ADMINISTRATIVE REVIEW BOARD
U.S. DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of:	)	
ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	)	
Prosecuting Party,	)	
v.	)	ARB Case No. 2023-0054
PARADIGM CONSTRUCTION & ENGINEERING, INC., KENT GLESENER, & CHRISTIE GLESENER,	)	
Respondents-Petitioners.	)	

ADMINISTRATOR'S RESPONSE BRIEF

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In the Matter of: ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, Prosecuting Party, v. PARADIGM CONSTRUCTION & ENGINEERING, INC., KENT GLESENER, & CHRISTIE GLESENER, Respondents-Petitioners.	)	ARB Case No. 2023-0054

ADMINISTRATOR'S RESPONSE BRIEF

The Administrator, Wage and Hour Division, United States Department of Labor ("Administrator") submits this brief in response to the petition for review ("Petition") and supplemental brief ("Supplement") filed by Paradigm Construction & Engineering, Inc. ("Paradigm"), Kent Glesener ("Kent"), and Christie Glesener ("Christie") (collectively referred to as "Respondents").

INTRODUCTION

The Davis-Bacon Act, 40 U.S.C. 3141, *et seq.* ("DBA"), requires covered contractors to pay prevailing wages to all laborers and mechanics performing covered work on covered contracts. The DBA is "'a minimum wage law designed for the benefit

of construction workers.'" *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1055 (D.C. Cir. 2007) (quoting *U.S. v. Binghamton Constr. Co.*, 347 U.S. 171, 178 (1954)). On covered projects, federal construction contractors must pay the minimum wage and fringe benefit rates determined by the Secretary of Labor to be locally prevailing for various classes of laborers and mechanics. 40 U.S.C. 3142(a)-(b). Schedules of the applicable minimum wage and fringe benefit rates (called wage determinations) are incorporated into solicitations and contracts for covered projects so that contractors know the rates that they will be required to pay the workers on the project. 40 U.S.C. 3142(a). In addition to the DBA itself, numerous federal statutes providing federal funding for construction projects incorporate the DBA's requirements for those projects. The DBA and these related statutes are together known as the Davis-Bacon and Related Acts ("DBRA").

Respondents committed many violations of the DBRA, including the Contract Work Hours and Safety Standards Act, 40 U.S.C. 3701, *et seq.* ("CWHSSA"), which requires payment of overtime to laborers and mechanics on covered construction projects. As the Administrative Law Judge found following a hearing, Respondents failed to correctly classify their workers according to the work that they were actually performing (thereby paying them below the applicable prevailing wage rates) and failed to pay overtime due a worker whom they classified as an independent contractor. In addition, Respondents failed to pay their workers on a weekly basis, failed to include workers that they classified as independent contractors on their certified payroll reports, and falsified their certified payroll reports

Respondents compounded their violations by also obstructing the investigation by the Department's Wage and Hour Division ("WHD") into whether they were complying with the law. As the ALJ further found, Respondents failed to cooperate with WHD, coached workers on what to say and what not to say to WHD, disingenuously cited safety concerns and threatened to call the police when WHD conducted a site visit to interview workers and observe the work performed, and refused to produce documents to WHD during the investigation.

Before the Board, Respondents focus their challenge on the amount of back wages awarded and the debarment ordered for these violations and their obstruction. However, there was more than sufficient evidence to support the underlying violations, the reasonableness of the back wages awarded (particularly given Respondents' failure to keep accurate records), and the debarment ordered.

Possibly in light of this record of violations and obstruction, Respondents trumpet the ALJ's characterization that WHD "targeted" Respondents. However, as the ALJ explained, any perceived "targeting" is "not relevant to the questions of whether Respondents misclassified and underpaid employees, kept accurate records, and otherwise complied with the law." ALJ Decision and Order ("D&O"), 12. Moreover, WHD's investigators "are charged to enforce the law by finding and penalizing noncompliant employers" and "[t]heir targeting of Respondents, in the absence of evidence of any other motive, shows only that the [investigators] believed Respondents to be noncompliant." *Id*. Indeed, WHD here, as it does routinely in other cases, received a complaint from another federal agency with knowledge of Respondents' business

practices, conducted an independent investigation of Respondents to determine any violations of applicable law, and presented its case to the ALJ for the determination of liability and any remedies. Ultimately, that complaint was borne out by the evidence, and the ALJ found that Respondents violated the DBRA and CWHSSA, awarded back wages, and ordered debarment. Only those findings by the ALJ and the resulting back wages and debarment are before the Board in this appeal, and they should be affirmed for the reasons set forth herein.

BACKGROUND

For years, Paradigm has bid on and won federally-funded highway bridge construction projects in Oklahoma. D&O, 3. Kent and Christie jointly own and run Paradigm. *Id*. Paradigm's work at issue here was performed for the Oklahoma Department of Transportation ("ODOT"), was funded by Federal Highway Administration ("FHA"), and was accordingly covered by the DBRA. *Id.* at 1-3. Kent has worked in highway construction for his entire career, reviews all of Paradigm's contracts, and understands the contracts' DBRA components and requirements. *Id.* at 3. Christie manages Paradigm's payroll and attended a DBRA training presented by WHD and ODOT during the year prior to WHD's initial investigation. *Id*.

1. WHD's Investigations.

WHD initially investigated Respondents' compliance with the DBRA in 2013. D&O, 3. WHD determined that Respondents had violated the DBRA by misclassifying skilled workers as laborers, improperly calculating fringe benefits, failing to pay their workers weekly, and failing to submit certified payroll reports on a weekly basis. *Id.* at 4.

Respondents did not agree that they had violated the DBRA or promise to comply with the DBRA as part of a resolution of the case proposed by WHD. *Id*. After further back and forth between WHD and Respondents and because the contracts at issue were paid out, among other reasons, WHD "essentially dropped the matter" with the idea of investigating Respondents' compliance on more recent contracts. *Id*.

During the initial investigation, Darren Kaihlanen, the chief compliance officer for the FHA in Oklahoma ("Kaihlanen"), had contacted WHD to express concerns with Respondents' DBRA compliance. D&O, 3. Kaihlanen contacted WHD again in 2014 to raise concerns that Respondents were misclassifying workers as laborers and underpaying them on a then-current contract. *Id.* at 4. WHD subsequently investigated Respondents' compliance with the DBRA on that contract and two related contracts. *Id.* at 4-5.

Apparently feeling that they had not received closure on the initial investigation, Respondents refused on multiple occasions to meet with WHD during the subsequent investigation. D&O, 5. Respondents also refused to produce any records during the subsequent investigation, and WHD obtained some documents from ODOT. *Id*. WHD visited a Paradigm worksite in April 2015 and interviewed workers. During that visit, Cheryl Masters, a WHD investigator ("Investigator Masters"), observed that the workers were all tying rebar, and she spoke with an ODOT engineer there who explained what the workers were doing and the process. *Id*. WHD visited a Paradigm worksite again in May 2015, and on this occasion, Christie, asserting "workplace safety" as an excuse, threatened to call the police on WHD's investigators if they did not leave the worksite. *Id*.

Following the investigation, WHD found that Respondents had violated the DBRA by misclassifying workers as laborers and underpaying them, failing to pay workers weekly, failing to post the correct posters and information at their worksites, and failing to keep required records. D&O, 5-6. WHD also found that Respondents, in violation of CWHSSA, failed to pay overtime due to two workers treated as independent contractors. *Id.* at 6. WHD calculated that Respondents owed $24,058.73 in back wages for their violations of the DBRA and CWHSSA and recommended that Respondents be debarred for the violations and obstruction. *Id.* at 2. Respondents objected to the findings, and an ALJ proceeding ensued. *Id.*

2. ALJ's Decision and Order.

Following an eight-day evidentiary hearing, the ALJ issued a decision and order determining that Respondents violated the DBRA and CWHSSA, awarding back wages for the violations, and ordering the debarment of each of the Respondents for three years.

a. Misclassification of Field Employees and Back Wages Due.

The ALJ ruled that WHD proved that Respondents incorrectly classified 17 field employees under the DBRA – treating them as laborers when they performed skilled work. The ALJ found that Respondents typically classified only one "lead" worker as a skilled worker and classified the others as laborers. D&O, 14. The ALJ noted that the finding was consistent with Kent's testimony and also the testimony of Sean Estes, a Paradigm engineer ("Engineer Estes"), that "Respondents paid workers according to their perceived skills, including the ability to read plans." *Id*. The ALJ explained that the "suggestion that pay should be based on skill set possessed rather than task performed is

a fundamental misapprehension of an employer's obligation under the law" because the "relevant question" is "what work the employee actually performed." *Id.* at 14 n.69. Respondents classified the employees at the laborer rate "except one lead worker during a [concrete] pour prior to April 2015" (when WHD made its first worksite visit). *Id.* at 14.

In support of the finding that the employees did not perform laborer work, the ALJ cited the testimony of Kent, who said that they "operated Bidwell machines, forklifts, and cranes" on the projects. D&O, 14. The ALJ also cited the testimony of the employees themselves, who said that they operated diggers, heavy duty forklifts, heavy machinery, and sky lifts. *Id*. During a worksite visit, Investigator Masters observed an employee operating a sky lift. *Id*. In addition, Kent, Engineer Estes, James Arnold Bruce, an ODOT engineer ("Engineer Arnold"), and Philip Kyle Wilson, who owned a construction company in the area similar to Paradigm ("Wilson"), "all credibly" testified that "a small bridge construction project takes more skilled workers than Respondents' certified payroll reports show worked at a given time." *Id.* at 15. Engineer Arnold testified that "about 80% of the workers on deck should be classified as concrete finishers during a pour." *Id*. Engineer Estes "allowed that Respondents may have had more concrete finishers on deck than indicated by certified payroll reports showing one at a time prior to April 2015." *Id*. And Investigator Masters testified that "she observed all employees tying rebar" (i.e., performing iron work) during a worksite visit. *Id*.

