In the Matter of:

Disputes concerning debarment and the payment of prevailing wage rates, fringe benefits and overtime pay by:

CODY-ZEIGLER, INC., FRANCIS D. ZEIGLER, President, ROBERT D. ZEIGLER, Vice President, JAMES A. SWARTZMILLER, Vice President, STANLEY C. CALDWELL, Vice President,

PETITIONERS/ RESPONDENTS,

v.

ADMINISTRATOR, WAGE and HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PETITIONER/ RESPONDENT,

and

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO,

INTERVENOR,

With respect to laborers and mechanics employed by the prime contractor on U.S. Postal Service Contract No. 232098-94-B-0291, Dublin, Ohio, and employed by the prime contractor and sub-contractor on U.S. Postal Service Contract No. 232098-95-0215, Westerville, Ohio.

ARB CASE NOS. 01-014
01-015

ALJ CASE NO. 97-DBA-17

DATE: December 19, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioners/ Respondents:
Roger L. Sabo, Esq., *Schottenstein, Zox & Dunn, Columbus, Ohio*

For Petitioner/Respondent Administrator, Wage and Hour Division:
Carol Arnold, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., Acting Solicitor, *U.S. Department of Labor, Washington, D.C.*

For Intervenor Building and Construction Trades Department, AFL-CIO:
Terry R. Yellig, Esq., *Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington, D.C.*

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board (ARB or Board) pursuant to the Davis-Bacon Act, as amended (DBA or the Act), 40 U.S.C.A. § 3141 et seq. (West Supp. 2003)[1], the Postal Reorganization Act, 39 U.S.C.A. § 410(b)(4)(C) (West 2001), the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C.A. § 327 et seq. (West 2001), Reorganization Plan No. 14 of 1950, 5 U.S.C.A. App. (West 2001) and the regulations at 29 C.F.R. Parts 5 and 7 (2002). We are considering the Petitions for Review filed by the Administrator, Wage and Hour Division (Administrator) and by Cody-Zeigler, Inc., et al., (CZI).[2] The parties are seeking review of aspects of the April 7, 2000 Decision and Order (D. & O.) and the September 28, 2000 Final Decision and Order of Administrative Law Judge Rudolf L. Jansen (ALJ) ordering CZI to pay $64,520.75 in back wages for improper deductions from the prevailing wage rates and fringe benefits set forth in the applicable wage determinations.

BACKGROUND

CZI was the contractor awarded a contract for the construction of a post office at Tuttle Crossing in Dublin, Ohio, in 1994 and was the contractor awarded a contract for the construction of a post office in Westerville, Ohio. Both contracts were subject to the Postal Reorganization Act and the Contract Work Hours and Safety Standards Act, both Davis-Bacon Related Acts, and the applicable regulations. Respondent's Exhibits (RX) 1-2, 2A.

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[1] 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 currently codified at 40 U.S.C.A. § 3141 et seq. (West Supp. 2003).

[2] Although the Building and Construction Trades Department, AFL-CIO, gave notice of its intent to participate in this case as an "interested person" and to file a reply brief and/or a rebuttal brief, no brief was received.

In 1997, Wage and Hour Division Investigator Michele Lenkaitis (the Investigator) investigated, on behalf of the Administrator, CZI's performance on both post office projects in regard to the payment to its employee laborers and mechanics of the prevailing wage rates and fringe benefits set forth in the applicable wage determinations attached to the contracts. By an Order of Reference dated June 18, 1997, the Administrator informed CZI of the results of the investigation of CZI's performance on the post office projects which concluded that CZI failed to pay the prevailing wage rates, fringe benefits and overtime pay as required by the Act and the applicable wage determinations attached to the post office contracts. The Order of Reference also sought debarment of CZI and its officers. CZI requested a hearing before the Office of Administrative Law Judges. A hearing was held before the ALJ from March 23, 1999, through March 25, 1999.

In the ALJ's initial April 7, 2000 Decision and Order, the ALJ ruled that the Administrator's claim of the informer's privilege pursuant to 29 C.F.R. § 6.5 (2002) regarding CZI's request for the production of ten non-testifying CZI employees' interview statements, upon which the Administrator relied, in part, to find that CZI had misclassified a portion of CZI's skilled employees' work days as having been spent performing laborer's work, that was compensated at a lower wage rate, could not be sustained. The ALJ further ruled that the Administrator's failure to comply with CZI's discovery requests and the ALJ's subsequent discovery order regarding the employees' interview statements were proper grounds for the ALJ to invoke the sanction as prescribed under 29 C.F.R. § 18.6(d)(2)(ii) and hold that the matter concerning the misclassification of employees' work would be taken as established adversely to the Administrator's position. In a subsequent order issued on June 14, 2000, the ALJ ordered the Administrator to compensate CZI for attorney's fees related to defending the misclassification issue, as a sanction for failing to comply with the ALJ's discovery order.

Next, the ALJ ruled in his initial Decision and Order that CZI did not claim improper credit for its pension fund contributions as a fringe benefit toward the prevailing wage requirement under the DBA, but did claim improper credit for its profit sharing plan contributions, health plan contributions, administrative costs of providing employee benefits and for vacation and holiday leave.[3] The ALJ also held, however, that CZI was not required to pay the higher prevailing wage for laborers for Delaware County on the Westerville Post Office project, where the work was actually performed, as opposed to the lower prevailing wage for Franklin County, which was where the Post Office had represented that the project was located. The ALJ further held that CZI failed

[3] Although the ALJ ruled that CZI claimed improper credit for its health plan contributions as a fringe benefit toward the prevailing wage requirement under the DBA, the ALJ nevertheless held that CZI permissibly claimed credit for the hourly cash equivalent of their health plan contributions based on the hours worked by the employees in the previous year.

to pay an employee of one of its subcontractors for 62 hours of work and improperly reduced its overtime compensation rate based on its claimed fringe benefits and, therefore, found back wages due for these violations. The ALJ found, however, that Elwood Smith was a superintendent of CZI and not subject to the prevailing wage requirements of the DBA. Furthermore, the ALJ concluded that CZI and two of its officers did not commit aggravated or willful violations of the DBA and, therefore, were not subject to debarment. Finally, the ALJ rejected CZI's contention that the Portal-to-Portal Act applies to DOL administrative proceedings such as DBA causes of action.

STATEMENT OF ISSUES

The Board considers the following issues:

1. Whether the ALJ erred in ruling that the Administrator's claim of the informer's privilege pursuant to 29 C.F.R. § 6.5 (2002) regarding the production of the non-testifying CZI employees' interview statements could not be sustained and that the Administrator's failure to comply with CZI's discovery requests and the ALJ's discovery order were proper grounds for the ALJ to invoke the sanction as prescribed under 29 C.F.R. § 18.6(d)(2)(ii) and hold that the matter concerning the misclassification of employees' work would be taken as established adversely to the Administrator's position.

2. Whether the ALJ erred in ordering the Administrator to compensate CZI for attorney's fees and costs related to defending the misclassification issue.

3. Whether the ALJ erred in holding that CZI is not required to annualize its DBA pension fund contributions, which CZI claimed as a fringe benefit and credit toward the prevailing wage requirement under the DBA.

4. Whether the ALJ erred in holding that the Administrator properly disallowed a credit for contributions to CZI's Profit-Sharing Plan, that CZI claimed as a fringe benefit toward the prevailing wage requirement under the DBA, pursuant to the relevant criteria at 29 C.F.R. § 5.28(b)(1)-(4) (2002).

5. Whether the ALJ erred in determining that CZI violated the DBA and that back wages were due because CZI improperly blended the family and individual health plan premium rates it paid for its employees when claiming the health plan contributions as a fringe benefit under the DBA.

6. Whether the ALJ erred in determining that CZI violated the DBA and that back wages were due because CZI improperly claimed health plan contributions as a fringe benefit under the DBA for employees who were not eligible for health plan coverage.

7. Whether the ALJ erred in holding that CZI permissibly claimed credit for the hourly cash equivalent of the health plan contributions as a fringe benefit toward the prevailing wage requirement under the DBA based on the hours worked by the employees in the previous year.

8. Whether the ALJ erred in holding that CZI improperly claimed credit for its administrative costs of providing employee benefits as a fringe benefit toward the prevailing wage requirement under the DBA.

9. Whether the ALJ erred in holding that CZI was not required to pay the higher prevailing wage for laborers for Delaware County on the Westerville Post Office project, where the work was actually performed, as opposed to the lower prevailing wage for Franklin County, which was where the Post Office had represented that the project was located.

10. Whether the ALJ erred in concluding that CZI and two of its officers did not commit aggravated or willful violations of the DBA and, therefore, were not subject to debarment.

11. Whether the ALJ erred in concluding that the statute of limitations in the Portal-to-Portal Act does not apply to administrative proceedings under the DBA and/or the Related Acts.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction, inter alia, to hear and decide appeals taken from ALJs' decisions and orders concerning questions of law and fact arising under the DBA and the numerous related Acts which incorporate DBA prevailing wage requirements. *See* 29 C.F.R. § 5.1 (2002); 29 C.F.R. § 6.34 (2002); 29 C.F.R. § 7.1(b) (2002).

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 2001). *See also* 29 C.F.R. § 7.1(d)(2002) ("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 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 Sundex, Ltd. and Joseph J. Bonavire*, ARB No. 98-130, slip op. at 4 (Dec. 30, 1999) and cases cited therein.

In addition, the Board will assess any relevant rulings of the Administrator to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to her to implement and enforce the Davis-Bacon Act. *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 Service Contract Act, 41 U.S.C.A. §§ 351-358 (West 2001)). 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).

DISCUSSION

I. The Administrator made a good faith claim of the informer's privilege pursuant to 29 C.F.R. § 6.5 in response to CZI's discovery requests and, therefore, the Administrator's failure to comply with the ALJ's discovery order was not proper grounds to invoke sanctions as prescribed under 29 C.F.R. § 18.6(d)(2)(ii) and hold that the matter concerning the misclassification of employees' work would be taken as established adversely to the Administrator's position. Nevertheless, the record does not establish a basis for underpayments by CZI to its employees based on the misclassification of the employees' work.

Initially, the Administrator contends on appeal that the ALJ erred in ruling that the Administrator's claim of the informer's privilege pursuant to 29 C.F.R. § 6.5 (2002) regarding the production of ten non-testifying CZI employees' interview statements could not be sustained. Moreover, the Administrator asserts that the ALJ erred in ruling that the Administrator's failure to comply with CZI's discovery requests and the ALJ's discovery order were proper grounds for the ALJ to invoke the sanction as prescribed under 29 C.F.R. § 18.6(d)(2)(ii) and hold that the matter concerning the misclassification of the employees' work would be taken as established adversely to the Administrator's position.

The Investigator found that CZI's payroll supervisor, Stanley C. Caldwell, regularly misclassified a portion of CZI's skilled employees' work days as having been spent performing laborer's work, that was compensated at a lower wage rate, even though the payroll supervisor was not present at the work site everyday. The Investigator determined that CZI's payroll supervisor's calculations regarding the classification of CZI's skilled employees' work days were contrary to the employees' own daily time card records and employees' interview statements provided to the investigator.

At the hearing, the Investigator testified that she relied, in part, on approximately ten employee interview statements in determining that CZI made underpayments based on the misclassification of employees. Hearing Transcript (HT) at 336-338, 341-342. Although CZI's counsel requested copies of the employee interview statements for the purposes of cross-examination, HT at 378, counsel for the Administrator refused, citing the informer's privilege at 29 C.F.R. § 6.5. HT at 389. CZI also indicated that they had made a discovery production request for the employee interview statements prior to the

hearing that the Administrator also refused in light of the informer's privilege. HT at 395. Counsel for the Administrator indicated that if the ALJ ordered that the statements be produced, she would have to seek authorization from her superiors on whether to comply. HT at 397. The ALJ ordered that the Administrator produce the witness statements. HT at 400. The Administrator indicated that she was subsequently instructed by her "National Office of the Solicitor" in "Cleveland" not to provide the statements. HT at 401-402.

The ALJ indicated that a sampling of the time cards of record established that CZI's payroll supervisor on a routine basis would assign or classify portions of their skilled employees' work days as having been spent performing laborer's work, that was compensated at a lower wage rate. *See* D. & O. at 6. Nevertheless, the ALJ observed that, although CZI had been previously audited in regard to other construction projects, no questions were ever raised prior to the instant case regarding the misclassification of employees. D. & O. at 29-30. Because the Investigator "relied extensively" on the employee interview statements as an "integral part" of the adjustment for the misclassification of employees, the ALJ determined that the employee statements were "critical" and "extremely important" for CZI to determine the exact basis for the adjustments made and, therefore, for CZI's right to defend on this issue. Thus, the ALJ concluded, by inference, that production of the employee statements outweighed the informer's privilege as set forth at 29 C.F.R. § 5.6(a)(5) (2002). In addition, although the Administrator also relied on the informer's privilege regarding the production of witness statements prior to the hearing of testimony of that witness at 29 C.F.R. § 6.5, the ALJ held that Section 6.5 did not address the question of non-testifying potential witnesses, which was at issue in this case.

Alternatively, the ALJ also held that the Administrator had not properly invoked or claimed the informer's privilege in this case. Specifically, the ALJ found that the record contains no evidence that the Administrator "personally" reviewed the witness statements sought to be withheld or had submitted any written affidavit claiming the privilege in accordance with Secretary's Order 5-96 § 4b(2)(a), (d)-(e), 62 Fed. Reg. 107 (Jan. 17, 1997)[4], regarding the Administrator's delegated authority to invoke the informant's privilege, which was applicable at the time of the hearing in March, 1999. Consequently, because the Administrator refused to comply with the ALJ's order compelling the Administrator to produce the employee interview statements and as the

[4] The invocation or claim of privilege must follow the "personal consideration of the matter" by the Administrator and the Administrator must "personally review" the documents or statements to be withheld, in accordance with the Secretary's Order 5-96 § 4b(2)(a), (d)-(e), 62 Fed. Reg. 107 (Jan. 17, 1997), applicable at the time of the hearing in this claim. Thus, Secretary's Order 5-96 § 4b(2)(a), (d)-(e), regarding the Administrator's delegated authority to invoke the informant's privilege, contemplates discovery of investigative materials and, we note, has been more recently reaffirmed in Secretary's Order 5-2001 § 4b(2)(a), (d)-(e), 66 Fed. Reg. 17762 (Apr. 3, 2001).

record does not clearly disclose the basis upon which the underpayments at issue are being asserted, the ALJ concluded that the classification issue should be decided in favor of CZI as a sanction pursuant to 29 C.F.R. § 18.6(d)(2)(ii) (2002). The ALJ also ordered the Administrator to compensate CZI for attorney's fees and costs related to this issue. D. & O. at 30-31.

The principles enunciated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), apply to the instant case regarding the determination of back wage claims arising under the DBA and its related Acts, including the parties' respective burdens of proof. *See Thomas & Sons, supra*; *Tratoros Constr. Corp.*, WAB No. 92-03, slip op. at 6 (Apr. 28, 1993). Under these principles, the Administrator, as the party that initiated and brought the enforcement case, has the initial burden of proof of establishing that the employees performed work for which they were improperly compensated. The Administrator carries her burden if she proves that the employees have:

> in fact performed work for which [they were] improperly compensated and if [she] produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Mt. Clemens Pottery, 328 U.S. at 687-688; *see also Thomas & Sons, supra; Joseph Morton Co.*, WAB No. 80-15 (July 23, 1984). "Due regard must be given to the fact that it is the employer who has the duty . . . to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and produce the most probative facts concerning the nature and amount of work performed," 328 U.S. at 687-688. Thus, although the Administrator has the burden of establishing that the employees performed work for which they were improperly compensated, where an employer's records are inaccurate or incomplete, employees are not to be penalized by denying them back wages simply because the precise amount of uncompensated work cannot be proved. Consequently, *Mt. Clemens* provides specific guidance on the responsibilities of the trier of fact:

> Unless the employer can provide accurate estimates [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence . . . .

328 U.S. at 693. *See United Kleenist Org. Corp.*, ARB No. 00-042, slip op. at 2-3 (Jan. 25, 2002); *Star Brite Constr. Co.*, Inc., ARB No. 98-113, slip op. at 5-6 (June 30, 2000);

Apollo Mech., Inc., WAB No. 90-42, slip op. at 2-3 (Mar. 13, 1991). *See also P.B.M.C., Inc.*, WAB No. 87-57 (Feb. 8, 1991); *Tratoros Constr.*, slip op. at 6.

The *Mt. Clemens* principles permit the award of back wages to non-testifying employees based on the representative testimony of a small number of employees. *Apollo Mech., Inc.*, slip op. at 2; *Permis Constr. Corp. and Tratoros Constr. Corp.*, WAB Nos. 87-55 & 87-56, slip op. at 4-5 (Feb. 26, 1991). Thus, the Department of Labor (DOL) may rely on the testimony of representative employees to establish a prima facie case of a pattern or practice of violations. *Id*. Once a pattern or practice is established, the burden shifts to the employer to rebut the occurrence of violations or to show that particular employees do not fit within the pattern or practice. *Permis Constr. Corp.*, slip op. at 5.

Pursuant to 29 C.F.R. § 6.5, "[t]he parties … may serve on any other party a request to produce documents or witnesses in the control of the party served" … and "[i]f a privilege is claimed, it must be specifically claimed in writing prior to the hearing or orally at the hearing or deposition, including the reasons therefore." 29 C.F.R. § 6.5. "In no event shall a statement taken in confidence by the Department of Labor or other Federal agency be ordered to be produced prior to the date of testimony at trial of the person whose statement is at issue unless the consent of such person has been obtained." *Id*. Similarly, 29 C.F.R. § 5.6(a)(5) states:

> It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of an employee who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the employee's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the employee. Disclosure of employee statements shall be governed by the provisions of the "Freedom of Information Act" (5 U.S.C. 552, see 29 CFR part 70) and the "Privacy Act of 1974" (5 U.S.C. 552a).

29 C.F.R. § 5.6(a)(5). A claim of privilege is not absolute, but is determined by "[w]hether, in balance, the public policy favoring nondisclosure" is "outweighed by a party's interest in obtaining disclosure" and his or her right to prepare his or her defense, which depends upon the particular circumstances of each case. *See Holman v. Cayce*, 873 F.2d 944, 946 (6th Cir. 1989), *citing Roviaro v. United States*, 353 U.S. 53, 62 (1957).

Finally, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges apply to enforcement proceedings under the Davis-Bacon and Related Acts. *See* 29 C.F.R. § 18.1(a) (2002); 29 C.F.R. Subtitle A,

Part 6, Subtitle C (2002); *Lui Landscaping, Inc.*, WAB No. 94-05 (May 20, 1994). As the ALJ noted, these rules, in pertinent part, provide that:

> If a party or an officer or agent of a party fails to comply with ... an order, including, but not limited to, ... the production of documents, or the answering of interrogatories ..., the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:
>
> (ii) Rule that for purposes of the proceeding the matter ... concerning which the order ... was issued be taken as established adversely to the non-complying party;
>
> (iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense . . . .

29 C.F.R. § 18.6(d)(2)(ii)-(iii). *See also Supervan, Inc.,* ARB No. 00-008 (Sept. 30, 2002); *Lui Landscaping, Inc.*, *supra*. The Board may set aside the ALJ's determination based upon the failure to comply with his order only upon a finding of abuse of discretion by the ALJ. *See Lui Landscaping, Inc.*, *supra*.

On appeal, the Administrator asserts that, because Section 6.5 states that the informer's "privilege" may be "claimed" "orally at the hearing," *see* 29 C.F.R. § 6.5, and as CZI had not filed a motion to compel, as referred to by 29 C.F.R. § 18.6(d), the ALJ erred in holding that the informer's privilege was not properly invoked or claimed by the Administrator and in deciding the classification issue in favor of CZI as a sanction pursuant to 29 C.F.R. § 18.6(d)(2)(ii). Mere "speculation" as to the usefulness of the employee statements is insufficient, according to the Administrator, to compel the Administrator to produce the statements, but CZI must establish "special circumstances" and the fact that CZI attempted to obtain the information "by other means" in order to compel their production. Ultimately, the Administrator contends that CZI did not establish that the employee statements and/or identities were essential to CZI's defense or that it was prejudiced by the Administrator's refusal to release the statements.

Alternatively, the Administrator argues on appeal that, even assuming the Administrator improperly invoked the informer's privilege regarding the employee statements and, therefore, the employee statements in question are not considered, the record nevertheless establishes that CZI made underpayments based on the misclassification of employees. Specifically, the employee time cards from CZI, *see* RX 17, in conjunction with the job classification phase codes the employees used to classify the type of work they performed on their time cards, *see* RX 15; Complainant's Exhibit

(CX) 10 (D 15 at 72), as well as the testimony of the three employees whose interview statements the ALJ admitted into the record and the testimony of CZI's payroll supervisor, are sufficient, according to the Administrator's characterization, to establish the reasonable inference, in accordance with the principles set forth in *Mt. Clemens*, that CZI regularly misclassified a portion of their skilled employees' work days as having been spent performing laborer's work, that was compensated at a lower wage rate. Thus, according to the Administrator's characterization, the record indisputably establishes, as the Investigator found, that CZI arbitrarily misclassified a portion of their skilled employees' work days as having been spent performing laborer's work, that was compensated at a lower wage rate, without sufficient knowledge or documentation and which was contrary to the employees' statements of record.

Initially, we note that the issue regarding the Administrator's claim of the informer's privilege pursuant to 29 C.F.R. § 6.5, regarding the production of the ten non-testifying CZI employees' statements as they relate to the misclassification of CZI's employees' work, has not been well presented for review before the Board by either the Administrator or CZI. Although CZI indicated at the hearing that the Administrator had previously refused CZI's pre-hearing discovery production request for the ten employee interview statements which are at issue by citing the informer's privilege at 29 C.F.R. § 6.5, see HT at 395, a review of the record does not indicate whether the Administrator properly invoked the privilege at that time in accordance with Section 6.5 and Secretary's Order 5-96 § 4b(2)(a), (d)-(e). A review of the record further does not indicate, in any event, whether CZI pursued or argued the issue of whether the Administrator properly invoked the privilege at that time in accordance with Secretary's Order 5-96 § 4b(2)(a), (d)-(e) or if CZI had requested redacted versions or summaries of the ten non-testifying CZI employees' statements, thereby preserving the issue for appeal.

A review of the hearing transcript does indicate that the Administrator orally claimed the informer's privilege regarding the production of the ten non-testifying CZI employees' statements at the hearing pursuant to Section 6.5, *see* HT at 389, 401-402. The informer's privilege may permissibly be "claimed" or invoked "orally at the hearing," as in this case. 29 C.F.R. § 6.5; *Howell Constr., Inc.*, WAB No. 93-12 (May 31, 1994). Although CZI's counsel requested copies of the employee interview statements for the purposes of cross-examination, HT at 378, CZI's counsel did not make, and has not made on appeal, a compelling case that CZI was actually prejudiced by the Administrator's refusal to produce the statements.

In addition, as the Administrator asserts, the ALJ erred in holding that Section 6.5 was relevant to only a claim of privilege regarding the production of witness statements prior to the hearing of testimony of that witness and not to non-testifying potential witnesses. Section 6.5 specifically states that it is also relevant to the production of "documents," such as the employees' interview statements. 29 C.F.R. § 6.5. Moreover, as the Administrator notes, claiming a privilege is relevant only to the statement of a non-testifying witness, for any issue regarding privilege as to a witness' identity or statement is irrelevant once the witness testifies. However, although the Administrator may attempt to rely on Section 6.5 to preclude discovery of the ten employees' statements until they

might testify, Section 6.5 does not unambiguously state that witness statements cannot be produced in some other redacted or summarized form before the witness testifies or that a witness statement cannot ultimately be produced if the witness or declarant does not testify.

Nevertheless, Section 6.5 does provide a basis for the Administrator to make a good faith objection to the production of the ten employees' statements in this case and, therefore, for the Board to be concerned that the ALJ abused his discretion in sanctioning the Administrator for failing to comply with his discovery order regarding the production of the employees' statements. *See Lui Landscaping, Inc.*, *supra*. Thus, the portion of the ALJ's order holding that the misclassification matter be taken as established adversely to the Administrator's position as a sanction for failing to comply with the ALJ's discovery order, pursuant to the sanction prescribed in 29 C.F.R. § 18.6(d)(2)(ii), is inconsistent with the Administrator's good faith objection and invocation of the informer's privilege pursuant to Section 6.5. Consequently, the ALJ's holding pursuant to Section 18.6(d)(2)(ii) is vacated, as an abuse of discretion by the ALJ. *See In re Lui Landscaping, Inc.*, *supra*.

We further determine, however, that the Investigator's hearsay testimony summarizing the ten employee interview statements, *see* HT at 336-338, 341-342, on which she relied, in part, in determining that CZI made underpayments based on the misclassification of employees, deserves no weight in regard to the misclassification matter. Although it is well settled that hearsay evidence, such as the Investigator's summary of the employee interview statements, is admissible in administrative proceedings arising under the DBA and Related Acts, *see M. C. Lazzinnaro Constr. Corp.*, WAB No. 88-08 (Mar. 11, 1991), and can support an award of back wages to non-testifying employees, *see Executive Suite Services, Inc.*, BSCA No. 92-26 (Mar. 12, 1993), we must nevertheless evaluate the weight to be given such hearsay evidence. Not only did the Investigator not produce the ten employee interview statements, she also did not testify as to what those ten employees actually said to her, but simply testified to the conclusions she drew therefrom. Moreover, the Investigator's hearsay testimony summarizing the ten employee interview statements is counterbalanced by the testimony of CZI's payroll supervisor, Stanley Caldwell, whom the Investigator apparently did not interview. CZI's payroll supervisor testified that he would break down on the employees' timecards how much time each employee spent performing skilled work and laborer's work, i.e., between skilled and unskilled work classifications, based on his own knowledge, experience, and conversations with the job superintendent in the field, and used the timecards to create the certified payroll records, HT at 592-656.[5] While the ALJ

[5] CZI's payroll supervisor testified that the job superintendent would also keep his own record of how much time each employee spent performing skilled work and laborer work on a "scratch pad" "piece of paper," which the supervisor would review in conjunction with the employees' time cards in determining their employees' paychecks. *See* HT at 630-631. However, CZI's payroll supervisor testified that the job superintendent's records or papers

Continued . . .

determined the Investigator's testimony to be credible, he found CZI's payroll supervisor's testimony credible as well. D. & O. at 15, 18. Thus, we give no weight to the Investigator's hearsay testimony summarizing the ten employee interview statements in regard to the misclassification matter.

We now consider the testimony of the three CZI employees, on which the Administrator relied, in part, in determining that CZI made underpayments based on the misclassification of employees. Ronald Flowers testified that he worked as a skilled carpenter, and also did laborer work as well for an hour a day, a few days per week. HT at 55, 57, 65-66. Flowers testified that CZI workers would fill out daily time records using phase codes to relate what work project they had performed and the amount of time they had spent on it, but he gave no indication that the phase codes related to or differentiated between skilled work and laborer work. HT at 60, 63. Flowers testified that CZI's payroll supervisor informed him that CZI figured or classified between 8 to 16 hours per week per skilled employee as having been spent performing laborer work, that was compensated at a lower wage rate. *See* HT at 63-64. Charles Smith, another CZI employee, also testified that CZI workers did different types of work and that a portion of his work was compensated at a lower wage rate, HT at 119-120, 136-137, but gave no specific indication that he performed skilled work for which he was compensated at the lower rate for laborer work. Finally, Danny Vannicelli, another CZI employee, testified that he worked as a laborer and as an apprentice mason and that his wages were reduced to reflect a certain number of hours as having been spent performing laborer work, that was compensated at a lower wage rate. HT at 166, 169-170, 179-182, 184. Again, Vannicelli did not specify when he performed skilled work for which he was compensated at the lower rate for laborer work.

We find the testimony of Flowers, Smith and Vannicelli inconsistent and insufficient to specifically establish that they had performed skilled work for which they were improperly compensated at a lower wage rate for laborer work. Consequently, we hold that the testimony of Flowers, Smith and Vannicelli is insufficient to establish the Administrator's prima facie case of a pattern or practice, in accordance with the principles set forth in *Mt. Clemens,* by CZI to misclassify a portion of their skilled employees' work days as having been spent performing laborer work, that was improperly compensated at a lower wage rate. *Apollo Mech., Inc., supra; Permis Constr. Corp., supra*. Thus, the ALJ's finding that the record does not establish a basis for underpayments by CZI to its employees based on the misclassification of the work performed by its employees, s*ee* D. & O. at 30, is affirmed.

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were not retained or kept and were not available for the Investigator's review. *See* HT at 630. CZI's payroll supervisor also testified that he was not present at the work site every day and only a portion of any day if he did go to the work site. *See* HT at 631-632.

II. The Administrator is not liable to CZI for attorney's fees and costs related to defending the misclassification issue.

The Administrator further argues that the ALJ also erred in ordering the Administrator to compensate CZI for attorney's fees and costs related to defending the misclassification issue. D. & O. at 30-31. After CZI's counsel submitted an itemized statement listing its relevant attorney's fees, but not costs, and the Administrator was given an opportunity to object, the ALJ issued a subsequent order on June 14, 2000, for the Administrator to pay CZI's counsel attorney's fees in the amount of $1,856.25, as a sanction for failing to comply with the ALJ's discovery order.

The ALJ noted 29 C.F.R. § 6.6(a) (2002), under the Rules of Practice for Administrative Proceedings under the Davis-Bacon Act and related acts, which states that "[p]roceedings under this part are not subject to the provisions of the Equal Access to Justice Act" (EAJA) and that ALJs "shall have no power or authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the [EAJA]." While the ALJ agreed that the EAJA applies to administrative proceedings, the ALJ would not consider the question of the EAJA's applicability to the imposition of the attorney's fees and costs against the Administrator in this case because CZI "has not claimed compensation under the EAJA" and because Section 6.6(a) "would appear to preclude the [EAJA's] applicability." June 14, 2000 Order at 2-3.

The ALJ found that neither the relevant Acts in this case or the regulations under 29 C.F.R. Part 6 provide any guidance to the imposition of attorney's fees and costs as a sanction against the United States government. The ALJ determined, however, that the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, applicable to enforcement proceedings under the Davis-Bacon and Related Acts, *see* 29 C.F.R. § 18.1(a); 29 C.F.R. Subtitle A, Part 6, Subtitle C, authorize the ALJ to take any action authorized by the Federal Rules of Civil Procedure and the Administrative Procedure Act (APA) which are not provided for by the relevant statute and regulations pursuant to 29 C.F.R. § 18.29(a)(6), (8) (2002). The ALJ further held that the APA provides authority for the imposition of attorney's fees and costs as a sanction against the United States government. *See* 5 U.S.C.A. §§ 504(a)(1) and 556(c)(11) (West 2001). Thus, in reliance on Rule 37(a)(4) and (b)(2) of the Federal Rules of Civil Procedure authorizing the imposition of attorney's fees and costs as a sanction for failing to comply with a district court judge's discovery order, the ALJ ordered the Administrator to pay CZI's counsel attorney's fees. June 14, 2000 Order at 4. *See generally Echaveste v. Vinton D. Erickson Farms*, No. 91-CLA-76 (July 13, 1995, DOL Off. Adm. App.); *Aiken*, BSCA No. 92-06 (July 31, 1992) (both affirming the sanctioning of a private party under Rule 37(b)(2) for failing to comply with an ALJ's discovery order).

As the Administrator contends on appeal, however, a majority of circuit courts have held that the requisite waiver of sovereign immunity for an award of attorney's fees against the United States pursuant to Rule 37 exists only in the EAJA, 28 U.S.C.A. § 2412(b) (West 2001), and not in terms of Rule 37 itself. *See M.A. Mortenson Co. v.*

United States, 996 F.2d 1177, 1184 (Fed. Cir. 1993); *see also In re Good Hope Indus., Inc.*, 886 F.2d 480, 482 (1st Cir. 1989) (same in regard to Rule 38); *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988) (same in regard to Rule 11).[6] The ARB has held that administrative proceedings under the DBA and Related Acts are not subject to the attorney's fee and costs provisions of the EAJA, 5 U.S.C.A. § 504, as they are not "adversarial adjudications" within the meaning of the EAJA, because there is no statutory requirement for an administrative proceeding conducted pursuant to the APA and as DBA proceedings are not listed in the enumerated types of DOL administrative proceedings subject to the EAJA, *see* 29 C.F.R. § 16.104 (2002). (The regulation at 29 C.F.R. § 6.6(a) explicitly excludes from EAJA coverage DBA administrative proceedings conducted before an ALJ.) *See Bhatt Contracting Co., Inc.*, ARB No. 98-097 (ARB May 19, 1998); *Heavy Constructors Ass'n of the Greater Kansas City Area*, WAB No. 94-13 (Dec. 30, 1994); *Paul G. Marshall, Jr.*, WAB No. 88-37 (Jan. 31, 1991); *Roderick Constr. Co.*, WAB No. 88-39 (Dec. 20, 1990).[7] Consequently, the ALJ's order that the Administrator pay CZI's counsel attorney's fees is reversed.

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[6] In contrast, a panel of the United States Court of Appeals for the Ninth Circuit explicitly rejected the EAJA theory relied upon by the Tenth Circuit in *Adamson* and reasoned that the Federal Rules of Civil Procedure, having been authorized by Congress, provide the basis for a waiver of sovereign immunity. *See Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir. 1991); *see also Barry v. Bowen*, 884 F.2d 442, 444 (9th Cir. 1989) (suggesting that the Federal Rules of Civil Procedure, having been authorized by Congress, may provide the basis for a waiver of sovereign immunity). These cases have been questioned, however. *See* Timothy J. Simone, Comment, *Rule 11 and Federal Sovereign Immunity: Respecting the Explicit Waiver Requirement*, 60 U. Chi. L. Rev. 1043, 1052-57 (1993); *see also Schanen v. United States Dep't of Justice*, 798 F.2d 348, 350 (9th Cir. 1986)(imposing monetary penalty against government under Rule 60 without addressing sovereign immunity); *United States v. National Med. Enters., Inc.*, 792 F.2d 906, 910-11 (9th Cir. 1986)(upholding penalty against government under Rule 37 without addressing sovereign immunity); c*ited in United States v. Gavilan Joint Cmty. College Dist.*, 849 F.2d 1246, 1251 (9th Cir. 1988)(because the circuit had ordered the government to pay costs and attorney's fees under Rules 60 and 37 in *Schanen* and *National Med. Enters.*, respectively, "no independent justification exists for barring Federal Rules of Civil Procedure sanctions under sovereign immunity; nevertheless, as attorney's fees were properly awarded under the EAJA, imposition of the same sanctions under the Federal Rules of Civil Procedure are unnecessary).

[7] The Sixth Circuit has held in a similar case arising under the Federal Employees Compensation Act (FECA) that waivers must be strictly construed in favor of the sovereign, *citing Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986), and held that FECA benefit determinations are not adversary adjudications, *citing Fidelity Constr. Co. v. United States*, 700 F.2d 1379 (Fed. Cir. 1983). *Owens v. Brock*, 860 F.2d 1363, 1366-67 (6th Cir. 1988). Thus, the Sixth Circuit held that Congress intended under the EAJA and FECA to preclude review of administrative denials of EAJA petitions in FECA cases, *see Owens*, 860 F.2d at 1369. The Sixth Circuit also specifically criticized the Ninth Circuit's holding in *Escobar*

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III. CZI is required to annualize its pension fund contributions when working on a Davis-Bacon project.

Next, the Administrator properly contends that the ALJ erred in holding that CZI is not required to annualize its DBA pension fund contributions, which CZI claimed as a fringe benefit and credit toward the prevailing wage requirement under the DBA. The Investigator found that CZI contributed to the pension fund at a rate that varied depending on the job classification of the employee when working on a Davis-Bacon project, but contributed at a lower flat rate for all employees when working on a private, non-Davis-Bacon project. *See* HT at 203-205; 241-242; 359-360, 688-689; RX 16, 28.

The Investigator relied on Section 15f13(g)(2)-(3) of the "Wage and Hour Field Operations Handbook" (FOH) that:

> Because employer's pension plan did not provide for immediate vesting, employer's contributions to the pension fund should be annualized for DBA purposes based on the effective rate of contributions for all hours worked during the year by averaging the employees' pension fund contributions made when working on a Davis-Bacon project and on a private, non-Davis-Bacon project during the year, *i.e.*, dividing the total annual contributions made for employees by the total number of hours worked by the employees on both Davis-Bacon and non-Davis-Bacon work during the year.

See CX 13; RX 23. Thus, only the proportion of the pension fund contributions attributable to Davis-Bacon work is credited toward the prevailing wage requirement under the DBA. The employer is prevented from using pension fund contributions made during Davis-Bacon work to fund the pension plan for periods of non-Davis-Bacon work or is prevented from receiving credit toward the prevailing wage requirement under the DBA for pension fund fringe benefit contributions that are actually attributable to the employees' non-Davis-Bacon work, thereby preventing the underpayment of employees for their Davis-Bacon work. Consequently, the Administrator argues that CZI's pension fund provides a year-round benefit that was "disproportionately" funded by contributions during Davis-Bacon work.

The ALJ noted that the Administrator relied on the holding of the United States Court of Appeals for the Eleventh Circuit in *Miree Constr. Corp. v. Dole*, 930 F.2d 1536, 1545 (1991), in which the court required an employer to annualize its contributions for an

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Ruiz v. INS, 838 F.2d 1020 (1988) that INS deportation proceedings were adversary adjudications. *See Owens*, 860 F.2d at 1365.

annual apprenticeship program which the employer claimed as a fringe benefit and credit toward the prevailing wage requirement under the DBA, that was funded entirely by contributions that occurred during the employer's Davis-Bacon work. The ALJ believed, however, that the facts and the contrary holding of the United States Court of Appeals for the District of Columbia Circuit in *Mistick v. Reich*, 54 F.3d 900 (1995), were more applicable to the instant case. D. & O. at 31-33. In *Mistick*, the court did not require an employer to annualize its contributions for a fringe benefit program, when the program provided for immediate vesting. The court in *Mistick* held that, unlike the employer in *Miree* that funded an annual fringe benefit program entirely by contributions which occurred only during the employer's Davis-Bacon work, the Administrator did not establish, and the court was "not willing to so assume" even if it "could" occur, that the fringe benefit program contributions made by the employer in *Mistick* for Davis-Bacon work (like CZI in the instant case) "reduced," "lowered" or "financed" the fringe benefits provided to employees during private work periods and that would have been funded by a separate fringe benefit plan but for the Davis-Bacon fringe benefit plan, and/or did not establish that the fringe benefits used by their employees during periods of private work were financed primarily by Davis-Bacon contributions. *Mistick*, 54 F.3d at 905 n. 4.

The ALJ in this case similarly held that the Administrator presented "no evidence," and, like the court in *Mistick*, was "unwilling to assume," that CZI had funded contributions to its pension fund during private work with contributions during Davis-Bacon work. D. & O. at 32-33. In addition, the ALJ held that Section 15f13(g)(2)-(3) of the FOH, on which the Administrator relied, did not provide any reasonable explanation why annualization is required for a fringe benefit plan that does not provide for immediate vesting, but makes no such requirement for a fringe benefit plan that provides for immediate vesting.

As the Administrator contends, however, unlike the employer in *Mistick*, CZI's pension plan in this case did not immediately vest. Section 15f13(g)(2)-(3) of the FOH requires annualization of a fringe benefit plan that does not provide for immediate vesting for DBA purposes, but makes no such requirement for a fringe benefit plan that provides for immediate vesting, because pension or other fringe benefit plans which provide for immediate vesting are similar to deferred cash payments, whereas a fringe benefit plan that does not provide for immediate vesting is not the functional equivalent of a deferred cash payment that is creditable for DBA purposes. *See Dyad Constr., Inc.*, Opinion Letter of the Deputy Administrator (June 6, 1985); *see also Tom Mistick, Inc.*, WAB Nos. 88-25 and 88-26 (May 30, 1991). Further, unlike the plan in *Mistick* (which consisted entirely of DBA contributions), the plan here is a single plan which commingles amounts contributed from DBA work with amounts contributed from other work, resulting in a combined payment based on both sources. Under these facts, it is not unreasonable to consider the DBA contribution in conjunction with the contribution during periods of private work.

In addition, Section 15f10(b) of the FOH states that "[c]ontributions made to a fringe benefit plan for Government work may not be used to fund the plan for periods of non-government work." Section 15f10(b) of the "Wage and Hour Field Operations

Handbook." Thus, "[i]f an employer chooses to provide a year-long benefit," such as CZI's pension fund in this case, annualization is required to ensure "that a disproportionate amount of that [fringe] benefit is not paid out of wages earned on [government] Davis-Bacon work." *See Miree*, 930 F.2d at 1546; *see also Mistick*, 54 F.3d at 905 ("annualization ensures that an employer does not receive Davis-Bacon credit for contributions made for Davis-Bacon work but which pay for benefits used by an employee while performing private work").

Consequently, we defer to the Administrator's long-standing policy interpretation as enunciated in Section 15f13(g)(2)-(3) of the FOH, requiring the annualization of a fringe benefit plan that does not provide for immediate vesting for DBA purposes, as reasonable. *See Titan IV Mobile Serv. Tower*, slip op. at 7. The ALJ's holding that CZI is not required to annualize its DBA pension fund contributions is, therefore, reversed.

IV. CZI's claim of a credit for contributions to CZI's Profit-Sharing Plan as a fringe benefit toward the prevailing wage requirement under the DBA is disallowed pursuant to 29 C.F.R. § 5.28(b)(4).

Next, CZI contends that the ALJ erred in holding that the Administrator properly disallowed a credit for contributions to CZI's Profit-Sharing Plan, that CZI claimed as a fringe benefit toward the prevailing wage requirement under the DBA, pursuant to the relevant criteria at 29 C.F.R. § 5.28(b)(1)-(4) (2002). D. & O. at 33-34. According to the testimony of CZI president, Francis D. Zeigler, CZI made annual contributions to a Profit-Sharing Plan, which was funded by 25% of CZI's annual profits. HT at 681-683, 715-720; RX 24. An expert witness testifying on behalf of CZI, Paul C. Morrison, conceded that the bonus plan was an "unfunded" plan (for which CZI paid benefits out of its own funds, *see* 29 C.F.R. § 5.28(b)), but stated that it could alternatively be funded by retained earnings. HT at 229, 250-256. CZI argues on appeal that such profit-sharing plans are permitted by the regulations at 29 C.F.R. § 5.28(b). Specifically, according to CZI's characterization, the plan could be reasonably anticipated to provide benefits as required pursuant to Section 5.28(b)(1), as the plan could alternatively be funded from retained earnings irrespective of whether CZI had any profits. In addition, CZI asserts that the plan could be guaranteed or legally enforced, as required pursuant to Section 5.28(b)(2), by a performance bond, which is required on public construction contracts.

The ALJ considered whether the Profit-Sharing Plan could be considered a fringe benefit under the Act pursuant to the relevant criteria at 29 C.F.R. § 5.28(b)(1)-(4), which provides:

> (b) No type of fringe benefit is eligible for consideration as a so-called unfunded plan unless:
>
> (1) It could be reasonably anticipated to provide benefits described in the act;
> (2) It represents a commitment that can be legally enforced;

> (3) It is carried out under a financially responsible plan or program; and
> (4) The plan or program providing the benefits has been communicated in writing to the laborers and mechanics affected. (See S. Rep. No. 963, p. 6)

See 29 C.F.R. § 5.28(b)(1)-(4).

The ALJ found that the amount of the annual contributions to the plan would vary based on the annual profits and, although CZI asserted that the plan could alternatively be funded from retained earnings, the ALJ concluded that it was difficult to determine why retained earnings would be used or how CZI could know in advance what its contribution would be to its employees. Thus, the ALJ doubted whether the plan could be reasonably anticipated to provide benefits pursuant to Section 5.28(b)(1). D. & O. at 34; *see also* Section 15f13(b) of the FOH. Although CZI also contended before the ALJ that the plan could be guarantied or legally enforced by a performance bond, the ALJ found CZI's contention highly speculative as to how an employee could legally enforce the payment of benefits under the plan in an unprofitable year pursuant to Section 5.28(b)(2). *See also* Section 15f13(b) of the FOH.[8] The ALJ further noted that the expert witness testifying on behalf of CZI regarding the profit-sharing plan was unable to state what kind of financially responsible plan or program pursuant to Section 5.28(b)(3) CZI used to ensure the payment of benefits under the plan. *See* HT at 255-256. Finally, the ALJ concluded that there was no evidence in the record that the plan was communicated in writing to the laborers and mechanics affected pursuant to Section 5.28(b)(4). *See* HT at 256.

A review of the record supports the ALJ's finding that there was no evidence that the plan was communicated in writing to the employees affected as required pursuant to Section 5.28(b)(4), *see* HT at 256, and CZI has not challenged this finding on appeal. Moreover, we note that CZI's annual contributions to the profit-sharing plan fail to meet the requirement that plan contributions be made not less than quarterly. *See* 29 C.F.R. §

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[8] Section 15f13(b) of the FOH states:

> As a general rule, contributions to profit sharing plans providing pension benefits may not be creditable towards meeting a contractor's or subcontractor's prevailing wage obligation because of the uncertainty or discretionary nature of the contribution provisions of the plan. Since by its nature a profit sharing plan is only operative if there are profits, there is no guarantee that any contributions will be made on behalf of an employee.

Section 15f13(b) of the "Wage and Hour Field Operations Handbook."

5.5(a)(1)(i) (2002); Section 15f13(b), (c) of the "Wage and Hour Field Operations Handbook." Thus, the ALJ's holding that CZI's claim of a credit for contributions to CZI's Profit-Sharing Plan as a fringe benefit toward the prevailing wage requirement under the DBA is disallowed pursuant to 29 C.F.R. § 5.28(b)(4) is affirmed.

V. CZI improperly blended the higher family health plan premium rate and lower individual health plan premium rate that it paid for its employees when it claimed the health plan contributions as a fringe benefit under the Davis-Bacon Act.

CZI also contends that the ALJ erred in determining that CZI violated the DBA and that back wages were due because CZI improperly blended the family and individual health plan premium rates it paid for its employees when claiming the health plan contributions as a fringe benefit under the DBA. When claiming the health plan contributions as a fringe benefit and credit toward the prevailing wage requirement under the DBA, CZI blended the differing family and individual health plan coverage premium rates it paid for its employees or used the family health plan coverage premium rate even for those with lower individual health plan coverage, rather than determining the health benefits provided to each employee based on their individual type of coverage.[9] *See* HT at 219, 247, 351-352, 684-685. The monthly health care premium paid by CZI to an employee with individual coverage was $154.57, whereas the monthly health care premium paid by CZI to an employee with family coverage was $435.80, *see* RX 9; CX 10 (D10 at 54). Consequently, by blending the differing family and individual health plan coverage premium rates or using only the family health plan coverage premium rate it paid when claiming the health plan contributions as a fringe benefit under the DBA, CZI took credit for more than it actually contributed for its employees with individual coverage, whereas CZI took credit for less than it actually contributed for its employees with family coverage.[10]

The Investigator determined that CZI improperly blended the family and individual health plan premium rates it paid for its employees when claiming the health plan contributions as a fringe benefit, based on Section 15f11(d) of the FOH. Section 15f11(d) states that:

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[9] CZI also acknowledged before the ALJ that it failed to account for their employee co-payments when claiming the employee health plan contributions as a fringe benefit and credit toward the prevailing wage requirement under the DBA. D. & O. at 35. Thus, the ALJ found back wages due for this violation.

[10] Although CZI contends on appeal that using the blended rate benefits the employee with family coverage, CZI ignores the fact that by using the blended rate, CZI took credit for more than it actually contributed for its employees with individual coverage.

> [U]nder 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 contribution for each individual employee.

See CX 13. The ALJ concluded that Section 15f11(d) of FOH was reasonable and, therefore, held that CZI's use of the blended rate violated the DBA and that back wages were due. D. & O. at 35.[11]

On appeal, CZI notes that, while the wage determinations contained in the post office construction contracts set forth only one rate for fringe benefits per employee craft, they could have set forth the different health care fringe benefit contribution rates for individual and family coverage into the wage determinations. CZI also notes that, as CZI's expert witness testified, *see* HT at 219, 242-244, union employee contracts which CZI submitted into the record, *see* RX 20-21, 25, 27, use the same blended rate of individual and family health plan contributions as a fringe benefit for all of their employees. Thus, CZI further argues that the Administrator is not treating union and non-union employers the same as required by the DBA, asserting that the result is that a union worker is paid a different prevailing wage than the non-union worker for the same work. Consequently, CZI urges that the Administrator should either allow or ban deductions of blended health plan premium rates for both non-union and union employers as well.

In regard to CZI's specific contention that wage determinations set forth only one rate for fringe benefits and not different family and individual health care fringe benefit contribution rates, the fringe benefit rate in the wage determinations is for all fringe benefits paid to employees. Thus, CZI's contention in this regard is rejected. In addition, as to CZI's assertions regarding union contracts, CZI's expert testified that CZI is a non-union contractor. *See* HT at 246. CZI also paid differing family and individual health

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[11] The ALJ noted that 29 C.F.R. § 3.5(d)(4) (2002) allows for a deduction for health care plan contributions from the prevailing wage requirement under the DBA so long as "[t]he deductions shall serve the convenience and interest of the employee," and found that it was unclear how the deductions claimed by CZI for the health benefit premiums of employees with individual coverage based on the blended premium rate over and above the amount that CZI actually paid on their behalf serves the convenience and interest of the employees with individual coverage. Contrary to the ALJ's speculation, the Copeland regulations at Section 3.5 apply to deductions for employee contributions to fringe benefit plans, but do not apply to employers' fringe benefit contributions, which is at issue in this case. *See Builders, Contractors, and Employees Ret. Trust and Pension Plan*, WAB No. 85-06, slip op. at 1, 4-5 (Dec. 17, 1986).

plan premium rates for its employees and not, as the ALJ noted, the same contractually negotiated blended rate for all employees as found in the union contracts submitted into the record by CZI. Thus, the union contracts are irrelevant to the instant case. Furthermore, the Administrator's policy is consistent as to non-union and union employers, as it is based on the actual health plan premium rates that either a union or non-union employer actually pays its individual employees.

Consequently, 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 CZI violated the DBA and that back wages were due because CZI 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.[12]

VI. CZI improperly credited health plan contributions as a fringe benefit under the Davis-Bacon Act for employees not eligible for health plan coverage.

CZI similarly contends that the ALJ erred in determining that CZI violated the DBA and that back wages were due because CZI improperly claimed health plan contributions as a fringe benefit under the DBA for employees who were not eligible for health plan coverage. When claiming the health plan contributions as a fringe benefit and credit toward the prevailing wage requirement under the DBA, CZI also claimed this credit for employees who were not yet eligible for health plan coverage, as they had not been employed long enough beyond a "waiting period" required by the health plan to be eligible for coverage. HT at 722. Although CZI argued before the ALJ that union employee contracts, which CZI submitted into the record, use a waiting period, the ALJ found CZI's argument unpersuasive, as it was irrelevant. D. & O. at 35-36. Ultimately, the ALJ again held that the deductions claimed by CZI for the health benefits of ineligible employees does not serve the convenience and interest of those employees pursuant to Section 3.5(d)(4) and, therefore, held that back wages were due.

On appeal, CZI reiterates its contention that union employee contracts, which CZI submitted into the record, *see* RX 20-21, 25, 27, use a waiting period. CZI further notes that the wage determinations contained in the post office construction contracts did not state that CZI could not claim health plan contributions as a fringe benefit during a waiting period when the employees are not yet eligible for health care coverage.

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[12] Although the Administrator arguably could interpret the statute differently, we do not find the Administrator's interpretation, as set forth in the FOH, unreasonable. We therefore give it deference.

CZI also responds to the assertion that claiming a deduction for health care for an ineligible employee or, similarly, deducting a higher blended rate from the prevailing wage of an employee with individual coverage that is greater than the rate that the employer actually pays for the benefits that such an employee receives, inequitably results in the fact that ineligible employees, in effect, are subsidizing the health care benefits of eligible employees and, similarly, employees with individual coverage are, in effect, subsidizing the benefits of employees with family coverage. CZI notes that Section 15f12 of the FOH states, in part, that "[i]t is not required that all employees *participating* in a bona fide fringe benefit plan be entitled to receive benefits from that plan at all times," *see* CX 13. Finally, CZI argues that the fact that ineligible employees and employees with individual coverage do not share equally in the benefits provided by its health care plan is no different than apprenticeship plans approved under the DBA, *see* 40 U.S.C.A. § 3141(2)(B)(ii). As the ALJ noted, D. & O. at 35, CZI contends that Section 15f16 of the FOH, CX 13, allows that credit for contributions to an apprenticeship fund be determined by dividing the total costs of the program between both journeymen and apprentices, i.e., by the total hours worked by both journeymen and apprentices, even though the journeyman does not receive any benefit from the program. *See also Miree*, 930 F.2d at 1545-46. CZI further notes that a benefit, such as health care insurance, need not go directly to an individual employee, as they may never have the need to use the insurance or benefit.

Initially, as CZI's expert testified that CZI is a non-union contractor, *see* HT at 246, we affirm the ALJ's holding that the union contracts are irrelevant to the instant case. Similarly, just as the union contracts are irrelevant to the instant case, the implications for crediting contributions to an apprenticeship plan is not at issue in this case and is irrelevant. Moreover, as the Administrator notes, participation or contributing to an apprenticeship plan is specifically craft-oriented, whereas participation and contributing to a health care plan is not based on the employee's craft, but whether the employee has individual or family coverage.

Finally, contrary to CZI's characterization, the relevant part of Section 15f12 of the FOH states in full:

> If the plan requires contributions to be made during the eligibility waiting period, credit may be taken for such contributions, since it is not required that all employees participating in a bona fide fringe benefit plan be entitled to receive benefits from that plan at all times. However, credit may not be taken for contributions for employees who by definition are not eligible to participate, such as employees who are excluded because of age or part-time employment.

See CX 13; Section 15f12 of the "Wage and Hour Field Operations Handbook." As the Administrator notes on appeal, there is no evidence in the record that CZI's health care plan requires contributions to be made for employees during the waiting period prior to

their eligibility and CZI makes no similar assertion that it does so on appeal. Thus, as CZI has not controverted the Administrator's assertion, CZI's contention in this regard is rejected. Consequently, we defer to the Administrator's long-standing policy interpretation as enunciated in Section 15f12 of the FOH as reasonable, *see Titan IV Mobile Serv. Tower*, slip op. at 7, and, therefore, affirm the ALJ's determination that CZI violated the DBA and that back wages were due because CZI improperly claimed health plan contributions as a fringe benefit under the DBA for employees who were not eligible for health plan coverage.

VII. The Administrator reasonably determined that CZI could claim credit for the hourly cash equivalent of the health plan contributions as a fringe benefit toward the prevailing wage requirement under the DBA based on the hours actually worked by the employees in the month of CZI's contributions, i.e., the period covered by the contributions.

The Administrator contends that the ALJ erred in holding that CZI permissibly claimed credit for the hourly cash equivalent of the health plan contributions as a fringe benefit toward the prevailing wage requirement under the DBA based on the hours worked by the employees in the previous year. When claiming credit for the health plan contributions as a fringe benefit toward the prevailing wage requirement under the DBA, CZI determined the hourly cash equivalent to claim for each employee by dividing the annual cost of the health care plan by the number of hours worked by the employee in the previous year. S*ee* HT at 684-685. CZI's president testified that CZI had an annual health insurance contract, which it paid in monthly installments. *Id*.

Based on Section 15f11(a) of the FOH, *see* CX 13, the Investigator determined, and the Administrator contends on appeal, that the credit for CZI's health plan contributions as a fringe benefit must be based on "the period covered by the contribution," which in this case was done monthly, thereby ensuring that CZI takes credit for only their actual fringe benefit costs. Thus, just as the Investigator determined pursuant to the example set forth at Section 15f11(a), the Administrator argues that to determine the hourly cash equivalent to claim for each employee, CZI should divide the monthly cost of the health care plan by the number of hours actually worked by the employee in that month.

The ALJ noted, however, that Section 15f11(c) of the FOH states that "where the contractor makes annual payments in advance to cover the coming year and actual hours worked will not be determinable until the close of that year, the total hours worked by [their employees] ... for the preceding calendar year (or plan year), will be considered as representative of a normal work year," or "[s]imilarly, where the contractor pays monthly health insurance premiums in advance on a lump sum basis, the total hours actually worked in the previous month or in the same month in the previous year may be use[d]," *see* CX 13. Thus, the ALJ held that Section 15f11(c) explicitly approved the use of total hours worked in the previous year to determine the hourly cash equivalent for health insurance premiums as a fringe benefit when an employer makes annual payments in advance. D. & O. at 36.

The ALJ held that the formula used by the Investigator and advocated by the Administrator on appeal, i.e., calculating the hourly contributions to the health plan at the end of the month, "after the fact" (or, as CZI contends, on a "look back basis") "would make it impossible for Employer [CZI] to know in advance what its fringe benefit offset would be for health insurance payments in a given month" or "what payments it must make to comply with the Davis-Bacon Act requirements," *id*.[13] The ALJ reasoned or inferred that Section 15f11(c) of the FOH approves the use of hours worked in the previous year by an employer who makes annual payments for the same reason. Since CZI's health insurance cost or premium was determined on an annual basis, the ALJ found no reason to treat CZI differently than one who makes an annual payment merely because CZI in this case paid its annual premium on a monthly basis. Thus, the ALJ found that CZI's formula which used the hours worked by the employee in the previous year in determining the hourly cash equivalent to claim for their health plan contributions was reasonable.

Section 15f11(c) of the FOH states that:

> the total actual hours worked in the previous month or in the same month in the previous year may be used to determine (i.e., estimate) the hourly equivalent credit per employee during the current month. Any representative period may be utilized in such cases, provided that the period is reasonable.

See CX 13. In this case, although CZI entered into an annual health insurance contract, because CZI paid for the contract in monthly contribution installments, *see* HT at 684-685, the Administrator properly argues that the Investigator permissibly determined that the credit for CZI's health plan contributions as a fringe benefit must be based on the month of the contribution, because credit for a fringe benefit must be taken for each employee in accordance with "the period covered by the contribution," *see* Section 15f11(a) of the FOH; CX 13. The month of CZI's contribution used by the Investigator is a reasonable representative period to determine the hourly equivalent credit per employee during the current month in accordance with Section 15f11(c), as it accurately reflects "the period covered by the contribution." Because CZI claimed credit for their health plan contributions based on the hours worked by the employees in the previous year, and not the monthly "period covered by the contribution," the Administrator properly contends that the ALJ erred in holding that CZI permissibly claimed credit for the hourly cash equivalent of their health plan contributions as a fringe benefit based on

[13] As CZI contends, an employee's health insurance credit would vary per month, based on the hours worked by the employee, even though the annual health insurance premium is the same.

the hours worked by the employees in the previous year.[14] We defer to the Administrator's long-standing policy interpretation as enunciated in Section 15f11(c) of the FOH as reasonable, *see Titan IV Mobile Serv. Tower,* slip op. at 7. Consequently, the ALJ's determination that that CZI's formula was reasonable and, therefore, that CZI permissibly claimed credit for the hourly cash equivalent of their health plan contributions as a fringe benefit toward the prevailing wage requirement under the DBA based on the hours worked by the employees in the previous year is reversed.

VIII. CZI improperly claimed credit for its administrative costs of providing employee benefits as a fringe benefit toward the prevailing wage requirement under the DBA.

CZI contends on appeal that the ALJ erred in holding that CZI improperly claimed credit for its administrative costs of providing employee benefits as a fringe benefit toward the prevailing wage requirement under the DBA. D. & O. at 36-37. Section 15f17 of the FOH states that "[t]he administrative expenses incurred by a contractor ... in connection with the administration of a 'bona fide' fringe benefit plan are not creditable towards the prevailing wage under the Davis-Bacon Act." *See* CX 13. CZI contends that, contrary to the FOH, 29 C.F.R. § 5.5(a)(1) states that "costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics." *See* 29 C.F.R. § 5.5(a)(1). CZI's administrative costs in this case included bank fees, payments to clerical workers for preparing paper work and dealing with insurance companies. *See* HT at 693-694, 728-729.

While the ALJ noted that Section 5.5(a)(1) allows a deduction for costs reasonably anticipated for bona fide fringe benefits, Section 5.5(a)(1) further states that it is "subject to the provisions of paragraph (a)(1)(iv)." *See* 29 C.F.R. § 5.5(a)(1). The ALJ further noted that Section 5.5(a)(1)(iv) requires that when a contractor does not make these payments to a third party, the contractor must make a written request for approval of the Secretary of Labor that the applicable standards of the Davis-Bacon Act have been met. *See* 29 C.F.R. § 5.5(a)(1)(iv). The ALJ found no evidence that CZI sought or

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[14] CZI contends that the holdings in *Mistick* and *Miree* approve of the annualization formula for fringe benefits such as CZI's health care plan. The approval of the annualization principle in those cases was based on the fact that it ensured that a disproportionate amount of a year-long fringe benefit is not paid for out of wages earned on Davis-Bacon work. *See Mistick*, 54 F.3d at 905 n. 4; *Miree,* 930 F.2d at 1546. Neither of those cases states or addresses, however, the appropriate period of contribution for the fringe benefits involved in those cases and what effect that may have on the annualization principle, which is at issue here.

received the approval of the Secretary of Labor for a deduction of its administrative costs and, therefore, ordered CZI to pay back wages for this violation.

CZI concedes on appeal that it did not obtain the Secretary's approval, as Section 5.5(a)(1)(iv) requires. *See* CZI's Rebuttal Brief at 9. Indeed, CZI was on notice that "[c]ontractors ... seeking credit under the act for costs incurred for such [fringe benefit] plans must seek specific permission from the Secretary under [Section] 5.5(a)(1)(iv)." *See Cody-Zeigler, Inc.*, WAB No. 89-19, slip op. at 2 n. 2 (Apr. 30, 1991). Moreover, the Board's predecessor, the Wage Appeals Board (WAB),[15] has held that the contractor's own administrative expenses in providing bona fide fringe benefits are not creditable toward discharging its obligation to pay prevailing wages under the Davis-Bacon Act, "but view these costs as a part of the general overhead expenses of doing business and should not serve to decrease the direct benefit going to the employee." *See Collinson Constr. Co.*, WAB No. 76-09, slip op. at 2 (Apr. 20, 1977); *see also* Section 15f17 of the "Wage and Hour Field Operations Handbook." Consequently, the ALJ's finding that CZI improperly claimed its administrative costs as a fringe benefit is affirmed.

IX. CZI is required to pay the higher prevailing wage for laborers for Delaware County on the Westerville Post Office project, where the work was actually performed.

Next, the Administrator contends that the ALJ erred in holding that CZI was not required to pay the higher prevailing wage for laborers for Delaware County on the Westerville Post Office project, where the work was actually performed. The prequalification package and solicitation materials on the Westerville Post Office contract state that the project was located in Franklin County, Ohio, as does the List of Attachments page of the contract. *See* CX 1 at C-143b; CX 10 at 12-13 (D-1 b& c); RX 1 at 2; RX 1A at 6, 37. The Investigator determined, and CZI does not challenge, that the project was actually located in Delaware County, Ohio, *see* HT at 278, which has a higher prevailing wage for laborers than Franklin County. CZI paid its laborer employees on the Westerville project at the lower prevailing wage for Franklin County. The Investigator determined that CZI was required to use the higher prevailing wage for laborers for Delaware County, where the work was actually performed.

The ALJ determined that CZI submitted its bid and performed work on the Westerville project based on the Post Office's representation that the project was located in Franklin County. D. & O. at 38. The ALJ further held that the regulations and WAB case law hold that modifications to project wage determinations shall not be effective after contract award. *See* 29 C.F.R. § 1.6(c)(2)(ii) (2002). Thus, the ALJ held that changing the wage requirement for laborers from the prevailing Franklin County rate to the higher prevailing Delaware County rate would constitute an impermissible

[15] The WAB issued final agency decisions pursuant to the DBA and its related statutes from its establishment in 1964 until creation of the Administrative Review Board in 1996.

modification to the project wage determination after the contract award and would be unreasonable.

In response to the Administrator's contention on appeal, CZI notes that the general wage determination attached to the Westerville Post Office contract contains the prevailing wage for laborers for Franklin County that was paid by CZI. CZI also argues that, as the ALJ found, CZI must know its labor costs in advance of submitting its bid, whereas the Administrator is attempting to modify the contract after it was awarded and completed.

As the Administrator notes on appeal, however, the general wage determination attached to the Westerville Post Office contract, even before the contract was awarded, contains the prevailing wages for laborers in both Franklin and Delaware Counties. *See* RX 1A at 38, 82, 85. Thus, contrary to the ALJ's characterization, the Administrator was not modifying or changing the project or contract wage determination after the contract award, but was merely enforcing the proper wage rate which was contained in the applicable contract wage determination. Because the Westerville Post Office project was located in Delaware County, and not in Franklin County, the Franklin County prevailing wage rate for laborers was "not relevant under any circumstances" to the project. *See Spencer Tile Co., Inc.*, ARB No. 01-052, slip op. at 4 (Sept. 28, 2001). The prevailing wage rate under the DBA is geared to the area "in which the work is to be performed," *see* 40 U.S.C.A. § 3142(b); 29 C.F.R. § 1.2(b) (2002); thus, the Investigator's determination to rely on the Delaware County wage determination rates, rather than the Franklin County rates advocated by CZI "enjoys direct support in the statute itself." *See Spencer Tile*, slip op. at 4 n.2.

Moreover, as the Administrator contends, the contract prequalification and solicitation materials do not bar the Administrator from requiring payment of the appropriate wage or relieve CZI of its responsibility to pay the correct wage rate to laborers employed on its project. *See Metropolitan Rehab. Corp.*, WAB No. 78-25, slip op. at 3 (Aug. 2, 1979); *see also Spencer Tile*, slip op. at 4; *The Law Co., Inc.*, ARB No. 98-107, slip op. at 8 n. 10 (Sept. 30, 1998); *Swanson's Glass*, WAB No. 89-20, slip op. at 3 (Apr. 29, 1991); *More Drywall, Inc.*, WAB No. 90-20, slip op. at 3 (Apr. 29, 1991). The DOL has the final authority in this regard under the statute and Reorganization Plan No. 14, and no one outside the Department operates with any apparent authority such as would estop the DOL from making the final determination and the laborers on the project do not forfeit any legal rights they may have under the DBA, which was intended to protect the rights of the laborers employed on the project. *See Metropolitan Rehab. Corp., supra*. Thus, it was immaterial that the Administrator never questioned the wage rate until after the project was completed. *See Metropolitan Rehab.*, slip op. at 1. The ALJ's holding is also inconsistent with the ALJ's earlier and correct holding that "[i]t is the contractor's responsibility to review the wage determination, locate the job classifications and rates applicable to the county in which the project is being performed and apply the proper rates to the employees." *See* D. & O. at 5.

