



**In the Matter of:**

**Disputes concerning the payment of prevailing wage rates and overtime pay by: RAY WILSON COMPANY, a corporation, Prime Contractor,**

**ARB CASE NO. 02-086**

**(ALJ CASE NO. 2000-DBA-14)**

**DATE: February 27, 2004**

**With respect to laborers and mechanics employed by a subcontractor, Aztec Fire Protection, Inc., on Contract Number GS-09P-95-KTC-0012 let by the General Services Administration, Region 9, to Respondent Ray Wilson Company, regarding the Ronald Reagan Building in Santa Ana, California.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For Petitioner:***

**Charles S. Kirwan, Esq., *Charles S. Kirwan and Associates, Pawtucket, Rhode Island***

***For Respondent Administrator, Wage and Hour Division:***

**Carol Arnold, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., Solicitor, *U.S. Department of Labor, Washington, D.C.***

**FINAL DECISION AND ORDER**

This matter is before the Administrative Review Board pursuant to the statutory authority of the Davis-Bacon Act (DBA or the Act), 40 U.S.C.A. § 3141 *et seq.* (West Supp. 2003),<sup>1</sup> the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C.A. § 327 *et seq.* (West 1997), and Reorganization Plan No. 14 of 1950<sup>2</sup>, 5 U.S.C.A. App. (West 2003). Our jurisdiction

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<sup>1</sup> 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 codified at 40 U.S.C.A. § 3141 *et seq.* (West Supp. 2003).

<sup>2</sup> Reorganization Plan No. 14 of 1950 centralized Federal policy making and enforcement

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to hear and decide appellate matters under these Acts is delegated to the Administrative Review Board (the Board) pursuant to the regulations at 29 C.F.R. Parts 5 and 7 (2003) and Secretary's Order (SO) 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).<sup>3</sup>

We are considering a Petition for Review filed by Aztec Fire Protection, Inc. (Aztec), Abraham Yazdi, and David Naim (respectively Aztec's President and Vice President). Ray Wilson Company, which held the prime contract for which Aztec was a subcontractor, filed an appearance before the Board joining in Aztec's Petition for Review. However, it did not file a separate petition for review or a brief in support of Aztec's petition.

Aztec seeks review of a Decision and Order (D. & O.) issued by an Administrative Law Judge on May 10, 2002. The Administrator, Wage and Hour Division (Administrator) – the complainant below – opposed Aztec's petition for review.

The Petitioners argue that the ALJ erred in making four adverse determinations. First, Aztec challenges the ALJ's refusal to dismiss the administrative proceeding on the basis of purportedly extreme delay in scheduling a hearing after the withholding of contract monies. The Petitioners contend that the delay prejudiced their defense against the Administrator's charges of prevailing wage and overtime violations. They make two arguments under this general theory of prejudicial delay. They allege that the Administrator's delays deprived them of property (i.e., the withheld contract funds) without due process of law (i.e., a prompt and meaningful hearing) in violation of the United States Constitution. Further, they raise the defense of laches, on the basis that the Administrator's delays impaired Aztec's ability to rebut the Administrator's charges.

Secondly, the Petitioners object to the ALJ's rejection of their argument that the DBA did not apply to certain persons who performed sprinkler fitters' work (installing a fire protection sprinkler system) because the workers were exempt as partners or owner-operators of R&F Fire Protection, Inc. (R&F). Aztec sub-contracted with R&F to perform the labor portion of the sub-contract Aztec had with Wilson (to install the sprinkler system). The ALJ ruled that R&F's failure to pay these employees the appropriate prevailing wage rates and overtime pay resulted in underpayment of wages in the amount of \$145,856.98 (D. & O. at 12), and that Aztec was liable

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authority concerning the DBA and its related acts within the Department of Labor.

