misclassified and underpaid its employees who were using five particular pieces of heavy equipment in the land clearing operations: the 1) hydro-ax; 2) skidder; 3) bulldozer; 4) tree chipper, and 5) stump grinder. A brief, yet thorough, description of these pieces of equipment and their uses follows, and is liberally paraphrased from the ALJ's findings of fact to avoid needless repetition. *See generally* D. & O. at 8.

The hydro-ax is similar to an end loader and is a relatively large piece of equipment; it is 10 feet tall and approximately 20 feet long. Hydro-axes are used to cut down trees up to 20 inches in diameter and can also clear underbrush. Skidders also measure approximately 10 feet tall and 20 feet long. This type of equipment is used with a grappling attachment to pick up and transport the trees that are cut by the hydro-axes. Bulldozers were also used by Lang's employees on the projects. But other than noting that bulldozers were used on one contract (the Kent County project), the ALJ provides no description of how the employees used the bulldozers.⁷ The tree chipper is used to process felled trees (and brush) into wood chips; it is 30 to 40 feet long, 15 to 16 feet high, and is capable of reducing a 20-inch diameter tree to wood chips in less than one minute. The final piece of disputed equipment is the stump grinder, used to grind away

⁷ Lang employees generally testified consistently about how they used bulldozers. One testified that he used a bulldozer to "sometimes ... pick up trees. But most of the time I raked [tree and brush debris] with it." Tr. 111. Another testified that "we used it for raking behind the stump grinders and we used [a bulldozer with a rake attachment] for pushing trees away from power lines, houses." *Id.* at 180.

the tree stumps which remain after the trees have been removed by the hydro-ax. The stump grinder, a modified excavator or backhoe, weighs 70 to 80 thousand pounds and in less than two minutes can grind a stump up to 22 inches in diameter. *Id.*

The Investigator alleged that Lang's use of the Group IV Operator subclassification violated DBA prevailing wage requirements, based on the results of interviews with representatives of the International Association of Heavy Equipment Operators, Local No. 324 and written statements provided by two union contractors. These sources reported that the prevailing industry practice in the State of Michigan was to classify workers using Lang's five pieces of disputed equipment as Group I Operators. D. & O. at 7-8.

DISCUSSION

For our analysis of the issues raised by the parties' respective Petitions for Review, we first address the fringe benefit issues in a single section. We will conclude with our discussion of the power equipment operators' misclassification issue.

I. *Fringe Benefit Issues*

A. *Lang made intermittent cash payments that were not creditable for DBA purposes as either a vacation fringe benefit or as cash payments made in lieu of fringe benefits.*

On appeal, Lang challenges the ALJ's ruling that certain sporadic cash payments made to its Kent County project employees were not creditable against the contract's prevailing rate obligations. The ALJ based this ruling on his conclusions that those payments were not creditable as either bona fide fringe benefits or as cash payments made in lieu of required fringe benefits within the meaning of the interpretative regulations.

Lang argues that the ALJ erred in concluding that the irregularly-made cash payments to employees were not bona fide vacation fringe benefits. The ALJ ruled that the infrequent or intermittent cash payments were bonus payments that are not creditable as DBA fringe benefits because the payments were not "made on a regular basis, at least quarterly." D. & O. at 24. In the alternative, Lang contends that the intermittent payments should be credited against its DBA obligations as cash payments made in lieu of fringe benefit payments. The ALJ ruled that this argument was unavailing, because "the payments were clearly not made in accordance with the weekly payment requirement of the regulations." *Id.* For the following reasons, we conclude that the ALJ correctly ruled that these intermittent cash payments were not properly creditable against Lang's DBA obligations either as fringe benefits or as cash payments in lieu of fringe benefits.

We initially note that the Act contains a list of the specific types of bona fide fringe benefits that Congress determined were common in the construction industry when

it enacted the Act's fringe benefit provisions. Those fringe benefits, which Congress enumerated in the Act as bona fide were for:

medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, *or for other bona fide fringe benefits.*

40 U.S.C.A. § 3141(2)(B) (emphasis added).

As the emphasized statutory language indicates, fringe benefits other than those enumerated in the Act may be acceptable if they are bona fide. The Administrator has promulgated a regulation implementing this DBA provision regarding fringe benefits. The regulation at 29 C.F.R. § 5.29(c) interprets the DBA's statutory phrase "other bona fide fringe benefits" as being "open end[ed], permitting the Secretary to recognize new fringe benefits as they become prevailing." Under 29 C.F.R. § 5.29(c) and (d), a particular fringe benefit need not be recognized beyond a particular area for the Secretary to find it prevailing in that area; but in the ordinary case a fringe benefit will be considered bona fide only if it is common in the construction industry. Congress crafted the fringe benefit provisions of the Act to list all fringe benefits that it found were common in the construction industry when it amended the DBA to provide for fringe benefits. *See* S. Rep. No. 963, 88th Cong., 2d Sess. 6 (1964). Congress did not include bonus payments as fringe benefits common to the industry at the time. Nor have bonus payments ever been found to be common in the industry and therefore the Administrator has never recognized bonus payments as bona fide fringe benefits.

The record clearly demonstrates that Lang's disputed payments were not vacation fringe benefit payments; the payments were, in fact, merely bonus payments and accordingly cannot be creditable as DBA fringe benefits. Bonuses are not one of the statutorily enumerated fringe benefits and the payments do not fit within the "open-ended" DBA provision, which allows for addition of new bona fide fringe benefits as they may become common in the construction industry.

As a matter of company policy, Lang did not ordinarily provide vacation pay to its employees. D. & O. at 10; Tr. at 674 (Lang). But on the Kent County project Lang's owner testified that the employer made the so-called "vacation" payments to cover a "deficiency in the DBA fringe benefit requirements on this job." D. & O. at 11; Tr. at 675. Lang paid the employees on the Kent County project three checks in the summer of 1995, and also paid them a final check in December 1995. D. & O. at 11; Tr. 41-44; Tr. 676-79. A Lang employee testified that Lang's owner told them the payments were for "doing a good job." Tr. at 54. Yet another of Lang's employees testified that Lang told

him that the extra payments were a “bonus” (Tr. at 84) and were “basically, just for doing a good job.” Tr. at 85.

Significantly, Lang’s owner confirmed in his hearing testimony that he had admitted during his pre-hearing deposition that he “probably” told the employees that the money was “their bonus.” Tr. at 46. And the disputed payment checks themselves bear the notation that the payments were bonus payments. Administrator’s Exhibits (Adm. Exs.) 13, 16. In short, the record contains no evidence (other than uncorroborated testimony by Lang’s owner) to support the contention that these disputed sporadic payments were made for vacation fringe benefits. We conclude that Lang’s testimony is of little or no persuasive value on the question whether the cash payments were bona fide fringe benefits. The preponderance of the evidence (testimony by Lang’s employees, the documented check notations stating the payments to be bonuses, and Lang’s own admission in the pre-hearing deposition) demonstrates that these payments were a bonus, and not a bona fide vacation fringe benefit.

Board precedent holds that cash bonus payments are not creditable fringe benefits. In *Cody-Zeigler, Inc.*, WAB Case No. 89-19 (Apr. 30, 1991), our predecessor held that cash bonuses were not creditable as fringe benefits because, in the first place, they were not included in the list of the Act’s allowable fringe benefits, as Congress specified. Lang failed to offer evidence that bonus payments were common fringe benefits in the Michigan construction industry. Accordingly, the record does not support a conclusion that the construction industry (including that in Michigan) has recognized bonus payments as bona fide fringe benefits.

Even if the Board disregarded Lang’s labeling the payments as “bonus” money, these payments still would not qualify as bona fide fringe benefits because to be creditable for DBA payment purposes, fringe benefit payments must be made on a “regular” basis. Lang did not do so in the case of its so-called vacation payments. Under 29 C.F.R. § 5.5(a)(1)(i), DBA contractors may satisfy prevailing wage obligations to employees by paying them “not less often than once a week” the full amount of wages and bona fide fringe benefits (or cash equivalent) as reflected in an applicable wage determination. The regulation permits DBA credit where contributions may be made to plans, funds, or programs less frequently than on a weekly basis. “[R]egular contributions made or costs incurred for more than a weekly period (*but not less often than quarterly*) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period.” 29 C.F.R. § 5.5(a)(1)(i); emphasis added. Thus, contributions for bona fide fringe benefits may never be made less frequently than quarterly.

Lang did not make these disputed payments to employees on the Kent County project on a regular basis. Lang made three of these payments in less than a one-month period (July 13 to August 3, 1995) and then made a final payment on December 29, 1995. Respondent’s Exhibit (RX) 26. Lang’s payments were not made on a “regular” basis, i.e., they were made less frequently than quarterly as required under the regulation.

Accordingly, these intermittent payments were made infrequently and therefore are not creditable as bona fide fringe benefits, whether made for vacation purposes or not.

Finally, as noted, Lang alternatively contended that these irregular cash payments should be creditable under 29 C.F.R. § 5.31(b)(3). This regulation allows employers to satisfy their fringe benefit obligations under the Act “by making an additional cash payment in lieu of the required [fringe] benefits.” *Id.* But Lang’s sporadic cash payments do not meet the regulatory requirement that such payment, calculated at the hourly rate, be made no less often than weekly in accordance with 29 C.F.R. § 5.5(a)(1)(i). Lang’s intermittent payments to employees on the Kent County project clearly do not satisfy the regulatory requirement that “in lieu” cash payments must be made to employees on a regular weekly basis. Therefore, these payments could not be credited against Lang’s DBA prevailing rate obligations as cash payments made in lieu of fringe benefits. *See* 29 C.F.R. § 5.31(b)(3); *see also* *Cody-Zeigler, Inc.*, ARB Nos. 01-014, -015, slip op. at p. 31 (Christmas cash bonus paid annually does not meet requirement under 29 C.F.R. § 5.31(b)(3) of regular weekly payments for creditability of “in lieu” cash payments).

Thus, the ALJ correctly concluded that Lang’s intermittent and irregular cash payments could not be credited as either bona fide vacation fringe benefits or as “in lieu” cash payments. Accordingly, we affirm the ALJ’s ruling in this regard.

B. Lang’s payment for employees’ meals and lodging while working outside their daily commuting area cannot be credited as either a bona fide DBA fringe benefit or as “cash” offset against the Act’s prevailing rate requirements.

The ALJ concluded that Lang’s payments for employees’ meals and lodging while working on jobs outside of daily commuting distances were creditable against its DBA prevailing rate obligations. D. & O. at 17, 20. The Administrator appeals the ALJ’s two alternative conclusions for finding the payments creditable. First, the ALJ ruled that Lang’s payments for meals and lodging were creditable as bona fide fringe benefits. Secondly, he also ruled that these payments were a permissible offset against cash wages under regulations implementing the Fair Labor Standards Act of 1938, as amended (FLSA), 29 U.S.C.A. § 201 *et seq.* (West 1998) and were therefore, by extension, also creditable under the DBA. We reverse both of these rulings for the following reasons.

1. Lang’s payments for its employees’ meals and lodging are not bona fide fringe benefits under the Act, regulations and relevant agency policy guidance.

Lang’s payments for its employees’ meals and lodging costs cannot be credited as a DBA fringe benefit because such payments are not listed as recognized fringe benefits in the Act. Furthermore, on the facts of this case, these payments are not bona fide fringe

benefits within the meaning of the Act. As noted, prior to amendment of the Act in 1964, the DBA did not provide for crediting an employer with fringe benefit payments. In that year, Congress amended the Act to include fringe benefits that it determined were prevailing in the construction industry. *See* S. Rep. No. 963, *supra*. In these amendments, Congress specified the fringe benefits that it had found to be common in the construction industry and subsistence payments such as Lang’s are not among the fringe benefits listed in the Act. *See* 40 U.S.C.A. § 3141(2)(B). The question then becomes whether Lang may receive credit for the payments as a bona fide fringe benefit within the scope of the DBA’s so-called “open-ended” provision.

The ALJ properly recognized that Congress did not list payments for employees’ meals and lodging expenses in the Act. D. & O. at 17. However, based on the Act’s language permitting “other bona fide fringe benefits,” the ALJ held that “Lang’s payment of meal and lodging expenses satisfies the statutory definition of other fringe benefits.”⁸ *Id.* at 18. The ALJ further concluded that “[t]he payments were bona fide because they provided a benefit to the employee.” *Id.* But the DBA, as noted, does not define the statutory term “other bona fide fringe benefits.” Accordingly, we reject the ALJ’s “benefit to the employee” analysis because it is without basis in the Act, its implementing regulations, agency policy guidance or case precedent.

The Department of Labor promulgated 29 C.F.R. § 5.29 to interpret the “other bona fide fringe benefits” clause. In keeping with Congressional intent to allow for adoption of new fringe benefits as they become common in the construction industry, 29 C.F.R. § 5.29(d) advises that these “other” fringe benefits must be bona fide to “insure against considering and giving credit to any and all fringe benefits, some of which might be illusory or not genuine”

Lang correctly notes that in determining the bona fides of purported other fringe benefits, the Administrator is obligated on “a case by case basis” to examine “the facts and circumstances” regarding payments other than those enumerated in the Act.⁹ 29 C.F.R. § 5.29(e). *See also* Lang’s Brief in Reply to Administrator’s Initial Brief (Lang

⁸ The ALJ did not elaborate on his statement that Lang’s subsistence payments met the “statutory definition” of other bona fide fringe benefits. Despite the ALJ’s assertion to the contrary, the Act does not define the term “other bona fide fringe benefits” in any manner whatsoever.

⁹ Regarding payments for unconventional benefit plans (i.e., those not enumerated in the Act or uncommon in the construction industry), this regulation further requires that “[c]ontractors or subcontractors seeking credit under the act for costs incurred for such plans must request specific permission from the Secretary under [29 C.F.R.] § 5.5(a)(1)(iv). Lang did not request the Administrator’s prior approval of its subsistence expenses. The parties, however, have not raised this as an issue before the Board.

