



IN THE MATTER OF:

**Disputes concerning the
payment of prevailing
wages and overtime pay by**

ARB CASE NO. 2017-0023

ALJ CASE NO. 2015-DBA-00030

J.D. ECKMAN, INC.,

DATE:

JUL - 9 2019

Prime Contractor,

PANTHERA PAINTING, INC.,

1st – Tier Subcontractor

ANDREW MANGANAS

President, 1st – Tier Subcontractor,

BRUCE ROBERTS,

Secretary, 1st – Tier Subcontractor,

446 PAINTING, and

JUSTIN HAUTH,

President, 446 Painting

Former Vice President, 1st – Tier Subcontractor,

and proposed debarment for labor standards violations by:

PANTHERA PAINTING, INC.,

1st – Tier Subcontractor,

ANDREW MANGANAS,

President, 1st – Tier Subcontractor,

BRUCE ROBERTS,

Secretary, 1st – Tier Subcontractor, and

446 PAINTING, and

JUSTIN HAUTH,

President, 446 Painting

Former Vice President, 1st – Tier Subcontractor,

RESPONDENTS.

Appearances:

For the Respondents:

Christopher P. Furman, Esq.; Washington, Pennsylvania

For the Administrator, Wage and Hour Division:

Nicholas C. Geale, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Jonathan T. Rees, Esq.; and Heather Maria Johnson, Esq.; U.S. Department of Labor, Office of the Solicitor; Washington, District of Columbia

Before: William T. Barto, Chief Administrative Appeals Judge, James A. Haynes and Daniel T. Gresh, Administrative Appeals Judges

DECISION AND ORDER OF REMAND

PER CURIAM. This matter is before the Administrative Review Board (the Board) pursuant to the Federal-Aid Highway Acts (FAHA or the Act),¹ a Davis-Bacon Related Act (DBRA),² and the implementing regulations at 29 C.F.R. Parts 5,

¹ 23 U.S.C. § 101 et seq. (2015).

² See 23 U.S.C. § 113 (2012); 29 C.F.R. § 5.1(a)(12) (2018).

6, and 7 (2018). 446 Painting and its President, Justin Hauth, seek review of an Administrative Law Judge's (ALJ) Decision and Order (D. & O.) ordering their debarment for three years for violating the prevailing wage provisions at 29 C.F.R. § 5.5(a)(1) and (4). We reverse the ALJ's decision ordering their debarment pursuant to 29 C.F.R. § 5.12(a)(2) and remand for the ALJ to consider whether Hauth or 446 Painting committed a willful or aggravated violation of the relevant DBRA under 29 C.F.R. § 5.12(a)(1), the proper debarment standard for DBRA cases.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from final decisions of ALJs in DBRA cases.³ In reviewing an ALJ's decision in a DBRA case, the Board acts "as the authorized representative of the Secretary of Labor" and "shall act as fully and finally as might the Secretary of Labor concerning such matters."⁴ Pursuant to the Administrative Procedure Act, the Secretary or his designee, acting on behalf of the Department of Labor (DOL), "has all the powers which [the ALJ] would have in making the initial decision except as [the agency] may limit the issues on notice or by rule."⁵ In light of this broad grant of appellate authority in DBRA cases,⁶ the Board reviews questions of law and fact de novo.⁷

The scope of review on appeal is generally limited to the administrative record assembled by the ALJ below, and the Board will not receive new evidence

³ See 29 C.F.R. § 7.1(b) (2018) ("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 . . ."); *id.* § 7.1(e) (describing the Board's function in DBRA cases as "an essentially appellate agency"); 29 C.F.R. Part 5 (regulations addressing Davis-Bacon and Davis-Bacon Related Act labor standards); *id.* § 5.12 (setting forth procedures for debarment proceedings); Secretary's Order No. 1-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072-01 (Apr. 3, 2019).

⁴ 29 C.F.R. § 7.1(d).

⁵ 5 U.S.C. § 557(b) (1976).

⁶ 29 C.F.R. § 7.1(e).

⁷ See *Interstate Rock Prods., Inc.*, ARB No. 15-024, ALJ No. 2013-DBA-010, slip op. at 8-9 (ARB Sept. 27, 2016); *Cody Zeigler Inc. v. Adm'r, Wage and Hour Div.*, ARB Nos. 01-014 and 01-015, ALJ No. 1997-DBA-17, slip op. at 5-6 (ARB Dec. 19, 2003); *Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 00-050, ALJ No., 96-DBA-37, slip op. at 4 (ARB Aug. 27, 2001).