The ALJ also relied on pay records. The records showed that Respondents adjusted the classifications of their skilled workers and "used the laborer classification when the worker was performing a task outside of his skill." D&O, 15. For example,

"when laying concrete, the concrete finisher was correctly paid as a skilled concrete laborer, while the rest of the crew performing the same or similar concrete work was incorrectly paid as a laborer." *Id*. The records also showed that, after WHD's worksite visit in April 2015, "Respondents changed their default classification of many employees from their laborer rate to the higher skilled . . . rates." *Id*. Respondents' argument that the employees "simply attained a more advanced skill level at the same time WHD visited the site is unlikely" and "revisit[ed] the (faulty) philosophy that they paid based on skill level." *Id*. For all of these reasons, the ALJ concluded that WHD proved by a preponderance of the evidence that "Respondents incorrectly classified and paid employees by skill level rather than tasks performed" – misclassification of employees in violation of the DBRA. *Id*.

After finding the violation, the ALJ addressed the back pay due the employees under the DBRA. The ALJ explained that WHD's back pay calculations "need not be perfect, as they are derived from incomplete information." D&O, 16. The ALJ further explained that, "[i]f an employer fails to supply accurate records, the [ALJ] must draw reasonable inferences from whatever evidence [WHD] produces, even if the calculations are only approximate." *Id.* at 6. The ALJ added that an "'employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [statutory] requirements.'" *Id.* at 6-7 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946)) (alteration by ALJ). Thus, WHD's "reconstruction of the number of hours worked by employees in each classification is generally reasonable and equitable if it is based on an analysis of all

available evidence including check records, employees' personnel records, certified payrolls, employee testimony, [and] interview statements." *Id.* at 8.

When considering WHD's back pay calculations, the ALJ explained that "WHD applied the job classification of the lead worker" to the employees misclassified as laborers, resulting in "a 'work as a unit' approach that assumed the crews generally all worked on one type of task at the same time (ironwork, concrete, etc.) depending on the stage of construction." D&O, 16. The ALJ cited testimony from Investigator Masters and added that Kent "corroborate[d] Masters's reconstruction efforts" because his "description of the work the laborers did includes practically every task the skilled worker did in that same step, except for reading plans." *Id*. The ALJ also noted that the employees classified as laborers "testified to performing the same work as the skilled classifications performed: using the tools of the skilled trades, placing rebar, operating machinery, etc." *Id*. The ALJ added that, "[d]uring a concrete pour, the whole crew worked on the pour – the laborers, form workers, and the concrete finisher, if necessary[,]" and the ALJ reiterated Engineer Arnold's testimony that most of the workers "on deck should be classified as concrete finishers during a pour." *Id*. Thus, WHD's back pay calculations reflected that "the crew all worked as a team on a single step at any given time and paid the laborers the same as the skilled worker on the project at the time." *Id.* at 17.

As additional support for the reasonableness of WHD's back pay calculations, the ALJ noted that WHD credited Respondents for all wages and fringe benefits paid to the employees. D&O, 17. The ALJ reiterated that, "after April 2015 [when WHD made its

first visit to a Paradigm worksite], Respondents changed their default classification of many employees from their laborer rate to higher [prevailing wage] rates, corroborating [WHD's] calculations." *Id*. The ALJ added that the documents produced by Respondents "after the investigation concluded show what type of work the workers were performing each week and support [WHD's] reconstructions." *Id*. The ALJ concluded that WHD's back pay reconstructions were "rationally based on Masters's personal observations on the jobsites, information from ODOT, certified payrolls, employee testimony, and interview statements," were "reasonable and equitable," and "satisf[ied] the burden under *Mt. Clemens*." *Id*. The ALJ accordingly awarded the 17 field employees $11,115.68 in back wages. *Id*.

b. Failure to Pay Overtime to Barnes and Back Wages Due.

Ronald Barnes ("Barnes") worked for Respondents on the contracts. D&O, 18. Respondents treated Barnes as an independent contractor; however, they did not include Barnes on the certified payrolls and did not have a "DBRA compliant subcontracting agreement" with him that would permit them to exclude him from the certified payrolls. *Id*.[1] Respondents argued that Barnes was an "ODOT Specialized Service Provider" who did not need to be included on the certified payrolls. *Id*. The ALJ rejected this argument based on Barnes' testimony of the duties that he performed and the "credible testimony" of an "experienced contractor in Eastern Oklahoma" (Wilson) regarding how workers

[1] The requirements of the DBRA and CWHSSA apply to persons performing the duties of a laborer or mechanic under covered construction contracts regardless of whether the contractor treats the person as an employee or an independent contractor. D&O, 8.

such as Barnes are typically treated. *Id*. The ALJ concluded that Respondents "treated Barnes as an independent contractor without having a compliant subcontract and also failed to include him in their pay records as required[,]" and that "Respondents violated the DBRA by omitting Barnes from the certified payroll reports." *Id*.

Because Respondents failed to keep the required records regarding Barnes' hours worked and pay and refused to produce any records during WHD's investigation, WHD had to reconstruct the hours worked by him and the back wages due him. D&O, 18 (citing Tr. 281:1-5). To do that, WHD used interview statements that Barnes provided to WHD. *Id*. Barnes was paid more than the DBRA prevailing wage rate but was not paid any overtime under CWHSSA. Based on his interview statements, WHD calculated that he worked an average of 50 hours per week (or 10 overtime hours per week) and was due a total of $10,000 in back wages for unpaid overtime. *Id*. at 18-20; *see also* Tr. 281:14 – 282:16; Joint Exhibits at 1779, 1787, 1791.

The ALJ noted that Barnes' interview statements and his subsequent hearing testimony "tell different stories and present a major problem in arriving at a reliable determination of how many hours he worked." D&O, 18. The ALJ found Barnes' hearing testimony to be "an attempt to distance himself from interview statements he made, which [are] also problematic since they were internally inconsistent." *Id.* at 19. Considering the testimony and evidence presented at the hearing, the ALJ concluded that WHD's reconstruction of back wages due Barnes "was not based on a reasonable extrapolation of the information (however ambiguous) provided by Barnes." *Id.* at 20. Nonetheless, although Barnes' testimony was "ambiguous" and using it "may lead to

inexactitude," the ALJ explained that this issue would be easily resolvable had Respondents kept the proper records, and the ALJ adopted "a more reasonable approach" to reconstructing his back wages. *Id*. Specifically, because "Barnes stated more than once that he worked 40-45 hours on average," the ALJ estimated that he worked an average of 42.5 hours per week. *Id*. Applying that to the period of investigation, the ALJ calculated $2,942.40 in unpaid overtime due Barnes, which the ALJ described as a "fair and equitable calculation, in keeping with the principle that employers bear the risk of inaccurate or incomplete records." *Id*.[2]

c. Respondents' Additional Violations.

In addition to misclassifying field employees as laborers, underpaying them, failing to include Barnes on the certified payroll reports, and failing to pay him overtime due, the ALJ determined that Respondents "failed to provide accurate records." D&O, 21. Respondents provided no records to WHD during the investigation, and the certified payroll reports that they submitted for the contracts at issue did "not accurately set forth the time spent [by workers] in each specific classification." *Id*. Although Respondents produced some records in connection with the ALJ hearing, they never produced "detailed records establishing the precise amount of work performed in each classification by each worker." *Id*.

[2] WHD had calculated that Respondents owed back wages to a second independent contractor, David Nadri, but WHD withdrew that claim following Nadri's testimony at the hearing (he had refused WHD's requests to be interviewed during the investigation). D&O, 13.

The ALJ determined that Respondents also failed to pay their workers weekly as required by the DBRA: "Respondents made a conscious choice to pay workers covered by the DBRA biweekly despite being experienced contractors and knowing the DBRA requirements." D&O, 22. Moreover, the ALJ determined that Respondents falsified certified payroll reports in an effort to cover up the frequency of their wage payments: "To hide their practice of paying workers biweekly, Respondents manipulated the certified payroll reports [that it] submitted to ODOT." *Id*. Christie "directed employees to white out information . . . which would have revealed how often Respondents were paying their workers." *Id*.

d. Debarment.

The ALJ explained that an "aggravated or willful" violation of the DBRA's provisions requires debarment for a period "not to exceed three years." D&O, 9-10 (citing 29 C.F.R. 5.12(a)(1) as it existed then).[3] The ALJ added that "[t]his includes the debarment of individual responsible officers of contractors and subcontractors." *Id.* at 10. The ALJ noted that "willful" encompasses intentional disregard or plain indifference to the statutory requirements. *Id*. The ALJ further noted that, once a violation is shown to be aggravated or willful, debarment should be for the full three years except in extraordinary circumstances. *Id*.

[3] Throughout the Decision and Order, the ALJ cited to 29 C.F.R. Part 5 as it existed at the time of the decision. The Department has since revised certain of those regulations. For example, effective on October 23, 2023, for contracts entered into after that date, debarment "for a period of 3 years" is required under 29 C.F.R. 5.12(a)(1) "[w]henever any contractor or subcontractor is found by the Secretary of Labor to have disregarded their obligations to workers or subcontractors under the [DBRA]."

Applying these standards, the ALJ ruled that the facts of this case "establish gross negligence (or willful blindness) and justify debarment" for three years. D&O, 23-24. Specifically, the ALJ relied on Respondents' "level of noncompliance related to the multiple violations" of the DBRA and their obstruction and interference with WHD's investigation. *Id.* at 23. The ALJ noted that "credible" witness testimony established that Christie "coached employees on what to say and what not to say to investigators during the first investigation," and that Christie "disingenuously cited safety" concerns when threatening to call the police on WHD during a visit to a worksite to interview workers. *Id*. The ALJ explained that "[i]nstances of improper attempts of witness coercion or intimidation warrant debarment." *Id*. The ALJ added that, "[d]espite their preexisting familiarity with the law, [Respondents] simply refused to pay employees weekly and altered the process; refused to cooperate with the WHD investigation; engaged in threatening behavior toward WHD; and demonstrated a history of coaching employees on what to say to an investigator." *Id*. The ALJ determined that Respondents' violations and obstruction merited debarment of each of them. *Id.* at 23-24.[4]

STANDARD OF REVIEW

The Board has jurisdiction to hear and decide appeals from ALJ decisions and orders concerning questions of law and fact arising under the DBRA. 29 C.F.R. 7.1. The Board is "an essentially appellate agency." 29 C.F.R. 7.1(e). Absent clear error, the Board will generally defer to an ALJ's factual findings, especially those "predicated upon

[4] Respondents filed a timely petition for review with the Board on November 9, 2023.

the ALJ's weighing and determining credibility of conflicting witness testimony." *Interstate Rock Prods., Inc.*, No. 15-024, 2016 WL 5868562, at *7 (ARB Sept. 27, 2016) ("[I]t must be remembered that the ALJ heard and observed the witnesses during the hearing. It is for the trial judge to make determinations of credibility . . . .") (internal citations omitted); *accord Sundex, Ltd.*, No. 98-130, 1999 WL 1277545, at *4 (ARB Dec. 30, 1999) (citing *Homer L. Dunn Decorating, Inc.*, No. 87-03, 1989 WL 407460, at *2 (WAB Mar. 10, 1989)); *Fontaine Bros., Inc.*, No. 96-162, 1997 WL 578333, at *3 (ARB Sept. 16, 1997) ("We defer to an ALJ's determination that a violation is willful unless the ALJ's findings are clearly erroneous.") (citing *LTG Constr. Co.*, No. 93-15, 1994 WL 764105, at *6 (WAB Dec. 30, 1994)). "Though the Board 'will not hear matters de novo except upon a showing of extraordinary circumstances,' 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.'" *Coleman Constr. Co.*, No. 15-002, 2016 WL 4238468, at *5 (ARB Jun. 8, 2016) (quoting 29 C.F.R. 7.1(e)).

ARGUMENT

1. The ALJ's Determination that Respondents Misclassified Field Employees in Violation of the DBRA Is Supported by Substantial Record Evidence.

The ALJ correctly found that the Administrator established that Respondents misclassified their field employees under the DBRA by classifying them based on skill

level and classifying them as laborers when they actually performed skilled work. The ALJ's finding is supported by more than substantial evidence in the record.[5]

As an initial matter, the ALJ relied on the testimony of Kent and Engineer Estes that Paradigm "paid workers according to their perceived skills, including the ability to read plans." D&O, 14. For example, Kent testified that the distinction between skilled workers and laborers is their experience and expertise, Tr. 807:3-20, and that the ability to read and understand plans separates laborers from skilled workers, *id.* at 896:2-13. Engineer Estes testified that workers' classifications are determined by each worker's "specific duties and abilities," *id.* at 1438:2-8, and that skilled workers are paid "according to their skills that they demonstrate," including reading and interpreting plans, *id.* at 1447:9-21. However, as the ALJ explained in response to this testimony, "[t]he suggestion that pay should be based on skill set possessed rather than task performed is a fundamental misapprehension of an employer's obligation under the law." D&O, 14 n.69. Indeed, the DBRA requires workers to "be paid the appropriate wage rate and fringe benefits on the wage determination for the classification(s) of work actually performed, without regard to skill." 29 C.F.R. 5.5(a)(1)(i).

The ALJ also relied on multiple statements that Paradigm's field employees operated power equipment although Paradigm classified none of them as power

[5] *See Lakeshore Plaza Holding, LLC*, No. 14-072, 2016 WL 866114, at *4 (ARB Feb. 5, 2016) (concluding that ALJ's findings of facts, which were the basis for determining that DBRA was violated and awarding back wages, were supported by substantial evidence); *Lloyd T. Griffin*, Nos. 00-032 & 00-033, 2003 WL 21269140, at *7 (ARB May 30, 2003) (concluding that testimony was substantial evidence proving work was DBRA-covered).

equipment operators. Kent testified generally that "workers operated Bidwell machines, forklifts, and cranes" on the relevant projects. D&O, 14. Four field employees (Armando Flores, Jose Ramirez, Henry Barrios, and David Rivera) stated in their witness statements that they operated machinery such as the digger, sky truck (heavy duty forklift), and sky track. *Id.*; *see also* Complainant's Exhibit 26 at 7 (Barrios), 10-11 (Flores), 43 (Ramirez), and 47 (Rivera).

The ALJ additionally found that the cumulative testimony of several witnesses "credibly suggest a small bridge construction project takes more skilled workers than Respondents' certified payroll reports show worked at a given time." D&O, 15. For example, Engineer Arnold, whom the ALJ characterized as a "comparatively neutral witness as a resident engineer for ODOT," testified that "about 80% of the workers on deck should be classified as concrete finishers during a pour." *Id.* (citing Tr. 1004-05).[6] Engineer Estes "allowed that Respondents may have had more concrete finishers on deck than indicated by certified payroll reports showing one at a time prior to April 2015." *Id.* (citing Tr. 1450). The ALJ also cited the testimony of Wilson, *id.*, who said that, although it depends on the concrete pour, his company would typically have ten workers on a pour – "five to six finishers and three or four laborers." Tr. 1309:18 – 1310:2.[7]

[6] Engineer Arnold added that there should be "a few laborers" in addition to the concrete finishers. Tr. 1005:2-7.

[7] For ironwork performed by his company, Wilson testified that there are typically three workers classified as ironworkers and about five workers classified as laborers. Tr. 1310:7-9.

Moreover, numerous field employees stated in their witness statements (most of which were taken on April 1, 2015) that they were paid the same hourly rate without regard to the work that they actually performed. Complainant's Exhibit 26 at 7 (statement of Barrios that he performs various types of work but his pay "is not separated between the jobs that I do"), 11 (statement of Flores that he gets paid the same rate even though he works "other positions"), 43 (statement of Ramirez that he is paid the same hourly laborer rate even when he actually works as a carpenter or with concrete or iron), 47 (statement of Rivera that he is paid the same rate whether he works as a carpenter, steel worker, or concrete worker). And as the ALJ noted, Investigator Masters observed during a visit to Paradigm's worksite that the group of employees there were tying rebar. D&O, 15; *see also* Tr. 133:1-3 ("[W]e noticed there were five or six gentlemen working on the bridge and they were tying rebar.").

Finally, the ALJ found that some of the "more probative" evidence were Respondents' certified payroll reports before April 1, 2015, which often showed only one employee classified as a skilled worker while "the rest of the crew" who performed the same or similar work were generally classified as laborers. D&O, 15; *see also*, *e.g.*, Complainant's Exhibits at 121-132, 141-155, 170-182, 230-34, 236-244, 358-380. The ALJ contrasted these certified payroll reports with those from after April 1, 2015, explaining that after WHD visited the worksite during its investigation, "Respondents changed their default classification of many employees from their laborer rate to the higher skilled . . . rates." D&O, 15; *see also*, *e.g.*, Complainant's Exhibits at 342-357 (employees were primarily classified as skilled workers – e.g., ironworkers, concrete

finishers, form setters – rather than as laborers for weeks ending April 4, 2015 through May 2, 2015), and 400-431 (same for weeks ending July 18, 2015 through August 29, 2015). The ALJ added that "Respondents' explanation that the employees simply attained a more advanced skill level at the same time WHD visited the site is unlikely" and "revisits the (faulty) philosophy that they paid based on skill level." D&O, 15.

The totality of this evidence is more than sufficient to support the ALJ's finding that Respondents did not classify their field employees according to the work that they actually performed and therefore violated the DBRA. Workers "must be classified and paid according to the work they perform, without regard to their level of skill." *Pythagoras Gen. Contracting Corp.*, Nos. 08-107 & 09-007, 2011 WL 729638, at *7 (ARB Feb. 10, 2011) (citing, *inter alia*, 29 C.F.R. 5.5(a)(1)(i)). If 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, which time the employer's payroll records must accurately reflect." *Id.* (citing, *inter alia*, 29 C.F.R. 5.5(a)(1)(i)). As described above, testimony from numerous witnesses at the hearing and Paradigm's certified payroll reports demonstrate that Respondents violated this requirement and misclassified their field employees.

Respondents' primary response to the ALJ's finding of misclassification is to attack Investigator Masters and WHD's investigation. Petition, 15-19. However, the issue on appeal before the Board is the ALJ's finding that Respondents violated the DBRA – not WHD's investigation. In any event, the ALJ made an independent determination based on the testimony given and the documents submitted at the hearing

that Respondents misclassified employees under the DBRA. D&O, 13-15. The ALJ relied only sparingly on the testimony that Investigator Masters gave at the hearing. *Id.* at 14-15 (citing Investigator Masters' observations during site visits that a worker was operating a skylift and workers were tying rebar). The ALJ gave no undue weight to Investigator Masters' testimony and instead followed the evidence and testimony presented at the hearing.[8] That evidence and testimony more than carried WHD's burden of proving that Respondents misclassified employees under the DBRA, as the ALJ found. *Id.* at 15. Attacking Investigator Masters is no counter to – and does nothing to undermine – that evidence and testimony at the hearing on which the ALJ relied.