<sup>3</sup> Prior to May 3, 1996, final agency decisions pursuant to the DBA were rendered by our predecessor, the Wage Appeals Board (WAB). Under SO 2-96, 61 Fed. Reg. 19,978 (May 3, 1996), the Secretary of Labor established the Administrative Review Board and delegated to this Board jurisdiction to hear and decide administrative appeals arising under, inter alia, the DBA and numerous statutes requiring DBA compliance, collectively referred to as the Davis-Bacon Related Acts. *See* 29 C.F.R. § 5.1 (2003). SO 2-96 has been superceded by subsequent orders amending and updating the provisions relevant to the composition of the Board and its jurisdiction; however, the delegation with respect to the Act and its Related Acts is essentially unchanged. The current delegation of authority is set forth in SO 1-2002.

for the back wages because “[a]s a subcontractor on this project, Aztec is responsible for the actions of the lower tier subcontractors.” *Id* at 14. This amount included back wages found due for overtime violations.

Third, the Petitioners attack the ALJ’s rejection of Aztec’s contentions that the Administrator’s documentary evidence of hours worked and wages paid was hearsay and should have been excluded. Aztec also argued that the evidence failed to meet the burden of proof required to legally support a determination that the alleged employees were underpaid.

Finally, the Petitioners challenge the ALJ’s finding that Aztec committed violations in disregard of its obligations to employees within the meaning of the Act. Based on this conclusion, the ALJ ordered debarment of Aztec and its principals for a period of three years.

### **JURISDICTION AND STANDARD OF REVIEW**

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 1996). *See also* 29 C.F.R. § 7.1(d)(2003) (“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, ALJ No. 1994-DBA-58, slip op. at 4 (ARB Dec. 30, 1999) and cases cited therein.

In addition, the Board will assess any relevant rulings and official guidelines issued by 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 [the Department of Labor’s] 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).

### **BACKGROUND**

The General Services Administration (GSA) awarded a prime contract for construction of the Ronald Reagan Building (in Santa Ana, California) to Ray Wilson Company. *D. & O.* at 2. Wilson in turn subcontracted installation of the fire protection system to Aztec, of which David

Naim and Abraham Yazdi were respectively president and vice president. Aztec then subcontracted the labor portion of the fire protection system to R&F. *Id.*

Four individuals working for R&F performed the actual labor of installing the fire sprinkler system in the Reagan Building. *Id.* at 7. A Wage and Hour Division investigator examined R&F's payment practices regarding the four sprinkler fitters and determined that although their work was subject to DBA requirements, R&F did not pay them the sprinkler fitters' prevailing rate of \$37.96 per hour (including \$9.84 hourly for fringe benefits). *Id.* at 2. R&F claimed that the sprinkler fitters' work was exempt from the Act's coverage because the individuals were partners of R&F. *Id.* at 2.

In early 1997, at the Wage and Hour Division's request, GSA withheld contract funds from payment to Wilson in the approximate amount of the back wages due as a result of the alleged violations, \$152,238.46. *Id.* Wilson in turn withheld payment from Aztec and the Wage and Hour Division subsequently mistakenly disbursed over \$100,000.00 of the withheld funds to the four affected employees. *Id.* Approximately three years after the withholding directive, the Administrator commenced this administrative proceeding upon filing an Order of Reference with the Office of ALJs on March 30, 2000. *Id.* The hearing was held over the course of three days in November 2001. The ALJ issued the adverse D. & O. and Aztec appealed the decision to the Board.

## DISCUSSION

- I. **The regulations implementing the DBA afford Aztec an administrative hearing and appellate process to determine its rights to the withheld contract funds; accordingly, there has been no denial of due process in this matter. Furthermore, neither Wilson nor Aztec has a "present entitlement" to the withheld contract funds and, therefore, no constitutional right to a prompt hearing on the claim. Finally, the delay in this matter did not prejudice Petitioners' defense against the Administrator's prevailing wage violation charges.**

### *A. Aztec's due process allegations*

The Petitioners argue that delay between the withholding of funds and the time of the hearing denied Aztec its property without due process of law in violation of the 5th and 14th amendments to the United States Constitution. For the following reasons, we conclude that the withholding did not deprive Aztec (or similarly, Wilson, the prime contractor) of a present entitlement.<sup>4</sup> Moreover, even if the claim to the withheld funds is considered a property interest of Aztec's, the administrative proceedings to determine DBA violations constitute due process.

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<sup>4</sup> All Federal construction contractors are on notice upon entering into a DBA-covered contract, that the government has the right to withhold contract funds in the event of underpayment allegations. *See* 29 C.F.R. § 5.5(a)(2).

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A recent Supreme Court decision conclusively settles both of these questions. In *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001), the contractor alleged that it was denied due process because California withheld contract funds from it for alleged violations of California's prevailing wage statute. The Supreme Court concluded that the California enforcement process did not violate due process, even though the state did not provide an opportunity for a hearing to determine the merits of the allegation. The Court held: "Because we believe that California law affords respondent sufficient opportunity to pursue that claim in state court, we conclude that the California statutory scheme does not deprive G & G of its claim for payment without due process of law." *Id.* at 195. The Court was of the opinion that due process was afforded G & G by way of a breach of contract lawsuit in the California state courts. *Id.* at 197.

As is patent from the procedural history of this matter, contractors accused of DBA violations have an opportunity for a fact finding hearing before an ALJ (29 C.F.R. §§ 5.11, 5.12; 29 C.F.R. Part 6, Subpart C). The regulations further provide administrative procedures for appeal of adverse ALJ findings and conclusions (29 C.F.R. § 6.34; Part 7). These procedures, designed specifically for determining the merits of alleged DBA violations, afford due process for resolution of Aztec's property interest claim.<sup>5</sup> Accordingly, we conclude that the Administrator's procedures did not deprive Aztec of due process.

Furthermore, Aztec has not been denied any "present entitlement" to property, such as would constitutionally require a prompt hearing.<sup>6</sup> As the Court in *G & G* explained:

G & G has been deprived of payment that it contends it is owed under a contract, based on the State's determination that G & G failed to comply with the contract's terms. G & G has only a claim that it did comply with those terms and therefore that it is entitled to be paid in full. Though we assume for purposes of decision here that G & G has a property interest in its claim for payment, ... it is

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<sup>5</sup> The Petitioners cite the duration of the process since the funds were first withheld as evidence of deprivation without due process. The Court in *G & G*, observing that lawsuits are not known for expeditiously resolving claims, nonetheless concluded that a lawsuit of several years' duration, "while undoubtedly something of a hardship, cannot be said to deprive respondent of its claim to payment under the contracts." *Id.* at 196.

<sup>6</sup> The Petitioners argue that they have already been permanently deprived of a majority of the withheld contract funds based on the fact that "the DOL ... violated its own regulations by prematurely dispersing [sic] some of the funds to the R&F workers in 1998 before a hearing was held on the ... violations." D. & O. at 2. The early disbursement of funds in the amount of \$108,000, while unfortunate, does not constitute a permanent deprivation of the funds. As noted by counsel for the Administrator, "if Aztec prevails in this case, it would have a claim against the government for the full amount withheld." Stmt. for the Adm. at 17.

an interest ... that can be fully protected by an ordinary breach-of-contract suit.

*Id.* at 196. We too have assumed for the purpose of this discussion that Aztec had a property interest in its claim for payment. However, were disposition of this matter to turn on the question of whether Aztec had more than a mere claim to the funds, the Board believes that the Supreme Court's dicta concerning the property interest in *G & G* would settle in the negative the Petitioners' argument that Aztec had an enforceable property interest, i.e., a present entitlement to property. Simply put, contract funds withheld for DBA violations are the Federal government's property until and unless it is demonstrated that the contractor is entitled, i.e., upon demonstrating that it met the applicable prevailing rate and overtime requirements.