“except upon a showing of extraordinary circumstances.”⁸ When necessary, the Board 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.”⁹

DISCUSSION

A contractor or subcontractor found to be in aggravated or willful violation of a DBRA is ineligible to receive any DBRA or Davis-Bacon Act (DBA) contracts or subcontracts for a period of up to three years.¹⁰ An “aggravated or willful” violation of a DBRA must be voluntary, deliberate, intentional, and not merely negligent.¹¹ By way of contrast, a contractor or subcontractor, or responsible officer of either, who is found to have merely “disregarded their obligations to employees” under the DBA is ineligible to receive any contract or subcontract of the United States or the District of Columbia for a fixed period of three years.¹²

It is uncontroverted that the ALJ used the incorrect standard to determine whether Respondents should be barred. Notwithstanding the parties’ stipulation that the FAHA funded the contract and that the DBRA prevailing wage provisions applied,¹³ the ALJ initially applied the debarment standard for the DBA (requiring only a disregard of obligations for debarment),¹⁴ rather than the heightened

⁸ 29 C.F.R. § 7.1(e); *cf. id.* § 7.7 (allowing presentation of evidence and argument on appeal from “other interested persons”).

⁹ 29 C.F.R. § 7.1(e).

¹⁰ 29 C.F.R. § 5.12(a)(1).

¹¹ *See Cody Zeigler Inc.*, ARB Nos. 01-014 and 01-015, slip op. at 31 (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)).

¹² *See* 29 C.F.R. § 5.12(a)(2).

¹³ D. & O. at 4. As the Administrator notes in her brief, under the DBRAs, the DBA prevailing wage provisions apply. Response Brief of the Administrator at 3. *See* 29 C.F.R. §§5.2(h), 5.5(a)(1).

¹⁴ 29 C.F.R. § 5.12(a)(2) (“In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit . . . the names of the contractors . . . who have been found to have disregarded their obligations to employees . . .”).

requirement for debarment for DBRA violations (requiring a willful or aggravated violation for debarment).¹⁵ D. & O. at 4, 26-28.

But counsel for the Administrator essentially argues that the error was harmless because the ALJ ultimately found, as a matter of fact, that Respondent had willfully violated the Act.¹⁶ This finding may have been dispositive if supported by sufficient evidence; however, we conclude that it is not. The ALJ relied primarily upon two evidentiary factors to find willful violations on the part of Respondents: Respondent Hauth's status as vice-president of Respondent Panthera and his inconsistent statements concerning that status. For the reasons noted below, neither provides sufficient support for the conclusion that she reached.

The ALJ's findings and some conclusions concerning Respondent Hauth's status as vice-president are relatively concise and are reproduced here:

In signing the subcontract, Hauth warranted that he and Panthera are familiar with the terms of the contract, including DBA requirements, even though he testified that he did not actually read the contract. (AX-4; Tr. 356). As vice-president with an essential role in the day-to-day management and supervision of the company, his obligations included awareness and compliance with DBA requirements. His failure to read the contract is no defense to debarment. *Cody Zeigler, Inc.*, ARB Case Nos. 01-014 and 01-015. Similar to the vice-president in *Ray Wilson* who was debarred, Hauth did not read the DBA provisions in the contract and did not ensure compliance; therefore, Hauth has disregarded his obligations under the DBA. ARB Case No. 02-086. Consequently, Hauth must also be debarred. Hauth currently operates his own painting company, 446 Painting. (Tr. 356). Because this is a company in which Hauth has an interest, 446 Painting must also be debarred. 29 C.F.R. § 5.12(a)(2).¹⁷

¹⁵ 29 C.F.R. §5.12(a)(1) ("Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in §5.1 other than the Davis-Bacon Act, such contractor or subcontractor . . . shall be ineligible for a period not to exceed 3 years . . . to receive any contracts . . .").

¹⁶ Response Brief at 16. The ALJ also asserted harmless error in her March 1, 2017 post-hearing order denying as untimely the Administrator's Motion to Amend the Decision and Order seeking to clarify that debarment in this case arose under the relevant DBRA rather than the DBA.

¹⁷ D. & O. at 36.

Willful or aggravated violation of the DBRA requires actual knowledge or awareness of *the violation*, and not merely one's *obligations* under the DBRA or any applicable contracts.¹⁸ The closest the ALJ came to finding that Hauth had any knowledge of violations was "that he was at least on notice that there was a delay in Panthera's payrolls" because of "paperwork requirements," despite his and Respondent Manganas' denials at the hearing that Hauth had anything to do with payroll.¹⁹ While these findings of constructive knowledge may tend to support a "disregard of obligations" debarment standard, they fall significantly short of satisfying the appropriate "aggravated or willful" standard. Indeed, the Assistant District Director for the district office of the Wage and Hour Division testified that other than the contract that originated the work in this case, he did not have any documentation that would support a contention that Hauth willfully violated the Act. Tr. at 146. He also testified that there was no evidence that Hauth knew about a violation other than that he represented himself as vice-president and signed the contract as such. Tr. at 147.²⁰ Thus, we hold that the ALJ's putative finding that Hauth "committed willful violations of the DBA," D. & O. 36, is not supported by a preponderance of the evidence of record.

Disposition of this matter is somewhat complicated by the fact that the ALJ's decision rests in part upon her credibility determinations. "This Board has endorsed the general principle that where a decision rests upon credibility findings made by a trier-of-fact, we will not reverse the decision in the absence of clear error."²¹ In this

¹⁸ See *McLaughlin*, 486 U.S. 128; *Souryavong v. Lackawanna Cty.*, 872 F.3d 122, 126 (3d Cir. 2017) ("Acting only 'unreasonably' is insufficient—some degree of actual awareness is necessary") (quoting *McLaughlin*, 486 U.S. at 135 n.13.).

¹⁹ D. & O. at 29; Hearing Transcript (Tr.) at 310, 366-67. Hauth's testimony is also consistent with Manganas' who testified that Hauth was never an officer, had no payroll responsibilities, never worked on employees' hours, or certified payrolls. Tr. at 248, 306, 310.

²⁰ We note that there is no strict liability for corporate officers when it comes to the DBRA willful or aggravated debarment standard. *Facchiano Constr. Co.*, 987 F.2d 206 (3d Cir. 1993); see *McLaughlin*, 486 U.S. 128.

²¹ *In re Star Brite Constr. Co., Inc.*, ARB No. 98-113, ALJ No. 97-DBA-12, slip op, at 5 (ARB June 30, 2000). Being a "general principle," it is therefore subject to qualification in particular applications. An ALJ's credibility determination will receive maximum deference from the Board when it is based upon observations of demeanor and physical conduct at the hearing that are not visible to an appellate reviewer. Less deference is due to determinations made in reliance upon factors that are within the capability of the Board to

instance, the ALJ found Respondent Hauth's testimony to be less than "entirely credible" because of what the ALJ considered to be Hauth's inconsistent statements concerning his status as vice-president at Respondent Panthera.²² The ALJ used this determination to support her findings that Respondent Hauth was a responsible officer with Respondent Panthera, that he knew of his obligations under the Act, and he nevertheless disregarded them.

Under these circumstances, the ALJ's credibility determination does not constrain our ability to reverse the decision below. As a threshold matter, Hauth's credibility or lack of it is simply not relevant to the legal error the ALJ committed, which is the reason for our action. Moreover, the ALJ's credibility determination was ambiguous in that it was not expressly linked to any specific findings of fact related to the error noted above; the only attempt at making such a link was her assertion that Hauth's inconsistent statements "were sufficient to call his credibility, at least in part, into question, especially with respect to his position at Panthera." D. & O. at 20. As we have not disturbed the ALJ's findings as to Hauth's "position at Panthera," her credibility determination on this point is causally unrelated to our disposition of this appeal. And finally, to the extent that the ALJ referred to the DBA rather than the relevant DBRA in this case in her credibility determination, such reference is clearly erroneous and cannot be sustained in light of this ruling. Thus, the ALJ's decision ordering the debarment of Respondents Hauth and 446 Painting pursuant to 29 C.F.R. § 5.12(a)(2) is reversed and this case is remanded for the ALJ to consider whether Hauth or 446 Painting committed a willful or aggravated violation of the relevant DBRA under 29 C.F.R. § 5.12(a)(1), the proper debarment standard for DBRA cases.

assess and weigh, such as a witness' prior inconsistent statements or the inability of a witness to observe or recall relevant facts.

²² D. & O. at 20. While Hauth acknowledged he was vice-president of Panthera in connection with another DOL investigation, Hauth testified in this case that he was never the vice-president of Panthera, Tr. at 352; he testified that he signed the contract as Manganas directed him to, Tr. at 352, 378; he testified that his title of "vice-president" was a joke, Tr. at 373; Hauth testified to the same in regards to the other matter, *see* Tr. at 372-73, 377 (that his title as vice-president was not official, did not have any meaning to it, and that it was a joke, although he did admit he was second in command with regards to "office stuff."). D. & O. at 14-15.

CONCLUSION

In light of our holding that the evidence is insufficient to sustain a finding that either Respondents Hauth or 446 Painting engaged in a willful or aggravated violation of the relevant DBRA,²³ we hereby **SET ASIDE** the Order below purporting to debar Respondents Hauth and 446 Painting for a period of three years under the DBA and **REMAND** this matter for the ALJ to enter revised findings of fact and conclusions of law consistent with the administrative record, this decision, and the DBRA-implementing regulations at 29 C.F.R. § 5.12(a)(1).²⁴

SO ORDERED.

²³ In light of our present disposition of this matter, we need not address the other issues the Respondents raised in their Petition for Review or supporting Brief.

²⁴ See *Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 97-SCA-20, slip op. at 10 (ARB Apr. 30, 2001), citing *A. Vento Constr.*, WAB No. 87-51, slip op. at 7 (Oct. 17, 1990) (“the Board and its predecessors typically have found an employer’s action to be ‘aggravated or willful’ if it meets ‘the literal definition of those terms - intentional, deliberate, knowing violations of the labor standards provisions of the Related Act.’”).