Rep. Br.) at 7. In this case, our analysis of all of the facts and circumstances surrounding Lang’s subsistence payments leads us to conclude that the payments are not bona fide fringe benefits because the payments are “illusory or not genuine....” 29 C.F.R. § 5.29(d).

Employer reimbursements for meals and lodging are commonly referred to as subsistence payments and Section 5.29(f) specifically addresses them with a general prohibition against creditability: “*payments made for travel, subsistence or to industry promotion funds are not normally payments for fringe benefits under the Act.*” Emphasis supplied. In support of this general policy, the regulation explains that the Act’s failure to specifically enumerate subsistence payments “which are common in the construction industry, suggests that these payments should not normally be regarded as bona fide fringe benefits under the Act.” *Id.* Thus, although the Act and regulations allow the Department of Labor to recognize new (i.e., “other bona fide fringe benefits”) as they become prevailing, the Administrator does not recognize subsistence payments as a bona fide fringe benefit because “subsistence expenses were not enumerated in the Act as being common to the industry at the time, and have not subsequently been shown to be common to the construction industry.” Administrator’s Brief in Support of Petition for Review (Adm. Pet. Br.) at 20.¹⁰

As noted, the Act is silent on the definition of “other bona fide fringe benefits” and the implementing regulations specifically advise of the high disfavor with which the Administrator views subsistence payments. Payments for meals, lodging and industry promotional funds are in fact the only specific examples the regulation notes as being “not normally regarded as bona fide fringe benefits” 29 C.F.R. § 5.29(f).

In addition to Section 5.29(f), the subject of payments for meals and lodging is extensively addressed in the Administrator’s *Field Operations Handbook (FOH)*, a publication which provides extensive DBA compliance guidance to both Wage and Hour Division officials and the public at large. Courts have held that the Administrator’s *FOH* interpretations are due some degree of deference. *See, e.g., Reich v. Miss Paula's Day Care Ctr., Inc.*, 37 F.3d 1191, 1194 (6th Cir. 1994). The Board, too, looks to the *FOH* for assistance in interpreting the Act’s and its regulations’ provisions. The *FOH* guidance regarding meals and lodging is fully consistent with the general disfavor accorded claims for subsistence payment credit. Thus, the *FOH* provides:

¹⁰ At hearing, Lang proffered no evidence that the construction industry (either generally or in the localities of Lang’s projects) recognizes subsistence payments as bona fide fringe benefits. Nor do the wage determinations at issue reflect that such payments prevail as a bona fide fringe benefit in the respective localities. To the contrary, the union contractors testified that subsistence payments are not recognized as fringe benefits in Michigan’s construction industry. *See, e.g.,* testimony of Ken Swartz, regional manager, Walsh Construction Company at Tr. 193-195.

Where an employer sends employees who are regularly employed in their home community away from home to perform a special job at a location outside daily commuting distances from their homes so that, as a practical matter, they can return to their homes only on weekends, the assumption by the employer of the cost of the board and lodging at the distant location, not customarily furnished the employees in their regular employment by the employer, and of weekend transportation costs of returning to their homes and reporting again to the special job at the end of the weekend, are considered as payment of travel expenses properly reimbursable by the employer and incurred for its benefit. Such payments are not considered bona fide fringe benefits within the meaning of the DBRA, are not part of the employees' wages, and do not constitute board, lodging, or other facilities customarily furnished which are deductible from the predetermined wage pursuant to Regs 3.5(j).

FOH Section 15f18. The parties sharply dispute the meaning of this *FOH* provision.

Lang argues that “[e]ven a cursory examination of the [*FOH* language], however, reveals that the Judge got it right and that the Administrator, as she has so often in this case, got it wrong.”¹¹ To the contrary, we conclude that the Administrator “got it right” and that the Administrator’s general policy prohibiting DBA creditability for subsistence payments has a reasonable basis. We reject the ALJ’s and Lang’s misreading of the *FOH*.

The ALJ misinterpreted the *FOH* term “special job,” in holding that the “jobs performed by the employees are not ‘special’ but are the work they perform in the regular

¹¹ Counsel’s disparaging commentary and other remarks bordering on ad hominem attack are highly inappropriate. For instance, counsel refers to the Administrator’s “outlandish claim” (Lang Rep. Br. at 3); charges that the “Administrator has misinterpreted, either deliberately or ignorantly, the phrase, ‘special job’ ...” (*Id.* at 9); and alleges that “[i]n [the Administrator’s] stupor, she has cited two inapplicable cases” (*Id.* at 2)). Such comments are disrespectful of the opposing party and are inappropriate in a legal proceeding. See *In re Edward J. Slavin, Jr.*, ARB No. 02-109, slip op. at 19 (June 30, 2003) (“Counsel had overstepped the bounds of zealous representation and responsible criticism of judges and the legal system by making unfounded remarks that impugn the integrity of the ALJ and other Federal officials, and by making personally offensive statements regarding the ALJ, other Federal officials, and opposing counsel.”).

course of their employment.” D. & O. at 20. The ALJ got it wrong because the vast majority of the jobs performed by Lang’s employees are “special” as contemplated by the *FOH* and Lang’s subsistence payments are correctly characterized as “travel expenses properly reimbursable by the employer and incurred for its benefit.” *FOH* 15f18.

The *FOH* treats the subject of subsistence payments in terms of two types of prevailing rate projects. The first type consists of those jobs located within the employees’ daily commuting range; these are “regular” jobs. The second type are those where “an employer sends employees ... away from home to perform a special job at a location outside daily commuting distances from their homes so that, as a practical matter, they can return to their homes only on weekends” *Id.* Regarding these distant, “special” jobs, the *FOH* clearly specifies that meals and lodging subsistence payments are “considered as payment of travel expenses properly reimbursable by the employer and incurred for its benefit.”¹² *Id.*

Given our conclusion regarding the meaning of the term “special job,” we reject the ALJ’s irrational notion that Lang’s jobs were not “special” because the Lang employees’ work consistently (i.e., the vast majority) took place away from their home distance commuting area of Bearton, Michigan. D. & O. at 20. To the contrary, it is clear on the record that all of the Lang jobs at issue here were “special” jobs within the meaning of the *FOH* because all of them were outside a commuting zone which would allow employees to return home nightly after each day’s work shift.

The ALJ also incorrectly interpreted a very narrow exception to the Administrator’s general prohibition against finding meal and lodging payments to be bona fide fringe benefits. Noting that Lang provides meals and lodging on “all jobs” the ALJ opined that therefore “one may say Lang does ‘customarily furnish’ this service to employees.” But contrary to ALJ’s highly selective quotation from the *FOH*, the exception regarding treatment of meals and lodging “special” jobs plainly applies only where such payments are “not customarily furnished the employees in their regular employment by the employer.” Since, as we conclude, Lang’s employees worked only on “special” jobs, it follows that Lang’s failure to furnish subsistence payments on “regular” jobs (of which there are few or none) becomes meaningless within the context of the *FOH* guidance.

