



In the Matter of:

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

ARB CASE NO. 07-124

**PALISADES URBAN RENEWAL
ENTERPRISES, LLP**

ALJ CASE NO. 2006-DBA-0001

**DT ALLEN CONTRACTING CO., INC.
DANIEL T. ALLEN, PRESIDENT
GREGORY ALLEN, VICE PRESIDENT,
Prime Contractors,**

DATE: July 30, 2009

**A. MONTESINO ELECTRICAL
CONTRACTING, INC.,
Subcontractor,**

**NUCOR CONSTRUCTION, INC.,
Subcontractor.**

**UNITED MECHANICAL CONTRACTORS, INC.
Subcontractor**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner Palisades Urban Renewal Enterprises, LLP and DT Allen Contracting Co., Inc., Daniel T. Allen, and Gregory Allen:

**John A. Stone, Esq., Charles Shaw, Esq., Edwards & Caldwell, LLC,
Hawthorne, New Jersey, Paul Speziale, Esq., Ridgefield Park, New Jersey**

For the Department, Wage and Hour Division:

**Mary J. Rieser, 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**

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),¹ the Cranston-Gonzalez National Affordable Housing Act of 1990 (NAHA),² the Contract Work Hours and Safety Standards Act (CWHSSA),³ and Reorganization Plan No. 14 of 1950.⁴ After a hearing, a U.S. Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) finding that DT Allen Contracting Co., Inc. (DT Allen) violated the labor standards and prevailing wage provisions of the DBA, NAHA and CWHSSA. DT Allen filed a petition for review.

BACKGROUND

1. The Legal Framework

The DBA applies to every contract of the United States in excess of \$2,000 for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works in the United States.⁵ It requires that contractors pay a minimum wage to the various classifications of mechanics or laborers they employ.⁶ The Department of Labor's Wage and Hour Division (Department) determines these minimum wages and publishes them as "Wage Determinations."⁷ The minimum wage rates contained in the wage determinations derive from rates prevailing in the area where the work is to be performed or from rates applicable under collective bargaining agreements.⁸ "Prevailing" wages are wages paid to the majority of laborers or mechanics in corresponding classifications on similar projects in the area.⁹ A contractor will be liable for its subcontractor's failure to pay the minimum wage.¹⁰ The Davis-Bacon Act

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

² 42 U.S.C.A. § 12701 et seq. (West 2003).

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

⁴ 5 U.S.C.A. App (West 1996).

⁵ 40 U.S.C.A. § 3142(a).

⁶ *Id.*

⁷ 29 C.F.R. Part 1.

⁸ 40 U.S.C.A. § 3142(b); 29 C.F.R. § 1.3.

⁹ *See* 29 C.F.R. § 1.2(a)(1).

applies to construction contracts entered into directly between the Federal government and a contractor.

The NAHA is a Davis-Bacon Related Act.¹¹ The Davis-Bacon Related Acts incorporate the Davis-Bacon prevailing wage requirements into contracts between a non-Federal entity, such as a State or local government, and a contractor where the Federal government provides funding indirectly.

2. Chronology of Events

The ALJ thoroughly discussed the facts of this case as presented at the hearing on November 14 and 15, 2006.¹² We summarize briefly.

Palisades Urban Renewal Enterprises (PURE), a joint partnership between GDA Affordable Housing and the Economic Development Corporation (EDC), was the developer of an affordable housing project at 3900 Palisades, Union City, New Jersey. Gregory Allen was a principal member of GDA, a non-profit organization.¹³ PURE received funds from several sources for the construction of the housing project.¹⁴ On August 30, 1999, the Hudson County Division of Housing and Community Development (Hudson County Division), approved \$1,166,000 for the PURE project from the HOME program of the U.S. Department of Housing and Urban Development.¹⁵ The letter approving the funding explained the HOME program regulations and stated that PURE was required to submit “evidence of compliance with the applicable Davis-Bacon wage rates . . . including the incorporation of such wage rates into the construction contract.”¹⁶

On November 3, 1999, PURE and DT Allen Contracting Co., Inc. (DT Allen) entered into a construction contract for the Palisades Project. At that time Daniel Allen, Gregory Allen’s brother, was president of DT Allen, and Gregory Allen was vice president.¹⁷ PURE and the Hudson County Division entered into a Regulatory

¹⁰ See 29 C.F.R. § 5.5(a)(6).

¹¹ 29 C.F.R. § 5.1(a).

¹² D. & O. 4-14.

¹³ Hearing Transcript (Tr.) 31, 36-37, 55, 99; Government Exhibit (GX) 8.

¹⁴ Tr. 31-32, 35, 48, 382-383, 394.

¹⁵ Tr. 35, 382-383. The HOME program is a federal housing initiative, which provides federal funds to develop very low income housing. Tr. 31, 33.

¹⁶ GX-2.

¹⁷ Tr. 365-366.

Agreement on April 10, 2000. The Agreement restated the federal requirements under the HOME program, including the requirement that PURE comply with “all Federal laws and regulations as described in Federal Regulation 24 C.F.R. Part 92, Subpart H,” but did not contain a Davis-Bacon wage determination.¹⁸

In response to a complaint that carpenters were not being paid the prevailing wage, Bruce Braverman, an investigator for the Wage and Hour Division, investigated DT Allen’s and its subcontractors’ performance on the contract. Beginning in the summer of 2000, Braverman visited the job site eight to ten times. He testified that on four visits he found no activity on the site, but on four to six other visits he was able to observe employees working.¹⁹ He observed employees Chris Petrich and Fabian Ortiz using carpentry tools and doing carpentry work.²⁰ He testified that “once the tools of the trade are in their hands, the employees are carpenters and not laborers.”²¹ He also interviewed approximately ten employees and obtained payroll and other records from the contractor and subcontractors.²² Based on his review of the certified payroll records, his jobsite evaluations, and employee interviews, Braverman concluded that DT Allen and its three subcontractors had misclassified employees as laborers when they were performing work as mechanics (carpenters, plumbers, electricians).²³ Braverman also concluded that DT Allen and its three subcontractors paid their employees less than the applicable prevailing wages for their classifications, and that DT Allen failed to pay two employees overtime for working more than forty hours in a workweek. Braverman computed back wages for the employees and on April 30, 2002, sent DT Allen a letter informing the contractor that it had violated the statute and ordering it to pay back wages.²⁴

On September 28, 2005, the Wage and Hour Division filed an Order of Reference, referring the case to the Office of Administrative Law Judges for hearing and a

¹⁸ The regulations at 24 C.F.R. Part 92 implement the HOME Investment Partnerships Act. Subpart H, “Other Federal Requirements,” provides that housing construction contracts for 12 or more units assisted with HOME funds must contain the Davis-Bacon prevailing wage requirements and CWHSSA overtime provisions. 24 C.F.R. § 92.354(a)(1).

¹⁹ Tr. 205-207, 211, 223-224, 241, 362.

²⁰ Tr. 205-207, 241.

²¹ D & O. at 9; Tr. 207, 209-210.

²² Tr. 177-178, 269.

²³ Tr. 201-203, 218-219, 223-224, 228, 269, 362.

²⁴ Tr. 408; ALJ Exhibit (ALJX) 1.

determination of whether DT Allen and its three subcontractors violated the DBA, NAHA and CWHSSA and whether back wages and debarment of the contractor were appropriate.²⁵ Because United and Nucor failed to appear at the hearing on November 14 and 15, 2006, or otherwise participate in these proceedings, the ALJ issued an Order granting Default Judgment against them on June 5, 2007.

On August 3, 2007, the ALJ issued a D. & O. ruling that DT Allen violated the DBA by misclassifying and underpaying two employees as laborers rather than carpenters. The ALJ credited investigator Braverman's testimony that on several of his visits to the jobsite he had observed Chris Petrich and Fabian Ortiz performing carpenter's work. The ALJ found that Braverman's testimony was credible because it was "based on his personal observations as well as interviews with these two employees."²⁶ The ALJ also found that Gregory Allen's own testimony that the two employees may have performed carpentry tasks provided further credibility to Braverman's testimony.²⁷ He therefore concluded that DT Allen and its subcontractors had violated the Acts:

[T]he Government has persuasively established that the work performed by the Respondents' employees and those of its subcontractors was exactly the type of work performed under the job that Mr. Braverman classified them as. In addition the testimony of Mr. Braverman, the DOL investigator, concerning his calculations of back wages due was based on the Respondents' certified payroll submissions and are readily verifiable. I find those calculations and summaries reliable, correct, and appropriate, and I adopt them.²⁸

The ALJ further concluded that PURE, DT Allen, Daniel Allen and Gregory Allen were jointly and severally liable for payment of back wages to Allen's employees in the amounts of \$93,008.53 for prevailing wage violations and \$576.28 for overtime violations.²⁹ He also found that DT Allen, Daniel Allen and Gregory Allen, as prime contractors, were jointly and severally for the payment of back wages to the employees of its subcontractors.³⁰ The ALJ, however, rejected the Department's contention that DT

²⁵ ALJX-1.

