In the Matter of:

ADMINISTRATOR, WAGE & HOUR, DIVISION, U.S. DEPARTMENT OF LABOR,	**ARB CASE NO. 15-002**
	ALJ CASE NO. 2013-DBA-004
PROSECUTING PARTY,	**DATE: June 8, 2016**

v.

COLEMAN CONSTRUCTION CO., and FREEMAN COLEMAN, SR., an individual,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Prosecuting Party, Administrator, Wage and Hour Division*:**
Sarah J. Starrett, Esq.; Jonathan T. Rees, Esq.; William C. Lesser, Esq; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; *U.S. Department of Labor, Office of Solicitor,* Washington, District of Columbia

***For the Respondents, Coleman Construction Co., and Freeman Coleman, Sr.*:**
Freeman Coleman, pro se; *Coleman Construction Co.*, Omaha, Nebraska

Before: E. Cooper Brown, *Administrative Appeals Judge;* Luis A. Corchado, *Administrative Appeals Judge*; and Anuj Desai, *Administrative Appeals Judge*. Judge Corchado, concurring.

FINAL DECISION AND ORDER

This case involves the labor standards provisions of the National Housing Act, a so-called Davis-Bacon Related Act, and the overtime provisions of the Contract Work Hours and Safety Standards Act. Coleman Construction was a subcontractor doing concrete work on a project subject to both statutes. An Administrative Law Judge (ALJ) found Coleman Construction to be in violation of both statutes and awarded the Administrator of the Department of Labor's Wage and Hour Division (Administrator or Wage and Hour) $99,020.66 in damages on Coleman's employees' behalf. The ALJ also ordered that both Coleman Construction and its President and founder, Freeman Coleman, Sr., be debarred from receiving federal contracts for three years.

On appeal, Coleman Construction and Freeman Coleman, Sr., appearing without counsel, make numerous arguments, most of which either feign ignorance of clearly applicable statutory authority or attempt to shift the blame for the violations onto someone else. None of these arguments has any merit, but we nonetheless find that the ALJ did make some small mistakes in his Decision and Order. We thus **AFFIRM** the ALJ's Decision and Order, but do so with slight modifications.

BACKGROUND

A. Legal Background

The labor standards provision at issue in this case is found in the National Housing Act.[1] The National Housing Act's labor standards provision incorporates many of the labor standards of the Davis-Bacon Act and is thus known as a "Davis-Bacon Related Act" (or, as we will refer to it, a "Related Act"). To understand its labor standards provision thus requires an understanding of the Davis-Bacon Act itself.

The Davis-Bacon Act requires that contractors and subcontractors on certain federal construction projects pay no less than the "prevailing wage" to the "mechanics" and "laborers" they employ.[2] The Department of Labor's Wage and Hour Division determines the prevailing wage rates for various job classifications and publishes these rates in documents known as "wage determinations."[3] The prevailing wage rates contained in the wage determinations derive from rates prevailing in the geographic area where the work is to be performed or from rates applicable under collective bargaining agreements.[4] Those rates are determined based on wages

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1 *See* 12 U.S.C. § 1715c (2012).

2 40 U.S.C. § 3142(a) (2012).

3 29 C.F.R. Part 1 (2012).

4 40 U.S.C. § 3142(b); 29 C.F.R. § 1.3.

paid to the majority of laborers or mechanics in corresponding classifications on similar projects in the area.[5] Contracts and subcontracts subject to Davis-Bacon must include a whole host of provisions detailing the employers' legal obligations,[6] including those related to prevailing wages.[7] Department of Labor regulations also require that contracts and subcontracts subject to Davis-Bacon include provisions mandating that employers maintain proper payrolls and basic employee records.[8]

As one of the many Davis-Bacon Related Acts, the National Housing Act requires the application of many of the labor standards provisions of Davis-Bacon (including the Davis-Bacon prevailing-wage requirements) to certain construction contracts that are financed by mortgages insured by the United States.[9] Contracts subject to the National Housing Act are subject not only to the same Davis-Bacon Act prevailing wage requirements but also to the extensive regulations the Department of Labor has promulgated to implement Davis-Bacon.[10]

The second statute at issue in this case, the Contract Work Hours and Safety Standards Act (the "Work Hours Act"), requires that contractors and subcontractors on federally assisted or insured construction contracts of at least $100,000 pay "time and a half" to all of their laborers and mechanics who work more than forty hours per week.[11] The Work Hours Act is also a Davis-Bacon Related Act,[12] although in contrast to most other Related Acts, it does not incorporate any of the specific labor standards from the Davis-Bacon Act.

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5 *See* 29 C.F.R. § 1.2(a)(1).

6 40 U.S.C. § 3142(c); 29 C.F.R. § 5.5(a) (2012).

7 40 U.S.C. § 3142(c)(1); 29 C.F.R. § 5.5(a)(1).

8 29 C.F.R. § 5.5(a)(3).

9 *See* 12 U.S.C. § 1715c(a) (requiring contractors to "certify[] that the laborers and mechanics employed in the construction of the dwelling or dwellings or the housing project involved have been paid not less than the wages prevailing in the locality in which the work was performed for the corresponding classes of laborers and mechanics employed on construction of a similar character, as determined by the Secretary of Labor, in accordance with [provisions of the Davis-Bacon Act]").

10 *See* 29 C.F.R. § 5.1(a)(4); *see also* 29 C.F.R. § 5.5(a).

11 40 U.S.C. § 3702; § 3701(b)(1)(B)(iii) (2012); § 3701(b)(3)(A)(iii); 29 C.F.R. § 5.5(b).

12 *See* 29 C.F.R. § 5.1(a)(3).

B. Factual Background

In October 2010, general contractor Dicon Corporation ("Dicon") entered into a contract (the "prime contract") with Lakeview Residential, LLC to build eight three-story apartment buildings, known as the Lakeview Apartments, in Ralston, Nebraska, just outside of Omaha. The United States Department of Housing and Urban Development ("HUD") insured a mortgage for the Lakeview construction project under the National Housing Act. The contract was subject to both Davis-Bacon labor standards and the Work Hours Act overtime provisions; the contract thus incorporated a specific HUD form, Form HUD-2554, entitled "Supplementary Conditions of the Contract for Construction,"[13] which specifically included both the Davis-Bacon labor standards provisions and the Work Hours Act overtime provisions.[14]

Freeman Coleman, Sr. ("Mr. Coleman") is the President and founder of Coleman Construction Company ("Coleman"). Mr. Coleman is in charge of the day-to-day operations of Coleman Construction.

In January 2011, Coleman Construction entered into an $880,000 contract with Dicon (the "subcontract") to do the concrete flatwork on the Lakeview construction project. Mr. Coleman signed the subcontract on Coleman Construction's behalf. Just before signing the subcontract, Mr. Coleman, on behalf of Coleman Construction, had entered into a joint venture with John Main of Main Construction.

Like the prime contract, the subcontract included provisions indicating that it was subject to both the Davis-Bacon labor standards provisions and the Work Hours Act overtime provisions. In the very first section, the subcontract specifically stated that the "Subcontract Documents" included the prime contract.[15] Elsewhere in one of the Subcontract Documents, on a page that Mr. Coleman initialed, Coleman Construction "acknowledge[d] that the Supplementary Conditions of the Construction Contract, HUD Form-2554, are included in this agreement and that all requirements noted shall be completed."[16] Two other pages of the Subcontract Documents that Mr. Coleman initialed include a reference to "Davis Bacon Wage Rates,"[17] and on another page that Mr. Coleman initialed, it references the specific wage

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[13] Administrator's Exhibit (AX) 1 at 001.

[14] The applicable labor standards provisions are found in the Department of Labor's regulations implementing those acts. *See* 29 C.F.R. § 5.5.

[15] Joint Exhibit (JX) C at 006.

[16] *Id.* at 020; *see also id.* at 033 (referencing the same form).

[17] *Id.* at 019, 033.

determination applicable to the Lakeview project, "Davis-Bacon Wage Determination Number NE20080009 Modification 2 dated 06/24/2010."[18]

The contract and subcontract's wage determination specified the minimum prevailing rates (including the fringe benefit cash equivalents) to be paid to workers on the Lakeview construction project. Relevant for the subcontract in this case are two categories of workers in the applicable wage determination: cement masons/concrete finishers ("concrete finishers") had to be paid $24.31 per hour, plus fringe benefits of $8.60 per hour, for a total of $32.91 per hour; and general laborers had to be paid $10.41 per hour, plus $1.80 per hour in fringe benefits, for a total of $12.21 per hour.

Coleman Construction kept track of the hours its employees worked on the Lakeview project by having a foreman record the daily hours by hand and then submit those handwritten time records to Mr. Coleman. Coleman Construction kept its certified payroll records on a Department of Labor form that is mandatory for projects subject to Davis-Bacon and Related Acts. After the employees were paid, Coleman Construction then destroyed the handwritten time records. However, unbeknownst to Mr. Coleman, Kenny Ingram, a foreman, kept copies of the handwritten time records.

Throughout the subcontract, Coleman Construction paid some employees precisely the wage rates listed in the wage determination, though it did not pay the concrete finisher rate to all of the employees who performed concrete finisher work. Coleman Construction's work on the subcontract began in December 2010 (just before the signing of the subcontract) and ended in December 2011, with a break for about two months during the winter (January and February of 2011). Right from the beginning of the subcontract, some employees were paid exactly $12.21/hour and some were paid exactly $32.91/hour. Those who were paid $32.91/hour were recorded as "Finisher" or "Concrete Finisher" on Coleman's certified payroll records, and the others were recorded as "General Labor." Indeed, some employees were paid these amounts even in December 2010, prior to Coleman signing the subcontract. From February through June 2011, Coleman paid only two individuals at the finisher rate of $32.91/hour, John Main (Mr. Coleman's joint-venture partner) and Mr. Coleman himself. Most of Coleman's other employees earned $12.21 per hour for most of that four-month period. Moreover, during most of that time, there were anywhere from eight to eighteen employees paid as "general laborers" (four to nine times the number of individuals paid as concrete finishers), despite the fact that a typical concrete job involves an equal number of finishers and general laborers.

On July 1, 2011, Dicon sent Coleman Construction a letter noting the possibility of "a discrepancy" in Coleman Construction's certified payroll. The letter then stated, "Please make

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[18] *Id.* at 035. The wage determination number on that page has a small mistake. It should be a *2010* wage determination, rather than a 2008 wage determination, and so the number should be NE**2010**0009, rather NE**2008**0009. *See* ALJ Decision & Order (D. & O.) at 4 (Stipulated Fact No. 13).

sure that all employees are paid the minimum amount per Davis Bacon General Decision Number NE20100009 with modification 2 dated 06/25/10." It also went into the specifics of the "discrepancy," telling Coleman Construction, "[S]ome of your employees have indicated that they are cement mason/concrete finishers and you are currently listing them as General Labor."

After Dicon's July 2011 letter, Coleman Construction still didn't pay its employees in accordance with its prevailing-wage obligations, though it did begin to list a few more of its employees as finishers. First, Coleman Construction still did not pay all the employees doing finishing work at the $32.91/hour rate for that work: the number of finisher hours recorded on Coleman Construction's payroll was still well below the number of general laborer hours nearly every week until the end of the project in December 2011. Second, Coleman Construction reduced employees' pay by not counting hours whenever work needed to be redone.[19]

Third, Coleman Construction falsified its payroll records to skirt the Davis-Bacon prevailing wage requirement.[20] Around the time of Dicon's July 2011 letter, Coleman Construction employees learned that the project was subject to Davis-Bacon prevailing wage rates. Faced with a potential mutiny, but not wanting to comply with the company's legal obligations, Mr. Coleman met with several of the employees and asked them to accept lower pay.[21] He then falsified the certified payroll to make it seem as though he was in fact paying the prevailing wages.[22] At the hearing before the ALJ, one employee, Kenny Ingram, "credibly testified"[23] as to how this was done: Mr. Coleman told Mr. Ingram that he couldn't afford to pay him the $32.91/hour required by the contract, and so they agreed on $24/hour. To pay Mr. Ingram $24/hour while still recording him on the certified payroll as having been paid $32.91/hour, Mr. Coleman would multiply the number of hours Mr. Ingram worked by $24 and then divide by $32.91 to determine the number of hours to record on the certified payroll. So, for example, one week, Mr. Ingram worked 18.75 hours but the payroll showed him as having worked 13.68 hours (which is 18.75 x $24/$32.91).[24]

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19 D. & O. at 35; *id.* at 15; *id.* at 25 n.15.