¹² In addition to foreclosing bona fide fringe benefit status to subsistence payments, the *FOH* further explains that these payments similarly “are not part of the employees’ wages, and do not constitute board, lodging, or other facilities customarily furnished which are deductible from the predetermined wage pursuant to Regs. [29 C.F.R. §] 3.5(j).”

2. Lang's payments for meals and lodging were not creditable against DBA prevailing wage (as opposed to fringe benefit) obligations.

Most of the contracts Lang performed took place far from its base of operations in Bearton, Michigan. T. at 633. When hiring its employees, Lang informed them that on these distant jobs, the company would provide their food and lodging. *Id.* Lang testified that payment of these subsistence expenses for employees had been company policy since 1974. T. at 630. While on the distant jobs, employees paid for these expenses with a Lang-issued credit card or by cash, which Lang later reimbursed for the out of pocket costs of meals and lodging. T. at 633. Originally, Lang calculated the DBA credit for these costs by “periodically gather[ing] the meal and lodging reimbursements to employees to determine the cost of all meals and lodging expenses for all employees, and then divided that total number by the total number of hours worked in the field by the employees. D. & O. at 10. But after the Wage and Hour Division’s investigation concluded, Lang changed the method of calculating the hourly credit for these costs. Lang “now calculates the amount of fringe benefit credit by taking the total cost of meals and lodging on DBA jobs and dividing by the total hours worked by employees on that job.” *Id.*

We reject as fatally flawed the ALJ’s alternative conclusion that the disputed payments were creditable under the Act as cash payments made in lieu of its overall prevailing rate obligation. Under the DBA, implementing regulations do permit certain deductions from the required cash prevailing wage. Such permitted deductions include “not more than the ‘reasonable cost’” of board, lodging, or other facilities meeting the requirements of FLSA Section 3(m). 29 C.F.R. § 3.5(j).

The FLSA’s Section 3(m) provides that the statutory term “wage” may include an employer’s “reasonable cost” (as determined by the Secretary of Labor), of furnishing employees with board, lodging, or other facilities, but only “if such board, lodging, or other facilities are customarily furnished by [the] employer to his employees.” 29 U.S.C.A. § 203(m). The Administrator has interpreted the Section 3(m) requirements at 29 C.F.R. § 531(d)(1). Under this regulation, subsistence payments are not recognized as reasonable (and are therefore not creditable) if the payments are primarily for the benefit of the employer.¹³

¹³ Thus, subsistence payments made for the employer’s benefit are treated consistently under the DBA and FLSA. The *FOH* addresses treatment of meals and lodging under Section 3(m):

Where the primary benefit of such facilities is to the employer’s business interest, credit will be denied. The following are commonly viewed as furnished primarily for the benefit or convenience of employees:

Continued . . .

The employee lodging and food expenses in this case were clearly undertaken for Lang's primary benefit. Lang could only perform its far distant DBA contracts (and benefit thereby) if its employees incurred the substantial detriment of traveling to locales far from their homes for most of every work week. Lang's employee travel to the "special" out-of-area jobs served the primary interest and benefit of the employer. Lang required employees to travel to the "special" jobs as a condition of their employment. The employees had no choice but to travel on Lang's business in order to get and keep their jobs. Tr. at 37, 50, 80-1, 103, 121, 156, 176. We accordingly conclude Lang's subsistence payments for its employees' meals and lodging were for the primary purpose of furthering the employer's business and not for the primary benefit of the employees. These subsistence payments cannot be credited as acceptable DBA cash payments in lieu of fringe benefits.¹⁴

(1) Meals

Meals furnished by the employer are regarded as primarily for the benefit and convenience of the employees. *This rule does not apply, however, to the meal expenses incurred by an employee while traveling away from home on the employer's business.*

(2) Lodging

Lodging, like meals, is ordinarily considered for the benefit and convenience of the employee. Circumstances may exist, however, where *housing is of little benefit to employees, as where an employer requires an employee to live on the employer's premises to meet some need of the employer, or where the employee must travel away from home to further the employer's business. In such circumstances, housing will be considered as primarily benefiting the employer. . . .*

FOH 30c03(a) (emphasis added). Thus, the Administrator's FOH guidance similarly prohibits wage credit for subsistence payments under both the DBA and FLSA.

¹⁴ Lang argues that the employer-provided meals and lodging were for the employees' benefit based on language in 29 C.F.R. § 531(c). This regulation provides that "meals are always regarded as primarily for the benefit and convenience of the employee." But this language does not apply to travel expenses such as Lang's subsistence payments. Section 531(c) also cross-references 29 C.F.R. § 778.217 for guidance on the treatment of costs such as "travel expenses." This regulation prohibits crediting those costs incurred while on travel and performing the business of the employer. 29 C.F.R. § 778.217(b)(3).

The Wage Appeals Board considered the question of DBA creditability for meals and lodging subsistence payments in *Calculus, Inc.*, WAB No. 93-06 (Oct. 29, 1993). There, the WAB ruled that the employer's provision of food and lodging to employees traveling beyond their daily commuting area on the employer's business was primarily for the employer's benefit:

The evidence in the record reveals that the employees had no choice about whether to accept the per diem in lieu of the full prevailing wage payments just as they had no choice about whether to commute to the job or stay at the hotel selected by Calculus. Since employees were required to remain at the job site during the week and return on Sunday night, there can be no other conclusion than that the facilities were for the benefit and convenience of the employer. Accordingly, the per diem payments are not permissible deductions from the wages earned by Calculus' employees.

Id., slip op. at 9-10. *Accord Bryan Elec. Const., Inc.*, WAB No. 94-16, slip op. at 5 (Dec. 30, 1994) (amounts paid for purported fringe benefits such as lodging, food and transportation would not be considered bona fide fringe benefits if paid for convenience of employer rather than employees).

We conclude that the facts in *Calculus* precisely mirror those presented by Lang's subsistence payments plan and that the WAB's decision in *Calculus* therefore controls disposition of this matter. Like the employees in *Calculus*, Lang's employees had no choice but to travel on their employer's business; their hiring and retention depended on complying with the employer-mandated travel. Because of the extreme distances from their homes, Lang required its employees to stay at facilities near the work sites and permitted their return home only on weekends. There was little, if any, personal benefit to Lang's employees in this arrangement.¹⁵ While on Lang's business trips, the employees shared motel rooms with one or two other workers.

Such subsistence payments are expenses incurred for the benefit of the employer because they are expended in furtherance of the employer's business¹⁶, i.e., in this case,

¹⁵ Lang argues that the subsistence payments for lodging were for its employees' personal benefit, but we determine this question to the contrary. Because Lang's employees shared lodging, Lang's housing payments cannot be likened to the "personal benefit" found in the employer's provision of *private* rooms to airline employees in *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578 (D.C. Cir. 1980).

¹⁶ Reasoning that the employees would pay extra income tax if the payments were treated as taxable wages, the ALJ found Lang's payments were a benefit to the employees in

Continued . . .

the solicitation and construction of Federally-assisted projects. Also, regarding the issue of its subsistence payments, Lang did not present any evidence and therefore failed to demonstrate that subsistence payments are common in the national or local construction industry. Accordingly, Lang's subsistence payments cannot be considered bona fide fringe benefits. In short, treating subsistence payments as creditable prevailing wages or fringe benefits effectively reduces employees' statutorily required basic hourly wage and fringe benefit rates beneath applicable prevailing hourly rates. Accordingly, we reverse the ALJ's conclusions allowing Lang prevailing wage and/or fringe benefit credit for subsistence payments.

C. Lang violated the Act by taking an improper DBA wage credit that was calculated by averaging the more expensive family health plan premium rate and the less expensive individual health plan premium rate it paid for employees.

The Administrator charged that Lang violated the Act when it computed and took DBA wage credit for health insurance fringe benefit payments it made on behalf of employees. As found by the Investigator, Lang "was determining the amount of this credit by using a representative amount and calculating a single averaged credit for all employees." D. & O. at 8; Tr. 488. This "representative amount" was determined by taking "the total amount of health insurance premiums paid for all Lang Land employees over a one year period and divid[ing] that amount by the total number of hours actually worked by employees." D. & O. at 9. *See also* Tr. 714 (Lang's testimony); Adm. Ex. 2 (Lang letter to Wage and Hour Investigator). Lang claimed these averaged (or blended) contribution rates for health insurance premiums as its hourly DBA credit for all its employees. The ALJ ruled that Lang's methodology was not a violation. We reverse that conclusion.

The fundamental flaw with Lang's use of an averaged health insurance fringe benefit rate is that it runs afoul of the Administrator's interpretive guidance found at *FOH* Section 15f11(a) providing that to "determine[e] cash equivalent credit for fringe benefit payments, the period of time to be used is the period covered by the contribution." Illustrating this principle, Section 15f11(a) presents examples of hospitalization plans with weekly, bi-weekly or quarterly premium payments and notes that computing the rate

the form of reduced taxes. The ALJ exceeded his jurisdiction when he opined on ramifications of the Federal tax code. In any event, this so-called "benefit" to employees is of illusory or indeterminable value, given that no two employees are likely to be in the same tax bracket or have the same amounts of exemptions, deductions, credits, or filing status. Finally, we note that in *Calculus, Inc.*, the WAB rejected the employer's contention that the subsistence payments were designed to reduce employees' taxes. The WAB ruled that the payments benefited the employer and not the employees regardless of the contention regarding tax benefits. We agree.

of contribution is appropriately based on the time period covered by the contribution period of each particular plan.

The Administrator alleged that Lang's method of computing the averaged health insurance credit improperly failed to account for the different premiums that Lang paid on behalf of its family plan and individual plan employees.¹⁷ We agree that Lang's averaged rate resulted in violations of the Act. Lang paid its health insurance provider a smaller monthly premium for employees with individual plan coverage than it paid on behalf of its employees with family plan coverage. Thus, under this methodology of averaging health insurance costs, Lang failed to pay its single-insured employees their required DBA prevailing wage because the average rate overstated the cash value of their insurance benefit.

Section 15f11(d) of the *FOH* provides guidance on computing the proper DBA credit where an employer pays differing rates for employees' health insurance premiums. Thus,

[u]nder certain kinds of fringe benefits plans the rate contribution for employees may vary. For example, under a hospitalization plan, the employer often contributes at different rates for single and family plan members. *In such situations, an employer cannot take an across-the-board average equivalent for all employees; rather the cash equivalent can only be credited based on the rate of contributions for each individual employee.*

Emphasis added. To ensure that every employee receives the required DBA minimum rates, this *FOH* section specifically prohibits averaging single and family plan health insurance premium contributions to compute a single hourly rate for all the employees' DBA credit.¹⁸

¹⁷ The ALJ recognized the existence of this charge in reciting the Investigator's testimony: "Additionally, higher family rate premiums were paid for some employees and the benefit to these employees was greater than to other workers." D. & O. at 8-9. However, the ALJ failed to address this in his Conclusions of Law. *See* D. & O. at 21-23.

¹⁸ In his decision, the ALJ wrongly failed to address application of Section 15f11(d) to the facts presented by Lang's methodology. Instead, the ALJ improperly focused on Section 15f11(c), which allows employers who *actually* make annual premium payments to use an annualized basis to compute the DBA credit. Lang, as noted, paid its premiums on a monthly basis but computed an annualized (and averaged) credit.

The Board recently examined the question whether individual and family plan rates may be averaged to compute a single rate of DBA credit for all employees in *Cody-Zeigler, Inc.*, ARB Nos. 01-014, -015, ALJ No. 97-DBA-17 (ARB Dec. 19, 2003). In that case, the Board affirmed an ALJ's ruling that the contractor violated the Act when it used an averaged rate which disregarded the actual premium paid (whether for family or individual coverage) on behalf of each particular employee. The Board ratified the Administrator's use interpretation of the Act as found in *FOH* Section 15f11(d), stating:

we defer to the Administrator's long-standing policy interpretation as enunciated in Section 15f11(d) of the *FOH* as reasonable, *see Titan IV Mobile Serv. Tower*, slip op. at 7, and, therefore, affirm the ALJ's determination that [the employer] violated the DBA and that back wages were due because [it] improperly blended the family and individual health plan premium rates it paid or used only the family health plan coverage premium rate it paid when claiming the health plan contributions as a fringe benefit under the DBA.

Id., slip op. at 22. We conclude that the Administrator's prohibition against averaging the differing premiums has a reasonable basis and we approve of the application of *FOH* Section 15f11(d) to bar Lang taking credit for an averaged rate.

Lang's use of the averaged health insurance premium amount for all employees also impermissibly reduced certain of its employees' DBA wages insofar as Lang included employees in the averaging who were not yet covered by the health insurance plan. *See* Adm. Ex. 10. The *FOH* addresses the proper treatment of such employee ineligibility periods:

Eligibility standards are permissible in an otherwise "bona fide" fringe benefit plan under DBRA. *However, an employer must make payments or incur costs in the applicable specified amounts with respect to each individual laborer or mechanic performing covered contract work. Employees who are excluded from a plan for whatever reason and for whom the employer makes no contribution must be paid in cash.*

FOH Section 15f12 (emphasis added). The *FOH* provides the following example:

[M]any hospitalization plans require a waiting period of 30 days before an employee can participate in the plan. *Since the employe[r] normally makes no contribution for the employee during the waiting period, the employee must be paid the fringe benefit in cash or furnished other bona fide fringe benefits equal in monetary value.*

Id. Thus, under the guidance provided in this section of the *FOH*, Lang could have properly taken DBA rate credit for ineligible employees only if it had actually made health insurance premium payments for those employees during their periods of ineligibility. Lang proffered no evidence to support the proposition that it had made such contributions. Accordingly, we conclude that the Administrator met the burden of proving this violation. *See* Adm. Ex. 10 (demonstrating that Lang’s health insurance premiums increased in the month following the conclusion of an employee’s period of ineligibility). We conclude that the Administrator met the burden of proving this violation by a preponderance of the evidence because Lang failed to present evidence to rebut the Administrator’s prima facie demonstration that Lang violated the Act as a matter of “just and reasonable inference.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946).

