U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

Disputes concerning the Payment of prevailing wage Rates by:

E.T. SIMONDS CONSTRUCTION COMPANY, Prime Contractor,

With respect to laborers employed On Contract No. 78314, for heavy Highway construction work on Illinois Highway 34

ARB CASE NO. 2021-0054

ALJ CASE NO. 2021-DBA-00001

DATE: May 13, 2022

Appearances:

For the Petitioner:

Andrew J. Martone, Esq. and Matthew B. Robinson, Esq.; *Hesse Martone, P.C.*; Saint Louis, Missouri

For the Administrator:

Seema Nanda, Esq.; Jennifer S. Brand, Esq.; Sarah K. Marcus, Esq.; Jonathan T. Rees, Esq.; Bradley G. Silverman, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the Davis-Bacon Act (DBA) and "Related Acts" (DBRA),[1] and the applicable implementing regulations.[2] The DBRA apply the DBA's labor standards to certain federally assisted construction projects, including the highway projects at issue here.[3] On May 25, 2021, a Department of Labor (Department or DOL) Administrative Law Judge (ALJ) issued an Order Granting Administrator's Motion for Summary Judgement, in Part (ALJ Order). E.T. Simonds Construction Company (Petitioner) appealed to the Administrative Review Board (ARB or Board). We affirm.

BACKGROUND

The Illinois Department of Transportation awarded a bid to Petitioner to perform construction work, including patch work from Illinois Route (IL) 34 to IL 142 (worksite).[4] Petitioner paid Mark Basler Excavating (Basler) to provide truckdrivers to haul waste materials from the IL 34 portion of the worksite. Basler provided six truckdrivers, including the company's owner, Mr. Mark Basler. While on the worksite, Basler truckdrivers did not load their own trucks, but sat inside of their trucks waiting for their trucks to be loaded by other individuals at the worksite.[5] Once their trucks were loaded, Basler truckdrivers would haul the materials to remote off-site locations.

After an investigation by the U.S. Department of Labor's Wage and Hour Division (Administrator), the matter was referred to the Office of Administrative Law Judges (OALJ) for a formal hearing.

Before the ALJ, both parties filed motions for summary judgment. On May 25, 2021, the ALJ granted the Administrator's Motion for Summary Judgment in Part. The ALJ concluded that there was no genuine issue of material fact that Basler truckdrivers are subject to the DBA and must be paid prevailing wages for

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1 40 U.S.C. § 3141 *et seq.* (2013).

2 29 C.F.R. Parts 1, 3, and 5 (2020).

3 29 C.F.R. § 5.1 (listing The Federal-Aid Highway Acts (72 Stat. 895, as amended by 82 Stat. 821; 23 U.S.C. § 113, as amended by the Surface Transportation Assistance Act of 1982, Pub. L. 97-424)).

4 ALJ Order at 1.

5 On appeal, the Solicitor submitted "Experts of Record" to the Board, including the declarations of Mr. Mark Basler and another Basler truckdriver, Mr. Arthur McLorn. Their declarations state that Basler truckdrivers stayed inside of their trucks on-site and that they did not leave their trucks to perform any services.

the time spent working on the worksite.[6] The ALJ further concluded that Basler truckdrivers spent more than a *de minimis* amount of time because they spent a sufficient amount of their workday on the worksite, or at least 15 minutes per hour on the worksite or an estimated 25 percent of their day.[7] The ALJ determined that "this amount of time [was] substantial enough to bring the truck drivers under the umbrella of the DBA."[8]

On June 6, 2021, the ALJ issued an Order Approving Joint Stipulation Regarding Damages. Thereafter, Petitioner appealed the ALJ's Order Granting Administrator's Motion for Summary Judgment in Part to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear appeals from ALJ decisions concerning questions of law or fact in DBA cases.[9] In reviewing an ALJ's decision in a DBA case, the Board "shall act as the authorized representative of the Secretary of Labor" and "as fully and as finally as might the Secretary of Labor concerning such matters."[10] The Board reviews ALJ orders granting summary decision de novo.[11]

DISCUSSION

In her decision, the ALJ concluded there was no genuine issue of material fact that Basler truckdrivers were covered under the DBA. Petitioner on appeal argues to the Board that the ALJ erred in granting summary decision. For reasons explained below, we conclude that the ALJ's decision is a well-reasoned ruling based on the applicable law, implementing regulations, and the evidence in the record.

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6 *Id.* at 5-6.

7 *Id.* at 6.

8 *Id.*

9 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020); 29 C.F.R. § 7.1(b).

10 29 C.F.R. § 7.1(d).

11 *See NCC Elec. Servs., Inc.*, ARB No. 2013-0097, ALJ No. 2012-DBA-00006, slip op. at 6 (ARB Sept. 30, 2015).

1. DBA's Statutory and Regulatory Background

The DBRA incorporate the DBA's requirement that contractors or subcontractors pay their employees no less than the prevailing wage rate.[12] The DBA requires that any employer who enters into a contract in excess of $2,000 with the federal government for construction, alteration, or repair of public buildings and public works to pay its laborers and mechanics who are employed "directly on the site of the work" the minimum prevailing wage and fringe benefit rates.[13] The applicable regulations provide that:

> The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.[14]

In *Building & Construction Trades, AFL-CIO v. U.S. Dept. of Labor Wage Appeals Board* (*Midway*),[15] the United States Court of Appeals for the District of Columbia Circuit concluded material transportation drivers were not covered under the DBA because Congress intended that the location of an employee's job was determinative of the DBA's coverage and that the DBA "covers only mechanics and laborers who work *on the site* of the federally-funded public hearing or public work, not mechanics and laborers employed *off-site*, such as suppliers, materialmen, and material delivery truckdrivers."[16] The court also concluded that: "Material delivery truckdrivers who come onto the site of the work merely to drop off construction materials are not covered by the Act even if they are employed by the government contractor."[17]

In a direct response to *Midway*, the Department published proposed revisions to its implementing regulations.[18] In its explanatory preamble, the Department interpreted the *Midway* decision narrowly, stating that "time spent on the site of a

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[12] *Pythagoras Gen. Cont. Corp. v. Adm'r, Wage & Hour Div.*, ARB Nos. 2008-0107, 2009-0007, ALJ No. 2005-DBA-00014, slip op. at 4 (ARB Mar. 1, 2011) (citing 40 U.S.C. § 3142(a); 29 C.F.R. §§ 5.2(h), 5.5(a)(1)).

[13] *See* 40 U.S.C. §§ 3142(a)-(c).

[14] 29 C.F.R. § 5.2(l).

[15] *Bldg. & Constr. Trades, AFL-CIO v. U.S. Dep't of Labor Wage Appeals Bd.* ("*Midway*"), 932 F.2d 985, 992 (D.C. Cir. 1991).

[16] *Id.* at 992.

[17] *Id.*

[18] 29 C.F.R. § 5.2(j).

dedicated facility and time spent hauling between such a dedicated facility and the actual construction location remain covered."[19] The Department explained its rationale as follows:

> The rule limits coverage of truck drivers who are employed by the construction contractor or a construction subcontractor to only their time spent while employed 'directly upon the site of the work.' Under this rule, those truck drivers who transport materials to or from the 'site of the work' would not be covered for any time spent off-site, but would remain covered for any time spent directly on the 'site of the work.'[20]

In 2000, the Department again published proposed revisions regarding the Act's applicability to material transportation drivers, stating that:

> The Department disagrees that *Midway* exempts all material delivery truck drivers regardless of how much time they spend on the site of the work. Clearly, truck drivers who haul materials or supplies from one location on the site of the work to another location on the site of the work are 'mechanics and laborers employed directly upon the site of the work,' and therefore, entitled to prevailing wages. Likewise, truck drivers who haul materials or supplies from a dedicated facility that is adjacent or virtually adjacent to the site of the work pursuant to amended section [29 C.F.R. §]5.2(l) are employed on the site of the work within the meaning of the Davis-Bacon Act and are entitled to prevailing wages for all of their time spent performing such activities.[21]

The Department provided further clarification of the proposed regulatory revisions, stating that:

> Our reading of Midway does not preclude coverage for time spent on the site of the work no matter how brief. However, as a practical matter, since generally the great bulk of the time spent by material truck drivers is off-site beyond the scope of Davis-Bacon coverage, while the time spent on-site is relatively brief, the Department chooses to use a rule of reason and will not apply the Act's prevailing wage requirements with respect to the amount of time spent on-site, unless it is more than "de minimis." Pursuant to this policy, the Department does not assert coverage for material delivery truckdrivers who come onto the site of the

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19 57 Fed. Reg. 19204, 19205 (May 4, 1992).

20 *Id.* at 19205-06.

21 65 Fed. Reg. 80268, 80275-76 (Dec. 20, 2000).

> work for only a few minutes at a time merely to drop off construction materials.[22]

The Department's Field Operation Handbook[23] Chapter 15 (DBA and other related Acts) incorporates these principles in its guidance for investigators:

> Section 15e22(a)(1)(2) states "truck drivers are covered by the DBA in the following circumstances . . . [d]rivers of a contractor or subcontractor for time spent loading and/or unloading materials and supplies on the site of the work, if such time is not de minimis"
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> Section 15e22(b)(3) states "truck drivers are not covered in the following instances . . . [t]ruck drivers whose time spent on the site of the work is de minimis, such as only a few minutes at a time merely to pick up or drop off materials or supplies."[24]

2. The Department's "*De Minimis*" Test Includes Both a Temporal and a Functional Component

Citing *Midway* and other cases, the Petitioner asks us to rely on the statute's language "directly on the site of the work" in combination with material transportation drivers' primarily off-site work to reject the Department's "*de minimis*" rule.[25] Petitioner asserts that material transportation drivers are not covered by the DBA even if they spend at least a part of their workday on the worksite. Petitioner also identifies difficulties with applying the *de minimis* standard, particularly in a situation where a driver may transition from non-covered to covered because of time spent in the queue on the worksite. Petitioner argues the standard could reasonably be interpreted to treat two drivers differently for performing the exact same task, thereby rendering the regulation "void for vagueness."[26] For example, the Department's *de minimis* test might reward inefficient drivers for spending more time on-site while paying more efficient drivers less wages.

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[22] *Id.* at 80276.

[23] The FOH is an operations manual that provides WHD investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance.

[24] https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15#B15e22.

[25] Petitioner's Br. 28-29.

[26] *Id.* at 32-33.

Although Petitioner's arguments and the analysis of the statutory text by some federal courts give us pause, we are bound by the Department's regulations.[27] The Department has explained that when determining whether a material transportation driver is covered under the DBA, the driver's function in connection to the construction performed on the site of the work is not the sole determinative factor.[28] Instead, the Department has provided that transportation drivers are covered for their time spent on site when that time is more than *de minimis*.

Petitioner also argues DBA coverage does not extend to material transportation drivers whose only purpose on the worksite is hauling materials to and/or from the worksite from a remote offsite location. The Department's regulations and the *Midway* decision both recognize that a driver who is on the site for a few minutes at a time and is merely dropping off or picking up material is not covered under the DBA.[29] Under these legal authorities, it is not unreasonable for us to infer that coverage might extend to material transportation drivers performing tasks beyond merely sitting in the truck and waiting for the truck to be off-loaded or loaded, even though temporally the driver is on the work site for a *de minimis* amount time. Thus, in determining whether a transportation driver's labor performed at the work on-site is more than *de minimis*, and thereby covered by the DBA, we conclude DBA coverage of material transportation drivers entails a

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[27] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186, 13187 (Mar. 6, 2020) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof . . ."); *Stouffer Foods Corp. v. Dole*, No. 7:89-2149-3, 1990 WL 58502, * 1 (D. S. C. Jan. 23, 1990) (citations omitted) ("Defendant's [[Department of Labor] administrative law judges are bound by Executive Order 11246 and its implementing regulations; they have no jurisdiction to pass on their validity.").

[28] In affirming the ALJ's order, we reject Petitioner's argument that the case law it cites in its briefing to the Board dispositively excludes from DBA coverage all material transportation drivers regardless of the time spent on the site of the work. The majority of the cases cited were issued prior to the Department's publishing the proposed revisions in 2000, and the only case that was decided afterwards did not address the current issue but considered whether federal law preempted state regulations. *See Frank Bros. Inc. v. Wisconsin Dept. of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005) ("The sole issue presented on appeal is whether the federal prevailing wage scheme, which expressly exempts truck drivers from its scope of coverage, preempts Wisconsin's prevailing wage law, which specifically includes truck drivers.").

[29] Department's preamble, *supra* note 22 provides: "Pursuant to this policy, the Department does not assert coverage for material delivery truckdrivers who come onto the site of the work for only a few minutes at a time merely to drop off construction materials."; *Midway*, 932 F.2d at 992, "Material delivery truckdrivers who come onto the site of the work merely to drop off construction materials are not covered by the Act even if they are employed by the government contractor."

"blended" approach, balancing both a driver's function in performing labor at the worksite with the actual amount of time a driver spent on the site of work. We further conclude the analysis of whether a material transportation driver is covered is contextual in nature and should include a discussion of the totality of the circumstances, including the employee's function in connection to the worksite's construction work, the services, if any, the employee performs on the site of the work, and the length of time spent on the site of the work.

3. The ALJ Did Not Err in Granting Summary Decision

An ALJ may grant summary decision "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law."[30] The moving party has the burden to show that the non-moving party has failed to create a genuine issue of material fact upon an essential element of the case.[31] To avoid summary decision, the non-moving party must rebut the movant's motion and evidence with contrary evidence sufficient to create a genuine issue of material fact to avoid summary decision.[32] The non-moving party must present specific facts that could support a finding in their favor and may not rely on conclusory allegations.[33] The Board views the allegations and evidentiary submissions in the light most favorable to the non-moving party.[34]

Upon review of the party's arguments and the record in the light most favorable to Petitioner, we disagree with Petitioner's argument that the ALJ erred in concluding that there was no genuine dispute that Basler drivers spent more than a *de minimis* amount of time on the worksite and that they were entitled to prevailing wages for time spent on the worksite. The ALJ found that Basler drivers made repeated trips to the worksite, spending an estimated 25 percent of their

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30 29 C.F.R. § 18.72.

31 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Jones v. Williams*, 791 F.3d 1023, 1030-31 (9th Cir. 2015) (quotation omitted) ("In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.").

32 *Nortell v. N. Cent. Coll.*, ARB No. 2016-0071, ALJ No. 2016-SOX-00013, slip op. at 3 (ARB Feb. 12, 2018).

33 *Id.* at 3-4; *Latigo v. ENI Trading & Shipping*, ARB No. 2016-0076, ALJ No. 2015-SOX-00031, slip op. at 3 (ARB Mar. 8, 2018).

34 *Ellis v. Goodheart Specialty Meats*, ARB No. 2021-0005, ALJ No. 2019-FDA-00006, slip op. at 4 (ARB July 19, 2021) (citation omitted).

workday on the site of the work.[35] The parties submitted evidence from two of Basler's drivers, and their undisputed statements demonstrate that Basler's drivers spent 15 minutes of every hour on the worksite. Further, the record shows that drivers stayed in their trucks and did not perform construction work directly on the site of work. Thus, we agree with the ALJ that Basler's drivers spent a significant amount of their workday on the worksite although their time on site was not in one session. There is nothing in the regulations that prohibits the ALJ from aggregating every trip to the worksite that Basler truckdrivers made throughout a workday to find that their time spent cumulatively on the site of the work was more than *de minimis*.

The record supports the ALJ's conclusion there is no genuine issue of material fact that the time Basler's drivers spent on site was more than *de minimis*. Accordingly, we affirm the ALJ's decision to grant summary decision on the issue of whether the material transportation drivers were covered by the DBA.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's Order Granting Administrator's Motion for Summary Judgement in Part.

SO ORDERED.

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[35] Petitioner disputes the Administrator's method of calculating the amount of time spent per hour rather than per-trip. Petitioner also takes issue with the evidence supporting the Administrator's figure of 25% of the drivers' workday. The issue for purposes of this summary decision order is whether the drivers spent a sufficient amount of time on the worksite. The ALJ did not grant summary decision on the amount of back pay owed, which was addressed in a subsequent ALJ order that is not part of this appeal.