20 *See id.* at 35 (noting that Coleman "used dishonest tactics to inaccurately pay lower wages to its employees"); *id.* at 44 ("Respondent falsified payroll records and certified payrolls."); *id.* at 43 (noting that Coleman "falsified records to avoid compliance with the regulations").

21 *See id.* at 14.

22 *See id.* at 44 ("Respondent falsified payroll records and certified payrolls.").

23 *Id.* at 35.

24 *Id.* at 14-15. The fact that 13.68 hours is an incredibly odd amount of time to work—it represents 13 hours, 40 minutes and 48 seconds—seems not to have bothered Coleman. Other strange time periods that were recorded on the certified payroll for concrete finishers included

Finally, although employees would sometimes work more than forty hours in a workweek (both before and after Dicon's July 2011 letter), Coleman never paid any of them "time and a half" for that overtime.

C. The ALJ's Decision

The Administrator issued an Order of Reference seeking the payment of back wages and debarment on January 10, 2013. In a Decision and Order issued August 21, 2014, the ALJ found that Coleman Construction and Mr. Coleman violated both the labor standards provisions of the National Housing Act (a Davis-Bacon Related Act) and the overtime provisions of the Contract Work Hours and Safety Standards Act. In particular, he concluded that they knowingly misclassified twelve workers as laborers rather than "concrete finishers" under the applicable wage determination; that they knowingly underpaid twenty-five workers; that they failed to pay required overtime; and that they falsified and destroyed payroll records. The ALJ held them liable for $97,079.24 in back wages and $1,941.42 in overtime compensation, for a total of $99,020.66. He also ordered that both Coleman Construction and Mr. Coleman be debarred from receiving federal contracts for three years.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from final decisions of ALJs in Davis-Bacon and Related Act cases.[25]

In reviewing an ALJ's decision in a Davis-Bacon or Related Act case, the Board acts "as the authorized representative of the Secretary of Labor" and "shall act as fully and finally as

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1.52 hours (1 hour, 31 minutes and 12 seconds), 4.74 hours (4 hours, 44 minutes and 24 seconds), 8.21 hours (8 hours, 12 minutes and 36 seconds), 13.61 hours (13 hours, 36 minutes and 36 seconds), 2.89 hours (2 hours, 53 minutes and 24 seconds), and 6.84 hours (6 hours, 46 minutes and 12 seconds). *Id.* at 23. It was only the concrete finishers who were ever recorded as having worked these bizarre fractional time increments; the general laborers were always recorded as having worked in precise fifteen-minute increments.

[25] *See* 29 C.F.R. § 7.1(b) (2012) ("The [Administrative Review] Board has jurisdiction to hear and decide . . . appeals concerning questions of law and fact from final decisions under part[] . . . 5 of this subtitle . . ."); 29 C.F.R. Part 5 (regulations addressing Davis-Bacon and Davis-Bacon Related Act labor standards); 29 C.F.R. § 5.11 (setting forth procedures for disputes "concerning payment of prevailing wage rates, overtime pay, or proper classification"); *see also* Secretary of Labor Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,377; 69,378 (Nov. 16, 2012).

might the Secretary of Labor concerning such matters."[26] Pursuant to the Administrative Procedure Act, the Secretary, acting on behalf of the Department of Labor, "has all the powers which [the agency] would have in making the initial decision except as [the agency] may limit the issues on notice or by rule."[27] One rule limiting the Board's power in Davis-Bacon or Related Act cases is section 7.1 of title 29 of the Code of Federal Regulations. It provides that this "Board is an essentially appellate agency."[28] Though the Board "will not hear matters de novo except upon a showing of extraordinary circumstances,"[29] the Board does decide questions of law de novo. It also "may remand under appropriate instructions any case for the taking of additional evidence and the making of new or modified findings by reason of the additional evidence."[30]

DISCUSSION

On appeal, Coleman Construction and Mr. Coleman raise several arguments, most of which are barely decipherable. Because they appear without counsel, however, we have attempted to extract their most salient arguments, often by reading between the lines.

Liability

A. Applicability of Davis-Bacon prevailing wage standards

Coleman Construction was required to pay its employees the prevailing wages under the National Housing Act (a Davis-Bacon Related Act), the Department of Labor regulations implementing Davis-Bacon and Related Acts, and the applicable wage determination. The prime contract was for a construction project that received federal assistance or insurance under the National Housing Act,[31] a Davis-Bacon Related Act,[32] and Coleman Construction was a

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[26] 29 C.F.R. § 7.1(d).

[27] 5 U.S.C. § 557(b) (2012).

[28] 29 C.F.R. § 7.1(e)); *see also Pythagoras Gen. Contracting Corp. v. Admin., Wage & Hour Div.*, ARB Nos. 08-107, 09-007; slip op. at 9 (ARB Feb. 10, 2011) (as reissued Mar. 1, 2011).

[29] 29 C.F.R. §7.1(e).

[30] *Id.*

[31] 12 U.S.C. § 1715c(a).

[32] *See* 29 C.F.R. § 5.1(a)(4).

subcontractor on that project. That suffices to subject Coleman Construction's subcontract to Davis-Bacon prevailing wages.

Coleman's only argument that Davis-Bacon shouldn't apply to it is premised on a combination of feigned ignorance about the applicability of Davis-Bacon and an attempt to shift the blame for his alleged ignorance to the prime contractor, Dicon. This argument has no merit.

The evidence establishes that Coleman Construction knew or clearly should have known that the subcontract was subject to the Davis-Bacon Act requirements. First, the evidence was undisputed that Coleman Construction had worked under contract on projects subject to Davis-Bacon Act requirements in the past, and that Mr. Coleman signed and initialed the Lakeview project subcontract on Coleman Construction's behalf. The subcontract Mr. Coleman signed on Coleman Construction's behalf had numerous references to Davis-Bacon and the relevant labor standards, and he specifically initialed pages that included those references. The subcontract explicitly referenced "Davis Bacon Wage Rates" and incorporated by reference the prime contract, which in turn included the contractual terms required by Davis-Bacon as well as the relevant wage determination.[33] Moreover, Mr. Coleman initialed a page that specifically stated that "[s]ubcontractor acknowledges that the Supplementary Conditions of the Construction Contract, HUD Form-2554 are included in this agreement and that all requirements noted shall be completed."[34] HUD Form-2554 includes all of the contractual terms required by the Department of Labor's Davis-Bacon regulations,[35] including the requirement that "[a]ll laborers and mechanics employed or working upon the site of the work . . . be paid . . . the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) . . . computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof."[36]

Moreover, Coleman Construction knew the relevant wage determination's prevailing wage rates too, although even if he hadn't known them, this would not excuse Coleman from its legal obligation to pay the prevailing wage rates. Coleman Construction blames Dicon, arguing that Coleman never saw the actual wage determination and that it wasn't until Dicon sent Coleman a letter in July 2011, about six months into the contract, that it even knew Davis-Bacon

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[33] D. & O. at 28; JX-C at 019; JX-C at 006. The subcontract that Mr. Coleman signed specifically stated that a "copy of the Prime Contract, consisting of the Agreement Between Owner and Contractor . . . and the other Contract Documents enumerated therein, has been made available to the Subcontractor." JX-C at 005.

[34] JX-C at 020.

[35] 29 C.F.R. § 5.5(a).

[36] *Compare* Admin. Mot. for Summ. Dec. Exh. D (HUD Form-2554) *with* 29 C.F.R. § 5.5(a).

prevailing wage rates applied. But the ALJ specifically found otherwise, and we agree. For one, the record appears to indicate that a printout of the applicable wage determination from the Government Printing Office website was attached to the subcontract itself.[37] Moreover, from soon after the beginning of the contract, Coleman Construction had been paying Mr. Coleman himself (and occasionally others) the exact hourly wage required by the Davis-Bacon wage determination for "concrete finishers" ($32.91/hour), and in March 2011, Coleman reduced the hourly rate of many of his employees from $14/hour to $12.21/hour, the exact wage rate specified in the Davis-Bacon wage determination for "laborers." These were such unlikely numbers that it couldn't have been a coincidence; someone paying these hourly wage rates had to have been aware not only that Davis-Bacon prevailing wages were required but also of the specific rates.[38] Moreover, there was also evidence that these exact wage rates were posted at the construction site. Finally, one page in the subcontract that Mr. Coleman initialed even specifically referenced the wage determination number and date.[39]

Coleman Construction also asserts that the relevant wage determination was unavailable on the Department of Labor's website. The record does not appear to contain any evidence of this alleged website omission, but even if it did, that would not suffice to excuse Coleman Construction of its obligation to pay Davis-Bacon prevailing wages. The law is clear that, if a contract subject to Davis-Bacon lacks the wage determination, it is the employer's obligation—here, Coleman Construction's—to get it. So, even if Coleman Construction did not know what the correct Davis-Bacon prevailing wage rates were, it was its responsibility to figure it out.[40]

B. Misclassification

Coleman violated the prevailing wage provision of a Davis-Bacon Related Act when he misclassified twelve "concrete finishers" and paid them the lower wage rate for "general

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37 JX-C at 036-039.

38 D. & O. at 28-29.

39 JX-C at 035.

40 *Cf. Abhe & Svoboda v. Chao*, 508 F.3d 1052, 1060 (D.C. Cir. 2007) (in a Davis-Bacon Related Act case, noting that "[p]arties dealing with the government are expected to know the law, and there is no grave injustice in holding parties to a reasonable knowledge of the law" (citations and internal quotation marks omitted)); *Ray Wilson Co.*, ARB No. 02-086, ALJ No. 2000-DBA-014, slip op. at 12 (ARB Feb. 27, 2004) ("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.").

laborers." Contracts and subcontracts subject to a Davis-Bacon Related Act require that employees be "paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed."[41] Moreover, "[i]f workers perform labor in more than one job classification, they are entitled to compensation at the appropriate wage rate for each classification according to the time spent in that classification, . . . time [that] the employer's payroll records must accurately reflect."[42]

Coleman Construction misclassified twelve of its employees as "general laborers," when they should have been classified and paid as "concrete finishers."[43] Coleman does not appear to object to the ALJ's finding to this effect on appeal, and the evidence in the record supports the ALJ's finding that Coleman Construction misclassified these twelve employees in violation of a Davis-Bacon Related Act. We affirm that finding here.

C. Undercounting of Hours

Coleman Construction violated the prevailing wage provisions of a Davis-Bacon Related Act by failing to pay many of its employees for the full number of hours they worked.

Employees performing work under a contract covered by a Davis-Bacon Related Act are entitled to monetary compensation for wages and benefits for the actual amount of time they worked. When an employer pays an employee for fewer hours than the employee works, the employer has effectively paid the employee nothing—or, in other words, at a rate of $0/hour—for some of the hours the employee worked. This necessarily violates the prevailing wage provision because, whatever the prevailing wage is, it is always higher than $0/hour.

Coleman Construction failed to pay many of its employees for the full number of hours they worked. Where, as here, an employer is alleged not to have paid employees for the hours they actually worked, we apply the burden-shifting framework set forth by the United States Supreme Court in the Fair Labor Standards Act case, *Anderson v. Mt. Clemens Pottery*.[44] Under *Mt. Clemens Pottery* and the Davis-Bacon and Related Act cases applying its framework, the Administrator's burden of proof is discharged by (1) "prov[ing] that [the employees have] in fact performed work for which [they were] improperly compensated" and (2) "produc[ing] sufficient

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41 29 C.F.R. 5.5(a)(1)(i); *see also Pythagoras*, ARB Nos. 08-107, 09-007; slip op. at 12 ("Under [a Davis-Bacon Related Act], employees must be classified and paid according to the work they perform, without regard to their level of skill.").

42 *Pythagoras*, ARB Nos. 08-107, 09-007; slip op. at 12-13.

43 The twelve employees are identified in the ALJ's Decision and Order. *See* D. & O. at 32.

44 328 U.S. 680 (1946); *see Pythagoras*, ARB Nos. 08-107, 09-007; slip op. at 5.

evidence to show the amount and extent of that work as a matter of just and reasonable inference."[45] Once the Administrator has satisfied this burden, the burden then shifts to the employer to demonstrate either the precise number of hours worked or to present evidence sufficient to negate "the reasonableness of the inference to be drawn from the [Administrator]'s evidence."[46] To meet its burden, the employer must submit evidence that "(1) is based on individualized records[] and (2) fully accounts for the work hours in question, consistent with the project as a whole."[47] If the employer fails to carry this burden, an ALJ may award damages to employees, even if the amount of such damages is approximate.[48]

Here, applying the *Mt. Clemens Pottery* framework, the Administrator introduced sufficient evidence to prove that Coleman Construction's employees had in fact worked hours without being paid, including evidence showing the amount and extent of that work as a matter of just and reasonable inference; and Coleman Construction provided no evidence to rebut the Administrator's evidence and the reasonable inferences one could glean from that evidence. In particular, the testimony of Kenny Ingram, one of Coleman Construction's foremen, and a copy of a detailed, handwritten, fifty-nine page spreadsheet Ingram contemporaneously created, detailing on a daily basis the hours worked by every Coleman Construction employee on the Lakeview job, provides the primary evidence to find that Coleman Construction failed to pay many of its employees for all the hours they worked. Each page of the spreadsheet covers one week of work for about twenty employees. The specific dates covered are listed at the top of the page. Along the left side of the chart are about twenty rows with employees' names. Along the top, each weekday (Monday through Friday) is listed and then divided into three columns, one for "in," one for "brk" and one for "out," for a total of fifteen columns covering the five weekdays. In the "in" and "out" columns, the chart contains the time of day the employee began and ended work on the given day, and the "brk" column lists the amount of time the employee took for a lunch break that day. Along the right side is a final column that tallies the total number of hours worked for each employee for the given week. Comparing Ingram's spreadsheet with the certified payroll records Coleman kept on a Wage and Hour Division form

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[45] *Mt. Clemens Pottery*, 328 U.S. at 687; *see also Pythagoras*, ARB Nos. 08-107, 09-007; slip op. at 5.

[46] *Mt. Clemens Pottery*, 328 U.S. at 688; *see also Pythagoras*, ARB Nos. 08-107, 09-007; slip op. at 5.

[47] *Pythagoras*, ARB Nos. 08-107, 09-007; slip op. at 23.

[48] *Mt. Clemens Pottery*, 328 U.S. at 688; *see also Pythagoras*, ARB Nos. 08-107, 09-007; slip op. at 5.

(OMB 1215-0149) shows significant discrepancies between the number of hours recorded in Ingram's spreadsheet and the number for which Coleman actually paid those employees.[49]

Once the burden shifts to the employer under the *Mt. Clemens Pottery* framework, it is irrelevant why an employer cannot produce evidence to demonstrate either the precise number of hours worked or the unreasonableness of the inference to be drawn from the Administrator's evidence. Coleman Construction argues that it didn't have a malicious intent when destroying the time sheet records;[50] but the reasons for destroying those records are irrelevant on the question of Coleman's liability for not paying its employees for all the hours they worked. Under *Mt. Clemens Pottery*, once the Administrator (on behalf of the employees) has presented evidence of the number of employee hours worked and the amount that they should have been paid, it is Coleman's burden to produce the counter-evidence;[51] Coleman thus had to demonstrate either that the Administrator's evidence of the number of hours was incorrect or that Coleman paid the employees for those hours. Here, the Administrator introduced Ingram's detailed spreadsheet as evidence, and Coleman submitted no evidence to rebut Ingram's spreadsheet. Coleman argues that Ingram "tampered with" the records—perhaps meaning that Ingram added hours to his spreadsheet—but without any counter-evidence as to what Coleman thought the proper hours should have been, Ingram's records satisfy the Administrator's burden. In any event, the ALJ made clear that he believed Ingram and believed that the records he kept were accurate.[52] In sum, like the ALJ, we conclude that Coleman has provided "no competent

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[49] In addition to Ingram's testimony and records, other evidence also supports this conclusion. The Wage and Hour investigator, Wesley Hays, also testified that, based on his review of the job site time records and interviews with employees, about fifteen employees had their hours reduced for redoing work. *See* D. & O. at 6; *see also id.* at 12 (one of the Coleman workers, William Jenkins, testifying, "I know I wasn't paid for all the hours I worked.").

[50] The ALJ disagreed, finding as a fact "that [Coleman] purposely destroyed time records in order to conceal violations" of the labor standards provisions of a Davis-Bacon Related Act. D. & O. at 44.

[51] *Mt. Clemens Pottery*, 328 U.S. at 687-88.

[52] D. & O. at 34 ("Respondent has no competent evidence to prove that Mr. Ingram's time records are false, and I accept them as accurate."). Given this, the *Mt. Clemens Pottery* burden-shifting framework may not have even been necessary to rule in the Administrator's favor here. Since the Administrator submitted concrete evidence of the specific number of hours the employees worked and the employer did not submit any counter-evidence, the ALJ may not have even needed to make any "just and reasonable inference" about the number of hours worked. Since he believed Ingram's testimony and spreadsheets, that evidence might have been sufficient to meet the Administrator's burden even without the benefit of the *Mt. Clemens Pottery* burden-shifting framework.

evidence to prove that Mr. Ingram's time records [were] false, and [we] accept them as accurate."[53]

Under the *Mt. Clemens Pottery* framework, it is also irrelevant whether Ingram had authorization to keep copies of the handwritten time records. Coleman argues that, by making (and keeping) copies of the time records, Ingram violated Coleman Construction policy and employee privacy, and improperly retained company property. Even if Ingram did violate some Coleman company policy (and Coleman has not submitted any evidence of such a policy), this would be irrelevant to Coleman Construction's liability here. The ALJ found Ingram's evidence to be credible, and Coleman provided nothing to rebut that evidence. That is enough to affirm both that Coleman Construction undercounted hours and the number of hours the ALJ found Coleman Construction to have undercounted.

D. Overtime

Under the Contract Work Hours and Safety Standards Act, contractors and subcontractors on contracts for over $100,000 "financed at least in part by loans or grants from, or loans insured or guaranteed by" the federal government must pay "time and a half" for hours worked in excess of forty hours per week.[54]

The $880,000 Lakeview construction project subcontract was financed at least in part by a loan insured or guaranteed by HUD, and Coleman Construction failed to pay "time and a half" to eight of his employees who worked overtime on the project.[55] Coleman Construction admitted that it didn't pay the required "time and a half" for overtime hours. There is thus no

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[53] D. & O. at 34.

[54] 40 U.S.C. § 3702 ("For each workweek in which the laborer or mechanic is so employed, wages include compensation, at a rate not less than one and one-half times the basic rate of pay, for all hours worked in excess of 40 hours in the workweek."); § 3701(b)(1)(B)(iii) ("This chapter applies to . . . (B) any . . . contract that may require or involve the employment of laborers or mechanics if the contract is one . . . (iii) which is a contract for work financed at least in part by loans or grants from, or loans insured or guaranteed by, the Government or an agency or instrumentality under any federal law providing wage standards for the work."); § 3701(c)(3)(A) ("This chapter does not apply to . . . (iii) a contract in an amount that is not greater than $100,000."); 29 C.F.R. § 5.5(b)(1) (contracts subject to the Act shall have the following language: "no contractor or subcontractor contracting for any part of the con[t]ract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.").

[55] D. & O. at 40.

dispute that Coleman Construction failed to pay overtime as required by the Contract Work Hours and Safety Standards Act.

Remedies

A. Damages

Coleman Construction is liable for $99,020.66 in damages.[56] Coleman Construction failed to pay twenty-five employees for the full number of hours they worked and owes those employees $97,079.24 in back wages. This included a dozen whom Coleman Construction had misclassified as laborers rather than finishers, resulting in their being paid a lower wage rate than the prevailing wage required by the Davis-Bacon wage determination applicable to the contracts. Coleman Construction also failed to pay eight employees for overtime worked and owes those employees $1,941.42. Based on the ALJ's calculation of the amount Coleman Construction owes to each of its employees—which in turn was based on his careful review of detailed time sheets and payroll records, as well as testimony from a Wage and Hour investigator and several Coleman Construction employees, including Kenny Ingram, the foreman who kept detailed records of the hours all the employees worked—we agree that Coleman Construction is liable for the $99,020.66 the ALJ ordered it to pay.

Coleman Construction does not dispute any of the specifics of the amount of damages awarded, except to say that it should not be liable for those individuals the ALJ referred to as "the [unnamed] Hispanic workers"[57] and whom Coleman refers to as the "Mexican workers."[58] These were apparently employees of John Main, Mr. Coleman's joint-venture partner. However, the ALJ's damage award did not include any of these workers. In effect, then, Coleman prevailed below on the argument that it should not be responsible to pay those workers, and the ALJ did not include any of them in his calculations of damages in this case.[59] Therefore, the

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[56] Although the ALJ found both Coleman Construction and Mr. Coleman liable for the damages, we refrain from deciding the question of Mr. Coleman's personal liability for the damages. Neither the ALJ nor the Administrator cited any legal authority for holding Mr. Coleman personally liable for the damages, and we have not been able to find any either. We thus limit our analysis to Coleman Construction's liability for the damages.

[57] D. & O. at 35.

[58] *See* Coleman brief at 11 ("John Main had his own workers . . . [who] did not work for Coleman . . . . [T]hey were the Mexican[] employees of John Main on a project of John Main, [n]ot Coleman Construction.").

[59] *See* D. & O. at 35 ("As I have no evidence to show how much [the unnamed Hispanic workers] were paid, and if they were actually paid the appropriate wages by Mr. Main, I cannot include these employees in the award of back pay.").

ALJ's total amount of $99,020.66 does not include any payment to any of those workers. Thus, Coleman Construction was held liable only for back wages and overtime for its own employees.

Debarment

Both the Coleman Construction Company and Freeman Coleman, Sr., are to be debarred from receiving any contracts or subcontracts subject to the Davis-Bacon Act or any Davis-Bacon Related Act[60] for three years.[61]

In analyzing whether Coleman Construction and Mr. Coleman should be debarred, the ALJ conflated two different legal standards: the standard for debarment under the Davis-Bacon Act and the standard for debarment under Davis-Bacon Related Acts. This error was harmless however, and we affirm the ALJ's order debarring both Coleman Construction and Mr. Coleman.

The legal standards for debarment under the Davis-Bacon Act are different from the legal standards for debarment under Davis-Bacon Related Acts. Under the Davis-Bacon Act, the Comptroller General keeps "a list of the names of persons whom the Comptroller General has found to have disregarded their obligations to employees."[62] Davis-Bacon prohibits federal contracts from being awarded to such persons "until three years have elapsed from the date of publication of the list."[63]

In contrast, the National Housing Act and Contract Work Hours and Safety Standards Act, the two Davis-Bacon Related Acts under which this case is being brought, do not include a debarment provision. Rather, it is the Department of Labor regulations, duly promulgated pursuant to Reorganization Plan No. 14 of 1950, that provide for debarment for violations of a Related Act. While similar to the Davis-Bacon Act language, the relevant regulatory language applicable to Related Acts is not identical. The relevant provision prohibits the awarding of federal contracts to those "found . . . to be in *aggravated or willful violation*" of the labor

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[60] The Davis-Bacon Related Acts are listed in 29 C.F.R. § 5.1.

[61] The three-year period is to begin on the date the Comptroller General publishes their names on the ineligible list as provided in 29 C.F.R. § 5.12.

[62] 40 U.S.C. § 3144(b)(1).

[63] 40 U.S.C. § 3144(b)(2). The Department of Labor regulations implementing Davis-Bacon similarly provide for debarment of those "who have been found to have disregarded their obligations." 29 C.F.R. § 5.12(a)(2).

standards provisions of a Davis-Bacon Related Act and imposes debarment "for a period *not to exceed* 3 years."[64]

In other words, debarment under the Davis-Bacon Act differs from debarment under Related Acts in two substantive ways: First under Davis-Bacon, the standard for debarment is relatively low—a mere "disregard[ing]" of one's obligations suffices—whereas under Related Acts such as at issue here, the standard for debarment is a tad more stringent—one has to have been in "aggravated or willful violation" of the relevant labor standards provisions. Second, the Davis-Bacon Act and implementing regulations *mandate* a three-year period of debarment, whereas under a Related Act, the regulations provide for a debarment period "not to exceed 3 years."[65]

The ALJ committed legal error by conflating these two standards and by failing to exercise the discretion to determine the length of debarment. In particular, the ALJ specifically concluded—wrongly for a Related Act case such as this one—that he "lack[ed] the discretion to lessen the three year period of debarment."[66] While at times the ALJ's description of the law was accurate,[67] he began his analysis with a misstatement of the law,[68] ended his description of the law with a statement that strongly implied he misunderstood what law he was to apply,[69]

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[64] 29 C.F.R. § 5.12(a)(1) (emphasis added); *see also* 29 C.F.R. § 5.12(d).

[65] 29 C.F.R. § 5.12(a)(1); *see generally Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 00-050, ALJ No. 1996-DBA-037, slip op. at 4-5 (ARB Aug. 27, 2001); *A. Vento Constr.*, WAB No. 87-51, slip op. at 5-7 (WAB Oct. 17, 1990); *see also P&N Inc./Thermodyn Mech. Contractors, Inc.*, ARB No. 96-116, ALJ No. 1994-DBA-072, slip op. at 4 (ARB Oct. 25, 1996) (distinguishing between the standards under the Davis-Bacon Act and those under Related Acts and applying the laxer standard under the Davis-Bacon Act because that case involved violations of both Davis-Bacon and a Related Act); *cf. Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 1997-SCA-020, slip op. at 9 (ARB Apr. 30, 2001) (explaining a similar distinction in debarment standards between Davis-Bacon Related Acts and the Service Contract Act).

[66] D. & O. at 42; *see also id.* ("once an intentional violation is established, the standard for debarment is a bright-line test, i.e., a 3-year debarment period is mandatory, without consideration of mitigating factors or extraordinary circumstances." (internal quotation marks and citations omitted).

[67] *See, e.g.*, D. & O. at 42 ("To support a debarment order, the evidence must establish a level of culpability such as 'aggravated or willful' and beyond mere negligence or inadvertent behavior.").

[68] *See* D. & O. at 41 ("Debarment is warranted only when a person or firm has 'disregarded their obligations' to their employees . . . .").

[69] The ALJ said, "[W]hile mitigating factors may affect debarment under labor standards regulations, they do not have an impact on the debarment issue under the Davis-Bacon Act." D & O at 42. Although this is not a completely inaccurate statement of the law—indeed, it at least implies

quoted extensively from the wrong regulation,[70] and relied at times on cases discussing the Davis-Bacon, rather than Related Acts, debarment standard.[71]

Despite this improper conflation of the two legal standards, the ALJ's error was harmless in this case. Debarment for three years is required here under the proper Davis-Bacon Related Act standard: Coleman Construction's violations were "willful," and it is not entitled to a debarment period of less than three years.

First, debarment was required because the facts clearly demonstrate that Coleman Construction was in "willful violation" of the labor standards provisions of a Davis-Bacon Related Act. Quoting the Supreme Court of the United States, this Board has previously noted that "in common usage the word 'willful' is considered synonymous with such words as 'voluntary,' 'deliberate,' and 'intentional.' . . . [I]t is generally understood to refer to conduct that is not merely negligent."[72] Elsewhere, we have explained that a "'willful' violation encompass[es] intentional disregard, or plain indifference to the statutory requirements."[73]

Here, the facts unequivocally satisfy that standard: Coleman Construction's Davis-Bacon Related Act violations were deliberate and intentional and thus, within the meaning of the regulation, "willful." As for the misclassification of workers, Coleman Construction "knowingly

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that the ALJ understood that there are two different legal standards—the main clause of the sentence emphasizes "the Davis Bacon Act" and thus strongly implies that the ALJ believes this is a Davis-Bacon Act case, rather than, as it is, one involving "debarment [solely] under labor standards regulations." Not seeming to realize that this is a case of "debarment [solely] under labor standards regulations," he thus failed to consider whether there were "mitigating factors."

[70] *See* D. & O. at 41 (long block quote from 29 C.F.R. § 5.12(a)(2)).

[71] *See* D. & O. at 42 (quoting from a section of *Sundex, Ltd.*, ARB No. 98-130, ALJ No. 1994-DBA-058 (ARB Dec. 30, 1999) (in turn citing *G&O Gen. Contractors, Inc.* WAB No. 90-35 (WAB Feb. 19, 1991)) that specifically addressed the Davis-Bacon Act standard: "once an intentional violation is established the standard for debarment is a bright-line test, i.e., a 3-year debarment period is mandatory, without consideration of mitigating factors or extraordinary circumstances"); *id.* at 43 (citing *P&N Inc./Thermodyn Mech. Contractors, Inc.*, ARB No. 96-116, ALJ No. 1994-DBA-072).

[72] *Cody Zeigler Inc. v. Admin., Wage & Hour Div.*, ARB Nos. 01-014, -015; ALJ No. 1997-DBA-017, slip op. at 31 (ARB Dec. 19, 2003) (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)); *accord A. Vento Constr.*, WAB No. 87-51, slip op. at 7 (holding that "aggravated or willful" violation of a Related Act includes "intentional, deliberate, knowing violations of the Act").

[73] *Pythagoras*, ARB Nos. 08-107, 09-00; slip op. at 19-20 (citations omitted).

misclassified finishers as laborers"[74] and then "falsified records to avoid compliance with the regulations."[75] As for the failure to pay its employees for all the hours they worked, Coleman Construction "purposely destroyed time records" and did so "to conceal deceitful business practices."[76] Moreover, destroying those records constitutes an intentional violation of the separate regulatory provision requiring employers subject to Davis-Bacon (or a Related Act) to maintain payroll records.[77] Coleman Construction "falsified payroll records and certified payrolls" by "falsif[ying], manipulat[ing], and decreas[ing] the hours of its workers to simulate prevailing wage compliance."[78] We have previously upheld a debarment order under the "aggravated or willful" standard for Davis-Bacon Related Acts in similar circumstances.[79]

Second, a three-year debarment is warranted here, because the facts of this case do not permit an order of debarment of anything less. On its face, the regulation's language, "a period not to exceed 3 years," does appear to afford some discretion about the length of debarment. However, one of our predecessor Boards, the Wage Appeals Board, made clear more than two decades ago that, once the Administrator shows that a violation is "aggravated or willful," debarment should be for the full three years except in "extraordinary circumstances."[80]

The Wage Appeals Board established the demanding "extraordinary circumstances" standard for a reduced debarment period based on its reading of the entire regulatory provision: the "period not to exceed 3 years" language is found in 29 C.F.R. § 5.12(a)(1), but later in the same section, subsection 5.12(c) contains a "carefully crafted procedure . . . permit[ting] a violator to request removal from the debarment list only after completing six months of the debarment period, and provid[ing] for modification of the debarment period only after an

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74 D. & O. at 42.

75 *Id.* at 43.

76 *Id.* at 44.

77 29 C.F.R. § 5.5(a)(3)(i).

78 D. & O. at 44.

79 *Pythagoras,* ARB Nos. 08-107, 09-007; slip op. at 20-22.

80 *A. Vento Constr.*, WAB No. 87-51, slip op. at 5 ("unless a case presents extraordinary circumstances, an order imposing a three-year debarment period is warranted under the provisions governing debarment for 'aggravated or willful' violations of the labor standards provisions of the Related Acts."); *id.* at 14 ("The Board . . . concludes that 'aggravated or willful' violations of the labor standards provisions of the Related Acts warrant an order imposing a three-year debarment period absent extraordinary circumstances.").

investigation by the Administrator . . . demonstrates compliance with all applicable labor standards statutes."[81] The existence of this "carefully drawn procedure . . . suggests that this is the mechanism that the drafters of Section 5.12 intended to be used, in most instances, for reducing the length of the debarment period to less than three years."[82] The Wage Appeals Board thus held that the default debarment period should be three years and that an ALJ should deviate from that only in extraordinary circumstances. Because an ALJ's debarment determination necessarily comes "before . . . the minimum six-month debarment period . . . and before the Administrator has conducted the post-debarment investigation,"[83] an ALJ order of less than three years without "extraordinary circumstances" would undermine the "carefully crafted procedure" found in subsection 5.12(c).

Nothing in the record demonstrates the "extraordinary circumstances" necessary to warrant a debarment period of less than three years here. Coleman Construction not only knowingly misclassified workers, but also purposely destroyed time records, in an attempt to shortchange its employees of nearly $100,000 of their rightful wages. This is precisely the type of behavior for which this Board has previously upheld full three-year debarments in Davis-Bacon Related Act cases.[84] Indeed, in the case establishing the "extraordinary circumstances" standard, the Wage Appeals Board reversed a one-year debarment, increasing it to three years, under comparable circumstances.[85]

Finally, Freeman Coleman, Sr. should be debarred as well. Although the regulations do not explicitly grant authority to debar individual corporate officers in Related Act cases, the regulations have been interpreted to grant such authority for decades, and that authority has been upheld by at least one federal court of appeals.[86] Freeman Coleman, Sr., was the only one acting on Coleman Construction's behalf throughout the Lakeview construction project. All the violations are effectively his and his alone. Thus, Freeman Coleman, Sr. should also be debarred for three years.

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81 *A. Vento Constr.*, WAB No. 87-51, slip op. at 10.

82 *Id.* at 10.

83 *Id.* at 11.

84 *Pythagoras*, ARB Nos. 08-107, 09-007; slip op. at 20-22; *KP & L Elec. Contractors, Inc.*, ARB No. 99-039, ALJ No. 1996-DBA-034 (ARB May 31, 2000).

85 *A. Vento Constr.*, WAB No. 87-51, slip op. at 15-16.

86 *Facchiano Const. Co., Inc. v. U.S. Dep't of Labor*, 987 F.2d 206, 213-14 (3d Cir. 1993).

We do make one small correction to the ALJ's debarment order. The ALJ ordered that the "Coleman Construction Company and Mr. Freeman Coleman, Sr. [be] debarred from receiving federal contracts *subject to the DBRA* for a period of three years."[87] However, the relevant regulation requires that violators be debarred from "receiv[ing] any federal contracts or subcontracts subject to *any of the statutes* listed in § 5.1."[88] That list includes not only all of the Davis-Bacon Related Acts, but also the Davis-Bacon Act itself as well.[89] Accordingly, we order that Coleman Construction Company and Mr. Freeman Coleman, Sr. be debarred from receiving any contracts or subcontracts subject to any of the statutes listed in 29 C.F.R. § 5.1, including the Davis-Bacon Act itself, for three years from the date the Comptroller General publishes their names on the list of ineligible contractors and subcontractors.[90]

CONCLUSION

We conclude that the ALJ correctly determined that the Coleman Construction Company (a) violated the labor standards provisions of the National Housing Act, a Davis-Bacon Related Act, and its implementing regulations, when it paid twelve "concrete finishers" as "laborers"; (b) violated the labor standards provisions of the National Housing Act, a Davis-Bacon Related Act, and its implementing regulations, by failing to pay twenty-five of its employees for the full number of hours they worked; and (c) violated the Contract Work Hours and Safety Standards Act by failing to pay eight of its employees "time and a half" for working overtime. We thus **AFFIRM** the ALJ's Decision and Order to the extent that it found the Coleman Construction Company liable for $99,020.66 in damages for those violations;[91] and modify the ALJ's order of debarment slightly, such that both the Coleman Construction Company and Freeman Coleman, Sr., be debarred from receiving any contracts or subcontracts subject to any of the statutes listed

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87 D. & O. at 46 (emphasis added).

88 29 C.F.R. § 5.12(a)(1) (emphasis added).

89 29 C.F.R. § 5.1(a)(1).

90 29 C.F.R. § 5.12(a)(1).

91 The ALJ found Freeman Coleman, Sr. to be liable for the damages as well, but neither the ALJ nor the Administrator cite to any legal authority imposing personal liability for damages in a case such as this. *See supra* note 56.

The ALJ also ordered (a) the U.S. Department of Housing and Urban Development (HUD) to release to the Administrator $101,677.20 that HUD had apparently withheld from Coleman; and (b) the Administrator then to distribute $99,020.66 from that amount to the underpaid workers and distribute the rest to Coleman. Since the parties do not address this aspect of the ALJ's Order, we don't either.

in 29 C.F.R. § 5.1, including the Davis-Bacon Act itself, for a period of three years from the date the Comptroller General publishes their names on the ineligible list.

SO ORDERED.

ANUJ DESAI
Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

Luis A. Corchado, Concurring

I concur with the majority's decision affirming the ALJ's decision but on more limited and different grounds. As the majority noted, Mr. Coleman's petition for review is difficult to understand and, at best, only challenges the ALJ's finding as to DBA coverage. I agree with the majority's discussion on the coverage issue. Beyond that, Mr. Coleman's petition fails to raise understandable arguments or explain what errors the ALJ committed. I appreciate that Mr. Coleman appears before the Board without the benefit of legal counsel and that we often construe complaints and papers filed by pro se complainants liberally and with a degree of adjudicative latitude. However, granting some latitude does not include constructing appellate arguments for the pro se litigants. *See, e.g.*, *Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075, ALJ No. 2000-STA-028, slip op. at 10 (ARB Feb. 28, 2003) (pro se litigants have the same burden as represented parties to prove their case). Consequently, I affirm the ALJ's determination without offering any comments on the majority's opinion beyond the issue of coverage.

LUIS A. CORCHADO
Administrative Appeals Judge