



**In the Matter of:**

**Disputes concerning the payment of prevailing wage rates and overtime pay by:  
WEEKS MARINE, INC. (Contractor)**

**ARB CASE NOS: 2017-0076**

**ALJ CASE NO: 2009-DBA-00006**

**DATE: March 10, 2020**

**RESPONDENT.**

**With respect to laborers and mechanics employed by the contractor on:**

**Contract No. W912DS-07-C-0027  
(Jobsite: Fire Island Inlet, Long Island, New York).**

**Appearances:**

***For Respondent:***

**David M. Whitaker, Esq.; *Kean Miller LLP*; New Orleans, Louisiana**

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

**Quinn M. Philbin, Esq.; Nicholas C. Geale, Esq.; Jonathan T. Rees, Esq.; William C. Lesser, Esq.; Jennifer S. Brand, Esq.; *U.S. Department of Labor*; Washington, District of Columbia**

***For the Associated Builders and Contractors, as Amicus Curiae:***

**Maurice Baskin, Esq.; *Venable LLP*; Washington, District of Columbia**

**Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge* and James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges***

**DECISION AND ORDER OF REMAND**

This case is before the Administrative Review Board (ARB or Board) pursuant to the Davis-Bacon Act, as amended (DBA), 40 U.S.C.A. §§ 3141-3148 (2006), and its implementing regulations at 29 C.F.R. Parts 1, 3, 5, and 7 (2010).

## BACKGROUND

This is not the first time this case has been before the ARB and we point the parties to our prior Decision and Order of Remand issued on April 29, 2015 for a summary of the facts of this case. *Weeks Marine I*, ARB No. 12-093, -095, ALJ No. 2009-DBA-006 (ARB April 29, 2015). Pertinent to the appeal before us, the sole issue the ALJ adjudicated was whether Weeks Marine failed to reimburse nine Local 25 employees for their lodging costs on a dredging project that was away from their homes. The ALJ concluded that Weeks Marine's failure to reimburse the employees for their housing costs above a \$35 per diem violated the DBA. Both parties appealed to the Board. After analyzing the parties' arguments and summarizing the applicable law, the ARB remanded the case, concluding that the ALJ failed to indicate what evidence was weighed when finding that the lodging the Local 25 employees secured was primarily for the benefit of the employer, Weeks Marine.

On remand, the ALJ made further findings of fact surrounding the duties of Local 25 employees as well as the collective bargaining agreement (CBA). *Weeks Marine II*, ALJ No. 2009-DBA-006 (Aug. 7, 2017) (*Weeks II*). Notably, the ALJ found that Respondent has been a member of the CBA for more than twenty five years. The CBA covers the area from Maine to the panhandle of Florida with each dredging project taking an average of three to six months to complete. Local 25 members are expected to travel throughout this area to remain employed and employees do not have an expectation to work in or near their place of residence. Each employee is granted a \$35 day per diem pursuant to the CBA for subsistence while on a job. Local 25 members stay in hotel rooms or apartments while away from home.

After the additional fact finding, the ALJ weighed the "balance of the benefits" to the Local 25 employees and Weeks Marine and concluded that the housing primarily benefited the employer, Weeks Marine. *Weeks II*. The ALJ ordered the Local 25 employees be paid \$17,006.55 representing the underpayment incurred because of the lodging expenses.

Weeks Marine appealed.

## JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator's final decisions under the DBA.<sup>1</sup> The ARB's review of the Administrator's ruling is in the nature of an appellate proceeding and the Board "will not hear [factual] matters de novo except upon a showing of extraordinary circumstances." 29 C.F.R. § 7.1 (e). The ARB will assess the Administrator's rulings to determine whether they are consistent with the DBA and its implementing regulations, and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA. *William J. Lang Land Clearing, Inc.*, ARB Nos. 01-072, -079; ALJ Nos. 1998-DBA-001 through -006, slip op. at 5 (ARB Sept. 28, 2004)).

## DISCUSSION

The DBA requires that any employer who enters into a contract in excess of \$2,000 with the federal government for construction, alteration, or repair of public buildings and public works to pay its employed laborers and mechanics the minimum prevailing wage and fringe benefit rates. *See* 40 U.S.C.A. § 3142(a), (b). It was enacted to protect employees from substandard earnings by setting a floor for wages on federal government projects. *United States v. Binghamton Const. Co., Inc.*, 347 U.S. 171- 176-78, n.13 (1954). Accordingly, the DBA and its implementing regulations require that government contractors and subcontractors pay all mechanics and laborers employed directly on the work site "the full amounts" of prevailing wages and fringe benefits to which the employees are entitled, "unconditionally" and "without subsequent deduction or rebate on any account, . . . regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics." 40 U.S.C.A. § 3142(c); 29 C.F.R. § 5.5(a)(1). *See Bldg. & Constr. Trades, AFL-CIO, v. Reich*, 40 F.3d 1275, 1277 (D.C. Cir. 1994). However, the implementing regulations provide that the statutory requirement that prevailing wages be paid "without subsequent deduction" is subject to those exceptions "permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 C.F.R. Part 3)." Significantly, 29 C.F.R. § 3.5(j) of the Copeland Act regulations, provides for the deduction from an employee's wages of the "reasonable cost<sup>2</sup>" of lodging meeting the requirements of

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<sup>1</sup> Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board) (Feb. 21, 2020).

<sup>2</sup> 29 CFR § 531.30 provides:

section 3(m) of the Fair Labor Standards Act (FLSA) (codified at 29 U.S.C. § 203(m)) and the FLSA's implementing regulations found at 29 C.F.R. Part 531.

Section 3(m) of the FLSA states that:

“Wage” paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees. 29 U.S.C. § 203(m) (1994).

“Customarily furnished,” in turn, is defined in the regulations as “furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employees engaged in the same or similar trade, business, or occupation in the same or similar communities.” 29 C.F.R. § 531.31 (1995).

In *Soler v. G. & U. Inc.*, 833 F.2d 1104 (1987) (*Soler*), the court discussed the interplay of the § 3(m) and §531.3(d)(1) stating:

In practical effect, the balancing of benefits test established by the Regulation provides a common-sense and logical approach to resolve the reasonableness of costs for facilities *other than lodging and board* that may be counted toward the payment of an employee's wage: If the item in question primarily benefits the employer, the cost of that facility will not be recognized as reasonable and will not be an allowable inclusion in an employee's wage; if the item primarily benefits the employee, it will be construed to be a reasonable cost, like housing and meals, within the meaning of § 3(m).

The Second Circuit noted, however, that in some cases lodging would be of little benefit to the employee, such as in cases where an employee is required to live on site, has to be “on call,” or where housing is a burden imposed on the employee in

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The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily “furnished” to the employee. Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced.

furtherance of the employer's business. In such cases the cost of housing would not be subsumed within the employee's wage. The Second Circuit concluded:

We conclude that as a general rule the Administrator may rely on the statutory presumption accorded housing facilities under § 3(m), but that in appropriate circumstances, as determined by the Administrator, the presumption is subject to challenge and rebuttal under the Regulation's balancing of benefits standard.

Thus, pursuant *Soler*, the Administrator in challenging the presumption that the lodging is for the benefit of the Local 25 employees, has the burden to rebut the presumption by showing the lodging benefited Weeks Marine.

With the above statutory framework and case precedent in mind, we turn now to the parties' arguments. Respondent argues that the DBA does not affirmatively require an employer to pay employee lodging costs in addition to prevailing wage and fringe benefits and the ALJ erred in so concluding. We agree.

Not only does *Soler* offer guidance as to situations where housing may not be of benefit to the employee, Wage and Hour's Field Operations Handbook<sup>3</sup> guides us

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<sup>3</sup> The 8th Circuit, in discussing the FOH, recently said the following:

The DOL Handbook contains guidance in our inquiry. We treat the DOL Handbook as persuasive authority. "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference," *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), but are entitled to respect under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), based on their persuasiveness. *Christensen*, 529 U.S. at 587, 120 S.Ct. 1655. We agree with the class that just like the DOL regulations in part 778 of the Code of Federal Regulations, the provisions in the DOL Handbook are not dispositive but we do find them persuasive. The DOL Handbook "is an operations manual that provides Wage and Hour Division ... investigators and staff with interpretations of statutory provisions, ... and general administrative guidance." Field Operations Handbook (FOH), United States Dep't of Labor, <https://www.dol.gov/whd/FOH/index.htm>. We do not discount the expertise offered by the DOL, as it handles and regulates the application of the FLSA.

*Baouch v. Werner, Enter.*, 908 F.3d 1107 (8th Cir. 2018).

as to what evidence will rebut the presumption that lodging is for the benefit of the employee Under 3(m) of the FLSA:

The crediting by an employer of facilities furnished to employees as wages will depend on whether such facilities are furnished primarily for the benefit or convenience of the employee, as determined by WH. Where the primary benefit of such facilities is to the employer's business interest, credit will be denied. The following are commonly viewed as furnished primarily for the benefit or convenience of employees:

(1) *Meals*

Meals furnished by the employer are regarded as primarily for the benefit and convenience of the employees. This rule does not apply, however, to the meal expenses incurred by an employee while traveling away from home on the employer's business.

(2) *Lodging*

Lodging, like meals, is ordinarily considered for the benefit and convenience of the employee. Circumstances may exist, however, where housing is of little benefit to employees, **as where an employer requires an employee to live on the employer's premises to meet some need of the employer, or where the employee must travel away from home to further the employer's business. In such circumstances, the housing will be considered as primarily benefiting the employer.**

FOH 30c03 (emphasis added). FOH 15f19 further notes that under the DBA: **Where an employer sends employees who are regularly employed in their home community away from home to perform a special job at a location outside daily commuting distances from their homes** so that, as a practical matter, they can return to their homes only on weekends, the assumption by the employer of the cost of the board and lodging at the distant location, not customarily furnished the employees in their regular employment by the employer, and of weekend transportation costs of returning to their homes and reporting again to the special job at the end of

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the weekend, are considered as payment of travel expenses properly reimbursable by the employer and incurred for its benefit. Such payments are not considered bona fide fringe benefits within the meaning of the DBRA, are not part of the employees' wages, and do not constitute board, lodging, or other facilities customarily furnished which are deductible from the predetermined wage pursuant to 29 CFR §§ 3.5(j). *See* 29 CFR § 5.29(f) (2010 revision).

Emphasis added.

Thus, taking into consideration the statute, regulations and the *Soler* guidance, the Administrator can rebut the presumption that lodging is primarily for the benefit of the employee by showing that the employee fits under the on-the-road exception, where the employee is required to live on site, where the employee has to be “on call,” or where the employee is burdened by the lodging for the convenience of the employer.

Turning to *Weeks II*, we first note, as an initial matter, that the presumption that the lodging secured by the Local 25 employees was for the benefit of the employees was invoked by the testimony of the witnesses at the hearing describing the nature of the dredging business and that most dredging jobs were not near employees homes, requiring employees to travel to the work site once they were hired. At this point, the burden then shifts to the Administrator to rebut this presumption by producing evidence that the primary benefit of the lodging secured benefited Weeks Marine, through testimony or otherwise. In addressing whether the Administrator rebutted the presumption, the ALJ weighed the balance of the benefits and concluded “the primary benefit of the Local 25 Employees’ Fire Island lodging accrued to the Respondent.” *Weeks Marine II* at 17. In so concluding, the ALJ found persuasive:

- Dredging employers need experienced and qualified employees to further the employer’s job. D. & O. *Weeks II* at 11.
- Comparing Local 138 to Local 25, Local 25 employees are more specialized employees capable of operating more sophisticated machinery but who may live outside the commuting area. *Id.*
- The CBA’s partial payment supported an inference that the expense benefits the employer. *Id.*
- Local lodging allowed the employees to work long shifts which allowed for timely completion of the project. *Weeks II* at 12.

The ALJ relied on several prior ARB cases as support for the position that Weeks Marine primarily benefited from the lodging of Local 25 employees. Specifically, the ALJ relied on *KP&L*, ARB No. 99-039 (ARB May 31, 2000) (*KP&L*), *In Lang Land Clearing v. WHD*, ARB Nos. 01-072, -079, (ARB Sept. 28, 2004) (*Lang*), and *Calculus, Inc.*, WAB Case No. 93-06, 1993 WL 537381 (1993) (*Calculus*).

We conclude that the above analysis is in error. None of the reasons relied upon by the ALJ meet the statutory guidance as to what would rebut the presumption and as explained in *Soler*. None of the facts or reasons relied on by the ALJ show that the Local 25 employees were “on the road” or that Weeks Marine mandated where the employees stayed. Local 25 employees were not “on call” and it cannot be said that where they chose to live was for the convenience of the employer. Comparing Local 25 employees to Local 138 employees does not offer evidence of any benefit to the employer as these employees were operating under a different CBA, working different jobs.

Also, none of the cases the ALJ relied on are similar to the facts of the case before us. In *KP&L*, the employees regularly worked out of the location the company was based at but for the job at issue, the employees had to commute two hours and were confined to the project site. In *Lang*, the ARB concluded that meals and lodging for on-the-road employees were not creditable against DBA prevailing wages. In *Calculus Inc.*, the employees did not have a choice of where to stay and had to stay at a motel of the employers’ choosing and were not permitted to go home. In that case the Board concluded that lodging payments were not creditable as part of the “wage” because they were neither part of the basic rate of pay nor other bona fide fringe payments. Thus, the employees in these cases are incurring subsistence expenses on employer-directed travel assignments while employed from home base or a constructive home base. Weeks Marine’s employment is not an “on the road” travel situation as the Local 25 employees were not regularly employed at home and were not on employer-directed travel. The employees were hired by Weeks Marine off of the list supplied by the union for the particular job in New York.

However, we need not remand for additional fact-finding as the ALJ made sufficient findings in *Weeks II* for us to conclude that WHD failed to rebut the presumption. We find the following facts in *Weeks II* to be instructive:

- Local 25 members are required to travel throughout the territorial zone covered by the Local 25 CBA if they want to remain actively employed. *Weeks II* at 3.



- Employees hired off of an out-of-work list of Local 25 employees “are not hired with the expectation that they are going to work for the company in any one location or to work primarily in their place of residence.” *Id.*
- The CBA provides for a minimum subsistence allowance of thirty-five dollars a day to defray the costs of obtaining housing, meals, laundry, and work clothes. *Id.*
- The Employees stayed at motels or hotels during the Fire Island job because they were not residents of the area and had to reside within commutable distance of the job site. *Weeks II* at 4.

Thus, it cannot be said that Local 25 employees were required to live on Weeks Marine premises or housing mandated by Weeks Marine. Housing was not customarily furnished. Nor can it be said that the Local 25 employees were regularly employed within their community and had to go on the road to perform a special job for Weeks Marine. Local 25 employees were hired off of an out-of-work list with no expectation that they would be employed in their community. Weeks Marine does not enjoy any special benefit as a result of Local 25 employees’ choice of lodging. The CBA, negotiated by Local 25, provided thirty-five dollars per diem for subsistence including meals and lodging. Any discrepancy between the per diem amount the CBA provided the Local 25 employees and daily expenses does not fit any exception that would make lodging benefit Weeks Marine.

Based on the facts of this case as found by the ALJ in *Weeks I* and *Weeks II*, the primary benefit of the lodging was to the Local 25 employees. The Administrator failed to rebut the presumption that the primary benefit was for the employer, Weeks Marine.

## CONCLUSION

We **REVERSE** the ALJ’s findings that the lodging primarily benefitted the employer, Weeks Marine, **VACATE** the ALJ’s award of relief, and **REMAND** to the ALJ with instruction to deny the claim for relief.

**SO ORDERED.**