



In the Matter of:

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

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

WILLIAM J. LANG LAND CLEARING, INC.,

**ALJ CASE NOS. 98-DBA-1
through 6**

DATE: November 20, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

**Kraig M. Schutter, Esq., Masud, Patterson, Schutter, Peters & Vary P.C.,
Saginaw, Michigan**

For Petitioner/Complainant Administrator, Wage and Hour Division:

**Maria Van Buren, Esq., Paul L. Frieden, Esq., William C. Lesser, Esq.,
Steven J. Mandel, Esq., Gregory F. Jacob, Esq., Solicitor of Labor, United
States Department of Labor, Washington, District of Columbia**

ORDER OF REMAND

This matter is before the Administrative Review Board pursuant to the statutory authority of the Davis-Bacon Act (DBA or the Act),¹ the Federal Aid Highway Act (FAHA),² the Airport and Airway Improvement Act (AAIA),³ the Contract Work

¹ 40 U.S.C.A. § 3141-3148 (West Supp. 2003).

² 23 U.S.C.A. § 113(a) (West 2001).

³ 49 U.S.C.A. § 47112(b) (West 1997).

Hours and Safety Standards Act (CWHSSA),⁴ and Reorganization Plan No. 14 of 1950.⁵ The Secretary of Labor has delegated to the Administrative Review Board the jurisdiction to hear and decide appellate matters under these Acts.⁶

A United States Department of Labor Administrative Law Judge (ALJ) originally heard this case and issued an Interim Decision and Order ruling against the Administrator of the Department of Labor's Wage and Hour Division on all issues except one.⁷ The ALJ agreed with the Administrator that federal contractor Lang Land Clearing had violated the DBA and certain DBA-related Acts, by taking fringe benefit credit for bonus payments that Lang had improperly characterized as vacation payments. But the ALJ rejected the Administrator's position that Lang had improperly taken credit towards its DBA obligations by treating subsistence payments (meals and lodging) as fringe benefits and by averaging its health insurance costs on an annual basis instead of using the actual amounts paid per employee per month. The ALJ also rejected the Administrator's finding that Lang had misclassified its power equipment operators as Group IV, rather than the higher paid Group I, on the ground that the Administrator had failed to prove that the area practice was to classify power equipment operators as Group I if they used the type of equipment Lang's employees used.

The ALJ issued a Supplemental Decision and Order directing Lang to pay \$17,140.73 in back wages as a result of the "bonus payment" violations.⁸ That Supplemental Decision and Order incorporated the February 22, 2001 interim decision. Both the Administrator and Lang filed Petitions requesting the Board to review the ALJ's Supp. D. & O. The Board ultimately issued a Final Decision and Order affirming the Administrator's positions on all issues.⁹

Lang sought reversal of the Board's Final Decision and Order in the United States District Court for the Eastern District of Michigan. The matter was referred to a

⁴ 40 U.S.C.A. §§ 3701-3708 (West Supp. 2004).

⁵ 5 U.S.C.A. App (West 1996).

⁶ Secretary's Order, 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. Parts 5 and 7 (2008).

⁷ *William J. Lang Land Clearing, Inc.*, ALJ Nos. 1998-DBA-001 – 1998-DBA-006 (Feb. 22, 2001)(D. & O.).

⁸ *William J. Lang Land Clearing, Inc.*, ALJ Nos. 1998-DBA-001 – 1998-DBA-006 (May 25, 2001)(Supp. D. & O.).

⁹ *William J. Lang Land Clearing, Inc.*, ARB Nos. 01-072, 01-079; ALJ Nos. 1998-DBA-001 – 1998-DBA-006 (Sept. 28, 2004)(F. D. & O.).

Magistrate Judge, who recommended that the Board's decision be upheld in part and reversed in part. Both parties filed objections to the Magistrate Judge's recommendations and cross motions for summary judgment. The district court, upon review of the magistrate's Report and Recommendation de novo, issued an Opinion and Order that granted the Department's Motion for Summary Judgment and affirmed the entirety of the ARB's decision.¹⁰ Lang appealed the district court's decision to the Sixth Circuit Court of Appeals, which affirmed the Board's F. D. & O. in all respects.¹¹

In response to the Sixth Circuit's decision, the Acting Administrator has filed a Motion for Remand of Proceedings to an Administrative Law Judge for Back Wage Calculations. The Administrator avers that "[b]ecause the ALJ found that the Administrator had not established three of the four alleged violations of the Davis-Bacon Act, he did not make specific findings regarding the back wages for those violations."¹² The Administrator further states that, since the Sixth Circuit has now affirmed the Board's F. D. & O., we should remand the case to an ALJ to make findings regarding the calculation of back wages for the remaining three violations.

Lang responded to the Acting Administrator's Motion stating that it did not object to the Motion, but it did object to the Administrator's specific request for remand to "any ALJ;" its preference being that we remand the case to Judge Roketenetz, who originally heard the case.¹³ We are somewhat perplexed by Lang's purported quotation from the Acting Administrator's Motion because upon close scrutiny, the version of the Motion the Acting Administrator filed with the Board makes no reference to "any ALJ," only to "an ALJ." Furthermore, had Lang's counsel simply contacted the Office of Administrative Law Judges, he would have learned that Judge Roketenetz has retired. Thus the Administrator's reference to "an ALJ" was perfectly appropriate. Therefore, not only was the Lang's objection unfounded, it was completely unnecessary. In any event, while we agree that it would be preferable for the same ALJ to hear the case on remand, and we believe that, generally, the Chief Administrative Law Judge routinely assigns remanded cases to the same ALJs who had originally heard them, the decision whether to assign a case to a particular ALJ on

¹⁰ *William J. Lang Land Clearing, Inc. v. Administrator, Wage & Hour Div.*, 520 F. Supp. 2d 870 (E.D. Mich. 2007).

¹¹ *Lang Land Clearing, Inc. v. Administrator, Wage & Hour Div.*, No. 07-2423, 2008 WL 3287097 (Aug. 6, 2008).

¹² Motion for Remand of Proceedings to an Administrative Law Judge for Back Wage Calculations (M. R.) at 3.

¹³ William J. Lang Land Clearing's Response to Acting Administrator's Motion for Remand at 2.

remand, is within the Chief Judge's purview, not the Board's.

We agree with the Acting Administrator that it would be appropriate to remand this case to an Administrative Law Judge to make findings regarding the calculation of back wages for the remaining three violations. Accordingly, we **GRANT** the Administrator's Motion and **REMAND** this case.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge