U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of

P&N, INC./THERMODYN MECHANICAL CONTRACTORS, INC., a/k/a THERMODYN CONTRACTORS, INC.
Subcontractor

ALBERT GAMBOA, FRANK GAMBOA & ESPERANZA GAMBOA, individually

With respect to laborers and mechanics employed by the Subcontractor under Contract No. GS-07P-90-HUC-0056 for plumbing and utilities installation at the border inspection station located at 3900 Paisano, El Paso, Texas.

ARB Case No. 96-116
(Formerly WAB Case No. 95-13)

ALJ Case No. 94-DBA-72

Date: October 25, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

DECISION AND ORDER

This matter is before the Administrative Review Board pursuant to the petition of the Administrator, Wage and Hour Division, who seeks review of the Decision and Order (D. and O.) of the Administrative Law Judge (ALJ) issued in this case on September 25, 1995. The ALJ determined that P&N, Inc./Thermodyn Mechanical Contractors, Inc., a/k/a Thermodyn Contractors, Inc., (Thermodyn) and Albert Gamboa, Frank Gamboa and Esperanza Gamboa,[2/] individually, had not acted in violation of the Davis-Bacon Act (DBA), as amended, 40 U.S.C. U.S.C. § 276a *et seq.*

[1/] This matter was originally filed before the Wage Appeals Board. On April 17, 1996, the Secretary of Labor re-delegated authority to issue final agency decisions under, *inter alia*, the Davis-Bacon Act, as amended, 40 U.S.C. § 276a *et seq.* (1994), and the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. § 327 *et seq.* (1994), to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Board now issues final agency decisions.

[2/] The ALJ concluded that Esperanza Gamboa did not actively participate in the direction of the employees on this project and that she was not a responsible officer under the statutes here at issue. D. and O. at 4 ¶2. The Administrator does not challenge this finding. Adm'r Brief at 2 n.1.

(1994), or the Contract Work Hours and Safety Standards Act (CWHSSA), as amended, 40 U.S.C. § 327 *et seq.* (1994), in a manner sufficient to support debarment pursuant to 29 C.F.R. § 5.12(a).

Debarment is being sought by Wage and Hour following the investigation of Thermodyn's performance on the Bridge of the Americas (BOTA) border station project in El Paso, Texas, where Thermodyn acted as a subcontractor from November 20, 1990 until April 21, 1992. ALJX 1; T. 102-03.[3/] The Wage and Hour investigation found that certain Thermodyn employees who were classified and paid as laborers at the BOTA project had, on specific occasions during the months of May through September 1991, performed the work of sheet metal mechanics. Citing such misclassifications in addition to other alleged violations of the DBA and CWHSSA, Wage and Hour advised Thermodyn on December 17, 1991, of the proposed debarment pursuant to Section 5.12(a).[4/] Thermodyn requested a hearing on the Administrator's conclusion that it be debarred.

We agree with the Administrator that the evidence supports the conclusion that Thermodyn employees classified as laborers did perform the work of sheet metal mechanics and should have been classified and paid at a higher rate of pay. We also agree with the Administrator that the ALJ's conclusion that the evidence does not establish a disregard of obligations to employees under the DBA or aggravated or willful violations of the CWHSSA, as required to warrant debarment pursuant to Section 5.12(a)(1),(2), must be reversed.

I. Background

As subcontractor at the BOTA project, Thermodyn was responsible for demolition within the buildings at the site and the subsequent installation of sheet metal ductwork for heating, ventilation and air conditioning systems. T. 82-84 (Gamboa)[5/]; *see* D. and O. at 3. Wage Determination TX90-9 applied to the BOTA project. T. 8-9 (parties' discussion, referring to ALJX 8); D. and O. at 3. Pertinent to the demolition and sheet metal ductwork installation operations, the Wage Determination provided classifications for laborers and sheet metal mechanics. ALJX 1; D. and O. at 3. The Wage Determination provided that sheet metal mechanics would be paid at the hourly rate of $7.72 and laborers at $4.85. D. and O. at 3 ¶7; Respondents' Responses to Plaintiff's Request for Admissions, dated 4/3/95, ¶2; *see* D. and O. at 6.

[3/] The following abbreviations are used herein for references to the record: Hearing Transcript, T.; Plaintiff's Exhibit, PX; ALJ's Exhibit, ALJX. Although Thermodyn submitted exhibits with its Prehearing Exchange dated April 24, 1995, Thermodyn did not offer any exhibits at hearing.

[4/] The parties stipulated that $5,634.41 in back wages had been paid to Thermodyn employees pursuant to the assessment by Wage and Hour. T. 8-9 (parties' discussion, referring to ALJX 8). Although the Wage and Hour investigation also focused on the misclassification of laborers performing the work of equipment operators, that issue was not preserved by the Administrator for hearing. T. 23-25.

[5/] Of the Thermodyn officers, only Albert Gamboa, president of the company, testified at hearing.

In August 1991, a Wage and Hour investigator visited the BOTA site, observed and interviewed Thermodyn workers there, and concluded that some employees who were being paid as laborers were performing work as sheet metal mechanics. T. 15-21, 25-29 (Gibson), 88-90 (Gamboa); *see* D. and O. at 4. The investigator also found that some of the laborers were classified as semi-skilled laborers and that the laborers were receiving a wide range of pay, from approximately $4.90 to $7.00 per hour. T. 19 (Gibson); *see* D. and O. at 6; PX 1.

The investigator met with and advised Albert Gamboa, president of Thermodyn, of his findings regarding the misclassified employees. *Id.* Following the August 1991 meeting with the Wage and Hour investigator, Gamboa discussed the importance of the job classifications for mechanics and laborers under the DBA with the foreman and superintendent for the BOTA sheet metal work. T. 85-87, 90 (Gamboa); *see* D. and O. at 4.[6/] Similarly, James W. Molina, Thermodyn's superintendent of heating, ventilation and air conditioning for the BOTA project, told the sheet metal foreman at the site to instruct the laborers not to use any sheet metal tools in the course of their work "until [the] foreman tells them to use them . . . ." T. 97-98. The Wage and Hour investigator returned to the BOTA work site approximately one month later, in September 1991, and again found Thermodyn employees who were classified and paid as laborers performing the work of sheet metal mechanics. T. 20-21, 27-28 (Gibson); *see* D. and O. at 4 ¶16. The investigator again met with Gamboa to discuss with him the misclassifications. T. 27-28 (Gibson). Following completion of its investigation of Thermodyn's operations at the BOTA site, Wage and Hour issued its letter proposing debarment on December 17, 1991. ALJX 1. Thermodyn requested a hearing on the debarment issue on January 13, 1992. *Id.* On September 1, 1994, the case was referred to the Office of Administrative Law Judges for hearing. *Id.*

II. Discussion

In challenging the decision of the ALJ, the Administrator urges that the evidence establishes that Thermodyn acted, at minimum, with "reckless disregard" for its obligations to employees under the DBA. Adm'r. Brief at 17-18. The Administrator also asserts that the record establishes that Thermodyn committed aggravated and willful violations of the CHWSSA. Adm'r Brief at 19. Inasmuch as we agree with the Administrator's contention that a proper basis for debarment has been established pursuant to the DBA, *see* 29 C.F.R. § 5.12(a)(2), we need not reach the question ofwhether a basis for debarment has been established under the CHWSSA, *see* 29 C.F.R. § 5.12(a)(1).[7/]

[6/] The record does not support the ALJ's finding that "Gamboa held a meeting with employees at the site to advise laborers not to use tools to perform sheet metal work," D. and O. at 4 ¶15. *See* T. 85-87 (Gamboa), 97-98 (Molina); *see also* T. 34 (Regalado), 47-48 (Duran), 53-54 (Barragan); *see generally Tom Rob, Inc.,* WAB Case No. 94-03, June 21, 1994, slip op. at 5 (ALJ's factual findings generally given deference except when clear error is found).

[7/] The debarment period is three years under either the DBA or the CHWSSA. 29 C.F.R. § 5.12 (a); *compare* 29 C.F.R. § 5.12(a)(1) *with* (a)(2). Under the DBA, however, there is no provision for the Secretary to order a shorter period based on mitigating factors, as there is under the Davis-

(continued...)