In regard to CZI's contention and the ALJ's statement that CZI must know its labor costs in advance of its bid, the applicable wage determination attached to the contract contains the prevailing wages for laborers in Delaware County where the project was performed. *See* RX 1A; 40 U.S.C.A. § 3142(b); 29 C.F.R. § 1.2(b); *Spencer Tile*, slip op. at 4 n. 2. Moreover, as the Administrator notes and as the WAB stated in *Metropolitan Rehab.*, requiring payment of the appropriate wage does not "foreclose any action which such a contractor may have against the contracting agency," *see Metropolitan Rehab.*, slip op. at 3, or from seeking a price adjustment from the Post Office, as provided for in the contract. *See* RX 1A. Consequently, the ALJ's holding that changing the wage requirement for laborers to the higher prevailing Delaware County rate constituted an impermissible modification to the project wage determination after the contract award is vacated and the ALJ's finding that requiring that the higher prevailing Delaware County rate be paid to the laborers on the project was unreasonable is reversed.[16]

X. A proper basis for debarment of CZI and Francis D. Zeigler, president of CZI, has been established pursuant to 29 C.F.R. § 5.12, because CZI's current profit-sharing plan cannot be considered fringe benefits or wages under the DBA in accordance with the requirement at 29 C.F.R. § 5.5(a)(1), and, therefore, is the same as CZI's previously rejected "Christmas" bonus plan.

The Administrator further contends that the ALJ erred in concluding that CZI and two of its officers did not commit aggravated or willful violations of the DBA and, therefore, were not subject to debarment. The ALJ determined that the violations in the instant case were neither willful nor aggravated and, therefore, held that it was not appropriate to debar either CZI or any of its employees. D. & O. at 40-41. Specifically, the ALJ found no repeat violations in the instant case of those violations that were found in the previous WAB decision regarding CZI, *see Cody-Zeigler, supra*, and that none of the violations investigated in this case were ever questioned previously. The ALJ further found no evidence of altered records, fraud, deceit, subterfuge or any other knowing violation of the law, but concluded that CZI "appears" to have attempted to comply with the applicable statutes and regulations and fully cooperated in the investigation. The ALJ observed that the statute and the regulations do not offer specific guidelines for any of the

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[16] The ALJ also found that CZI improperly claimed credit for vacation and holiday leave toward the prevailing wage requirement under the DBA for employees who were ineligible for vacation or who had not taken or did not receive vacation, failed to pay an employee of one of its subcontractors for 62 hours of work, and improperly reduced its overtime compensation rate based on its claimed fringe benefits and, therefore, found back wages due for these violations. D. & O. at 37-39. These findings of the ALJ are not raised or challenged on appeal. Finally, the Administrator does not raise or challenge on appeal the ALJ's finding that Elwood Smith was a superintendent of CZI and not subject to the DBA's prevailing wage requirements. D. & O. at 39-40.

adjustments that were made by the DOL and that the DOL has not demonstrated that CZI or any of its officers knew that its actions violated the Act or showed reckless disregard of whether its practices violated the Act. Although the DOL disagreed with CZI's methods, the ALJ believed that the issues in this case were highly technical and that CZI's methods and practices were consistent and reasonable under the circumstances. Finally, the ALJ noted that the Investigator did not know why debarment was recommended in this case, *see* HT at 528.

The Administrator argues that, contrary to the ALJ's finding, there were repeat violations by CZI in this case, with CZI claiming a credit for its profit-sharing plan, which the Administrator contends was similar to a bonus plan that was previously found improper, *see Cody-Zeigler, supra*. The Administrator further contends that CZI's underpayment of employees based on the misclassification of their work constitutes the falsification of certified payrolls sufficient to support debarment, which the ALJ did not consider. In addition, the Administrator argues that CZI's claiming credit for their employees' health care plan co-payments, vacation and holiday leave for ineligible employees or employees who did take vacation, and for administrative costs toward the prevailing wage requirement under the DBA, while themselves might not support debarment, would, when considered together with the other violations of record, constitute willful or aggravated violations. Finally, although the ALJ did not consider whether CZI's officers should be debarred individually, as he found no aggravated or willful behavior, the Administrator also urges that CZI's president and payroll supervisor should be debarred individually, because they knew of or acted in reckless disregard of practices that violated the Act, especially in regard to the misclassification of employees' work.

In addition to the provisions requiring payment of prevailing wages, the further sanction of debarment for violation of the Davis-Bacon Related Acts is provided for in the regulations, i.e., placement of certain violators' names on a list of persons and firms ineligible to receive federal contracts and subcontracts for a certain period. Debarment for violation of the Davis-Bacon Related Acts, at issue in this case, is governed by 29 C.F.R. § 5.12 (2002), which provides in Section 5.12(a)(1):

> Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes … other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list...) to receive any contracts or subcontracts subject to [the Davis-Bacon Act or Related Acts].

29 C.F.R. § 5.12(a)(1). There is also a provision for the Secretary to order a shorter period based on mitigating factors under the Davis-Bacon Related Acts. *See G & O Gen. Contractors*, WAB No. 90- 35, slip op. at 2-3 (Feb. 19, 1991) and authorities cited therein. 29 C.F.R. § 5.12(c) provides that "[a]ny person or firm debarred under § 5.12(a)(1) may in writing request removal from the debarment list after six months from the date of publication by the Comptroller General of such person or firm's name on the ineligible list."

As noted in *Gaines Elec. Serv. Co., Inc.*, WAB No. 87-48, slip op. at 4 (Feb. 12, 1991), the Supreme Court has observed that "in common usage the word 'willful' is considered synonymous with such words as 'voluntary,' 'deliberate,' and 'intentional.'" *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). The term "willful," the Court added, "is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent." *Id.* at 133. Furthermore, in *A. Vento Constr.*, WAB No. 87-51, slip op. at 7 (Oct. 17, 1990), the WAB noted that the "aggravated or willful" standard "has not been expanded to encompass merely inadvertent or negligent behavior. Instead, the actions typically found to be 'aggravated or willful' seem to meet the literal definition of those terms - intentional, deliberate, knowing violations of the labor standards provisions of the Related Acts." (Footnotes omitted).

Under established law, a "willful" violation "encompass[es] intentional disregard, or plain indifference to the statutory requirements. . . . Although mere inadvertent or negligent conduct would not warrant debarment, conduct which evidences an intent to evade or a purposeful lack of attention to a statutory responsibility does. Blissful ignorance is no defense to debarment." *LTG Constr. Co.*, WAB No. 93-15, slip op. at 7 (Dec. 30, 1994); *see also Fontaine Bros., Inc.*, ARB No. 96-162, ALJ No. 94-DBA-48, slip op. at 3 (ARB Sept. 16, 1997).

As the Administrator notes, CZI was on notice that the WAB had held that its previous "Christmas" bonus plan could not be considered fringe benefits or wages under the DBA, that could be credited toward its prevailing wage obligations. *See Cody-Zeigler*, WAB No. 89-19, slip op. at 1-2. Specifically, the WAB held that that CZI's "Christmas" bonus plan that was paid annually failed to meet the requirement that such plan contributions be made not less than quarterly pursuant to 29 C.F.R. § 5.5(a)(1). *See also* Section 15f13(b), (c) of the "Wage and Hour Field Operations Handbook." Similarly, CZI made annual contributions to its profit-sharing plan, at issue in the current case, which we note also fails to meet the requirement that plan contributions be made not less than quarterly pursuant to Section 5.5(a)(1)(i) and Section 15f13(b), (c) of the FOH. In addition, CZI's president, Francis D. Zeigler, testified that the profit-sharing plan was an annual "bonus," *see* HT at 714-720, which, thereby, recalls or resembles its previous annual "Christmas" bonus plan. Thus, we vacate the ALJ's finding that the profit-sharing plan was not the same as the bonus plan that was previously rejected, *see* D. & O. at 34, 40, as not supported by substantial evidence.

Inasmuch as CZI was put on notice by the WAB's previous decision regarding the requirement that such bonus plan contributions must be made not less than quarterly pursuant to Section 5.5(a)(1), CZI's subsequent course of conduct in establishing a profit-sharing plan that was paid for by annual contributions demonstrated a reckless disregard for CZI to pay its employees in accordance with the requirement of Section 5.5(a)(1) and the WAB's previous holding. Having been put on notice of its obligation under Section 5.5(a)(1), CZI's current profit-sharing plan does not reflect that CZI and its officers made a good faith effort to correct its past violation of Section 5.5(a)(1) and indicates that CZI's conduct was more than merely negligent. As the Board and the WAB have held, conduct that evidences an intent to evade or a purposeful lack of attention to a statutory responsibility supports debarment and blissful ignorance is no defense. *See e.g., P&N, Inc.*, ARB No. 96-116, ALJ No. 94-DBA-72 (ARB Oct. 25, 1996); *LTG Constr. Co.*, slip op. at 7; *see also Fontaine Bros., Inc.*, slip op. at 3.

Consequently, the ALJ's holding that CZI and Francis D. Zeigler, president of CZI, did not commit aggravated or willful violations of the DBA pursuant to 29 C.F.R. § 5.12 and, therefore, were not subject to debarment is reversed. Inasmuch as we agree with the Administrator's contention that a proper basis for debarment has been established pursuant to Section 5.12, we need not reach the further questions raised by the Administrator of whether other bases for debarment have been established. CZI and Francis D. Zeigler, president of CZI, shall be debarred pursuant to Section 5.12(a) for a period of three years and shall be ineligible to receive any contract or subcontract subject to any of the statutes listed in 29 C.F.R. § 5.1 during that period.

XI. The statute of limitations in the Portal-to-Portal Act does not apply to administrative proceedings under the DBA or Related Acts.

Finally, CZI contends on appeal, as it did before the ALJ, that the statute of limitations in the Portal-to-Portal Act applies to the DBA and/or the Related Acts. The Portal-to-Portal Act, 29 U.S.C.A. § 255 (West 2001), provides:

> Any action . . . for unpaid minimum wages [or] unpaid overtime compensation . . . under the . . . Bacon-Davis Act [sic] (a) . . . may be commenced within two years after the cause of action accrued and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U.S.C.A. § 255. CZI argues, therefore, that the Portal-to-Portal Act limits the time frame within which to bring a cause of action for unpaid minimum wages under the "Bacon-Davis Act" and may be commenced within two years after the prevailing wage payments are due but not paid, stemming from the payroll itself, or three years if arising out of willful action. *See* 29 U.S.C.A. § 255. CZI urges that, at a minimum, the cause of action in this case accrued December 13, 1996, or when the decision issued, obviating,

preventing or barring the Administrator from asserting any complaints previous to that time. Thus, CZI contends that a portion of this proceeding is barred by the statute of limitations.

