In the Matter of:

Disputes concerning the payment of prevailing wage rates and overtime pay:

ARB Case No. 00-050

ALJ Case No. 96-DBA-37

DATE: December 6, 2001

THOMAS & SONS BUILDING CONTRACTORS, INC., Contractor

and

ZAGARI & SONS CONSTRUCTION CORP., Subcontractor, JOSEPH ZAGARI, President

Debarment for labor standards violations by:

ZAGARI & SONS CONSTRUCTION CORP. and JOSEPH ZAGARI, President

With respect to laborers and mechanics employed by the subcontractor on Contract No. F28609-90-D-0010 and Contract No. F28609-93-D-0009 at McGuire Air Force Base, Wrightstown, New Jersey.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER DENYING RECONSIDERATION

The Board has before it the motion of Petitioner Thomas & Sons Building Contractors, Inc. (Thomas & Sons), seeking reconsideration of our Final Decision and Order (F.D. & O.) issued on August 27, 2001. In the F.D. & O. we affirmed, *inter alia*, an administrative law judge's (ALJ's) finding that Thomas & Sons' subcontractor, Zagari & Sons Construction Corp., had underpaid workers employed on Federal construction contracts at McGuire Air Force Base, New Jersey. These contracts were subject to the prevailing wage requirements of the Davis-Bacon Act, 40 U.S.C. §276a *et seq.* (1994) and the overtime requirements of the Contract Work Hours and Safety Standards Act, 40 U.S.C. §327 *et seq.* (1994). The amount of the underpayments was $143,192.96. Because prime contractors on projects subject to the Davis-Bacon Act are responsible for proper payment of prevailing wages by their subcontractors (*see*, *e.g.*, *Silverton Construction Co.*, WAB No. 92-09

(Sept. 30, 1992)), we ordered the contracting agency to pay over to the underpaid workers monies that had been withheld from Thomas & Sons' contracts. *Thomas & Sons Building Contractors, Inc.,* ARB No. 00-050, ALJ No. 96-DBA-37 (ARB Aug. 27, 2001), 2001 WL 1031629, *4-5.

In support of its request for reconsideration, Thomas & Sons argues that the employee witnesses who testified at the hearing in this case did not meet their burden of proving wage underpayments under the burden of proof scheme outlined by the Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), and that the ALJ and this Board misapplied the *Anderson* standard. We disagree.

The central problem in the Petitioner's reconsideration request is a misunderstanding of the applicable burdens of proof in a wage underpayment case. Thomas & Sons asserts that under *Anderson*, "the employee bears the burden of providing the performance paper work [sic] and they [*i.e.*, the Zagari employee witnesses] didn't have any." Thus it appears that Thomas & Sons is claiming that in the absence of written documentation, the employees must lose. There are two fundamental errors in this claim.

First, this enforcement case was initiated by the Wage and Hour Administrator. As the party who brought the case, the initial burden of proof falls on the Administrator – *not* the workers. *See, e.g.*, 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §63 (2d ed. 1994) ("[The] broadest and most accepted idea [is] . . . that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims."). The Zagari employees participated in this case only as witnesses, not as parties, and therefore did not personally bear any proof burden. This is in contrast to *Anderson* – a case under the Fair Labor Standards Act – which was brought directly by the employees, and in which the employees therefore assumed the initial burden of proof.

Second, nothing in the *Anderson* methodology requires that any plaintiff or prosecuting party present "written documentation" of a wage underpayment. All that is required is *evidence* sufficient to show that the employees "in fact performed work for which [they were] improperly compensated[,]" and also "sufficient . . . to show the amount and extent of that work as a matter of just and reasonable inference." *Anderson*, 328 U.S. at 687. In this case, the Administrator presented the employees' testimony about their work hours and wage rates, coupled with an analysis of various payroll records. This evidence (testimonial and documentary) was credited by the ALJ and this Board. Significantly, neither Thomas & Sons nor Zagari presented the kind of rebuttal documentation needed under the *Anderson* approach to demonstrate with precision the hours worked and the wage rates paid. Accordingly, it was appropriate for the ALJ and this Board to "award damages to the employee[s], even though the result be only approximate." *Id*. at 687-88.

Although the extent of the Board's authority to reconsider its decisions in cases under the Davis-Bacon Act is an open question,[1/] careful consideration was given to this matter, including the

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[1/] *See Thomas and Sons Building Contractors, Inc.*, Order Denying Reconsideration, ARB No. 98-164, ALJ No. 96-DBA-33 (ARB June 8, 2001), 2001 WL 706733, *3-5. As explained in this earlier *Thomas and Sons* order, the Board's authority to reconsider Davis-Bacon Act cases is particularly (continued...)

briefs and arguments of the parties. Thomas & Sons has not presented any persuasive argument that would prompt us to reconsider the F.D. & O.

Accordingly, Thomas & Sons' motion for reconsideration is **DENIED**.[2/]

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member

Member E. Cooper Brown, concurring:

I concur in the denial of Thomas and Sons' request for reconsideration. I write separately to further explain why it is that the Board's Final Decision and Order in this case was reached consistent with *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946).

As noted in our Final Decision and Order issued August 27, 2001, the principles enunciated in *Anderson* governing allocation of the burden of proof between the parties under the Fair Labor Standards Act are applicable to the instant case. In *Anderson* the Supreme Court, in acknowledging that it is the employee who has the burden under the FLSA of proving that he performed work for which he was not properly compensated, cited certain factors inherent to the FLSA and its implementation that, the Court held, necessitated the erection of "a proper and fair standard . . . for the employee to meet in carrying out his burden of proof" lest otherwise the employee's burden become "an impossible hurdle." 328 U.S. at 687. The factors cited by the Supreme Court, equally applicable in a prevailing wage dispute under the Davis-Bacon Act (DBA), included the remedial nature of the FLSA, "the great public policy which [the FLSA] embodies, " and the obligation imposed by the FLSA upon the employer "to keep proper records of wages, hours and other conditions and practices of employment" which necessarily places the employer, and not the

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[1/](...continued)
problematic when debarment has been ordered. *Id.* Although the subcontractor in the instant case (Zagari & Sons Construction Corp.) and its principal (Joseph Zagari) were ordered debarred by the ALJ, the subcontractor's debarment was not an issue in the case when it was appealed to the Board, and thus debarment is not an issue in this request for reconsideration.

[2/] We note in passing that Thomas & Sons apparently did not serve a copy of its request for reconsideration on the Wage and Hour Administrator. Ordinarily, we would strike the motion and direct Thomas & Sons to resubmit the document with proper service on the opposing party before considering it. However, further participation by the Administrator is unnecessary in light of our decision summarily to deny the reconsideration request.

employee (or in the instant case the Administrator) "in [a] position to know and to produce the most probative facts concerning the nature and amount of work performed." *Id*.

As the majority states, it is the Administrator who has the burden of proving that the DBA and the Contract Work Hours and Safety Standards Act (CWHSSA) were violated. However, for the same policy reasons articulated in *Anderson*, coupled with the practical implications of the fact that it is the employer (and not the employee) who has the duty under these Acts to make and maintain specified employment records, including records pertinent to resolution of the instant case, the *Anderson* shifting of the burden of proof to the employer is warranted for otherwise the Administrator's burden would become, in the words of the Supreme Court in *Anderson*, "an impossible hurdle." 328 U.S. at 687.

In the instant case the Administrator thus had the initial burden of establishing that the Zagari employees performed work for which they were improperly compensated. This the Administrator accomplished by proving that the employees "in fact performed work for which [they were] improperly compensated and [by] produc[ing] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Anderson*, 328 U.S. at 687.

The Administrator having thus met his initial burden of proof, the burden was appropriately shifted to Thomas & Sons to either come forward "with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the [Administrator's] evidence." *Anderson*, 328 U.S. at 687-688. Thomas & Sons did neither. Accordingly, it was appropriate as the majority points out for the ALJ, and this Board upon review of the ALJ's Decision and Order, to "award damages to the employee[s], even though the result be only approximate." *Id*.

E. COOPER BROWN
Member