

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



IN THE MATTER OF:

**ADMINISTRATOR, WAGE AND
HOUR DIVISION, UNITED STATES
DEPARTMENT OF LABOR,**

PROSECUTING PARTY,

v.

**PARADIGM CONSTRUCTION &
ENGINEERING, INC., KENT
GLESENER, and CHRISTIE
GLESENER,**

RESPONDENTS.

ARB CASE NO. 2023-0054

**ALJ CASE NO. 2017-DBA-00010
ALJ PATRICK M. ROSENOW**

DATE: January 30, 2026

Appearances:

For the Prosecuting Party, Administrator, Wage and Hour Division:

**Seema Nanda, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq.,
Jonathan T. Rees, Esq., Dean A. Romhilt, Esq.; *U.S. Department of
Labor, Office of the Solicitor; Washington, District of Columbia***

For the Respondents:

**Jeffrey S. Fowler, Esq., and Marron A. Mahoney, Esq.; *Laner Muchin,
LTD; Chicago, Illinois***

**Before JOHNSON, Chief Administrative Appeals Judge, and KAPLAN and
BURRELL, Administrative Appeals Judges**

DECISION AND ORDER

This matter arises under the Davis-Bacon Act (DBA)¹ and the Davis-Bacon Related Acts (DBRA), including the Contract Work Hours and Safety Standards Act

¹ 40 U.S.C. § 3141 et seq.

(CWHSSA),² and their implementing regulations.³ Administrative Law Judge (ALJ) Patrick M. Rosenow found that Paradigm Construction & Engineering, Inc., Kent Glesener, and Christie Glesener (Respondents) falsified certified payroll reports, failed to pay workers weekly, misclassified skilled workers as laborers, failed to include independent contractor Ronald Barnes on payroll, and failed to cooperate with the Department of Labor's Wage and Hour Division (WHD).⁴ The ALJ ordered Respondents to pay \$14,058.08 to eighteen employees, and debarred Respondents for three years.⁵ Respondents appealed to the Administrative Review Board (Board). For the following reasons, we affirm.

BACKGROUND

Paradigm Construction & Engineering, Inc., is a company that worked on federally funded highway bridge construction projects in Oklahoma and is owned by Kent and Christie Glesener.⁶

Prior to the instant case, in early 2013, the WHD directed investigator Jacob Wiles to investigate two of Respondents' projects.⁷ Respondents provided some of the requested documents and permitted the WHD to interview its employees.⁸ During the investigation, Wiles received a call from Darren Kaihlanen, the chief compliance officer for the Federal Highway Administration in Oklahoma, informing Wiles that he believed that Respondents should not be involved in federal contracting after speaking with Christie Glesener about certified payroll records.⁹ Wiles determined that Respondents violated the DBRA by misclassifying skilled workers as laborers, improperly calculating fringe benefits, failing to pay workers weekly, and failing to submit certified payroll records on a weekly basis.¹⁰ Respondents contested the WHD's findings.¹¹ As part of the negotiation process, the

² *Id.* § 3701.

³ 29 C.F.R. Parts 1, 3, 5-7 (2023). In addition to the DBA, many federal statutes providing federal funding for construction projects incorporate the DBA's requirements. 29 C.F.R. § 5.1(a). The CHWSSA, as one of the many Davis-Bacon Related Acts, requires application of the labor standards provisions of the DBA.

⁴ Decision and Order (D. & O.) at 23-24.

⁵ *Id.*

⁶ *Id.* at 3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 4.

¹¹ *Id.*

WHD offered to reduce the alleged back wages if Respondents would agree in writing that they violated the DBRA but would promise to comply in the future.¹² Respondents declined and requested a comprehensive explanation of their non-compliance.¹³ Since the contracts were paid in full and the back wages were small, the WHD dropped the matter.¹⁴ The WHD turned its focus to Respondents' current, ongoing contracts because Kaihlanen had informed the WHD that he believed Respondents were misclassifying and underpaying workers.¹⁵

In November 2014, the WHD assigned Investigator Cheryl Masters to investigate three bridge construction contracts Respondents had with the Oklahoma Department of Transportation (ODOT).¹⁶ On December 5, 2014, Kaihlanen sent Masters a daily summary report, payroll reports, and other records.¹⁷ That same day, Masters requested records from ODOT.¹⁸

On December 22, 2014, Masters sent Respondents a letter notifying them that she was investigating them and requesting records.¹⁹ Respondents did not provide the records and would not agree to meet with Masters.²⁰ Over several months, Masters sent several more letters requesting to meet with Respondents and to obtain records.²¹ Respondents remained uncooperative.²²

On April 1-2, 2015, and May 21-22, 2015, Masters conducted site visits.²³ Masters was unable to meet with the Gleseners in April but conducted some employee interviews.²⁴ During the May 21, 2015 visit, Masters identified herself to Christie and explained why she was there.²⁵ In response, Christie threatened to call

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 4-5.