Initially, we reject Thermodyn's argument that this proceeding should be dismissed under the doctrine of laches. Response Brief at 16-18. As indicated *supra*, a hearing was requested in January 1992 but the case was not referred to the Office of Administrative Law Judges for hearing until September 1994. There was clearly no delay in charging Thermodyn with the alleged violations found by the Wage and Hour investigation. *Cf. Public Developers Corp.,* WAB Case No. 94-02, July 29, 1994 (involving three year delay between initiation of investigation and issuance of charging letter).

In addition, Thermodyn has not demonstrated that its defense against these charges was impaired by the passage of time. Thermodyn states that witnesses were unable "to remember the employees who were allegedly misclassified and underpaid," citing Gamboa's hearing testimony. Response Brief at 18. Recollection of such details, however, would not have bolstered Thermodyn's defense in this case. As discussed in detail *infra*, the Administrator's witnesses and documentary evidence provided ample support for the conclusion that underpayments resulting from misclassifications of Thermodyn employees did occur at the BOTA site. Thermodyn's defense turns on the question of what remedial steps were taken after the Wage and Hour investigator met with Gamboa in August 1991. The record provides no basis to conclude that a more detailed recollection of the specific employees involved would have changed the testimony of Thermodyn managers regarding the steps that were taken to correct DBA violations in August 1991. Similarly, although Thermodyn states that "numerous witnesses were unavailable to testify," Response Brief at 18, it has not explained how the calling of additional witnesses would have enhanced the presentation of its defense in this case.

Accordingly, and as was found by the ALJ, D. and O. at 4 ¶3, Thermodyn has provided no evidence of prejudice caused by the delay in referring this case for hearing on the debarment issue. Indeed, during the interim between the request for a hearing and the holding of the hearing in this case, Thermodyn benefited from the opportunity to continue to secure government contracts. D. and O. at 5-6; T. 92 (Gamboa); *cf. G & O General Contractors, Inc.,* WAB Case No. 90-35, Feb. 19, 1991 (rejecting argument based on length of time required for adjudication before ALJ and noting that contractor obtained DBA contracts in the meantime). The doctrine of laches, which the Wage Appeals Board has held may be applicable to these proceedings -- in cases where pursuit of action against a contractor "after many years of inexcusable delay," *J. Slotnik Co.,* WAB Case No. 80-05, Mar. 22, 1983, slip op. at 7-8, would be unfair -- is thus inapplicable on the facts of this case.

Relevant to the merits of the Administrator's recommendation for debarment, the ALJ concluded that the evidence supported the allegation that Thermodyn employees who were classified as laborers had at times performed the work of sheet metal mechanics at the BOTA project.[8/] D. and

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[7/](...continued)
Bacon Related Acts, including the CHWSSA. *See G & O General Contractors,* WAB Case No. 90-35, Feb. 19, 1991, slip op. at 2-3 and authorities cited therein.

[8/] Wage and Hour alleged underpayment of sixteen Thermodyn employees classified as laborers; the ALJ concluded that the evidence only provided support for the conclusion that seven (continued...)

O. at 5, 7, 9. The record clearly supports the conclusion that Thermodyn employees classified as laborers performed work with sheet metal tools that qualifies as sheet metal mechanics' work. In addition to the testimony of the Wage and Hour investigator, the record contains the testimony of two witnesses, one called by each party to this proceeding, regarding the respective roles of laborers and sheet metal mechanics in work such as that being done by Thermodyn at the BOTA site. T. 62-71 (Farmer), 76-78 (Whitney). That testimony establishes that laborers perform hauling and clean-up duties and may hold ductwork while connections are made by the sheet metal mechanic; the use of sheet metal tools is not necessary for performing laborers' work in the installation of ductwork. *See id.* The testimony of Molina, the Thermodyn sheet metal superintendent, provides further support for the foregoing conclusion. T. 100-02.

Four individuals who were classified and paid only as laborers while working for Thermodyn at the BOTA site testified regarding the duties they performed there. T. 31-40 (Regalado), 40-50 (Duran), 51-56 (Barragan), 56-59 (Valdez). Their uncontradicted testimony regarding the use of sheet metal tools and their participation in the installation of ductwork demonstrated that they had performed, at least on occasion, the work of sheet metal mechanics. The testimony of those employees was consistent with the testimony of the Wage and Hour investigator regarding his observations of Thermodyn employees during his investigation at the BOTA site in August and September 1991. T. 17-21, 25-28; *see* D. and O. at 6-8.

The foregoing evidence clearly establishes, as the ALJ in effect found, that Thermodyn committed violations of the DBA in the performance of the BOTA contract by the underpayment of misclassified workers. *See Framlau Corp.,* WAB Case No. 70-05, Apr. 19, 1971, slip op. at 4-5. Violations of the DBA do not *per se* constitute a disregard of an employer's obligations within the meaning of Section 5.12(a)(2), however. *Id.; see Structural Concepts, Inc.,* WAB Case No. 95-02, Nov. 30, 1995, slip op. at 3-4. To support a debarment order, the evidence must establish a level of culpability beyond mere negligence. *Id.; see, e.g., P.J. Stella Construction Corp.,* WAB Case No. 80-13, Mar. 1, 1984, slip op. at 5-6 (employer held to be "grossly negligent"); *Vicon Corp.,* WAB Case No. 65-03, Dec. 15, 1965, slip op. at 6-7 ("bad faith or gross carelessness" regarding compliance).

In concluding that the record did not support a debarment order, the ALJ relied on the following factors. First, the ALJ determined that it was "the prevailing practice in the community" for helpers to assist sheet metal mechanics. D. and O. at 9. The ALJ also relied on his findings that any work by Thermodyn laborers that rose to the level of that of sheet metal mechanics was performed under the supervision of journeymen sheet metal mechanics, was episodic and was performed without the knowledge of Thermodyn. *Id.* As argued by the Administrator, the foregoing reasoning is inconsistent with various principles pertinent to an employer's obligations under the DBA.

[8/](...continued)
Thermodyn employees had been underpaid based on misclassification. D. and O. at 5; T. 72-74. As noted by the Administrator, Adm'r Brief at 9 n.5, we need not decide the question of precisely how many employees were misclassified in order to reach a determination regarding the debarment issue.

Initially, we note the controlling nature of the provisions of Wage Determination TX90-9, which was applicable to the contract in this case. In the absence of a timely challenge to the provisions of the wage determination pursuant to Section 5.5(a)(1)(ii)(A),(B) and (C), Thermodyn was clearly bound to pay the minimum of $7.72 per hour to employees when they were engaged in the work of sheet metal mechanics. *See* 29 C.F.R. § 5.5(a)(1)(ii)(A), (B) and (C); *Tele-Sentry Security, Inc.,* WAB Case No. 87-43, June 7, 1989, slip op. at 1-5. Contrary to the ALJ's suggestion, the DBA does not permit Thermodyn to unilaterally establish a classification for sheet metal mechanics' "helpers" by using semi-skilled laborers in a capacity that requires those laborers to use sheet metal tools, whether or not under the supervision of a journeyman sheet metal mechanic, with a pay rate less than $7.72 per hour.[9/] *See* D. and O. at 9; *cf. Tele-Sentry Security, Inc.,* slip op. at 4-5 (noting that employer had failed to utilize 29 C.F.R. § 5.5(a)(1)(ii)(A),(B),(C) procedures for addition of a classification after contract). Furthermore, as noted by the Administrator, Adm'r Brief at 14 n.7, the record provides no basis to conclude that the position of helper to a sheet metal mechanic working at the BOTA project would meet the requirements for a helper position under the pertinent guidelines. *See* 61 Fed. Reg. 40366 (Aug. 2, 1996)(Notice regarding proposed rule, discussing the suspension of certain regulatory provisions regarding the use of helpers under the DBA that were initially issued on Jan. 27, 1989, and pertinent court decisions, *Building & Construction Trades' Dept. v. Martin,* 961 F.2d 269 (D.C. Cir. 1992)*; Building & Construction Trades' Dept. v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984), and Congressional enactments, Section 303 of Pub.L. 102-27, 105 Stat. 152; Section 103 of Pub.L. 103-112); *Rost Electric Co., Inc.,* WAB Case No. 90-10, May 24, 1991, slip op. at 3-5; *cf. Miller Insulation Co., Inc.,* WAB Case No. 91-38, Dec. 30, 1992, slip op. at 5-6, 9-10 (relying on contractor's on-going dispute with Wage and Hour over the absence of a particular classification in the wage determination to conclude that payrolls indicating payment to employees working in such classification was not intended to be deceptive).

As stated by the Wage Appeals Board in the *Tele-Sentry Security* decision, a contractor who chooses "to utilize misclassified and thus underpaid workers, . . . proceed[s] at its own peril." *Tele-Sentry Security, Inc.,* slip op. at 5. Consequently, the ALJ's reliance on his finding that the practice in the geographical area was to utilize helpers to assist journeymen sheet metal mechanics was erroneous.

Similarly erroneous was the ALJ's reliance on the sporadic nature of the mechanics' work performed by the laborers. As urged by the Administrator, it is incumbent upon the employer who utilizes employees in more than one classification to ensure that those employees are "properly paid for the various types of work . . . performed and for the hours" such work was performed. *Framlau Corp.,* slip op. at 4-5; *see also Permis Construction Corp.,* WAB Case Nos. 87-55, 87-56, Feb. 26, 1991. The fact that some Thermodyn laborers were underpaid on an intermittent, rather than a continuous, basis in no way negates the conclusion that they were underpaid because misclassified.

[9/] Inasmuch as Wage Determination TX90-9 did not allow for different classes of laborers, we need not distinguish between the classifications of "common laborer" and "semi-skilled laborer" used by Thermodyn, PX 1, for purposes of this analysis.

In analyzing the debarment issue, the ALJ also improperly required evidence that the Thermodyn officers had direct, certain knowledge that employees classified as laborers at the BOTA site were performing the work of sheet metal mechanics. *See* D. and O. at 3 ¶13, at 4 ¶18, at 6, 9; *cf. Gaines Electric Service Co., Inc.,* WAB Case No. 87-48, Feb. 12, 1991 (characterizing "aggravated or willful" violations of DBA related acts under Section 5.12(a)(1) as "intentional, deliberate, knowing violations"). As urged by the Administrator, the August 1991 meeting with the Wage and Hour investigator put Gamboa, and Thermodyn, on notice regarding the misclassification of laborers who were, during some periods of time, performing the work of sheet metal mechanics. The course of conduct engaged in by Thermodyn management after the Wage and Hour investigator's meeting with Gamboa in August 1991 allowed the continuation of such misclassifications and underpayments. Allowing these violations to persist demonstrated a "reckless disregard" for Thermodyn's obligations to pay its employees in accordance with the pertinent provisions of Wage Determination TX90-9. *Cf. Seal-tite Corp.,* WAB Case No. 87-06, Oct. 4, 1988, slip op. at 9 (concluding that failure of contractor to comply with decision regarding disputed wage rate constituted willful violation of the DBA).

Although Gamboa testified that he intended to address and correct any instances of non-compliance with the DBA that were brought to his attention by the Wage and Hour investigator or otherwise,[10/] T. 88-92; *see* T. 20 (Gibson), the Administrator's contention that Gamboa failed to make a good faith effort to do so, Adm'r Brief at 13, has merit. To begin with, the payroll records for August and September 1991 do not indicate an effort by Thermodyn to properly compensate the numerous laborers that the investigator had observed performing sheet metal mechanics' work in August. Rather, the payroll records for the pertinent period indicate a change regarding only one employee that could arguably have been made by Thermodyn to address the sheet metal work misclassifications that the Wage and Hour investigator observed and related to Gamboa in August. PX 1.[11/] Although Gamboa testified that he took steps after the August meeting with the Wage and Hour investigator to ensure that laborers would not be using sheet metal tools and thereby performing sheet metal mechanics' work in the future, he did not indicate that he made any effort

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[10/] In the course of this testimony, Gamboa referred repeatedly to previous problems with misclassifications and/or underpayments to employees. T. 86, 89-93. Thermodyn refused to admit that Wage and Hour had conducted three prior investigations of Thermodyn regarding DBA requirements. Respondents' Responses to Plaintiff's Request for Admissions at 3 ¶10. At hearing, however, Thermodyn agreed to stipulate that prior investigations of Thermodyn regarding compliance with DBA requirements had been conducted. T. 10 (parties' discussion regarding ALJX 8 at 3-4).

[11/] The one change that could arguably have been made in response to the investigator's meeting with Gamboa in August was the payment and classification of Moises Moreno, previously classified as a semi-skilled laborer and paid at the rate of $7.00 per hour, at the sheet metal worker classification and the higher rate of $7.72 per hour, beginning with the payroll period ending August 20, 1991. PX 1.

to properly compensate the laborers for the sheet metal work observed by the investigator. T. 79-92.[12/]

In addition, the testimony of Molina, the Thermodyn superintendent in charge of sheet metal work under the BOTA contract, provides further support for the conclusion that Thermodyn failed to make a good faith effort to ensure compliance with the classification provisions of Wage Determination TX90-9. Regarding the use of sheet metal tools by employees classified as laborers, Molina testified that the Thermodyn foremen were instructed to tell the laborers not to use "them until my foreman tells them to use them because my foreman is aware that he can split them. In other words, once they have tools, he says, 'Well, they're going to work three or four hours,' and he tells me -- he checks their time cards." T. 98. Molina continued, "He checks their time cards and says that he has got tools on so many hours a day." T. 98. The ALJ did not address this testimony which, as the Administrator urges, indicates a practice of utilizing employees who are otherwise classified as laborers to perform the work of sheet metal mechanics.

The foregoing testimony indicates that Molina understood the practice of segregating workers' hours, *i.e.,* paying the worker for each portion of a day that he worked in a different classification. Gamboa also indicated experience with the practice of segregating workers' hours. Gamboa testified that he had discussed guidelines for segregating work hours with a Wage and Hour representative and had implemented those guidelines. T. 92. Furthermore, the Thermodyn payroll records that are in evidence for May through September 1991 reflect segregation of hours worked by two employees in the laborer and plumber or equipment operator classifications, respectively, over the course of several payroll periods. PX 1. The payroll records covering the May through September 1991 period reflect segregation of hours worked in both the laborer and sheet metal mechanic classifications for only one employee during one payroll period, however. PX 1.[13/] The foregoing evidence provides further support for the conclusion that Thermodyn management failed to act in good faith to ensure that underpayments resulting from misclassifications did not continue after August 1991.

Finally, the ALJ credited the statements of Gamboa and Molina that they were unaware of any misclassifications of laborers who were performing the work of sheet metal mechanics without addressing other hearing testimony by those witnesses that indicates such statements were of little

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[12/] Although the Wage and Hour investigator advised Gamboa in the August interview that he would be checking prior payrolls to determine back wages that were due to misclassified employees at the BOTA site, there was no basis for Gamboa to fail to recognize Thermodyn's responsibility for ensuring that the payroll for the period then in progress, as well as future payrolls, accurately reflected payment to the misclassified employees for the sheet metal mechanics' work that the investigator had observed or any such work in the future. *See* T. 19-20, 27-29 (Gibson), 88-92 (Gamboa).

[13/] That payroll entry is for Leobardo Reyes, paid for hours as both a sheet metal worker and a common laborer during the payroll period ending May 14, 1991. PX 1.

or no probative value.[14/] D. and O. at 4 ¶18. Both Gamboa and Molina testified that they were rarely at the BOTA work site during the timeframe pertinent to this analysis. T. 84-88, 90 (Gamboa), 96-99 (Molina). The testimony of the Thermodyn employees also supports that conclusion. T. 34 (Regalado), 47-48 (Duran), 53-54 (Barragan). After having responded in the negative on direct examination concerning whether he had observed "anyone classified as a laborer performing sheet metal work," Gamboa also testified that he "wouldn't know who was a laborer or who was a sheet metal or a carpenter or a plumber." T. 84-85. Similarly, after having answered that he had not observed any "laborers . . . working as sheet metal workers" at the BOTA job, Molina testified that he "didn't see any of that. All I see is my foreman. I go out there, I saw my people working on the job, plus there's like 80 more people on the job, and I've never noticed one of these guys working with tools when they're not supposed to." T. 98-99.[15/] Employers performing contracts under the DBA are responsible for ensuring that the work performed by their employees is in compliance with DBA requirements. *See, e.g., Marvin E. Hirchert d/b/a M&H Construction Co.,* WAB Case No. 77-17, Oct. 16, 1978, slip op. at 6 (citing *C. M. Bone,* WAB Case No. 78-04, Sept. 13, 1978, order). Particularly after the August 1991 meeting between Gamboa and the Wage and Hour investigator, Gamboa and/or other Thermodyn managers should have ensured that the sheet metal foreman was providing accurate payroll information reflecting the sheet metal mechanics' work being done by employees classified as laborers.

Contrary to Thermodyn's argument, Response Brief at 10-16, Thermodyn's action in this matter does not reflect that a good faith effort was made to correct past misclassification violations and to prevent further violations. *Cf. Tilo Co., Inc.,* WAB Case No. 76-01, June 5, 1977 (efforts to correct and avoid DBA violations considered in determining that employer did not act in disregard of its obligations under Section 5.12(a)(2)); *C.M. Bone,* WAB Case No. 78-04, June 7, 1978, slip op. at 3 (concluding that contractor "failed to take sufficient corrective action to prevent repetition of the violations"). Thermodyn urges that this case is distinguishable from those cases involving "egregious conduct" that are relied on by the Administrator, and that Thermodyn's conduct thus does not rise to the level required for debarment under Section 5.12(a)(2). Response Brief at 14 n.10. Although the instant case does not involve evidence of flagrant, clearly intentional payroll

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[14/] The ALJ also did not address the material difference between the testimony of Gamboa and that of Molina regarding the question of whether laborers would have been expected to use sheet metal tools in demolition work inside the buildings at the BOTA site. Gamboa testified that laborers would use sheet metal snips and other tools for cutting ductwork from the structure during demolition. T. 84; *see* T. 83-85. In contrast, in response to a question on direct examination regarding whether the laborers use tools to perform the demolition inside the buildings, Molina answered, "No. Mostly it's done with a tractor or with a backhoe. It's knocked down and then all they do is load it up into dump trucks and the dump trucks haul it to the landfill or to a salvage yard." T. 95; *see generally Vicon Corp.*, WAB Case No. 65-03, Dec. 15, 1965, slip op. at 4-8 (addressing failure of ALJ to properly resolve conflicts in the evidence).

[15/] The sheet metal foreman at the BOTA site was Frank Elizadro. T. 86 (Gamboa). He was not called as a witness at hearing.

falsification as was evident in several of the cases cited by the Administrator,[16] the circumstances in this case clearly indicate that Thermodyn's misclassification of laborers, especially after the August 1991 meeting between Gamboa and the Wage and Hour investigator, was more than merely negligent. Having been reminded of its obligations under the DBA by the Wage and Hour investigator and advised of its failure to fulfill those obligations by misclassifying and underpaying employees, Thermodyn was responsible for policing the supervision of such employees to ensure compliance with DBA requirements. As the Wage Appeals Board has stated, "conduct which evidences an intent to evade or a purposeful lack of attention to a statutory responsibility" supports debarment under the DBA. *L.T.G. Construction Co.,* WAB Case No. 93-15, Dec. 30, 1994, slip op. at 7. Further, "[b]lissful ignorance is no defense to debarment." *Id.* Rather than simply relaying the direction to the sheet metal foreman at the BOTA site, Thermodyn managers should have taken steps, *e.g.*, regularly visited the site, observed the work being done, and reviewed payroll records, to ensure that the employees who were actually performing the work of sheet metal mechanics were being paid the proper hourly rate.

In sum, we agree with the Administrator that the evidence establishes that Thermodyn acted in disregard of its obligations to its employees under the DBA, within the meaning of Section 5.12(a).[17]

ORDER

Accordingly, the decision and order of the ALJ is reversed. P&N, Inc./Thermodyn Mechanical Contractors, Inc., a/k/a Thermodyn Contractors, Inc., and Albert Gamboa, president, and

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[16] The range of conduct in flagrant violation of the DBA and related acts involved in those cases includes the creation of fictitious payroll records in lieu of the keeping of accurate payroll records, *P.B.M.C., Inc.,* WAB Case No. 87-57, Feb. 8, 1991, and misstatements concerning the pay rates actually paid, *Phoenix Paint Co.,* WAB Case No. 87-08, May 6, 1989.

[17] Molina testified that, in determining how many hours a day a worker had performed sheet metal mechanics' work, the foreman considered how many hours a day the worker was wearing sheet metal tools. T. 98. Molina continued, "He guesses at it." *Id.* This evidence indicates a lack of a reliable procedure for properly recording work hours for the purpose of segregating work performed in different classifications.

Frank Gamboa, vice-president of that company, shall be debarred pursuant to Section 5.12(a) for a period of three years and shall be ineligible to receive any contract or subcontract subject to any of the statutes listed in 29 C.F.R. § 5.1 during that period.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member