The ALJ found that the WAB has held on numerous occasions that the Portal-to-Portal Act does not apply to DOL administrative proceedings such as DBA causes of action and, therefore, rejected CZI's contention as without merit, D. & O. at 41. Although the ALJ followed the precedent of the Board and the WAB, CZI asserts that this precedent is inappropriate due to the language of the Portal-to-Portal Act itself, *see* 29 U.S.C.A. § 255, and needs to be reviewed by the Board.

The Circuit Courts, as well as the Board, have consistently held that the statute of limitations in the Portal-to-Portal Act is not applicable to administrative proceedings such as this. Thus, the Board noted in *KP & L Elec. Contractors, Inc.*, ARB No. 99-039, slip op. at 2-3 (May 31, 2000) that, as the WAB explained:

> [T]he Board has consistently held that the Portal-to-Portal Act does not apply to administrative proceedings under the Davis-Bacon Act. *See, e.g., Martell Construction Co., Inc*., WAB Case No. 86-26 (July 10, 1987), at pp. 2-3 and cases cited therein. In so holding, the Board explained in *Martell*, the Board has followed the Supreme Court's ruling in *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59 (1953), that an administrative proceeding is not an "action" within the meaning of the statute of limitations under the Portal-to-Portal Act.

Ball, Ball and Brosamer, Inc., WAB Case No. 90-18, slip op. at 17-18 (Nov. 29, 1990), *rev'd on other grounds, Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994). *See also Irwin Co., Inc. v. 3525 Sage Street Associates, Ltd.*, 37 F.3d 212 (5th Cir. 1994); *Glenn Ellen Elec. Co. Inc., v. Donovan*, 755 F.2d 1028, 1034 n.7 (3d Cir. 1985) (because "Secretary's enforcement action has been entirely administrative . . . the limitations provisions of the Portal-to-Portal Act do not apply . . . ."); *M. A. Bongiovanni, Inc.*, WAB No. 89-DBA-101 (Apr. 19, 1991) (same). Moreover, as the Board held in *In re Delfour, Inc.*, ARB No. 96-186 (May 28, 1997), an "action" governed by the limitations period in 29 U.S.C.A. § 255 refers to a civil action in court, not an administrative proceeding, such as the enforcement action in this case. *See, e.g., Glenn Ellen Elec., Co., Inc.*, 755 F.2d at 1034 n.7. Finally, although 29 C.F.R. § 255 (2002) apparently is limited to actions arising under the DBA, and not the Related Acts as in this case, the Board has also held that "[I]nasmuch as the Secretary's enforcement action [under a Davis-Bacon Related Act] has been entirely administrative, i.e., neither complaint nor counterclaim filed, the limitations provisions of the Portal-to-Portal Act do not apply even if the Act is construed as governing the Davis-Bacon Related Acts." *See M.A. Bongiovanni, Inc.*, slip op. at 4; *see also* Rules 2 and 3, Federal Rules of Civil Procedure (1997) ("There shall be one form of action to be known as civil action, [and] [a] civil action is commenced by filing a complaint with the court."). Thus, the ALJ's

holding that the Portal-to-Portal Act does not apply to the Related Acts administrative proceedings in this case is affirmed.

CONCLUSION

The April 7, 2000 Decision and Order, the September 28, 2000 Final Decision and Order and the June 14, 2000 Order of Administrative Law Judge Rudolf L. Jansen are **AFFIRMED** in part, **VACATED** in part and **REVERSED** in part.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

Judith S. Boggs, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the decision of my colleagues in regard to the issues denominated as "VI" and "VII." The majority adopts the positions of the Administrator and holds that CZI improperly credited health plan contributions as a fringe benefit under the DBA for employees during a waiting period for health plan coverage. The majority further holds that the Administrator reasonably required CZI to credit the hourly cash equivalent of its contributions to its health insurance plans based on the hours actually worked by each employee in the month of CZI's contributions. However, the positions the Administrator presents in this case as to those issues do not pass the requisite tests for deference, and appear to have been arbitrarily and capriciously adopted. No deference therefore is due them.

Administrative interpretation or implementation of a particular statutory provision qualifies for deference when:

> it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

United States v. Mead Corp., 533 U.S. 218, 226-227 (2001). *See also Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Even if the administering agency does not have any express delegation of authority on a particular question which has been expressed with the requisite formality, "agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered." *Mead*, 533 U.S. at 227.

The measure of deference to an agency administering a statute, absent an express delegation of authority on a particular question, has been understood to "vary with circumstances." *Mead*, 533 U.S. at 228. The reasonableness of the agency's view is judged according to many factors, including the quality of the agency's reasoning, the degree of the agency's care, its formality, relative expertness, whether the agency is being consistent or, if not, its reasons for making a change, and the persuasiveness of the agency's position. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944); *see also Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *OFCCP v. Keebler*, ARB No. 97-127, ALJ No. 87-OFC-20, slip op. at 17 (ARB Dec. 21, 1999). "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. *See also, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."). "Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference," *see Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

The Board employs these same analytical considerations when, as here, we are determining whether to defer to the Administrator's position on appeal as reasonable and based on a persuasive explanation for her position. *See United Gov't Sec. Officers of America, Local 114*, ARB Nos. 02-012 to 02-020, slip op. at 7 (ARB Sept. 29, 2003); *OFCCP v. Keebler*, ARB No. 97-127, ALJ No. 87-OFC-20, slip op. at 20 (ARB Dec. 21, 1999); *see also Skidmore*, 323 U.S. at 140.

In regard to issue "VI," CZI's claiming credit for health plan contributions during an employee's "waiting period" as a fringe benefit toward the prevailing wage requirement under the DBA, the position of the Administrator is at odds with the established policy of the Administrator enunciated in the FOH.

Section 15f12 of the FOH states in, relevant part:

> If the plan requires contributions to be made during the eligibility waiting period, credit may be taken for such contributions, since it is not required that all employees participating in a bona fide fringe benefit plan be entitled to

> receive benefits from that plan at all times. However, credit may not be taken for contributions for employees who by definition are not eligible to participate, such as employees who are excluded because of age or part-time employment.

See CX 13; Section 15f12 of the "Wage and Hour Field Operations Handbook."

The Administrator disallowed the payments on the basis that the employees were not receiving health benefits at the time. The FOH clearly allows payments made during a waiting period to be counted as fringe benefits, recognizing that an employer's payment of contributions during an eligibility waiting period are a benefit to the individual employee, even though the individual employee may not yet be receiving benefits (such as the health benefits in this case). The FOH position is reasonable, since the payments entitle the employee to coverage thereafter. The FOH position that benefits may be claimed for contributions to a health care plan on behalf on an employee during a waiting period, when the employee will be eligible to participate thereafter, should therefore be upheld. Recognizing that there is a conflict between the FOH and her position before us, the Administrator now also argues that the company is not entitled to claim payments for health care coverage during an employee's waiting period because the company has not shown that it made such payments. However, the Administrator mistakes the burden of proof here. The Administrator, as the party that initiated and brought the enforcement case, has the burden of showing that the employees performed work for which they were improperly compensated, *see Mt. Clemens Pottery*, *supra*; *Thomas & Sons, supra; Johnson, d/b/a Southwestern Film Serv.*, 81-SCA-1390 (Dep. Sec'y Sept. 28, 1990); *Morton Co., supra*. In regard to CZI's claiming credit for its contributions during the employees' eligibility waiting period, the Administrator has failed to sustain that burden by not showing that such contributions were not made. Thus, the ALJ's determination that CZI violated the DBA and that back wages were due because CZI improperly claimed health plan contributions as a fringe benefit under the DBA for employees who were not eligible for health plan coverage should be reversed.

Next, the Administrator is now insisting in this case, in regard to issue "VII," that CZI calculate the hourly cash equivalent of health plan contributions on an individual, employee by employee basis, using the hours each employee worked in the month in which the benefits were received. This position conflicts with the FOH which states that the value can be calculated in advance in terms of "the total actual hours worked in the previous month," "the same month in the previous year," or "[a]ny" "reasonable" "representative period," *see* CX 13; Section 15f11(c) of the "Wage and Hour Field Operations Handbook."[17] The interpretation in the FOH is of long standing, has been

[17] Section 15f11(c) of the FOH states in relevant part:

Continued . . .

disseminated as the agency's policy, and has not been rescinded or specifically repudiated. The more restrictive position the Administrator takes before us has not been previously enunciated as agency policy. Moreover, as the ALJ found, the position taken by the Administrator would impose unreasonable administrative burdens on employers. Employers would be required to make complicated individualized calculations and would be unable to know they were paying the requisite fringe benefit amount in advance. A diligent employer would be forced to seek to locate workers no longer on the job in order to pay wages found owed as a consequence of the calculation method the Administrator seeks to impose.[18]

I therefore would defer to the position taken in the FOH, rather than the position newly minted by the Administrator. Thus, the Administrator must allow CZI to "estimate" or calculate the amount of the hourly cash equivalent of its health plan contributions based on a "reasonable representative period," and cannot insist on a calculation based on the hours actually worked by each employee in the month in which the benefits are received. Because the evidence is ambiguous as to the manner in which CZI actually paid its health benefits, I would remand for further development of the record. CZI's president, Francis D. Zeigler, testified that the company entered into an annual contract, an annual amount was determined, and that that annual amount was then divided into monthly payments. HT at 684-685. However, the exhibit located at RX 9 and also at CX 10 (D10 at 54), which appears to be a billing document, lists individual employees for a monthly period with separate amounts (either for a family or individual rate) for each. It is unclear whether CZI had an annual obligation and made uniform monthly payments, as the ALJ found, or whether it entered into an annual contract and made payments which varied monthly in amount. Clear information as to exactly how health benefits were paid by CZI is required in order to make a proper determination on Issue "VII". Accordingly, I would remand for the requisite record development and determination.

In this case, the interpretations offered by the Administrator as to issues "VI" and "VII" have not been issued with any formality, are inconsistent with previous policy

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> the total actual hours worked in the previous month or in the same month in the previous year may be used to determine (i.e., estimate) the hourly equivalent credit per employee during the current month. Any representative period may be utilized in such cases, provided that the period is reasonable.

See CX 13; Section 15f11(c) of the "Wage and Hour Field Operations Handbook."

[18] Under those circumstances, the very establishment of a health benefit could be undermined, since it would be far easier for an employer to simply pay cash and not be at hazard. This would disadvantage employees who otherwise cannot readily obtain health coverage at group rates.

pronouncements, do not evidence thorough consideration, and are not persuasively reasoned. Moreover, the Administrator's unexplained departure from FOH provisions which have not been repudiated or rescinded, and which appear directly relevant, itself appears arbitrary. Accordingly the interpretations now advanced by the Administrator with respect to issues "VI" and "VII" do not fit virtually any of the relevant criteria for deference and accordingly should not be adopted and applied by this Board.[19] *See Mead*, 533 U.S. at 227-228; *Christensen*, 529 U.S. at 587; *Skidmore*, 323 U.S. at 140.

In all other aspects, I concur with the majority's decision.

JUDITH S. BOGGS
Administrative Appeals Judge

[19] Of course, the relevant deference analysis applies to adoption and application of the FOH provisions as well. The cited FOH interpretations appear reasonable and meet the appropriate criteria for deference in the instant case.