Respondents additionally argue that Investigator Masters should have conducted an area practice survey as part of the WHD investigation. Petition, 16-17. Again, this is an attack on WHD's investigation and does nothing to refute the testimony and evidence presented at the hearing (and on which the ALJ actually relied) showing that Respondents misclassified their field employees in violation of the DBRA. In any event, the provision from WHD's Field Operations Handbook that Respondents cite clearly states that an area practice survey is discretionary: "To determine the proper classification of work performed on a DBA covered project, it may be necessary to conduct a local area practice survey." FOH ch. 15f05(a) (emphasis added); *see also U.S. ex rel. Plumbers & Steamfitters Local Union No. 38*, 183 F.3d 1088, 1094 (9th Cir. 1999) (holding that "an

[8] In fact, the ALJ did not hesitate to reject any determination made by Investigator Masters during WHD's investigation when warranted by the evidence at the hearing; for example, the ALJ did not accept WHD's calculation of the back wages due Barnes and awarded a lower amount. D&O, 19-20.

area practice survey is not a prerequisite to the determination of prevailing wage rates or job classifications"); *Pizzagalli Constr. Co.*, No 98-090, 1999 WL 377283, at *6 n.4 (ARB May 28, 1999) (explaining that area practice surveys "are conducted at the discretion of [WHD]").

Respondents' contention that the Board's decision in *Barco Enterprises, Inc.*, No. 13-041, 2015 WL 4674599 (ARB July 31, 2015), supports their argument that WHD should have conducted an area practice survey in this case is misplaced. In *Barco*, the contractors submitted a request to add to the wage determination a classification specific to lead paint abatement, and WHD treated the request as a conformance request and denied it because the work at issue could be performed by an existing classification on the wage determination, that of painter. *Id.* at *2. In denying the request, WHD cited the results of an area practice survey indicating that painters performed lead paint abatement work in building construction in the District of Columbia. *Id*. Thus, in *Barco*, WHD, exercising discretion, had already conducted an area practice survey, and the Board (in a decision in which each judge wrote separate opinions) remanded for further clarification on whether the contractors were seeking a conformance or clarification of the existing classifications on the wage determination. *Id.* at *7.

Here, Respondents violated the DBRA by systematically limiting the number of skilled employees on their certified payroll reports to one or two employees and misclassifying the remaining employees as laborers. The testimony and evidence at the hearing established that Respondents' approach to classification could not possibly be accurate or compliant given the type of work performed and the very different

classifications that Respondents used beginning in April 2015. Unlike *Barco*, there is no argument here about whether a classification needs to be added to the applicable wage determination (which is why WHD undertook the area practice survey in *Barco* even if the Board later remanded). And the issue here is not what job duties fall into what classification but whether Respondents were properly classifying the employees based on the actual work that they were performing.

Thus, Respondents have made no persuasive argument as to why the lack of an area practice survey here has any bearing on whether Respondents' particular approach to classification was unlawful, as the ALJ found. There is no basis as a general matter for the Board to consider transforming the area practice survey, long understood as a discretionary tool, into a mandatory step in WHD investigations, and this case is not the vehicle for such consideration in any event.[9]

Finally, Respondents contest Investigator Masters' conclusion that the employees generally performed the same types of work – worked "as a unit" – in arguing that the ALJ's misclassification finding was erroneous. Petition, 18-23. Again, however, the

[9] Relatedly, Respondents refer to the definitions of "laborer" used in Kansas and Texas and by the federal Occupational Information Network (O*NET). Petition, 22. The issue on appeal, however, is not which classification performs which type of duties. Instead, the issue is whether the ALJ correctly determined that the Administrator carried her burden of proving that Respondents misclassified field employees as laborers in violation of the DBRA by systematically allowing only one or two to be classified as skilled workers on the work performed. In any event, definitions from other states or O*NET's nationwide database of general occupational descriptions would not be relevant to classification issues in Oklahoma.

ALJ's conclusions following the hearing – not WHD's conclusions following the investigation – are on appeal before the Board.

In any event, the ALJ considered and applied the work "as a unit" approach when determining the extent of the misclassification and the resulting back wages due the employees and not when determining whether Respondents misclassified the employees in the first place. D&O, 14-17. What proved the misclassification was testimony from the employees that they performed skilled work (corroborated by Investigator Masters' observations during a site visit), certified payroll reports showing that Paradigm classified one (or at most two) employees as skilled workers and the rest as laborers on projects, testimony from witnesses familiar with the industry that there should have been a much higher percentage of skilled workers on the projects than Paradigm allowed, and certified payroll reports beginning in April 2015 treating (as the testimony provided) the exact same employees as skilled laborers much more often on the projects. Contesting the "work as a unit" approach applied by the ALJ to calculate the back wages due does not rebut this substantial evidence that Respondents misclassified the field employees in the first place.

2. Given Respondents' Failure to Keep Accurate Records, the ALJ Reasonably Determined the Amount of Back Wages due the Field Employees.

Having concluded that Respondents misclassified their field employees as laborers for work performed in violation of the DBRA, the ALJ had to determine the back wages due them for the violation. Although the records showed the number of hours worked, the records did not accurately reflect the classifications in which those hours were

worked. 29 C.F.R. 5.5(a)(3)(i)(B) (records required to be kept under the DBRA include "each worker's correct classification(s) of work actually performed"); *see also* D&O, 21 (explaining that none of the documents belatedly produced by Respondents "establishes the precise amount of work performed in each classification"). Accordingly, the ALJ considered whether WHD's reconstruction of the back wages due was reasonable:

> Given the misapplication of classifications and the consequential absence of accurate pay records, the next question is whether WHD's reconstruction is reasonable and equitable. WHD's calculations need not be perfect, as they are derived from incomplete information.

D&O, 16. As the ALJ recognized, the burden-shifting principles set forth in *Mt. Clemens* applied, and the Administrator could satisfy her initial burden "by producing 'sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.'" *Id.* at 6 (quoting *Pythagoras*, 2011 WL 729638, at *2). If the Administrator satisfies that burden, then the burden shifts to Respondents to present evidence of the precise amount of work performed or to negate the reasonableness of the inference to be drawn from the Administrator's evidence. *Id.*; *see also Pythagoras*, 2011 WL 729638, at *2 (citing *Mt. Clemens*, 328 U.S. at 687-88). If Respondents fail to produce such evidence, the ALJ may then award back wages, "even if the calculations are only approximate." D&O, 6 (citing *Pythagoras*, 2011 WL 729638, at *2, 9).

Here, the ALJ correctly found that WHD satisfied its burden of showing the extent of the field employees' misclassified work by a just and reasonable inference. Specifically, WHD "applied the job classification of the lead worker to the employees who were misclassified as laborers" to determine the wages due the misclassified

employee. D&O, 16. WHD's basis for this calculation was the evidence supporting "a 'work as a unit' approach that assumed the crews generally all worked on one type of task at the same time (ironwork, concrete, etc.) depending on the stage of construction." *Id.* (citing Tr. 260-61, 605). Investigator Masters testified:

> What I found is they had pretty much a set crew working at any one time together. The lead or foremen, supervisors, superintendent, whatever they wanted to call it, the lead person was typically paid the correct prevailing wage determination rate for what they were doing. Everyone else on the crew, the five or six employees that worked under that gentleman, were all paid general labor a majority of the time. The interview statements and my witnessing their work, they seemed to all do the same thing at the same time and there was nothing that I got throughout the investigation that disputed that. So, when I saw that the lead was getting paid concrete, everyone else was general labor, I computed them all for concrete. If Paradigm had designated the lead as iron worker, then I designated all the employees as iron workers. If the lead was paid form setter, I designated all of them as form setter. So, I used the employee's statements to verify that what they said was happening on the payroll and then I applied that to do my back wages.

Tr. 260:21 – 261:14; *see also id.* at 233:3-8 ("They were all doing the same, exact thing and the employee interviews also reflected that they worked together. When one of them was building forms, they were all building forms. When was one of them was doing concrete, they were all doing concrete."), 604:5 – 607:8.

As the ALJ found, Kent's testimony supported Investigator Masters' conclusions. D&O, 16 ("Respondent Glesener's description of the work the laborers did includes practically every task the skilled worker did in that same step, except for reading plans."). When asked what duties the laborers performed on the projects at issue, Kent explained that, in addition to assisting others: "They actually -- they do the form work. They do -- what else? They do form and pour concrete and they finish concrete." Joint Exhibits at 150. As the ALJ further found, the statements of the field employees also supported

Investigator Masters' conclusions. D&O, 16 ("Laborers on the projects . . . testified to performing the same work as the skilled classifications performed: using the tools of the skilled trades, placing rebar, operating machinery, etc."); *see also* Complainant's Exhibit 26 at 7 (statement of Barrios that he performs various types of duties, including driving the sky track, carpentry, and "cement finishing work"), 10-11 (statement of Flores that "we all work everything" and that he works carpentry, concrete, and "tying steel bars" and operates the digger and sky truck), 43 (statement of Ramirez that he works "as a carpenter, iron, heavy machinery operator and concrete," including making molds, working with the steel bars and tying the bars, operating the sky track, and finishing concrete), 47 (statement of Rivera that he works "in everything," including working "as carpenter, concrete and steel bars" and operating "the sky lift").

In addition, WHD's calculations properly accounted for the occasions when Respondents paid more than the required prevailing wage rate and properly credited Respondents for any fringe benefits provided. D&O, 17.

In sum, Investigator Masters based the back wages calculations on the certified payroll reports, her observations when on site at the work projects, information from ODOT, and the employees' interview statements. Tr. 260:2 – 261:14, 263:5-11, 412:10 – 413:18, 565:1-17, 607:14 – 608:5, 616:10 – 617:17; *see also* D&O, 17 (finding the back wages calculations to be "rationally based on Masters's personal observations on the jobsites, information from ODOT, certified payrolls, employee testimony, and interview statements."); *Thomas & Sons Bldg. Contractors, Inc.*, No. 00-050, 2001 WL 1031629, at *4-6 (ARB Aug. 27, 2001) (affirming back wages calculations pursuant to *Mt. Clemens*

where WHD provided "detailed testimony of the investigator about the methodology used in reconstructing the number of hours worked and the actual rate of pay received by the employees, which was corroborated by the testimony and written statements of several of [the employer's] employees"). The calculations were, as the ALJ found, "reasonable and equitable" and satisfied WHD's burden under *Mt. Clemens*. D&O, 17. The Board should affirm the $11,115.68 in back wages calculated for 17 field employees here as the Board has affirmed other back wages calculations for DBRA violations under the burden-shifting principles set forth in *Mt. Clemens*. *See*, *e.g.*, *Coleman Constr. Co.*, 2016 WL 4238468, at *7-8; *Pythagoras*, 2011 WL 729638, at *5-12; *Ray Wilson Co.*, No. 02-086, 2004 WL 384729, at *7-8 (ARB Feb. 27, 2004); *Thomas & Sons*, 2001 WL 1031629, at *4-6.

Respondents assert that WHD's reconstruction of the back wages due the field employees misclassified as laborers was not reasonable or equitable and was instead invented. Petition, 25-28; Supplement, 3-4. However, WHD's estimate of how many hours were worked by the field employees in particular classifications was solely the result of Respondents' failure to keep accurate records as required by law. And, WHD's estimate and resulting calculations followed the evidence and were reasonable, as explained above. Moreover, the burden-shifting analysis applicable under *Mt. Clemens* and *Pythagoras* allows Respondents to rebut WHD's calculations by presenting evidence of the precise amount of work performed or that would otherwise negate the reasonable inferences drawn from WHD's evidence. Respondents failed to do either before the ALJ and cite no such affirmative evidence on appeal. Rather, Respondents merely assert that

WHD made several errors in its calculations. However, even if WHD's calculations of the back wages due the field employees are only approximate, that is no basis for finding that the calculations were erroneous in light of Respondents' failure to keep accurate records. *Pythagoras*, 2011 WL 729638, at *9 (explaining that the Board may award back wages even if the result is "only approximate").[10]

First, Respondents assert that WHD's reconstruction of back wages treated one laborer (Barrios) as an ironworker on one day when the lead worker was classified as a concrete finisher. Petition, 26-27. Even if Respondents are correct, the difference between the two rates for the hours worked by Barrios on that day is about $21. More importantly, WHD's reconstruction of the back wages due Barrios must be evaluated in the context that Respondents produced no documents during the investigation and hindered WHD from obtaining full interview statements from employees. WHD accordingly reconstructed the back wages due each field employee using the information available to it at the time and reasonably chose to calculate the back wages due on a weekly – not a daily – basis, in part to credit a weekly fringe benefit amount provided by Paradigm. Tr. 258:13 – 259:19. Moreover, if the lead worker performed work in more than one classification during a week, WHD applied the classification with the highest prevailing wage rate in light of Respondents' failure to provide records or otherwise offer

[10] If the Board were to conclude that there were any material errors in WHD's calculations of the back wages, that would not change the fact that Respondents misclassified the field employees in violation of the DBRA or that they are owed back wages. If the Board were to reach such a conclusion, remand to the ALJ for the limited purpose of correcting any errors would be appropriate.

any probative evidence reflecting the hours that the workers performed work in each classification. 29 C.F.R. 5.5(a)(1)(i) (employer's records must "accurately set forth the time spent in each classification in which work is performed" for workers performing work in more than one classification to be compensated at the rate specified for each classification). During the week identified by Respondents, the lead worker (Maximino Meza) worked two classifications (ironworker and concrete finisher), Complainant's Exhibits at 384, so WHD applied the higher ironworker rate for that week. During that week, Paradigm classified Barrios as a laborer for most of the hours and as an ironworker for a few hours and did not otherwise segregate Barrios' hours worked among classifications, *id.* at 385 – further supporting application of the ironworker rate under the circumstances. Given that Respondents had produced no records, WHD's weekly calculation of the back wages due the misclassified field employees was, on the whole, a reasonable approximation.

Second, Respondents assert that WHD's calculation of back wages paid certain misclassified laborers at the ironworker wage rate for a period of time on the McIntosh project when "the certified payrolls for McIntosh do not list any worker in the ironworker classification." Petition, 27. However, the certified payroll reports cited by Respondents (Respondents' Exhibits at 216-318) indicate that plenty of skilled carpenter work was performed by the field employees on the McIntosh project at that time, and the prevailing wage rate for carpenters ($13.94) was higher than the prevailing wage rate for ironworkers ($13.63) on that project. D&O, 14; Complainant's Exhibits at 922. And Respondents do not suggest that this particular calculation disadvantaged them.

Third, Respondents assert that WHD wrongly used the carpenter classification instead of the form setter classification when calculating the back wages due. Petition, 27-28. Paradigm used both classifications on the certified payroll reports that it prepared at the time that the work was performed, which Kent years later sought to explain away as a "clerical" error. *Id.* at 27. The ALJ correctly rejected Respondents' argument as "unpersuasive" because Paradigm's "certified payroll reports use both 'form setter' and 'carpenter' at different times on the same projects." D&O, 17. Indeed, numerous certified payroll reports used both classifications during the same week and sometimes even for the same employee[11] – controverting any argument that the carpenter classification was inadvertently used by Paradigm or wrongly used by WHD.

Fourth, Respondents' assertion that the back wages due for violations was only a small percentage "of the total contract price for the projects" (Petition, 28) is beside the point. That assertion does nothing to change the fact that Respondents failed to pay $11,115.68 to 17 employees as required by law. Moreover, the small dollar amount of the recovery here is typical of WHD's investigations; WHD reports that it recovers an average of $1,297 in back wages per worker.[12] Contrary to Respondents' assertion, the relatively low back wages calculated by WHD was not an effort to "find violations against Respondents" (Petition, 28). Instead, WHD's calculation of the back wages due here reflects the nature of Respondents' violations and is typical of what WHD finds in

[11] *See*, *e.g.*, Complainant's Exhibits at 323-333, 335-357, 462-471, 620-29.

[12] *See* WHD by the Numbers 2023 | U.S. Department of Labor (dol.gov) (last visited May 9, 2024).

its investigations. The relatively low back wages due are not an excuse for Respondents' violations or evidence of any bias toward Respondents.

In attacking WHD's calculations of the back wages due the misclassified field employees, Respondents fail to identify any error in the ALJ's adoption of them. The ALJ identified and applied the proper legal standard considering Respondents' failure to keep accurate records and the resulting need for WHD to reconstruct the back wages due. D&O, 6-7, 8, 16-17 (citing, *inter alia*, *Mt. Clemens* and *Pythagoras*). The ALJ correctly ruled that the back wages calculated by WHD were reasonable and equitable and satisfied WHD's burden under *Mt. Clemens*. *Id.* at 17. Respondents failed to present evidence of the precise classifications in which the field employees performed work or otherwise negate the reasonableness of WHD's calculations. And WHD's calculations may be reasonable even if they are "only approximate." *Pythagoras*, 2011 WL 729638, at *9. As the Supreme Court has explained in situations where an employer does not keep the records required by law, "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [statutory] requirements." *Mt. Clemens*, 328 U.S. at 688. For all of these reasons, the Board should affirm the award of back wages to the misclassified field employees.

3. The ALJ Reasonably Determined the Amount of Back Wages due Barnes for Unpaid Overtime.

The ALJ ruled that Respondents "were required to include Barnes on the certified payroll reports as a worker or laborer on the projects" and "violated the DBRA by

omitting Barnes from the certified payroll reports." D&O, 18. Respondents do not contest this violation.

The ALJ further ruled that Respondents failed to pay Barnes in accordance with the DBRA and CWHSSA. D&O, 18. To remedy that violation and given Respondents' failure to keep records regarding Barnes' hours worked, the ALJ relied on Barnes' statements to find that he worked 40-45 hours per week on average (or an average of 2.5 hours of overtime per week) during the period of investigation and awarded him $2,942.40 in back wages. *Id.* at 20. The ALJ found this calculation to be "fair and equitable" and consistent with "the principle that employers bear the risk of inaccurate or incomplete records." *Id*. The Board should affirm.

The ALJ's finding that Barnes worked an average of 40-45 hours per week is well-supported by the record evidence. In signed interview statements that Barnes provided to WHD during its investigation, he testified that, "[o]n average, I worked 40-45 hours a week." Complainant's Exhibits at 706. Respondents argue that Barnes was referring to a highway construction project not at issue here (Petition, 29 n.7), but even if they are correct, Barnes clarified later in the statement that: "Before, I worked on the Muskogee, Creek, or McIntosh jobs [the projects at issue], when I worked there 40-45 hours a week on average." Complainant's Exhibits at 707. In addition to that precise testimony, Barnes testified more generally that he worked overtime hours and was paid a flat day rate (and not overtime pay) regardless of how many hours that he worked:

- "I am paid a salary of $250/day whether I am here for 4-9 hours." *Id.* at 704.

- "I worked the most – 13 hours in one day. I worked the most – 50 hours in a week." *Id*.
- "I work over 40 – 3 times a month, I work 40 hours or more." *Id*.
- "I am still only get the day rate regardless of the hours." *Id.* at 706.[13]

Moreover, as with the field employees, Respondents "failed to keep the requisite records" regarding Barnes' hours worked. D&O, 18; *see also id.* at 20 ("Respondents could have resolved any questions [regarding how many hours Barnes worked] with proper record keeping."). Thus, Barnes' testimony in his witness statements were sufficient to show as a matter of just and reasonable inference under *Mt. Clemens* that he worked on average 2.5 overtime hours per week. *Id.* at 20 (explaining that the overtime pay due Barnes calculated using 2.5 overtime hours worked per week "is a fair and equitable calculation, in keeping with the principle that employers bear the risk of inaccurate or incomplete records").

Respondents make two arguments in an attempt to rebut the reasonableness of this calculation. First, they cite Barnes' testimony from the ALJ hearing during which he denied working over 40 hours in a week. Petition, 29-30; Supplement, 5. The ALJ, however, fully considered Barnes' testimony from the hearing and acknowledged the

[13] Any suggestion by Respondents that Barnes was a supervisor who was exempt from overtime pay requirements is not supported by the record evidence. Barnes consistently testified that he operated cranes and other equipment for Paradigm and that he did not supervise workers. Complainant's Exhibits at 703 (testifying that he operated the crane and other equipment and that "I do not manage the employees"), 706-07 (testifying about how he operated cranes on several projects); Tr. 1402:8-9 ("Well, I wasn't supervisor. I just worked for Mr. Glesener at Paradigm and I was more or less my own boss."), 1411-1415 (testifying generally about his crane operation work).

inconsistency between that testimony and the testimony from his earlier witness statements. D&O, 18. Consistent with the ALJ's role of weighing evidence and determining credibility, the ALJ determined that Barnes's hearing testimony was "an attempt to distance himself from interview statements he made." *Id.* at 19. Barnes testified at the hearing five or six years after he provided the witness statements to WHD. Barnes was a week shy of 80 years-old when he testified at the hearing, and he acknowledged repeatedly that his memory was poor. Tr. 1425:4-5 ("Ma'am, I'm almost 80 years old. You don't --- you can't remember when was the last time you ate."), 1432:7-8 (stating "I want you all to remember this when you get 80 years old, see how much you all remember" when he completed his hearing testimony). Significantly, in response to numerous questions during the hearing about how many hours he worked for Paradigm, Barnes testified that he could not remember. Tr. 1405:7-10, 1406:9-13, 1429:21-25, 1430:18-24.

Moreover, although Barnes could not remember how many hours he worked, he testified to performing a substantial amount of work for Respondents. Barnes testified that he operated a crane, used forklifts, ran the Bidwell machine, did welding, and did whatever else needed to be done for Respondents. Tr. 1403-1404, 1411-1421. Barnes used the crane to do drive piling for each abutment, swing concrete buckets to pour concrete, and move girders and concrete beams. *Id.* at 1411-1415, 1422:15-25. Barnes also participated in the setup and breakdown of the crane every time. *Id.* at 1415:7-13. The extent of the work that Barnes performed for Respondents further supports the ALJ's determination that Barnes worked overtime hours.

The ALJ determines the credibility of witness testimony and resolves any conflicting evidence, and the Board "defer[s] to an ALJ's factual findings, especially in cases in which those findings are predicated upon the ALJ's weighing and determining credibility of conflicting witness testimony." *Interstate Rock Products*, 2016 WL 5868562, at *7. An ALJ's "duty" is "to search for the truth and resolve incomplete or inconsistent testimony relevant to the issues in the case before him." *March v. Metro-North Commuter R.R. Co.*, No. 21-0059, 2022 WL 355157, at *11 (ARB Jan. 21, 2022). And an appeals body such as the Board should be loath to reverse credibility findings unless clear error is shown. *Interstate Rock Products*, 2016 WL 5868562, at *7 (citations omitted); *R & W Transp., Inc.*, No. 06-048, 2008 WL 592806, at *4 (ARB Feb. 28, 2008) (citations omitted). Here, the ALJ reasonably gave more weight to Barnes' testimony that was five or six years more contemporaneous with the events giving rise to this case than his testimony at the hearing much later, when his memory was admittedly very poor and when he was motivated to "distance himself" from his earlier testimony. The fact that the ALJ did not side with the testimony that Respondents wanted the ALJ to side with (which is Respondents' argument) is not a basis to find an error and does not rebut the reasonableness of the ALJ's determination of Barnes' hours worked.

Second, Respondents argue that some billing sheets[14] and a document entitled "Barnes Contract Day History"[15] – documents that Respondents failed to produce to WHD during the investigation and were instead provided in connection with the ALJ

[14] Joint Exhibits at 1183-1216.

[15] Joint Exhibits at 1235-1236.

hearing – indicate that he did not work overtime hours. Petition, 30. However, the ALJ considered these documents in the context of the entirety of the record evidence and correctly found that they did not rebut the reasonableness of the determination regarding Barnes' hours worked.

Regarding the billing sheets, the ALJ found that "there was no testimony establishing who created the resultant billing sheets, when they were created, or whether they accurately reflected the total hours Barnes worked for Respondents." D&O, 19. The ALJ relied on Kent's testimony that Barnes called in his hours and that Kent did not know who created the billing sheets. *Id.* (citing Tr. 861). The ALJ also cited Barnes' testimony that he had never seen the billing sheets before and just called in his hours to some unidentified person. *Id.* (citing Tr. 1407-08). Regarding "Barnes Contract Day History", the ALJ noted that the spreadsheet did not include any information on Barnes' hours worked and merely reflected the days that he may have worked given that he was paid a day rate. *Id.* ("[T]his spreadsheet does not include how many hours Barnes worked, has limited probative value, and is consistent with a flat daily rate since there would be no need to track hours. The spreadsheet also fails to include any time spent on other projects for Respondents, if any."). The ALJ further cited Barnes' testimony when asked about the spreadsheet at the hearing that Barnes had "no idea how much [he] worked," did not "know how long [he] was there," and "didn't keep track of it." *Id.* (citing Tr. 1406). Again, the ALJ considered the record evidence as a whole and, consistent with the ALJ's role as the factfinder, resolved any conflicting evidence in a transparent and defensible manner. And for the reasons explained above, the ALJ was

justified, considering all of the evidence, in giving these produced-after-the-fact documents limited weight and finding that they do not rebut the reasonableness of the determination that Barnes worked on average a few overtime hours per week.[16]

Finally, Respondents focus on the fact that WHD during its investigation calculated a higher amount of unpaid overtime due Barnes than the ALJ ultimately determined was due him. Petition, 29. However, the issue on appeal before the Board is the reasonableness of the ALJ's – not WHD's – determination of overtime pay due Barnes, and that determination should be affirmed for all of the foregoing reasons.

4. The ALJ Correctly Debarred Respondents for Three Years.

As the ALJ explained, an "aggravated or willful" violation of the DBRA requires debarment for a period "not to exceed three years." D&O, 9-10 (citing 29 C.F.R. 5.12(a)(1) as it existed then). "This includes the debarment of individual responsible officers of contractors and subcontractors." *Id.* at 10 (citing, *inter alia*, *Pythagoras*, 2011 WL 729638, at *12-14, in which the Board affirmed the debarment of the contractor and its president). The Board has explained that "willful" encompasses intentional disregard or plain indifference to the DBRA's requirements, *id*. (citing *Pythagoras*, 2011 WL 729638, at *12), or "'conduct which evidences an intent to evade or a purposeful lack of attention to a statutory responsibility,'" *Cody-Zeigler, Inc.*, Nos. 01-014, 01-015, 2003

[16] In response to any argument that Barnes did not work overtime hours each week, the ALJ acknowledged and addressed this possibility: "Some evidence suggests workers were not on the projects all 80 weeks, but averages take into account those periods as well." D&O, 20 n.91. And as the ALJ stated repeatedly and consistent with *Mt. Clemens*, Respondents bore the responsibility for this because they failed to keep accurate records of Barnes' hours worked.

WL 23114278, at *24 (ARB Dec. 19, 2003) (quoting *LTG Constr. Co.*, 1994 WL 764105, at *6). Once a violation is shown to be aggravated or willful, debarment is for the full three years except in extraordinary circumstances. D&O, 10; *Coleman Constr. Co.*, 2016 WL 4238468, at *11-12. Applying these standards, the ALJ correctly ruled that the facts here "establish gross negligence (or willful blindness) and justify debarment." D&O, 23.

As an initial matter, Respondents are experienced federal contractors, D&O, 3, 6, and are thus presumed to have knowledge of the DBRA's requirements. *Id.* at 6 (citing *Ray Wilson,* 2004 WL 384729, at *10). Moreover, Respondents had actual knowledge of the requirements because Christie attended a DBRA training by ODOT and WHD in May 2012 at which Investigator Masters was a presenter. *Id.* at 3; *see also* Tr. 1022:4-19, 1024:17 – 1025:11.

Respondents' violations of the DBRA and CWHSAA were extensive. The ALJ found that Respondents:

- failed to keep accurate records of the time spent by employees in each classification, D&O, 21;
- misclassified field employees as laborers and accordingly failed to pay them the required prevailing wage rates, *id.* at 14-17;
- failed to include workers classified as independent contractors on their certified payroll reports, *id.* at 21, 23;
- failed to pay Barnes the overtime due him, *id.* at 18-21; and
- failed to pay workers on a weekly basis, *id.* at 22, 23.[17]

[17] The ALJ also found that Respondents committed a "technical" violation by failing to post current versions of required posters at worksites, but determined that this failure "does not rise to the level of a 'willful' or 'intentional' violation that would affect my finding on debarment." D&O, 22.

Regarding the failure to pay workers weekly violation, for example, Christie testified that Paradigm paid the workers weekly when the company started in 1999 but switched to paying biweekly because that was less stressful. D&O, 22; *see also* Tr. 1100:18 – 1101:12. A Paradigm employee who worked in accounting and was supervised by Christie testified that Christie stated that Paradigm "was her business and she could run it how she feels" and Paradigm would pay biweekly because it was "easier" for the business. Tr. 694:1-9; *see also* D&O, 22. The Paradigm employee who did the payroll testified that Christie switched Paradigm to biweekly because it was "a whole lot easier." Tr. 1349:13-18; *see also* D&O, 22. Based on this testimony and other evidence, the ALJ concluded that "Respondents made a conscious choice to pay workers covered by the DBRA biweekly despite being experienced contractors and knowing the DBRA requirements." D&O, 22.

Respondents' efforts to evade and obscure their legal obligations and obstruct WHD's investigation were similarly extensive:

- Respondents refused to provide any records to WHD during the investigation and "elected to be uncooperative during the investigation," D&O, 21;
- Respondents manipulated and falsified the certified payroll reports that they submitted to ODOT to hide the fact that they were paying workers on a biweekly basis, *id.* at 21, 23;
- Disingenuously citing safety concerns, Christe threatened to call the police when WHD visited the worksite as part of its investigation, *id.* at 23; and
- Christie coached employees on what to say and not to say to WHD during its first investigation, *id.* at 23 (emphasizing that the testimony on this point was credible).

Regarding Respondents' manipulation and falsification of certified payroll reports, for example, the ALJ explained that Respondents manipulated the payroll reports "[t]o hide their practice of paying workers biweekly." D&O, 22; *see also* Complainant's Exhibits at 76-79, 230-39, and 365-67 for examples of reports with such information whited out. Christie "directed employees to white out information, including the check numbers, check dates, and the period covered by the checks, which would have revealed how often Respondents were paying their workers." D&O, 22; *see also* Tr. 690:3 – 693:23, 1348:20-1353:24.[18] The ALJ characterized Respondents' argument that they whited out information on the certified payroll reports for privacy reasons or because the information was not required as "not persuasive" because "they did not consistently white out other personal information not required on the certified payroll reports." D&O, 22. The ALJ found that "[t]he record demonstrates the records likely were changed to create the appearance that they were paying their employees weekly." *Id*.

The ALJ generally summed up Respondents' obstruction and evasion as follows:

> Despite their preexisting familiarity with the law, they simply refused to pay employees weekly and altered the process; refused to cooperate with the WHD investigation; engaged in threatening behavior toward WHD; and demonstrated a history of coaching employees on what to say to an investigator.

D&O, 23. The ALJ correctly concluded that this evidence justified debarment. *Id*.

[18] Similarly, during WHD's first investigation, Christie directed employees to white out information in preparation for meeting with the investigator. *See generally* Tr. 697:19 – 699:1; *see also* Tr. 698:4-6 ("She had us white out a lot of things, more than what we would white out for ODOT, Social Security numbers. I can't remember exactly, but it was a lot of whiting out.").

The violations and obstruction by Respondents were at least as egregious and deliberate as the violations and conduct that the Board found to justify debarment in *Pythagoras* and *Coleman Construction*. In *Pythagoras*, the contractor and its president ("experienced federal contractors") misclassified employees as laborers and failed to pay them for the work that they actually performed, kept inaccurate payroll records and manipulated those records for at least one employee, and visited several employees to discuss their testimony before the hearing ("an improper attempt at witness coercion or intimidation"). 2011 WL 729638, at *12-14. The Board agreed that "a proper basis for debarment ha[d] been established" in that case. *Id.* at *14; *see also* D&O, 23 ("Instances of improper attempts of witness coercion or intimidation warrant debarment.") (citing *Pythagoras*). In *Coleman Construction*, the contractor and its president misclassified employees as laborers, failed to pay employees for all hours worked, falsified and manipulated payroll records, and destroyed records. 2016 WL 4238468, at *11. The Board explained that "[w]e have previously upheld a debarment order under the 'aggravated or willful' standard for Davis-Bacon Related Acts in similar circumstances." *Id.* (citing *Pythagoras*, 2011 WL 729638, at *12-14). Like the contractors and responsible individuals in *Pythagoras* and *Coleman Construction*, Respondents not only violated the DBRA, but also sought to evade the DBRA's requirements and engaged in misconduct in an attempt to cover up their violations.

In response, Respondents essentially blame WHD and its investigations. Petition, 31-40. For example, Respondents assert that they "wanted to comply with the DBRA, but WHD impeded their ability to do that" during the investigations. *Id.* at 31. In other

words (and as their Petition and Supplement amplify), Respondents were willing to comply with the DBRA on their own terms and their own timeline if WHD investigated them subject to their conditions. As the record evidence demonstrates, Respondents' course of conduct throughout this case is based on purposeful indifference to the requirements that the DBRA places on their business in exchange for the opportunity to perform work on federally-funded projects and resistance to the lawful oversight by the federal agency entrusted to enforce those requirements. Moreover, Respondents' repeated invocation of the ALJ's characterization that WHD "targeted" them falls flat given that the ALJ explicitly rejected any suggestion that they were excused from complying with the law. D&O, 12. As the full context of the ALJ's discussion of "targeting" makes clear:

> WHD investigators are charged to enforce the law by finding and penalizing noncompliant employers. Their targeting of Respondents, in the absence of evidence of any other motive, shows only that [they] believed Respondents to be noncompliant.

Id.

Respondents' more specific arguments likewise fail to show that the ALJ's debarment order was erroneous. First, Respondents' bald assertion that they believed that their classification of the field employees was consistent with area practices (Petition, 32) was belied by the evidence at the hearing. As discussed *supra*, Respondents correctly classified one or two employees as skilled workers and thus knew what type of work was being performed, and a Paradigm employee (Engineer Estes), an ODOT engineer (Engineer Arnold), and the owner of a comparable construction company in Oklahoma

(Wilson) each testified that many more workers should have been classified as skilled workers than Paradigm allowed. Respondents' statement that they happened to "typically" pay their employees "more than the wage determination rate" (*id.*) does not alter the conclusion that they misclassified their employees and failed to pay their employees at least the full wages required by law – the requirement here.

Second, Respondents argue that WHD during its first investigation essentially blessed their payment of wages on a biweekly basis. Petition, 33-34. As the ALJ explained, however, WHD during its first investigation found that Respondents had violated the DBRA in numerous ways, including by "failing to pay its workers weekly" and "failing to submit certified payrolls on a weekly basis." D&O, 4 (emphasis added). The ALJ cited the narrative report prepared by the first WHD investigator at the end of that investigation, which stated that the investigator found that Paradigm "paid employees on a bi-weekly pay period in violation of 29 CFR Part 5.5(a)[] which requires weekly pay," Complainant's Exhibit 27 at 18, and which documented the fact that the investigator communicated this violation and the other violations to Kent at an in-person final conference, *id.* at 21. The ALJ also cited a letter from WHD to Kent reiterating the violations found during the first investigation and conveyed to Kent at the final conference, including the failure to pay employees on a weekly basis. Joint Exhibits at 718.[19] This evidence refutes any argument that, during its first investigation, WHD

[19] At the final conference, WHD provided several publications, including the then-existing version of *Fact Sheet #66: The Davis-Bacon and Related Acts (DBRA)*, which stated, as does the current version, that contractors "are required to pay covered workers weekly." Complainant's Exhibit 27 at 3, 22. The current version is available at Fact

excused Respondents' failure to pay their workers weekly or that Respondents were unaware of that requirement.

Third, Respondents seek to relitigate the ALJ's factual finding that Respondents falsified certain payroll reports. Petition, 34-36; Supplement, 6-7. However, the ALJ made no clear error, and that finding was supported by more than substantial evidence as explained *supra*. The ALJ relied on payroll reports submitted into evidence at the hearing that had information whited out. D&O, 22 & n.106. The ALJ cited the testimony of two Paradigm employees to support the finding that Christie "directed employees to white out information, including the check numbers, check dates, and the period covered by the checks, which would have revealed how often Respondents were paying their workers." *Id.* at 22 (citing Tr. 690-93, 1348-49, 1351-53). Respondents contend that Sharla Knight ("Knight"), the employee "who prepared Paradigm's certified payrolls for ODOT," did not falsify certain information in the reports (Petition, 34-35), but Knight testified that she whited out other information (Tr. 1348:20-1353:24). Finally, Respondents' argument that they were not whiting out information regarding their pay frequency to hide their biweekly payments because they continued to white out that information in 2015 after they had begun to comply with the weekly payroll requirement (Petition, 35) is unavailing. By the end of 2015, they were no longer whiting out that information on the

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Sheet #66: The Davis-Bacon and Related Acts (DBRA) | U.S. Department of Labor (dol.gov) (last visited May 9, 2024). In addition, one of Respondents' exhibits at the ALJ hearing was a document that they had received from ODOT in 2012 summarizing the requirements of the DBRA, including the weekly payrolls requirement. Respondents' Exhibit 45 at 81.

certified payroll reports (Respondents' Exhibits at 531-543, 775-782) – refuting any belief that ODOT did not need that information.

Fourth, Respondents argue that Christie's threatening to call the police when Investigator Masters visited the worksite should be excused by WHD's "targeted" investigation. Petition, 36-37. As explained above, however, WHD investigated Respondents because of reliable information that they were not complying with the law and consistent with its duty as the agency responsible for enforcing the DBRA and CWHSSA. Moreover, this argument and Respondents' more general argument that they did not willfully refuse to cooperate with WHD's investigation downplay the seriousness of their actions. When WHD investigates an employer's compliance, it needs access to: (1) the records that the employer is required to maintain, and (2) the employer's worksite and employees. On the first point, Respondents indisputably produced zero records during Investigator Masters' investigation. D&O, 5, 21. And on the second point, their response to Investigator Masters' visit was to threaten to call the police for "safety" reasons that the ALJ determined were disingenuous. *Id.* at 5, 23. Respondents' actions struck at the heart of WHD's lawful authority to carry out its enforcement duties and demonstrated a willful refusal to cooperate with WHD's investigation that supports debarment, as the ALJ concluded consistent with the Board's precedent.

Fifth, Respondents argue that there was "no credible evidence that Christie improperly coached any witnesses," and they challenge the credibility of Jeannie Kirk ("Kirk"). Petition, 37. However, the ALJ already determined that Kirk's testimony was credible. D&O, 23 ("Ms. Kirk credibly testified that Mrs. Glesener coached employees

on what to say and what not to say to investigators during the first investigation."). The Board has repeatedly stated that the ALJ's credibility determinations are accepted absent clear error. *Interstate Rock Products*, 2016 WL 5868562, at *7; *Sundex*, 1999 WL 1277545, at *4; *Homer L. Dunn Decorating*, 1989 WL 407460, at *2. Respondents alternatively argue that telling a witness "what to say" and "what not to say" is comparable to telling a witness to tell the truth. Petition, 37-38. Christie did not direct the employees to tell the truth though according to the evidence, and the reasonable interpretation of the direction that Christie did give to the employees was that she sought to influence or intimidate them from disclosing information to WHD. Also, Respondents' citation to a witness statement from one employee stating that Kent and Christie did not tell that employee how to answer questions from WHD's investigators other than that "the investigators needed 'to make an appointment first' to speak with employees" (Petition, 38 (quoting Complainant's Exhibit 26 at 32)) – which itself still could be an effort to hinder WHD's efforts to interview their employees – does not mean that they did not coach other employees as Kirk and others stated.[20]

In sum, none of Respondents' arguments regarding debarment are persuasive, and in any event, the totality of Respondents' violations and obstruction described above –

[20] Respondents cite to that employee's witness statement but nonetheless argue that two other witness statements (from Kim Shelton and Jessica Willams) "are hearsay and should be given little weight." Petition, 38. Shelton said in her statement that Christie told Shelton that there would be consequences if Shelton talked to a WHD investigator, Complainant's Exhibit 26 at 52, and Williams said in her statement that Christie coached other employees, such as Kirk, on what to say to the WHD investigator, *id.* at 61-62.

not any particular one – were the basis for the ALJ's debarment order and support affirmance by the Board.

Respondents argue that the three-year debarment order should be reduced because of extraordinary circumstances. Petition, 39-40; Supplement, 7. Although possible in theory, Respondents cite no case in which the Board has actually found the existence of extraordinary circumstances that merit reduction of a debarment order. Indeed, the Board in *Coleman Construction* described the necessary showing as "demanding" and summarily dismissed the argument in that case, explaining that the contractor's violations and misconduct – which are analogous to Respondents' violations and misconduct as explained above – were "precisely the type of behavior" that warranted a three-year debarment. 2016 WL 4238468, at *12. Moreover, the circumstances asserted by Respondents are hardly extraordinary. Respondents again overplay the ALJ's characterization of WHD's investigation as "targeting" them and downplay the seriousness and scope of their violations and obstruction. For all of the reasons explained herein, the degree to which Respondents resisted WHD's investigation – not the investigation itself – is the extraordinary circumstance of this case. There is simply no basis, especially considering *Coleman Construction* and *Pythagoras*, for the Board to reduce the three-year debarment here.

Respondents' final argument on debarment is that, if anyone, only Christie should be debarred. Petition, 40-41. However, Respondents cite no Board precedent in support of this argument. Moreover, the simple assertion that debarment would harm Respondent's current employees does not make this case different from most of the other

proceedings in which debarment has been considered and ordered. The assertion that Respondents acted in good faith has no support in the record, is contrary to the ALJ's findings, and has no basis for all of the reasons explained herein. Whether or not Respondents have received any complaints since their conduct was investigated by WHD (which is separate from whether Respondents have complied with the law since the investigation) does not change the correctness of the ALJ's finding that their conduct warranted debarment.

In addition, there is no basis in the record to argue that Paradigm and Kent were unaware of the DBRA violations and obstruction with WHD's investigation, as was the case in the unpublished *Marques Enterprises*[21] decision cited by Respondents. Kent is the president of Paradigm and owns half of the company. Tr. 756:6-17. Kent testified that he has oversight of the company in "all aspects," and even if Christie handled payroll, Kent testified that "if there's problem, then obviously we talk about it." *Id.* at 758:5-22. Respondents cite no evidence that Christie acted without the knowledge and support of Kent and Paradigm. Moreover, the basis for the debarment here is not any single act that can be pinned on one person (as was the case of the particular executive who forced employees to kickback part of their wages in *Marques Enterprises*). Instead, the ALJ found that Respondents, "[d]espite their preexisting familiarity with the law," committed "multiple violations" and engaged in systematic efforts to obstruct WHD's

[21] *Marques Enter. v. Sec'y, U.S. Dep't of Labor*, Nos. 92-5876 & 92-7238, 1993 WL 259336 (E.D. Pa. Jun. 30, 1993), *aff'd*, 30 F.3d 1487 (3d Cir. Jun. 9, 1994).

investigation. D&O, 23. On this record and under Board precedent, Paradigm, Kent, and Christie each deserve debarment.

5. Respondents Waived Any Constitutional Arguments against the Department's Administrative Hearing and Review Process.

In their petition for review to the Board, Respondents for the first time in this case argue that the Department's administrative hearing and review process violates certain provisions of the Constitution. Petition, 42. Respondents cite the Fifth Circuit's decision in *Jarkesy v. SEC*,[22] include several quotes from *Jarkesy* and other cases, and (to "preserve the issue for any future administrative review") contend in a conclusory fashion that the Department's "adjudicatory procedures violate Article III and their Seventh Amendment right to a jury trial." *Id*. However, Respondents have waived any such arguments for two reasons.

First, the Board typically does not consider an issue raised for the first time on appeal when that issue could have been raised before the ALJ. *Nagle v. Unified Turbines, Inc.*, No. 13-010, 2013 WL 4928254, at *3 (ARB Aug. 8, 2013) ("[T]o the extent that this is an issue that Nagle should have raised before the ALJ, we will not consider arguments a party did not, but could have, presented to the ALJ."); *Mancinelli v. Eastern Air Ctr., Inc.*, No. 06-085, 2008 WL 592807, at *3 (ARB Feb. 29, 2008) ("We will not consider arguments a party did not but could have presented to the ALJ."); *Schlagel v. Dow Corning Corp.*, No. 02-092, 2004 WL 1004875, at *6 (ARB Apr. 30, 2004) (explaining

[22] 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023). The Supreme Court heard argument in *Jarkesy* on November 29, 2023.

that argument not raised before ALJ is waived on appeal); *see also Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) (rejecting appellant's contention that constitutional argument was not available to it until Supreme Court decision and explaining that "[n]o precedent prevented the company from bringing the constitutional claim before then").

Second, Respondents did not develop their constitutional arguments beyond a mere conclusory assertion. When "a party fails to develop the factual basis of a claim on appeal and, instead, merely draws and relies upon bare conclusions, the argument is deemed waived." *Hasan v. Sargent & Lundy*, No. 05-099, 2007 WL 2573634, at *5 (ARB Aug. 31, 2007); *see also Global Horizons, Inc.*, No. 11-058, 2013 WL 2450031, at *8 (ARB May 31, 2013) (same); *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) ("It is a 'settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'") (quoting *U.S. v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). Accordingly, Respondents waived any such argument.[23]

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board deny Respondents' petition for review and affirm the ALJ's decision.

[23] If the Board finds that Respondents have not waived this argument and the Supreme Court decides *Jarkesy* in a manner that could be relevant to this case, the Administrator requests that the Board order the parties to file supplemental briefs on the issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Administrator's Response Brief complies with: (1) the page limitation set forth in the Board's November 15, 2023 order in this case because it does not exceed 50 double-spaced pages, excluding the parts of the brief exempted by the order; and (2) the formatting requirements set forth in the order because it has been prepared in a proportionally spaced typeface, 13-point Times New Roman, using Microsoft Word 365.

/s/ Dean A. Romhilt

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Administrator's Response Brief was served this 10th day of May, 2024, via the Board's Electronic Filing and Service (EFS) system on each attorney who has appeared in this case and is registered with EFS.

/s/ Dean A. Romhilt