¹⁸ *Id.* at 5.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

the police if Masters did not leave, citing safety reasons.²⁶ No other meeting with the Gleseners took place.²⁷

On May 9, 2016, WHD issued a charging letter, finding that Respondents misclassified and underpaid workers, failed to pay workers weekly, failed to post the correct posters and information at jobsites, and violated recordkeeping regulations.²⁸ The WHD ordered Respondents to pay \$24,058.73 in back wages and recommended that Respondents be subject to debarment.²⁹

Respondents objected and requested a hearing with an ALJ before the Office of Administrative Law Judges.³⁰ At this point, Respondents submitted the records that Masters had requested.³¹ A hearing was held on March 23-26, 2021, and June 8-11, 2021.³² On August 28, 2023, the ALJ issued a Decision and Order (D. & O.), finding that Respondents falsified certified payroll reports, failed to pay workers weekly, misclassified workers, failed to include Ronald Barnes on certified payroll reports, and failed to cooperate with the WHD.³³ The ALJ ordered Respondents to pay \$14,058.08 to eighteen employees and debarred Respondents for three years.³⁴

Respondents petitioned the Board to review the D. & O.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator's final determinations under the DBA and CWHSSA.³⁵ The Board's review of the ALJ's decision "is in the nature of an appellate proceeding," and the Board "will not hear [factual] matters de novo except upon a

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 2, 5-6.

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ *Id.* at 5 n.14.

³² *Id.* at 2.

³³ *Id.* at 1, 23-24.

³⁴ *Id.* at 23-24.

³⁵ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

showing of extraordinary circumstances.”³⁶ Under this standard of review, the Board “will assess the ruling to determine whether it is consistent with the applicable statute and regulations, and is a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA.”³⁷

DISCUSSION

Upon review of the ALJ’s D. & O., the parties’ arguments, and the record, the Board affirms the ALJ’s D. & O.³⁸

1. Respondents Violated the DBA and Its Related Acts

The DBA requires the payment of locally prevailing wage rates and fringe benefits to laborers and mechanics working on Federal contracts in excess of \$2,000 for the construction, alteration, or repair of public buildings and public works.³⁹ As the Supreme Court has recognized, the DBA is “a minimum wage law designed for the benefit of construction workers.”⁴⁰ The purpose of the DBA is “to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.”⁴¹ In addition, the DBA requires employees be “paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard” to the level of skill required.⁴² For workers performing work in more than one classification, employers may compensate the work at the rate specified for each classification for the time

³⁶ 29 C.F.R. § 7.1(e); *Jamek Eng’g Servs., Inc.*, ARB No. 2020-0043, ALJ No. 2017-DBA-00021, slip op. at 7 (ARB June 23, 2021) (citation omitted).

³⁷ *Id.* (citation omitted).

³⁸ Respondents also raise arguments pertaining to the Department of Labor’s administrative hearing and review process for the first time on appeal, contending the Department’s adjudication procedures violate the Seventh Amendment and Article III of the U.S. Constitution. Respondent’s (Resp.) Brief (Br.) at 42. We decline to address this issue. Under the applicable regulations, Secretary’s Order, and ARB precedent, the ARB is bound to adjudicate claims consistently with the statute and Department regulations and the Board generally does not consider constitutional challenges to such regulations. Secretary’s Order No. 01-2020, 85 Fed. Reg. 13,186.

³⁹ See 40 U.S.C. § 3142.

⁴⁰ *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178 (1954).

⁴¹ *Dist. Council of Iron Workers of the State of Cal. v. Adm’r, Wage & Hour Div., U.S. Dep’t of Lab.*, ARB No. 2020-0035, slip op. at 2 (ARB July 26, 2022) (quoting *Univ. Rsch. Ass’n, Inc. v. Coutu*, 450 U.S. 754, 773 (1981)).

⁴² 29 C.F.R. § 5.5(a)(1)(i).

actually worked in that classification provided the “payroll records accurately set forth the time spent in each classification in which work is performed.”⁴³

A. Respondents Failed to Maintain Accurate Records

The DBA and DBRA require a contractor or subcontractor to maintain records for a period of three years and submit weekly payrolls that provide a worker’s name, the correct classification(s) of work actually performed, hourly rates of wages paid, the daily and weekly number of hours actually worked in total and on each contract, deductions made, actual wages paid, and other personal information.⁴⁴ Weekly submissions must include a statement of compliance that the above information is provided, the appropriate information and records are being maintained, each laborer has been paid the full weekly wages earned, and each laborer has been paid for the “classification of work performed, as specified in the applicable wage determination incorporated into the contract.”⁴⁵

The ALJ found that Respondents failed to maintain accurate records because Respondents’ records failed to indicate the precise amount of work each worker performed in each classification.⁴⁶ The ALJ acknowledged engineer Sean Estes’s testimony that he worked with field supervisors and used field reports, daily logs, ticket total sheets, and his general knowledge of the workers’ abilities to determine each worker’s classification; however, the ALJ found that these documents did not establish the precise amount of work each worker performed in each classification.⁴⁷

After a thorough review of the record, we agree with the ALJ. Neither Estes’s testimony nor any documents in the record indicate the time each worker actually worked in each classification.⁴⁸ Thus, we affirm the ALJ’s finding that Respondents failed to maintain records, violating 29 C.F.R. § 5.5(a)(3).

B. Respondents Misclassified Workers

When, as here, an employer is alleged not to have paid employees for the hours worked and has provided inadequate or no records, the Board applies a

⁴³ *Id.*

⁴⁴ 29 C.F.R. § 5.5(a)(3)(i).

⁴⁵ *Id.* at § 5.5(a)(3)(ii)(B).

⁴⁶ D. & O. at 21.

⁴⁷ *Id.*

⁴⁸ *See id.*

burden-shifting framework.⁴⁹ The WHD bears the initial burden of proving that employees performed work on the DBRA project for which they were improperly compensated.⁵⁰ To satisfy its burden, the WHD must: (1) show that employees performed work for which they were improperly compensated and (2) produce “sufficient evidence to show that the amount and extent of that work as a matter of just and reasonable inference.”⁵¹ Once the WHD has satisfied its burden, the burden 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 [WHD]’s evidence.”⁵² To satisfy 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.”⁵³ If the employer fails to carry this burden, employees may be awarded damages, even if the amount of such damages is approximate.⁵⁴

i. WHD Satisfied Its Burden that Employees Performed Work for Which They Were Improperly Compensated

The ALJ found that Respondents misclassified skilled workers as laborers.⁵⁵ The ALJ found that Respondents paid workers according to their perceived skills based on testimony from Kent and Estes.⁵⁶ The DBRA requires that workers be paid according to the work performed, not their skill.⁵⁷ Prior to April 2015, Respondents paid one lead worker the skilled rate, while all other workers were paid the laborer rate.⁵⁸ Yet, the ALJ found that laborers performed skilled work by operating machines, forklifts, and cranes.⁵⁹ The ALJ also cited testimony from engineers Estes and Arnold, and Philip Wilson, a construction company owner,

⁴⁹ *Adm’r, Wage & Hour Div., U.S. Dep’t of Lab. v. Coleman Constr. Co.*, ARB No. 2015-0002, ALJ No. 2013-DBA-00004, slip op. at 11-13 (ARB June 8, 2016) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)).

⁵⁰ *Id.* at 11.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ D. & O. at 14-15.

⁵⁶ *Id.*

⁵⁷ 29 C.F.R. § 5.5(a)(1)(i).

⁵⁸ D. & O. at 14. After the WHD conducted a worksite visit in April 2015, Respondents changed the classification of many workers from laborer to higher skilled prevailing wage determination rates. *Id.* at 15.

⁵⁹ D. & O. at 14.

that a small bridge construction project takes more skilled workers than Respondents' records show.⁶⁰ The ALJ also cited Masters's observation that all workers tied rebar, which is a skilled craft.⁶¹ The ALJ found that the most probative circumstantial evidence of misclassification was Respondents' pay records, which demonstrated that Respondents adjusted classifications when a laborer performed a task outside their skill rather than work performed and that Respondents changed its default classification system for many workers from a laborer rate to a skilled rate after Masters's visit in April 2025.⁶² The ALJ determined that it was more likely than not that Respondents incorrectly classified workers and paid them according to their skill level rather than the tasks they performed.⁶³ The ALJ then concluded that the crew worked as a unit, where all workers (laborers and skilled) generally worked on one task at a time depending on the stage of construction.⁶⁴

Respondents contend the ALJ erred in finding they misclassified workers.⁶⁵ Respondents argue the Administrator did not provide evidence that any worker performed jobs other than as classified by Respondents.⁶⁶ Respondents also contend the ALJ's finding that the crew worked as a unit is problematic because it is a novel approach and testimony from Kent, Estes, Arnold, and Wilson contradicted it.⁶⁷ Respondents assert that classifications must be based on area practices and contend that because Oklahoma does not have statewide job descriptions for labor classifications, Respondents had to rely on their experience in classifying

⁶⁰ *Id.* at 15. Specifically, the ALJ found Arnold to be a comparatively neutral witness and noted that he testified that approximately eighty percent of the workers on deck should be classified as concrete finishers during a pour. *Id.*

⁶¹ *Id.* Ironworkers used plyers, measuring tapes, found rebar, determined where to place rebar in the structure, took measurements, and tied the rebar in the bridge, whereas laborers assisted ironworkers in carrying rebar and used wire and plyers at the direction of the iron worker. Here, workers stated that they performed the same work as the skilled classifications performed, including placing rebar. *Id.* at 16.

⁶² *Id.* at 15. Respondents had contended those workers attained a more advanced skill set, but the ALJ did not credit this explanation. *Id.* We agree.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Resp. Br. at 14-15.

⁶⁶ *Id.* at 15.

⁶⁷ *Id.* at 15, 19-22. Respondents further contend that this approach is different than Investigator Wiles's approach. However, the Wiles investigation is not at issue here.

employees.⁶⁸ Respondents further contend that Masters should have conducted an area practice survey to determine proper classifications.⁶⁹

We are not persuaded by Respondents' arguments pertaining to classifying employees. The ALJ's finding that the crew worked as a unit did not create a novel standard but rather was a characterization of how the crew worked. We conclude that this was a reasonable inference based on the record and in light of Respondents' failure to maintain accurate records. The record shows that Respondents adjusted classifications of skilled workers depending on the stage of the job, and that general laborers performed skilled work with skilled workers.⁷⁰ Although Respondents contend that testimony from Kent, Estes, Arnold, and Wilson contradicted the ALJ's findings that the crew worked as a unit, the ALJ weighed their testimony and found that the more probative evidence was that after the WHD conducted a worksite visit in April 2015, Respondents changed the classification of many workers from laborer to skilled worker.⁷¹ Thus, we disagree that Respondents were unaware of the descriptions for skilled workers, but rather agree with the ALJ that the crew worked as a unit. In addition, we need not decide whether Masters should have conducted an area practice survey to determine proper classifications for various tasks because Respondents did not keep records segregating work and the crew worked as a unit with both laborers and skilled workers performing skilled work without regard to classifications.

Next, Respondents contend that testimony does not support the ALJ's conclusion that more skilled laborers were needed to complete the project.⁷² The record supports the ALJ's findings. Two engineers testified that more skilled workers would have been required to complete the bridge projects than what Respondents' records reflected.⁷³ In addition, the record also supports the ALJ's findings that laborers operated power equipment.⁷⁴

⁶⁸ *Id.* at 16-17 (citing *Fry Brothers Corp.*, WAB No. 1976-0006 (WAB June 14, 1997) and *Barco Enterprises*, ARB No. 2013-0041, slip op. at 13 (ARB July 31, 2015)).

⁶⁹ *Id.* at 16.

⁷⁰ D. & O. at 15. For example, as the ALJ found, when laying concrete, the concrete finisher was correctly paid as a skilled concrete worker while the rest of the crew performing the same or similar work was paid as a laborer. *Id.*

⁷¹ *Id.*

⁷² Resp. Br. at 23-24.

⁷³ D. & O. at 15.

⁷⁴ *Id.* at 14. Specifically, Kent testified that workers operated Bidwell machines, forklifts, and cranes, and workers Henry Barrios, Armando Flores, Jose Ramirez, and David Rivera stated that they operated machinery such as the digger, a heavy-duty forklift, and sky track, and were paid the same amount regardless of the type of work they performed. *Id.*

Respondents also contend the ALJ erred in relying on Masters's testimony because her observations were limited and are inconsistent with the investigation narrative.⁷⁵ The record supports the ALJ's finding that Masters observed all workers tying rebar.⁷⁶ In addition, while Masters's observations were limited to the dates she visited the worksites, this was, in part, due to Respondents' own actions. Masters had unsuccessfully attempted to meet Respondents on multiple occasions.⁷⁷ When Masters met with Christie Glesener on May 21, 2015, Christie threatened to call the police if Masters did not leave, despite Masters explaining why she was there.⁷⁸ Although Christie claimed it was for safety reasons, no other meetings took place at a time when safety concerns could have been ameliorated.⁷⁹ Accordingly, we conclude that Respondents have not demonstrated that the ALJ erred in crediting Masters's testimony.

Further, the record supports the ALJ's finding that Respondents violated the DBRA by relying more on a worker's skill level when determining classifications and pay rather than by the tasks they performed.⁸⁰ Specifically, Kent and Estes testified that Respondents paid workers according to their perceived skills and ability to read plans.⁸¹ Thus, we affirm the ALJ's finding that workers performed work for which they were improperly compensated.

ii. WHD Provided Sufficient Evidence to Show the Amount and Extent of Work Performed that was not Properly Compensated

Next, we find that the Administrator produced sufficient evidence regarding the amount and extent of work as a matter of just and reasonable inference. The ALJ found that seventeen workers were owed \$11,115.68 in back wages.⁸² For this determination, the ALJ accounted for when workers were paid more than the prevailing wage determination and when fringe benefits credits should be applied to determine which weeks resulted in an underpayment. Respondents

⁷⁵ Resp. Br. at 17-18.

⁷⁶ D. & O. at 15. The Board defers to an ALJ's factual findings "predicated upon the ALJ's weighing and determining credibility of conflicting witness testimony." *Interstate Rock Prods., Inc.*, ARB No. 2015-0024, ALJ No. 2013-DBA-0010, slip op. at 9 (ARB Sept. 27, 2016).

⁷⁷ D. & O. at 5.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See id.* at 14-15.

⁸¹ *Id.* at 14.

⁸² *Id.* at 17.

contend the ALJ's finding that the crew worked as a unit is problematic.⁸³ We disagree for the reasons stated above. Thus, Respondents have not demonstrated the ALJ erred. Rather, we conclude that the ALJ's findings are reasonable and supported by the record. Thus, we affirm that the Administrator satisfied WHD's burden.

iii. Respondents Failed to Carry Their Burden to Rebut the WHD's Reasonable Inference of a Misclassification of Workers and Wages Owed

Because the Administrator met WHD's burden, the burden shifts to Respondents to demonstrate either the precise number of hours worked or present evidence sufficient to negate the reasonableness of the inference drawn from the WHD's evidence. We agree with the ALJ that Respondents have not demonstrated the precise number of hours worked because Respondents failed to maintain accurate records of the hours workers worked in each classification.⁸⁴ Respondents have also not presented evidence to negate the reasonableness of the inference drawn from the WHD's evidence. Therefore, we conclude that Respondents failed to carry their burden, and the workers are entitled to damages.

If the employer fails to carry their burden, workers may be awarded damages, even if the amount of such damages is approximate.⁸⁵ The ALJ found that seventeen workers were owed \$11,115.68 in back wages.⁸⁶ The ALJ accounted for when workers were paid more than the prevailing wage determination and when fringe benefits credits should be applied to determine which weeks resulted in an underpayment. Respondents had argued that the WHD wrongly used the "carpenter" classification instead of the "form setter" classification when calculating back wages, which resulted in a higher prevailing wage on two out of the three contracts, and asserted that the use of the "carpenter" classification was a clerical error in their software.⁸⁷ However, the ALJ found that this argument was unpersuasive because certified payroll records used both "form setter" and "carpenter" at different times on the same projects.⁸⁸ The ALJ also found that Respondents changed their default classification on many workers from the laborer rate to higher prevailing wage determination rates, which corroborated Masters's

⁸³ Resp. Br. at 15, 19-22. Respondents further contend that this approach is different than Investigator Wiles's approach. Again, the Wiles investigation is not at issue here.

⁸⁴ *See id.* at 21.

⁸⁵ *Coleman Constr. Co.*, ARB No. 2015-0002, slip op. at 11.

⁸⁶ D. & O. at 17.

⁸⁷ *Id.*

⁸⁸ *Id.*

calculations.⁸⁹ The ALJ also noted that the documents Respondents provided showed that the type of work the workers performed each week supported Masters’s reconstructions.⁹⁰ Thus, the ALJ found that the WHD’s reconstructions were rationally based on Masters’s personal observations of the jobsites, information from ODOT, certified payrolls, workers’ testimony, and interview statements, and found them reasonable and equitable.⁹¹

Respondents contend the ALJ erred in finding that the WHD’s reconstructions were reasonable and equitable.⁹² However, given the information available and Respondents’ failure to maintain accurate records, we conclude that the ALJ’s calculations were reasonable and equitable. The ALJ considered relevant factors, including when workers were paid more than the prevailing wage determination and when fringe benefits credits resulted in no underpayment, and the ALJ’s findings are supported by the record. Accordingly, we affirm the ALJ’s finding that Respondents owe seventeen workers \$11,115.68 in back wages.

C. Weekly Payments

The DBRA requires that a contractor or subcontractor “pay all . . . laborers employed directly on the site of the work, unconditionally and at least once a week . . . [for] the full amounts accrued at the time of payment.”⁹³

The ALJ found that Respondents failed to pay workers weekly and manipulated the certified payroll records they submitted to ODOT to conceal this practice.⁹⁴ The ALJ also found that Respondents switched from weekly to biweekly payments because it was easier for them, and that Christie Glesener directed employees to white-out check numbers, dates, and the payment period.⁹⁵

Respondents concede that they paid their workers biweekly until December 2014, when they resumed weekly payments.⁹⁶ Respondents contend however, that they did not conceal this practice and that, during the Wiles investigation, Wiles

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Resp. Br. at 25-28.

⁹³ 40 U.S.C. § 3142(c)(1); *see also* 29 C.F.R. § 5.5(a)(1)(i).

⁹⁴ D. & O. at 22.

⁹⁵ *Id.*

⁹⁶ Resp. Br. at 33.

said it was not a significant issue.⁹⁷ Respondents further contend that they removed personal information they believed ODOT did not need, and that this practice continued into 2015, after they switched to a weekly payment schedule.⁹⁸

After a thorough review of the record, we conclude the record supports the ALJ's factual and credibility findings. The ALJ relied on testimony from Jeannie Kirk, one of Respondents' former workers who testified that Christie directed her to white-out certain information on the payroll records submitted to ODOT, and that Christie told her that Respondents could run their business how they wanted to and that biweekly payments were easier for Respondents.⁹⁹ We are not persuaded that Respondents whited-out information that ODOT did not need, because the record shows that they did not white-out other personal information or information that was not required. Rather, Respondents whited-out check dates and payment periods, which concealed that workers were not being paid weekly as required. Lastly, Respondents have not offered any evidence other than Kent and Christie's testimony that Wiles informed them that biweekly payments were not an issue. Moreover, the regulations state that employers must pay workers "at least once a week . . . [for] the full amounts accrued at the time of payment."¹⁰⁰ Thus, we affirm the ALJ's finding that Respondents failed to pay workers weekly, violating 29 C.F.R. § 5.5(a)(1)(i).

2. Respondents Owe Barnes Overtime Wages

The DBRA requires payment of prevailing wages to laborers and mechanics, not "employees," and thus "the lack of a traditional employee/employer relationship" is not a defense to a contractor's liability to pay prevailing wages and overtime.¹⁰¹ In addition, contracts must include the name of every laborer and mechanic on the certified payrolls.¹⁰²

The ALJ found that Ronald Barnes, an independent contractor, operated equipment on all of Respondents' construction projects as needed for a flat daily rate of \$250 regardless of how many hours he worked.¹⁰³ The ALJ found that Respondents did not have a DBRA-compliant subcontracting agreement with him

⁹⁷ *Id.* at 33-35.

⁹⁸ *Id.*

⁹⁹ *See D. & O.* at 22.

¹⁰⁰ 40 U.S.C. § 3142(c)(1); *see also* 29 C.F.R. § 5.5(a)(1)(i).

¹⁰¹ *Star Brite Constr. Co., Inc.*, ARB No. 1998-0113, ALJ No. 1997-DBA-00012, slip op. at 7 (ARB Jun. 30, 2000).

¹⁰² 29 C.F.R. § 5.5(a)(3).

¹⁰³ *D. & O.* at 18-19.

and violated the DBRA by omitting him from the certified payroll records.¹⁰⁴ The ALJ determined Respondents owed Barnes \$2,942.40 in overtime back wages.¹⁰⁵ Since Respondents failed to keep records, the ALJ analyzed whether the WHD’s reconstruction of back wages was reasonable and equitable.¹⁰⁶ The ALJ found that Masters’s testimony was not persuasive because she calculated Barnes’s overtime based on a fifty-hour work week but was unable to support that figure.¹⁰⁷ The ALJ also determined Masters’s calculation of \$25 per hour was flawed because Barnes was paid a daily flat rate.¹⁰⁸ The ALJ noted that Barnes’s testimony and witness statements contradicted each other regarding the number of hours he worked.¹⁰⁹ However, the ALJ found that this ambiguity was understandable given the pay arrangement and found that Respondents could have resolved this with proper recordkeeping.¹¹⁰ The ALJ also analyzed billing sheets and a spreadsheet entitled “Barnes Contract Day History,” but found these documents had limited probative value because they did not include how many hours Barnes worked and there was no testimony to establish who created the documents, when they were created, or whether they accurately reflected how many hours Barnes worked.¹¹¹ The ALJ determined that Barnes worked an average of 42.5 hours per week because he consistently stated that he worked 40-45 hours per week. Thus, the ALJ determined that Respondents owed Barnes a total of \$2,942.20 in overtime wages.¹¹²

Respondents contend that Barnes’s testimony does not support the ALJ’s finding.¹¹³ Respondents contend the ALJ should have credited Barnes’s testimony that he could not remember working more than forty hours per week and worked to “pass time.”¹¹⁴ Respondents further contend that billing sheets and the spreadsheet “Barnes Contract Day History” demonstrate that he did not work overtime.¹¹⁵

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 20.

¹⁰⁶ *Id.* at 18.

¹⁰⁷ *Id.* at 19.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 20.

¹¹³ Resp. Br. at 29.

¹¹⁴ *Id.* at 29-30.

¹¹⁵ *Id.* at 30.

We conclude that the Administrator satisfied WHD’s burden to demonstrate that Barnes performed work for which he was improperly compensated. Although Respondents assert that Barnes’s testimony was inconsistent, the ALJ considered this and found that Barnes consistently stated that he worked 40-45 hours per week.¹¹⁶ This is supported by the record, and we find that the ALJ’s calculation of 42.5 hours per week is a reasonable calculation. Thus, we affirm the ALJ’s finding that Barnes worked 2.5 hours of overtime per week for which he was not compensated.

Next, we find that Respondents neither demonstrated the precise number of hours Barnes worked nor negated the reasonableness of the inference drawn from the WHD’s evidence. Respondents rely on billing sheets and the “Barnes Contract Day History” spreadsheet to demonstrate that Barnes did not work overtime.¹¹⁷ However, the ALJ correctly found that neither document establishes the precise number of hours Barnes worked nor negates the reasonableness of the ALJ’s finding that Barnes worked 2.5 hours of overtime per week. In addition, as the ALJ found, there was no testimony that established who created the billing sheets, when they were created, or whether they accurately reflected Barnes’s hours. Rather, Barnes testified that he did not know if the billing sheets accurately reflected how much he worked. Thus, the ALJ reasonably gave these documents limited weight. Therefore, we find that Respondents failed to satisfy their burden.

Lastly, we find that the ALJ’s calculation of \$2,942.40 in overtime back wages owed to Barnes is reasonable and we affirm the ALJ’s award.

3. Debarment

Under the DBRA,¹¹⁸ whenever a contractor or subcontractor is found “to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in Section 5.1” such contractor “shall be ineligible for a period not to exceed 3 years . . . to receive any contracts or subcontracts subject” to the Davis-Bacon or Related Acts.¹¹⁹ The Board has found that “the word ‘willful’ is synonymous with such words as ‘voluntary,’ ‘deliberate,’ and ‘intentional’ and is “generally understood to refer to conduct that is not merely negligent.”¹²⁰ A willful

¹¹⁶ See D. & O. at 20.

¹¹⁷ Resp. Br. at 30.

¹¹⁸ The parties do not dispute that the DBRA debarment standard applies. We note the regulations have been amended after the version applicable to this case.

¹¹⁹ 29 C.F.R. § 5.12(a)(1).

¹²⁰ *Coleman Constr. Co.*, ARB No. 2015-0002, slip op. at 17.

violation also encompasses “intentional disregard, or plain indifference to the statutory requirements.”¹²¹

The ALJ debarred Respondents for three years.¹²² The ALJ found that Respondents committed gross negligence based on the Gleseners’ failure to familiarize themselves with the correct classification method, Christie’s disingenuously citing safety when threatening to call the police when the WHD conducted a site visit, and improper attempts of witness coercion or intimidation.¹²³ The ALJ found that Respondents’ initiative to start paying workers weekly in December 2014 and classifying their workers correctly in April 2015 were positive matters in extenuation and mitigation but were not relevant to the level of noncompliance related to the multiple violations he found.¹²⁴ Despite a preexisting familiarity with the law, the ALJ found that Respondents refused to pay employees weekly, altered payroll records, refused to cooperate with the investigation, engaged in threatening behavior toward the WHD, and demonstrated a history of coaching employees on what to say to an investigator.¹²⁵

Respondents contend the ALJ erred in finding there was sufficient evidence to support debarment.¹²⁶ Specifically, Respondents contend their failure to pay workers weekly should not be considered because Respondents disclosed this practice and were under the impression that biweekly pay was not an issue.¹²⁷

We conclude that Respondents’ failure to abide by the recordkeeping requirements and failure to pay workers weekly constitute a willful violation. As discussed above, Respondents previously paid workers weekly, and then moved to a biweekly schedule because Christie claimed it was “easier” for them.¹²⁸ This demonstrates that Respondents’ failure to pay workers weekly was a voluntary, deliberate choice, and a departure from what the regulations required. Moreover, Respondents were experienced contractors and had a significant history of working on DBA and DBRA projects.

¹²¹ *Id.*

¹²² D. & O. at 24.

¹²³ *Id.* at 23.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Resp. Br. at 31.

¹²⁷ *Id.* at 33-34.

¹²⁸ D. & O. at 22.

Next, Respondents contend they did not falsify their certified payroll records and were not trying to hide biweekly payroll from ODOT.¹²⁹ The record supports the ALJ's findings that Respondents altered payroll by whiting-out the paycheck date and the pay period dates, which concealed that Respondents did not pay workers weekly as required.¹³⁰ Next, Respondents contend that they were not concealing this practice because they continued to white-out information after switching to a weekly payment schedule.¹³¹ We are not persuaded by this argument because, by that point, Respondents were aware that the WHD was investigating them. Moreover, as the ALJ found, Respondents did not white-out other personal information or information that was not required by ODOT.¹³²

Respondents also contend the ALJ failed to consider the context of the WHD's investigations and how they impacted Respondents when the ALJ found that Respondents did not cooperate with the investigation and threatened Masters.¹³³ Respondents contend that any debarment order should be reduced for extraordinary circumstances because the WHD conducted a targeted investigation against them and failed to communicate properly with them, which resulted in confusion over whether the investigation was closed.¹³⁴

We are not persuaded by Respondents' arguments. The ALJ considered the circumstances and found that, while the WHD targeted them and Respondents were initially confused, these matters were not relevant to the questions of whether Respondents violated the DBA and DBRA.¹³⁵ As the ALJ found, the WHD investigators "are charged to enforce the law by finding and penalizing noncompliant employers" and, absent any evidence of another motive, the WHD's actions showed only that they "believed Respondents to be noncompliant."¹³⁶ In addition, while Respondents may have initially been confused when Masters began her investigation because they were accustomed to working with Wiles, Masters sent several letters attempting to request records and meet with them to no avail.¹³⁷ After months of Respondents refusing to comply with the investigation, Masters visited the worksite, only to have Christie threaten to call the police if she

¹²⁹ Resp. Br. at 34-36.

¹³⁰ See D. & O. at 22.

¹³¹ Resp. Br. at 34-36.

¹³² See D. & O. at 22.

¹³³ Resp. Br. at 36-37.

¹³⁴ *Id.* at 39.

¹³⁵ D. & O. at 12.

¹³⁶ *Id.*

¹³⁷ *Id.* at 5.

did not leave.¹³⁸ Additionally, it was not until Respondents filed their request for a hearing before the OALJ that Respondents submitted the records that the WHD had requested.¹³⁹ Thus, the record repeatedly shows that Respondents were hostile and noncompliant with the WHD's investigation. Respondents have not shown how this situation would demonstrate an extraordinary circumstance relieving them of debarment.¹⁴⁰

Respondents further contend there is no credible evidence that Christie Glesener improperly coached witnesses and challenges the credibility of Kirk's testimony.¹⁴¹ The ALJ determined that Kirk's testimony was credible, and Respondents have not pointed to anything that would demonstrate the ALJ erred. Additionally, as the Administrator contends, there is a difference between telling an employee to tell the truth and telling them what to say and what not to say.

Lastly, Respondents contend that the alleged violations in this case did not demonstrate any intent to harm or underpay their workers.¹⁴² Additionally, Respondents argue that the scope of the debarment order should be limited because there is no evidence to support a finding of willful violations.¹⁴³ However, the debarment regulations do not require an intent to harm employees. Rather, as discussed above, the Board has interpreted the word "willful" to be "synonymous with such words as 'voluntary,' 'deliberate,' and 'intentional' and is "generally understood to refer to conduct that is not merely negligent."¹⁴⁴ A willful violation is also an "intentional disregard, or plain indifference to the statutory requirements."¹⁴⁵ We agree with the ALJ that Respondents' failure to maintain records and pay workers weekly was voluntary and deliberate. Thus, we affirm the ALJ's order that Respondents be debarred for three years.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See Coleman Constr. Co.*, ARB No. 2015-0002, slip op. at 18 (once an "aggravated or willful" DBRA violation is found, "debarment should be for the full three years except in 'extraordinary circumstances.'") (citations omitted).

¹⁴¹ Resp. Br. at 37-38.

¹⁴² *Id.* at 39.

¹⁴³ *Id.* at 40-41.

¹⁴⁴ *Coleman Constr. Co.*, ARB No. 2015-0002, slip op. at 17.

¹⁴⁵ *Id.*

Accordingly, we **AFFIRM** the ALJ's D. & O.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

ELLIOT M. KAPLAN
Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge