



In the Matter of:

THYSSEN SECURITY ELEVATOR

ARB CASE NO. 99-113

***In re:* Application of Wage Determination Nos. PA960025, mod. 2, and PA960005, mod. 2, applied respectively to elevator mechanics at HUD No. 034-EE046/PA26-5951-005, Ivy House and HUD No. 034-EE046/PA26-S941-007, Booth Manor, both projects located in Philadelphia, PA.**

DATE: October 29, 1999

Appearances:

For the Complainant:

Dale D. Goodman, *pro se*, King of Prussia, PA

For the Respondent:

Steven J. Mandel, Douglas J. Davidson, Leif G. Jorgenson, *U.S. Department of Labor, Washington, D.C.*

REMAND ORDER

Thyssen Security Elevator (“Thyssen”) has petitioned the Administrative Review Board (“ARB”) pursuant to 29 C.F.R. Parts 5 and 7, to review a determination issued by the U.S. Department of Labor’s Wage and Hour Division on July 8, 1999, in this case arising under the Davis-Bacon Act (“DBA”), 40 U.S.C. §276a *et seq.* (1994). On September 15, 1999, the Deputy Administrator of the Wage and Hour Division filed a Motion to Remand for Lack of Ripeness and to Suspend the Briefing Schedule (“Motion to Remand”).

Thyssen is engaged in elevator construction work on two Davis-Bacon covered projects, Booth Manor and Ivy House, in Philadelphia, Pennsylvania. The initial endorsement of the mortgage for Booth Manor took place on August 29, 1997, and for Ivy House on January 22, 1998. After construction of the projects was underway, Thyssen asserted to the Wage and Hour Division that the rates listed in the applicable wage determinations for these projects for elevator mechanics were erroneous.

Timothy J. Helm, leader of the Government Contracts Team in the Wage and Hour Division, advised Thyssen in a letter dated July 8, 1999, that because Thyssen challenged the wage determinations long after the initial endorsement of the mortgages and after the start of construction on both projects, the challenge to the wage determinations applied to these projects was untimely. Helm’s letter also noted that it did not appear that Thyssen had submitted a request for an additional classification for either of the two projects at issue through the “conformance” process. 29 C.F.R. §5.5(a)(1)(v)(1999). However, Thyssen, in its Petition for Review to the ARB, submitted evidence

to show that it had submitted a Form 1444 dated March 24, 1998, to the general contractor on the Booth Manor project, requesting the addition of a classification of “elevator tender” and proposing a wage rate and fringe benefits for that classification. The general contractor apparently did not submit the form to the Wage and Hour Division. In any event, the Wage and Hour Division has not yet ruled on the “elevator tender” classification issue.

The Deputy Administrator asserts, in its Motion to Remand, that the ARB should remand the case because there has been no final agency action with regard to the “elevator tender” classification issue and therefore, the petition for review “is not ripe for review by the Administrative Review Board.” Motion to Remand at 1. We agree that the case should be remanded.

The regulation governing appeals to the ARB in DBA cases involving federal and federally assisted construction contracts provides:

Any party or aggrieved person shall have a right to file a petition for review with the Board . . . within a reasonable time from any final decision in any agency action under part 1, 3, or 5 of this subtitle.

29 C.F.R. §7.9(a). Thus, Thyssen’s request that the ARB review the “elevator tender” classification issue is premature, since the Wage and Hour Division has not yet issued a final decision on that issue.

The Wage and Hour Division has issued a final decision on the wage determination challenge. However, given the interests of efficient administration and judicial economy, we conclude that it is preferable to defer consideration of the wage determination issue until a final determination also has been issued on the conformance request.

Accordingly, we **DISMISS** Thyssen’s petition for review, **WITHOUT PREJUDICE**, and **REMAND** this case to the Deputy Administrator to issue a final decision on the “elevator tender” classification request on or before **forty-five (45)** days from the date of this order. Upon the issuance

of the Deputy Administrator’s final decision on the “elevator tender” classification issue, Thyssen may then appeal the Deputy Administrator’s final decisions of both issues to the ARB as provided in 29 C.F.R. §7.9(a).^{1/}

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

^{1/} Given our resolution of this case, the Deputy Administrator’s Motion to Suspend the Briefing Schedule is moot and we need not address it.