²⁶ D. & O. 15.

²⁷ Id.; Tr. 481.

²⁸ D. & O. 16.

²⁹ D. & O. 18. The ALJ adopted the Administrator's finding that \$623.23 of the \$93,008.53 was owed to Juan Dedio Gaspar, a laborer, who had also been underpaid.

³⁰ D. & O. 18-19.

Allen, Gregory Allen, and Daniel Allen should be debarred from government contracting because of the contractor's violations.³¹

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or the Board) has jurisdiction to hear and decide appeals from ALJ's decisions and orders concerning law and fact questions arising under the DBA and the numerous related Acts incorporating DBA prevailing wage requirements.³² In reviewing an ALJ's decision, the Board acts with "all the powers [the Secretary of Labor] would have in making the initial decision . . ."³³ Thus, "the Board reviews the ALJ's findings of fact and conclusions of law de novo."³⁴

DISCUSSION

DT Allen argues that the Board should reverse the ALJ's determination that it violated the Act by misclassifying and underpaying two employees as laborers rather than as carpenters on the ground that the Department offered insufficient evidence that the violations occurred. We reject this argument. The evidence clearly establishes, as the ALJ found, that the investigator visited the jobsite four to six times, that he observed Petrich and Ortiz doing carpentry work, and that the two men informed him during interviews that they were doing carpentry work. Gregory Allen's own testimony that it was possible that they had performed carpentry work further supports the ALJ's conclusion that these two men performed this work.³⁵ The certified payrolls also clearly establish that DT Allen paid Petrich and Ortiz at the laborers' rate for all hours worked.

³¹ D. & O. 18.

³² 29 C.F.R. §§ 5.1, 6.34, 7.1(b)(2007). See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

³³ 5 U.S.C.A. §557(b) (West 1996). See also 29 C.F.R. § 7.1(d) ("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.").

³⁴ *Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 00-050, ALJ No. 96-DBA-037, slip op. at 4 (ARB Aug. 27, 2001), order denying recon., slip op. at 1-2 (ARB Dec. 6, 2001). See also *Cody-Zeigler, Inc.*, ARB Nos. 01-014, 01-015, ALJ No. 97-DBA-017, slip op. at 5 (ARB Dec. 19, 2003).

³⁵ Gregory Allen testified as follows:

Q. [Counsel for Department of Labor] Now, is it your testimony that the DT Allen employees that were working on this project did not do any of these [carpentry] tasks?

DT Allen's brief argues that we must reverse the ALJ's decision because the Department did not meet its burden of proving that the contractor misclassified employees. In this regard, DT Allen avers that the Department should have submitted testimony concerning area practice.³⁶ But the Department submitted sufficient evidence at the hearing. The testimony of the investigator concerning his personal observations and interviews with employees, which the ALJ credited, and the certified payroll reports, which show wage underpayments, are substantial evidence of the violations in this case. DT Allen offered no evidence rebutting Braverman's testimony that Petrich and Ortiz performed carpenters' work.³⁷ DT Allen's only witness, Gregory Allen, admitted that he was not on the job every day and could not be certain of type of work the employees were doing.³⁸ We find that the Department produced sufficient evidence showing the amount and extent of work performed by employees for which they were not properly compensated. We further find that Respondents have failed to produce evidence to rebut the inferences the ALJ drew from the Department's evidence.

A. [Gregory Allen] No.

Q. So it's possible that DT Allen employees did do some of these tasks that you agree would be carpentry work; correct.

A. It's possible.

Tr. 481.

³⁶ Relying on *Lang Land Clearing, Inc.*, ARB Nos. 01-072, 01-079, ALJ Nos. 1998-DBA-001 through -006, slip op. at 24 (ARB Sep. 28, 2004), DT Allen argues that the Department should have introduced evidence of area practice, including testimony of union contractors. DT Allen also could have presented such evidence, but we do not find it necessary under our decision in *Lang*. The issue there was whether Lang had misclassified and underpaid its employees as Power Equipment Operators Group IV rather than Power Equipment Operators Group I. Evidence of area practice was necessary in that case to distinguish between two groups within a single classification. Here, we find that the un rebutted testimony of the investigator established that laborers perform hauling and clean-up duties while carpenters use tools of the trade and perform work such as cutting studs for framing, exterior and interior framing, and other carpentry work. Tr. 205-207, 242, 480-481.

³⁷ DT Allen offered no records indicating what the employees did each day on the jobsite. DT Allen offered only one exhibit into evidence, a document showing Gregory Allen's back wage computations. Furthermore, the only witnesses testifying for the contractor had no knowledge of what the employees were actually doing on the job each day because they rarely visited the jobsite.

³⁸ Tr. 482.

DT Allen further argues that, even assuming that Petrich and Ortiz performed some carpentry work, “[a] few moments, hours, or even days of carpentry do not convert all of a laborer’s work into carpentry.”³⁹ But the law is clear: while it is permissible under the contract labor requirements for employees to work in more than one classification, the contractor then has the added responsibility to make certain that it properly documents and pays the employee for the various types of work he performed and for the hours he performed it.⁴⁰ Gregory Allen testified that when he completed the certified payrolls, he did not segregate the time spent doing carpentry work and laborer work as required by the regulation.⁴¹ We do not penalize the employees for the employer’s failure to keep adequate records.⁴² Therefore, DT Allen must pay its employees the rate of the highest paid classification for all hours worked – here, the carpenters’ rate.

Finally, in its reply brief DT Allen challenges the ALJ’s determinations that its subcontractors violated the Act, and that DT Allen is jointly and severally liable for its subcontractors’ violations.⁴³ Allen did not raise these issues in its petition or in its opening brief.⁴⁴ We therefore decline to consider them. We note, however, that DT

³⁹ Petition for Review at 4.

⁴⁰ 29 C.F.R. § 5.5(a)(1) (“Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided*, That the employer’s payroll records accurately set forth the time spent in each classification in which work is performed.”) *See also P&N Inc./Thermodyn Mechanical Contractors, Inc.*, ARB No. 96-116, ALJ No. 94-DBA-0072, slip op. at 5 (ARB 1996).

⁴¹ Tr. 482.

⁴² *See Thomas & Sons*, slip op. at 4-5. DT Allen did not offer into evidence any records of the type of work employees performed on an hourly or daily basis.

⁴³ Reply Brief at 3 n.3.

⁴⁴ Federal Courts have generally held that arguments raised for the first time in reply briefs are waived. *See, e.g., Carter v. New Venture Gear, Inc.*, 310 Fed. Appx. 454, 456 n.1 (2nd Cir. 2009); *United States v. Ford Motor Co.*, 463 F.3d 1267, 1277 (Fed. Cir. 2006) (“[a]rguments raised for the first time in a reply brief are not properly before this court” and that “[i]t is unfair to consider an argument to which the government has been given no opportunity to respond”); *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) (“appellants cannot raise a new issue for the first time in their reply briefs”); *Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000) (“court does not ordinarily review issues raised for the first time in a reply brief”); *see also Erickson v. U.S. Environmental Protection Agency*, ARB No. 99-095, ALJ No. 99-CAA-002, slip op. at 4 (ARB 2001) (“the other party must be given an adequate opportunity to respond in some manner” to arguments raised for the first time in reply briefs).

Allen's contention that its subcontractors did not misclassify employees suffers from the same failing as its argument that it did not misclassify its own employees: there is no evidence to rebut the investigator's testimony that the subcontractors misclassified mechanics as laborers.⁴⁵ With regard to Allen's contention that it is not responsible for its subcontractors' back wages, we note that it is well settled that a prime contractor is responsible for the back wages due employees of its subcontractor under the Act, and is responsible for ensuring that all persons engaged in performing the duties of laborer or mechanic on the construction site receive the appropriate prevailing wage rates.⁴⁶

CONCLUSION

The record and relevant law support the ALJ's findings and conclusion that DT Allen violated the DBA, NAHA, and CWHSSA when it misclassified and underpaid three of its employees who worked on the Palisades housing project. The record supports the ALJ's finding that the employees were underpaid a total of \$93,008.53 in wages and \$576.28 for overtime. The record and relevant law also support the ALJ's finding that DT Allen, Daniel Allen, and Gregory Allen are jointly and severally liable for payment of the back wages to the employees of subcontractors Nucor Construction, Inc. and United Mechanical Contractors, Inc., and A. Montesino Electrical Contracting, Inc. Therefore, we **DENY** DT Allen's petition for review and **AFFIRM** the ALJ's findings and conclusions and, if still applicable, paragraph (7) of his August 3, 2007 Order regarding how the withheld funds are to be released, distributed and credited.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

⁴⁵ D. & O. 15 ("I note that Mr. Allen did not personally observe the United or the Nucor employees at work, yet he is asserting without any support, that Mr. Braverman's observations and re-classifications are incorrect.").

⁴⁶ 29 C.F.R. §§ 5.5(a)(2), 5.5(a)(6); *M. A. Bongiovanni*, WAB No. 91-08 (WAB Apr. 19, 1991).