### ***B. Aztec's assertion of the defense of laches***

The Petitioners allege that the amount of elapsed time between withholding of the contract funds and the time of the administrative hearing was so lengthy as to deny them a fair hearing in that their defense was prejudiced. The ALJ rejected this argument and we do as well.

Our precedent establishes that in certain circumstances, the excessive passage of time prior to a hearing can be grounds for dismissal of DBA charges in the administrative hearing process. *Tom Rob, Inc.*, WAB No. 94-03 (June 21, 1994); *Public Developers Corp.*, WAB No. 94-02 (July 29, 1994). Under these cases, our predecessor, the WAB, ruled that extreme delay prior to hearing could create a presumption of prejudice that could support dismissal. The delays prior to hearing in *Tom Rob* and *Public Developers* were five and eight years, respectively, but the Board did not find a presumption of prejudice in either case. The Board reversed the ALJs' dismissals of both cases, holding that actual prejudice to the respondents' defense had to be shown to support dismissal.

In this case, Aztec has not demonstrated that the passage of time resulted in actual prejudice to their defense. The Petitioners' allegation that the memories of witnesses had faded with time is true to some extent. However, the employee witnesses and the investigator testified credibly concerning the commission of the DBA violations and the ALJ accepted their evidence. Aztec has not suggested any specific testimony that could have been gathered earlier which would rebut the evidence of violations in this case. An allegation of prejudice alone is not sufficient to support dismissal.

Moreover, Aztec was aware as early as mid-1997 (when Aztec met with a Wage and Hour Division official to discuss the issues raised in the investigation) that the Wage and Hour Division questioned whether there had been compliance with the DBA prevailing wage and CWHSSA requirements. Aztec had opportunity to collect evidence then available. The Petitioners do not suggest the existence of any evidence (especially not any which was available only early in the process) that could rebut the testimony of the workers that they worked as sprinkler fitters when installing the fire suppression system. The hours worked by the employees were generally corroborated by the hours of work listed in R&F's certified payrolls. Compare testimony of employees Zohrabian (Tr. at 490-492) and Maisshi (Tr. at 177-178) with R&F's certified payrolls which also generally recorded 40-hour (or approximately so) work weeks for

the sprinkler fitters (CX-9). The Wage and Hour Division gave Aztec the opportunity to submit additional information and documentation after the 1997 meeting, when witnesses' memories would have been fresher and documentation should have been more readily available. Ex. C-18. But Aztec never submitted any additional information to the investigator. Tr. at 831.

Aztec failed to establish prejudice in its defense against the Administrator's charges. Accordingly, the ALJ properly refused to apply the defense of laches to support dismissal of this matter.

**II. The workers who installed the Reagan Building's fire sprinkler system were laborers or mechanics within the meaning of the Act and were therefore entitled to receive the prevailing rate for sprinkler fitters for all hours worked on the project.**

Throughout the administrative proceedings in this matter, Aztec has argued that the workers who installed the fire alarm sprinkler system were not "employed" within the meaning of the Act and were not therefore entitled to payment of the wage rates which the Administrator had determined (prior to award of the prime contract to Wilson ) prevailed in the area for the employee classification of sprinkler fitter. Wage Determination No. CA950002 (June 2, 1995) required payment to sprinkler fitters of a basic hourly wage rate of \$28.12 and an hourly fringe benefit rate of \$9.84, for a total required payment of \$37.96 hourly. D. & O. at 12 n.4.

According to Aztec, the workers were not covered by the DBA because they were "partners" (or "owner-operators"<sup>7</sup>) rather than employees. This contention is unavailing for the following reasons.

The plain language of the Act establishes that all workers who perform construction activity on a covered project are due the prevailing rates applicable to their respective classifications. In part, the Act provides that:

the contractor or subcontractor shall pay all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications [of the contract], *regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers or mechanics.*<sup>8</sup>

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<sup>7</sup> R&F listed the workers on certified payrolls submitted to the Federal government's contracting officer as "owner-operators."

<sup>8</sup> The legislative history of the amendment adding the "regardless of any contractual relationship" language makes clear that it was adopted for the purpose of eliminating schemes, like

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40 U.S.C.A. § 3142(c) (emphasis added). The implementing regulations for the Act elaborate somewhat on this principle, stating:

*every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by loans, grants, or guarantees from the United States is employed regardless of any contractual relationship alleged to exist between the contractor and such person.*

29 C.F.R. § 5.2(o) (emphasis added). Thus, both the statute and the interpretative regulation make clear (with limited exceptions not at issue here) that if a person performs construction work on a project covered by the Act, that person is always due the prevailing wage. This has long been the established precedent in DBA administration. In affirming this principle, the WAB ruled that the DBA establishes “a functional rather than a formalistic test to determine coverage: If someone works on a project covered by the Act and performs tasks contemplated by the Act, that person is covered by the Act, regardless of any label or lack thereof.” *Lance Love, Inc.*, WAB No. 88-32, slip op. at 2 (Mar. 28, 1991).

Similarly, this Board has held that the “fact that the workers were engaged in construction of the [DBA-covered project] triggered their coverage under the prevailing wage provisions of the Act; lack of a traditional employee/employer relationship” did not absolve the employer from the responsibility to insure that they were compensated in accordance with the requirements of the Act.” *Star Brite Constr. Co., Inc.*, ARB No. 98-113, slip op. at 7 (June 30, 2000). The Petitioners do not dispute that the persons who purportedly were R&F partners performed the work of sprinkler fitters while installing the fire sprinkler system in the Reagan Building. Therefore, the workers meet the Act’s functional test of employment. Accordingly, we affirm the ALJ’s ruling that Aztec was obligated to compensate these individuals at not less than the prevailing wage rate for the construction work performed.

### **III. Aztec failed to present sufficient evidence to rebut the Administrator’s proof of the extent and amount of DBA violations in this matter.**

The Petitioners allege that the ALJ erred in accepting the Administrator’s evidence as to the amount of wage underpayments. However, we conclude that under the circumstances presented, the Administrator carried her burden of demonstrating the amount due because of wage violations as a matter of just and reasonable inference. Where a DBA construction contractor has failed to maintain accurate records of hours worked and wages paid, it is proper to

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the one before us, characterizing workers as “owner operators” (or subcontractors) and which were frustrating enforcement of the Act’s provisions. *See* S. Rep. No. 1155, 74th Cong., 1st Sess., p. 13 (May 13, 1935); H. Rep. No. 1756, 74 Cong., 1st Sess., p. 3 (Aug. 9, 1935).



apply the principles establishing the burdens of proof set forth in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). As the WAB stated in *Apollo Mechanical, Inc.*,

an employee who seeks to recover unpaid wages “has the burden of proving that he performed work for which he was not properly compensated.” 328 U.S. at 687.

However, where an employer’s records are inaccurate or incomplete, employees are not to be penalized by denying them back wages simply because they cannot prove the precise amount of uncompensated work. In such circumstances, an employee meets his burden “if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” 328 U.S. at 687. The employer then has the burden to demonstrate the precise number of hours worked or to present evidence sufficient to negate “the reasonableness of the inference to be drawn from the employee’s evidence.” 328 U.S. at 688. In the absence of such a showing, the court “may then award damages to the employee, even though the result be only approximate.” *Id.* Furthermore, *Mt. Clemens Pottery* 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 . . . .” *Id.* at 693.

WAB No. 90-42, slip op. at 2-3 (Mar. 13, 1991). *See also StarBrite Constr. Co., Inc.*

Here, in the absence of accurate employer records from either Aztec or R&F, the ALJ properly credited the testimony of the workers that they had not received the required prevailing rates for sprinkler fitter work. Both of the workers who testified at the hearing testified that they were underpaid. While the required hourly rate for sprinkler fitters was \$37.96 (D. & O. at 10), Klod Grigorian Maisshi testified that he worked on the project for nine months and was paid \$10.00 per hour (with a \$500.00 monthly bonus). *Id.* He further testified that his normal work week on the project was 40 hours. Tr. at 177. His testimony was consistent with the employee interview statement taken by the investigator during the 1997 investigation. *Compare* testimony of Klod Grigorian Maisshi and Ex. R-44, where the length of his work on the project and his stated hourly wage rate agree with his testimony. The other employee (Bahid Zohrabian) testified that he too worked approximately nine months on the project (Tr. at 489) and was paid approximately \$12.00 per hour, with bonuses of \$2,500.00 paid “every couple of months.” *Id.*; Tr. at 485-87. He also testified that the work week was approximately 40 hours (7 or 7:30 a.m. to 3 or 3:30 pm). Tr. at 490. This employee’s testimony was fully consistent with the employee interview statements he gave during the investigation in 1997, several years prior to the hearing. *Compare* testimony of Bahid Zohrabian and Ex. C-27.

The employee testimony concerning their hours worked and the wages paid was further supported by the testimony of the Wage and Hour Division's investigator who had interviewed both the testifying and additional R&F sprinkler fitter employees during the investigation. The investigator stated that he used the numbers of hours worked as reported in the certified payrolls, given that that information was generally consistent with employee statements and that the certified payrolls were the only such record maintained.<sup>9</sup> The investigator requested R&F's records regarding wages and hours of work, but R&F never supplied information other than copies of cancelled checks. Tr. 263-264.

Since R&F and Aztec failed to maintain accurate records of hours worked and wages paid, the ALJ correctly based his findings on the testimony of the employees and the investigator and the evidence of hours worked in the certified payrolls. The prime contractor is ultimately liable for Aztec's failure to ensure its own lower-tier subcontractor's DBA compliance. *R.C. Foss & Son*, WAB No. 87-46 (Dec. 31, 1990). Moreover, Aztec discussed setting up the partnership exemption scheme with R&F prior to entering the lower-tier subcontract and should therefore have been aware that R&F was not submitting complete and accurate certified payroll information. Tr. at 74, 775. Aztec knowingly countenanced creation of the allegedly exempt R&F partnership which led to R&F's submission of the inadequate certified payrolls and its failure to maintain other payroll information; Aztec should not now be heard to claim that it was disadvantaged by those certified payrolls or the lack of other R&F payroll information.

We note also that Aztec asserts the payrolls were hearsay and that the ALJ improperly used information contained in them as evidence of hours worked by the R&F employees. We disagree. In the first place, the certified payroll records should be considered as admissible, even assuming that those records are hearsay, under the exception to hearsay allowing admission of "[r]ecords of regularly conducted activity." 29 C.F.R. § 18.803(a)(6). It is true the certified payrolls are hearsay statements, having been made by R&F,<sup>10</sup> and not by the investigator or contracting officer. However, hearsay is generally admissible in administrative proceedings. *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938), *Opp Cotton Mills v. Administrator*, 312 U.S. 129 (1949). See also *Howell Constr., Inc.*, WAB No. 93-12 (May 12, 1994). Under these circumstances, the certified payrolls are entitled to be given appropriate weight, which takes into account that they were not admitted into evidence by someone who prepared them or had personal knowledge of their contents. Although Robert Denoushi testified that the certified payroll hours were not accurate, we note that in his 1997 interview with the investigator, he

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<sup>9</sup> The investigator tried to cross-check the certified payroll hours with a security log maintained on the work site; the security log information was, however, unusable. Tr. at 255.

<sup>10</sup> Robert Denoushi, one of R&F's principal's (and not an employee for whom wages were sought) testified that his brother, Fred Denoushi, was present at the job site 80-90% of the time and prepared the certified payrolls. Tr. at 535-536. He also testified that his brother listed inaccurate hours of work in the certified payrolls, allegedly on the mistaken belief that the sprinkler fitters were not subject to payment of DBA wages, "because we didn't care how much hours we going to put there." *Id.* at 536.

stated that the sprinkler fitters generally worked 40 hours with approximately 6-8 hours of overtime per week. Ex. C-26. R&F's (Denoushi's) statement regarding the hours worked is consistent with the employee testimony and interview statements, the investigator's conclusions based on the employee interviews, and with the certified payroll information. Some of the certified payrolls indicate some work weeks with more or less than 40 weekly hours; however, the certified payrolls generally support the foregoing evidence of hours worked. *See* Ex. C- 9.

It is also true that the Administrator's counsel at hearing stated that the certified payrolls were "not being offered for the truth of the matter" asserted therein, i.e., the numbers of hours worked which R&F reported to the government contracting officer. *See* Tr. at 614. Aztec argues that the ALJ should have bound the Administrator to that mid-trial, oral statement. We do not concur. In the first place, the Administrator presented other, substantial evidence of the hours worked in addition to the statements of hours in the certified payroll reports prepared by R&F. The investigator and the employees testified credibly to the numbers of hours worked by the sprinkler fitters. The certified payrolls merely served to bolster the first hand employee testimony, the admissions made by R&F during the investigation, and the investigator's conclusions regarding hours worked.

The certified payrolls filed by contractors on DBA projects have an inherent evidentiary value, albeit one whose weight is for the trier-of-fact in the first instance to determine. Certified payrolls are required to contain complete information concerning wages paid and hours worked and certifications that the information is accurate and complete. 29 C.F.R. § 5.5(a)(3)(ii).

Subject to civil or criminal prosecution for making false statements, an R&F official certified each payroll as true and correct; such a warning is contained on every certified payroll form prepared by R&F.<sup>11</sup> *See* Ex. C-9; Tr. 285-286. Aztec did not submit any evidence of actual hours worked to rebut R&F's certified payroll statements of hours worked.

"The general rule is that an [a]ppellate [c]ourt may uphold the admission of evidence on any theory that finds support in the record." 1 Steven A. Saltzburg, et al., *Federal Rules of Evidence Manual*, 28 (7th ed. 1998). As "a corollary of the principle of harmless error" admitting the evidence does not prejudice the objecting party "where an alternative theory was available on which to admit the evidence." *Id.* Because the certified payroll records were properly admitted over the Aztec's objection, any error in counsel's statement that they were admitted for a limited purpose was harmless.

Furthermore, we do not see counsel's statement (which was a stipulation) as a valid basis to prevent the ALJ's using the certified payrolls to corroborate the investigator's and employees' testimony regarding the hours worked. A trier of fact may properly reject a stipulation made by counsel or a party in the course of hearing if the stipulation does not conform to the evidence of

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<sup>11</sup> In fact, the Wage and Hour Division reported its investigation findings to the Department of Labor's Office of the Inspector General (OIG) for determination of whether criminal charges were appropriate. Tr. at 420-422. The OIG closed their file without action. Tr. at 421.

record. In an analogous situation, the jurisdictional amount necessary for bringing an action was inaccurately stipulated by a party's counsel at trial. Other evidence refuted the stipulation. In rejecting the stipulation, the court there stated:

Although plaintiffs' counsel exhibited some confusion on this point at oral argument, and apparently conceded it, the complaint plainly alleges the jurisdictional amount. *We are not compelled to hold plaintiffs to a slip made by counsel* in the heat of a ten-minute argument. *Cf. H. B. Zachry & Co. v. United States*, 344 F.2d 352 (Ct.Cl.1965); *Albee Homes, Inc. v. Lutman*, 274 F.Supp. 875 (E.D.Pa.1967) (setting aside stipulations found contrary to evidence).

*Love v. Budai*, 665 F.2d 1060, 1064 (D.C. Cir. 1980) (emphasis added). Similarly, we will not hold the Administrator to "a slip made by counsel in the heat" of an argument concerning the arcana of hearsay uses and limitations. Here, the ALJ did not commit error to the extent that he considered the certified payrolls as additional evidence, albeit hearsay, which was consistent with the Administrator's other, testimonial, evidence of hours worked.

#### **IV. The ALJ properly ordered debarment of Aztec and its principals because they committed violations of the Act in disregard of their obligations to employees.**

The ALJ ordered debarment of Aztec, its President, and Vice President from bidding on Federal contracts for a period of three years. This is the statutorily mandated sanction for contractors "found to have disregarded their obligations to employees and subcontractors." 40 U.S.C.A. § 3144(b)(1). The Administrator did not seek Petitioners' debarment for committing willful or aggravated violations of the overtime provisions of CWHSSA, a so-called Davis-Bacon related act with a different standard for debarment established by regulation. *See* 29 C.F.R. § 5.12(a)(1).

The ALJ held that Aztec disregarded its obligations to R&F's sprinkler fitter employees, noting that Aztec was an experienced Federal government contractor, having "been involved in approximately ten previous projects involving the Davis-Bacon Act ...." D. & O. at 14. Based on this contracting history, the ALJ concluded that "it is unlikely that Aztec would not have been aware that the prevailing wage requirements would apply despite the partnership arrangement." *Id.* We concur.

When the government awards a contract, or when a portion of the work is subcontracted, "there has to be a presumption that the employer who has the savvy to understand government bid documents and to bid on a Davis-Bacon Act job knows what wages the company is paying its employees and what the company and its competitors must pay when it contracts with the federal government ...." *Phoenix Paint Co.*, WAB No. 87-08, slip op. at 7-8 (May 5, 1989). In this case, Abraham Yazdi admitted that he discussed the formation of a partnership with Robert Denoushi, advising that by doing so "they wouldn't have to pay prevailing wages." Tr. at 74; 775. Thus, Aztec, as an experienced government contractor, set the partnership scheme in motion, contrary to the standard of DBA compliance expected under *Phoenix Paint*.

Here, the record demonstrates Aztec's abdication from – and, thus, its disregard of – its obligations to employees of R&F, its own lower-tier subcontractor. Aztec's vice president, Abraham Yazdi, prepared the lower-tier subcontract with R&F. He testified that the R&F subcontract did not comply with the requirements of including the relevant DBA provision in R&F's agreement and that when he was preparing the R&F subcontract that he "was not aware of the detailed requirements, and therefore [he] did not comply." Tr. at 55. Yazdi admitted that he did not read the DBA provisions which prime contractor Wilson included in Aztec's own subcontract. Tr. at 773. Such failures constitute disregard of obligations, i.e., Aztec's obligations to be aware of DBA requirements and to ensure that its lower-tier subcontractor R&F properly complied with the wage payment and record keeping requirements on the project. *See Integrated Res. Mgmt., Inc.*, ARB No. 99-119, ALJ No. 1997-SCA-14, (ARB June 27, 2002) (debarment of Federal contractor who committed prevailing wage violations because of admitted failure to read requirements contained in contract subject to the Service Contract Act of 1965, as amended, 41 U.S.C.A. §§ 351 – 358 (West 2001)). *C.f. Administrator, Wage and Hour Div. v. Stuart A. Jackson*, ARB Case No. 00-068, ALJ No. 1999-LCA-0004 (Apr. 30, 2001) (attorney who failed to read conditions of Labor Certification Agreement under H-1B program for immigrant workers held to be liable for back wage payments on theory that attorney had constructive knowledge of the agreement's requirements). Accordingly, the ALJ appropriately ordered debarment of Aztec and its principals for a period of three years and we affirm that ruling.

### CONCLUSION

For the foregoing reasons, the ALJ's D. & O. issued May 10, 2002, is **AFFIRMED** and the Petition for Review is **DENIED**.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**JUDITH S. BOGGS**  
**Administrative Appeals Judge**