II. Lang violated the Act when it misclassified and underpaid its employees as Power Equipment Operators Group IV rather than Power Equipment Operators Group I.

In performing its DBA contracts, Lang employed workers to operate the heavy equipment used to clear land of trees and brush: the hydro-ax, skidder, bulldozer, chipper, and stump grinder. Lang classified these workers as Group IV Operators and paid them the prevailing rates for that subclassification listed in the applicable wage determinations. Upon investigation of Lang’s practices, the Investigator determined that these employees were actually performing the work of Group I Operators and that they were underpaid because Lang compensated them at the lower rate due Group IV Operators.

The ALJ found that the Administrator failed to carry the burden of proving that Lang had violated the Act by using its classification and payment methodology. Specifically, the ALJ rejected all of the Administrator’s testimonial evidence on this misclassification issue and held that “no evidence exists in this case affirmatively demonstrating that the Department of Labor adopted area practice [of] the local collective bargaining agreement when it issued the general prevailing wage rate decisions part of the contracts in this case.” *D. & O.* at 16. The ALJ first noted that the wage determinations’ Group IV Operator subclassification encompassed “all mulching equipment” and “stump grinders.” *Id.* at 16-17; *see* Stip. Exs. A-F. The ALJ then reasoned that the “purpose of the hydro-ax, skidder, and chipper is to clear land and then reduce the generated organic debris into mulch” and therefore concluded “these machines are clearly ‘mulching equipment’ as listed in Group IV...”¹⁹ *Id.* at 17.

¹⁹ Group IV “stump grinders,” the ALJ ruled, encompassed the work that Lang’s employees performed using their stump grinders. *D. & O.* at 17. Regarding Lang’s dump trucks (equipment specifically listed in Group I), the ALJ ruled that their use was “sporadic” and declined to award back wages for this alleged violation given the de minimis use of the

Continued . . .

The ALJ's reasoning and rulings betray a basic misunderstanding of the legal principles governing employee classification disputes under the Act. We reverse the ALJ's holdings for the following reasons.

The applicable wage determinations in Lang's DBA contracts are based on union wage rates which the Secretary of Labor (through the Administrator's offices) determined were the prevailing rates in the respective areas. *See* 40 U.S.C.A. § 3142(b). Each of Lang's contract wage determinations is designated with the notation, "ENGIO324."

Before the Board, the Administrator explained the meaning of the notation and argued that we consider its meaning in our decision. Lang contends that the Administrator "has tried to impermissibly augment the record after the hearing." Lang Rep. Br. at 1. Lang contends that the Administrator is attempting to improperly introduce new evidence by referring to the Wage and Hour Division's DBA wage determination reference material found on the Government Printing Office's internet website. But this material is not evidence. It is a matter of public record and as such, the Board may take official (or judicial) notice of it. *See Jones v. EG&G Def. Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3 (ARB Sep. 29, 1998) (Board takes judicial notice of commonly accepted scientific fact). Under Federal Rule of Evidence 201(b), a tribunal may take judicial notice of information either generally known or easily verifiable by reference to reliable sources. We conclude that it is appropriate to consider the Administrator's explanation of the "ENGIO324" notations on the wage determinations. Accordingly, we will take judicial notice that "ENGIO324" means that the Administrator determined that the prevailing wage rates for heavy equipment operators were the International Union of Operating Engineers, Local 324's collectively-bargained wage rates. At hearing, Lang presented no evidence on this issue. In any event, the preponderance of record evidence (testimony by the Administrator's Local 324 and contractor witnesses) demonstrates that Lang's wage determination rates were derived from collective bargaining agreements.

The Administrator's determination that collectively-bargained wage rates prevail in an area necessarily carries with it the concomitant determination that the union's (and its signatory contractors') practices regarding work assignment also prevail. This basic principle of DBA administration is long and well established. Our predecessor, the Wage Appeals Board, first addressed the question how to determine area prevailing practice where union wage rates have been determined to prevail. In *Fry Bros. Corp.*, WAB No. 76-06 (June 14, 1977), the respondent compensated employees as laborers rather than as carpenters. The WAB found that the wage determinations reflected union rates as prevailing and ruled that the disputed work belonged exclusively to carpenters under the local area practice. Therefore, the WAB upheld the determination that the employees were misclassified. The Wage Appeals Board explained the rationale behind its decision:

dump trucks. *Id.*

If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard. There will be little left to the Davis-Bacon Act. Under the circumstances that the Assistant Secretary determined that the wage determinations that had been issued reflected the prevailing wage in the organized sector it does not make any difference at all what the practice may have been for those contractors who do and pay what they wish. Such a contractor could change his own practice according to what he believed each employee was worth for the work he was doing.

Id. at 17. Accordingly, in *Fry Brothers* the WAB established the rule of law for determination of area practice disputes where the Administrator has determined that union rates prevail in an area. The WAB held that where union rates are determined to prevail, “the Labor Department has to see to it that the wage determinations carry along with them as fairly and fully as may be practicable, the classifications of work according to job content upon which the wage rates are based.” *Id.*

This Board adheres to the *Fry Brothers* principle to determine proper assignment of disputed DBA work where the Administrator has determined union rates prevail for a construction job classification. As we recently held, when “prevailing wage rates are based upon a collective bargaining agreement, *proper classification of duties under the [wage determination] must be determined by the area practice of the unions that are party to the agreement.*” *Abhe & Svoboda, Inc.*, ARB Nos. 01-063, -066, -068, -069, -70, slip op. at 12 (July 30, 2004). *See also Johnson-Massman, Inc.*, ARB No. 96-02, 1996 WL 566043 (Sept. 27, 1996).

The evidentiary documents and the testimony of the union representatives and contractors demonstrated that the equipment operator classifications and wage rates in Lang’s wage determinations were based on Local 324’s collective bargaining agreements with the Michigan Road Builders Association and the Association of Underground Contractors, Inc. The documentation and the undisputed, consistent testimony should have resolved any question about how to determine the classification of Lang’s heavy equipment under Local 324’s established area practice.

The ALJ erred because, as a matter of law, when the Administrator determined that Local 324’s wage rates prevailed, the Administrator also determined that the union’s work practices prevailed in the respective areas. *Fry Brother; Abhe & Svoboda*. Thus, the ALJ ignored applicable precedent and erred when he concluded that “no evidence exists in this case affirmatively demonstrating that the Department of Labor adopted area

practice [of] the local collective bargaining agreement when it issued the general prevailing wage rate decisions” D. & O. at 16.²⁰

The Administrator’s un rebutted documentary evidence established that the wage determinations’ disputed equipment operator classifications and rates were adopted from Local 324’s union agreements with the Michigan Road Builders and the Associated Underground Contractors. *Compare* Adm. Exs. GG, HH (portions of relevant collective bargaining agreements) and applicable contract wage determinations (Stip. Exs. A to F). Based on this evidence alone, *Fry Brothers, Inc.* obligated Lang to comply with the Act by paying its employees the collectively bargained wage rates as contained in the wage determinations and by following the union work assignment practices under the union agreements on which the Administrator based the prevailing rates.

The Local 324 representatives’ consistent testimony established that equipment operators in the area are classified as Group I or IV based on the type of equipment the operators use. Tr. at 216, 217-218 (testimony of John Hamilton, Local 324’s president for six years).²¹ Generally, Group I Operators are those employees who operate larger, more powerful equipment, which generally requires considerable skill and expertise to run. *Id.* For example, Hamilton testified that Operators of Group IV equipment are “mechanics’ helpers, oilers, you know, basically, small expertise type of equipment.” *Id.* at 219. The ALJ rejected this testimony because union witnesses “admitted that some equipment in Group IV was far larger in size and power than equipment listed in Group I.” D. & O. at 16. But the four examples to which the ALJ referred represent only a tiny fraction of the total number of different pieces of heavy equipment listed among the four equipment operator subclassifications in the wage determinations. *See* Lang Exs. 3, 4, 5, 7. Accordingly, we conclude that these four minor examples provide no rational support

²⁰ Since Lang’s wage determinations carried with them the Administrator’s conclusions that union wage rates (and practices) prevailed, in effect the ALJ improperly acceded to Lang’s belated attempt to challenge their substantive correctness. Challenges to wage determination must be made prior to contract award (or start of construction if there is no contract award). *See Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 00-050 (Aug. 27, 2001). Lang failed to challenge the wage determinations and the ALJ proceeding below was the inappropriate forum in which to attempt to do so. *See* 29 C.F.R. § 1.8 (procedures for seeking Administrator’s reconsideration of wage determinations); 29 C.F.R. §§ 1.9, 7.2-7.8 (procedures for ARB review of Administrator’s rulings on reconsideration of wage determinations).

²¹ Local 324 represents 12,000 Michigan construction workers employed as heavy equipment operators and mechanics. Tr. 214. As president of the local, Hamilton was responsible for negotiation and administration of the collective bargaining agreements.

for the ALJ's rejection of Lang's wage determinations listing bulldozer operators²² within Group I or the relevant area practice regarding the other four pieces of equipment.

Lang's employees used the hydro-ax, skidder, tree chipper, stump grinder and bulldozer. These are massive and powerful pieces of heavy equipment (*see* Exs. Y, DD; D. & O. at 8). Area practice well places Lang's disputed equipment in the Group I subclassification that in general consists of extremely large and powerful heavy equipment requiring advanced skill or expertise to operate; many of the pieces of the Group I equipment are also motorized and drivable, as is Lang's equipment.²³

Of the five disputed pieces of equipment, the wage determinations (and bargaining agreements) specifically referenced only bulldozers, which were categorized as Group I equipment. Sam Hart, Local 324's business manager²⁴, testified concerning each of the four omitted pieces of equipment. He identified them as belonging in Group I, based on the size of equipment and the level of skill and expertise required of the operators; he also testified that two of the pieces were similar to or nearly the same as equipment that was listed in Group I.²⁵

²² The ALJ committed clear error in rejecting the patent Group I designation for bulldozers in the wage determinations because their use on Lang's projects appeared "to be sporadic and the machines were not used as earth-moving equipment." D. & O. at 17. But the bulldozer use was not sporadic; it was merely a continuation of the employees' other Group I equipment use. Moreover, how the bulldozers were used is not relevant; the wage determinations listed them in Group I.

²³ "Group 1: Asphalt plant operator; Crane operator; Dragline operator; Shovel operator; Locomotive operator; Paver operator (5 bags or more); Elevating grader operator; Pile driving operator; Roller operator (asphalt); Blade grader operator; Trenching machine operator (ladder or wheel type); Auto-grader; Slip form paver; Self-propelled or tractor-drawn scraper; Conveyor loader operator (Euclid type); Endloader operator (1yd capacity and over); Bulldozer; Hoisting engineer; Tractor operator; Finishing machine operator (asphalt); Mechanic; Pump operator (6-in. discharge or over, gas, diesel powered or generator of 300 amp or larger); Shouldering or gravel distributing machine operator (self-propelled); Backhoe (with over 3/8 yd. bucket); Side boom tractor (type D-4 or equivalent or larger); Tube finisher (slip form paving); Gradall (and similar type machine); Asphalt paver (self propelled), [sic] Asphalt planer (self-propelled); Batch plant (concrete-central mix); Slurry machine (asphalt); Concrete pump (3 in. and over); Roto-mill; Swinging boom truck (over 12 ton capacity)" Stip. Exs. A to F.

²⁴ As business manager, Hart was responsible for "daily business of the operation" and "directing negotiations." Tr. at 274. He was also familiar with operations such as Lang's, having himself worked in "the industry of land clearing and tree clearing." *Id.* at 275.

²⁵ Hydro-ax: Tr. at 278; *Id.* at 279 ("along with size and skill... . It would be the skill to do it. The hydro ax with the mower is, basically, just like a front end loader [heavy

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Hart's testimony established that where a particular piece of equipment is not listed, the industry practice is to look to the treatment accorded a similar piece of listed equipment. Thus, Hart testified, Lang's four unlisted pieces of equipment were most similar to the generally larger equipment listed in Group I (such as the bulldozers Lang used). Tr. at 281-286. Indeed, the testimony showed that Lang's hydro-ax and stump grinder were merely modified pieces of heavy equipment otherwise listed under the Group I subclassification such as loaders and backhoes. Lang argues that because of specialized usage (i.e., land clearing) its machinery is unlike Group I's heavy or highway construction equipment. Its machinery, Lang contends, is "forestry equipment ... used for snipping down trees and reducing them to mulch" Lang Rep. Br. at 4. But use of much of the listed Group I equipment is not limited to only heavy construction's earth-moving or building of highways; yet the wage determinations nonetheless list all of it within Group I, with no caveat that use changes area practice. Lang's focus on the so-called specialized use of its equipment ignores the record evidence that, with one possible exception suggested by Lang (*Id.* at 5-6), specialized use of heavy equipment is not relevant to classification of the dozens of pieces of equipment listed in the wage determinations and collective bargaining agreements.

All the relevant testimony regarding Michigan area practice for equipment classification demonstrated that Lang's disputed equipment should have been treated as being within Group I. Bulldozers were specifically classified within Group I. Lang's other four pieces of machinery were clearly similar to the loaders, backhoes, and other types of heavy equipment within the Group I subclassification. Conversely, Lang's four pieces of disputed heavy equipment were clearly dissimilar to the vast majority of the smaller, less powerful pieces of machinery listed in the wage determinations' Group IV subclassification.²⁶

equipment which is listed in the wage determinations under Group I].” Grapple skidders: Used for “moving logs,” the grapple skidders would be Group I, because of “the size of the machine. And the expertise. It’s a very expensive machine and most contractors, that’s their production machine of getting them logs over to the chipper or getting them out of the way” *Id.* Tree Chipper (22 inches): Considered Group I because of “the size of the machine and the expertise it takes to run one and plus the maintenance on one. They’re a high cost machine and if you put somebody on it that didn’t know what they was doing you could screw it up big time.” *Id.* at 280. Stump Grinder: “It would be Group 1. ... It’s just an attachment put on a backhoe [listed in Group 1] or excavator, as they call them today.” *Id.*

²⁶ “Group 4: Boiler fire tender; Oiler; Fire tender; Trencher (service); Flexplane operator; Cleftplane operator; Grader operator (self-propelled fine-grade or form (concrete)); Finishing machine operator (concrete); Boom or winch hoist truck operator; Endloader operator (under 1 yd capacity); Roller operator (other than asphalt), [sic] Curing equipment operator (self-propelled); Concrete saw operator (40 h.p. or over); Power bin operator; Plant drier operator (asphalt); Vibratory compaction equipment operator (6 ft. wide or over); Guard

Continued . . .

The ALJ ruled that Lang’s four pieces of disputed equipment were equivalent to “mulching equipment” or “stump grinders,” as listed under Group IV; *see* n.26. We conclude that the ALJ was incorrect, because this ruling was contrary to the un rebutted evidence. Hart testified that the Group IV “mulcher is a machine that, basically, just blows straw or other material out on the ground for protection.” Tr. 287. Thus, he further testified that the massive hydro-ax, skidder, and tree chipper could not be considered similar to Group IV’s small mulching equipment because they were “[j]ust different operation[s].” *Id.* at 288. In any event, the fact that mulch was an end-product of Lang’s operations does mean that its heavy land clearing equipment is “mulching equipment” as contemplated under the Group IV term.

Furthermore, Hart’s un rebutted testimony leads us to reverse the ALJ’s finding that Lang’s stump grinder was the same as a Group IV “stump grinder”²⁷: “The one we have listed in Class [Group] IV is one you either walk behind or you pull behind with a truck. It’s a very, very small one.” *Id.* He further testified that the small Group IV stump grinder is “used for very, very selective cutting, like a park, putting a road through a park where you don’t want to disturb a lot of trees. You’d hand cut a tree and go in with this machine and dig this – take the stump out.” *Id.* at 288-289.

Representatives of contractors signatory to Local 324’s collective bargaining agreements testified and concurred with Hamilton’s and Hart’s uniform testimony regarding classification of Lang’s equipment. Harry Fox is the owner of Harry Fox, Inc., a Michigan company, that (like Lang) is involved primarily in “the same type of land clearing business.” D. & O. at 14. Fox’s company yearly performs 600 to 700 Michigan land clearing contracts. Tr. at 360.

Fox testified that he used the same or similar heavy equipment as Lang for clearing land and that he classified the equipment as Group I. *Id.* at 361-362. He testified that the level of skill required of operators and the size and power of equipment governed its classification. *Id.* at 375-376. He also testified that “mulching equipment” under Group IV “would [be for] blowing straw on grass seed after it’s been planted.” *Id.* at 375. Finally, he concurred with the union testimony regarding the Group IV stump

post driver operator (power driven); All mulching equipment; Stump remover, [sic] Concrete pump (under 3-in); Mesh installer (self-propelled); Tractor operator (farm type)” Stip. Exs. A-F.

²⁷ The ALJ rejected the “Administrator’s argument that all stump grinders are not created equal” because that position was “in direct contradiction with the plain meaning of the wage determinations.” D. & O. at 17. The ALJ’s “plain meaning” interpretation is contrary to the record testimony establishing that the area practice was to include Lang’s large stump grinder in Group I.

grinder, testifying that “it would be a small stump grinder that you pull behind like a pickup truck or a self-propelled machine of some kind.” *Id.* at 376. The “big difference” between a Group IV stump grinder and Lang’s stump-grinding equipment, Fox testified, was the “size and weight.” *Id.* at 377. Fox used bulldozers, end loaders and backhoes (all Group I equipment) for removing stumps, while Lang used stump grinders, similarly large and heavy equipment. *Id.* at 363.

David Park, Treasurer, B&V Construction, testified that his company did 200 to 250 contracts a year and contracted out its land-clearing work. *Id.* at 423-424. He confirmed Fox’s version of Michigan area practice when he testified that B&V classified land-clearing equipment such as Lang’s as Group I. *Id.* at 428. He also agreed with Fox and Hart that “mulching equipment” under Group IV “would be the thin mulchers. B&V has several of them that basically you throw a straw bale in one end and it shoots somewhat chopped up straw out the other end that’s used to tap [sic] down grass seed and kind of an erosion control device.” *Id.* at 438.

Craig Sickmiller (Vice President of Financing, Sunset Excavating) testified that his company yearly constructed 40 projects involving the use of land clearing subcontractors. *Id.* at 447. He also testified that Sunset classified heavy equipment such as or similar to Lang’s as Group I equipment. *Id.* at 451. Sickmiller also confirmed the other two contractors’ account of Michigan area practice when he testified that Group IV “mulching equipment” was for “laying down straw” and would not therefore include equipment like, for instance, the hydro-ax and grapple skidder. *Id.* at 456-457.

The ALJ erred as a matter of law when he rejected the Administrator’s copious, uniform, and un rebutted testimony from Local 324 and contractor signatories to collective bargaining agreement. The ALJ correctly noted that the Administrator’s witnesses on this question “were representatives of the local union or union contractors. All of these witnesses opined that the correct classification for the type of equipment used by Lang is Group I.” D. & O. at 16. But the ALJ wrongly rejected their testimony because “no consistent theory for this conclusion was offered by those who gave testimony.” *Id.*²⁸

The wage determination rates were derived from collective bargaining agreements. Under *Fry Brothers* and its progeny, the ALJ was obligated under controlling precedent to credit the un rebutted testimony of Local 324’s representatives and the contractor signatories to the collective bargaining agreement. These witnesses

²⁸ Our review of the record demonstrates that the witnesses consistently referred to the skill of the operators and the size and power of the equipment as the determining factors for classifying power equipment. It is not relevant that the witnesses offered varying reasons for assigning Lang’s equipment within Group I. The material consideration is the fact that the witnesses unanimously identified Lang’s equipment as within Group I because the pieces were most similar to the types of equipment listed in that category.

established the area practice by the preponderance of the evidence and demonstrated that Lang's employees operating the disputed equipment should have been classified and paid as Group I Operators.

CONCLUSION

We **GRANT** the Administrator's Petition for Review and **DENY** Lang's Petition for Review. Accordingly, the Administrative Law Judge's Decision and Order dated February 22, 2001, is affirmed in part and reversed in part, consistent with this Final Decision and Order.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge